# REPORTS

OF

# CASES IN LAW AND EQUITY,

DETERMINED

BY THE

# SUPREME JUDICIAL COURT

OF

# MAINE.

By SOLYMAN HEATH,
REPORTER TO THE STATE.

## MAINE REPORTS,
VOLUME XXXIX.

HALLOWELL:
MASTERS, SMITH & Co.
1856.

# 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,
HON. SETH MAY,
} ASSOCIATE JUSTICES.

ATTORNEY GENERAL.

HON. JOHN S. ABBOTT.

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By an Act of the Legislature, passed March 16, 1855, it was declared that the Supreme Judicial Court for the purpose of hearing and determining all questions of law and equity, and for the trial of capital offences, should consist of four justices, to be designated from the members thereof by the governor with the advice and consent of the council. Under this Act, in April of that year, the following members of the Court were designated for the purposes therein named, and constituted the law court in the hearing and determination of all cases in 1855: —

HON. ETHER SHEPLEY, LL. D. CHIEF JUSTICE,
HON. JOHN S. TENNEY, LL. D.
HON. RICHARD D. RICE,
HON. JOHN APPLETON.

*** By an Act of the Legislature of March 16, 1855, provision was made for an additional member of the Supreme Judicial Court, and Hon. SETH MAY was appointed and commissioned for that office.

The commissions of Hon. Ether Shepley, C. J., and Hon. Joseph Howard, Associate Justice, having expired in October, 1855, Hon. JOHN S. TENNEY was then appointed and commissioned as Chief Justice of the Supreme Judicial Court, and Hon. Daniel Goodenow was appointed one of the Associate Justices, and designated as one of the members of the Court of law.

Hon. WOODBURY DAVIS was appointed and commissioned as an Associate Justice of that Court.

Cases reported in this volume with this (†) prefix were determined by the remaining members of the law Court, after the commission of Chief Justice Shepley had expired.

ERRATA: — On page 23, 16th line from the bottom, for § insert c.

" 242, in 2d line of syllabus, for *was* read *were*.

" 287, in 4th line of syllabus, for *who* read *which*.

# CASES

## REPORTED IN THIS VOLUME.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

## EASTERN DISTRICT,

## 1854.

## COUNTY OF PENOBSCOT.

39 9
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### JEWETT *versus* RINES *& als.*

In a suit on a poor debtor's bond, the disclosure by him made, signed and sworn to, is admissible in evidence. But the debtor's statements, though made at the time of such disclosure, cannot be received.

It is no valid objection to *such use* of the disclosure, that the answers therein were written by the creditor's attorney.

The adjudication of the justices, as to the property thus disclosed, is not conclusive, but is subject to revision in a suit upon the bond.

Of the acts and omissions of the justices by which a bond may be forfeited.

Where the debtor disclosed money which he afterwards paid to the parties, but not for the creditor's use, no demand is necessary to recover the amount in a suit upon the bond.

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

DEBT on a poor debtor's relief bond.

In defence, the record of two justices of the peace and quorum, certifying that the principal debtor had made a disclosure and been admitted to the oath prescribed by law, was read in evidence.

The plaintiff then offered and read (though objected to,) the debtor's disclosure, by which it appeared that he had in his hands and possession, at the time of making it, $6 in money, two notes amounting to $26, and some personal chattels.

On an alias execution issued a few days after this disclosure, the notes and personal property were demanded, and such property, (excepting the notes,) was turned out to the sheriff, and sold and appropriated in part payment of the execution.

By the justices' record it appeared, that the debtor did not offer to assign the notes disclosed in writing, but did offer and tender them to the creditor's attorney, and the justices certified that the notes were outlawed and considered by them worthless.

The hearing before the justices was continued to a second day, and the copies showed, that the $6, disclosed as in the debtor's possession, were paid to the justices; and that they did not appraise any bank bills, notes, accounts, bonds or other contracts belonging to the debtor and disclosed by him; but they certified, that the creditor should have a lien for thirty days on the notes and other personal estate disclosed by the debtor as his.

The defendant offered to prove, that the debtor at the time of his disclosure stated, that the $6 was not his money, but the property of one Dunning, and that it was through the neglect of the justices it was not written down; and that most of the disclosure was written by the creditor's attorney; and that no request was made to the justices to reduce the disclosure to writing until it was nearly completed. Proofs of other important facts stated at the time but not written in the disclosure, were offered, but the Court refused to receive the evidence.

Defendant offered proof of the worthlessness of the notes, and that they were offered to plaintiff and declined; also, that they were left in the possession of the justices, and there remained till brought into Court.

The debtor stated in his disclosure that he had no interest in any real estate. He was asked about a bond given to convey certain real estate; and the date and contents of the bond were set forth in the disclosure. The justices decided the bond to be null and void. And no request was made for any lien upon real estate, nor was any attached.

Defendants requested the following instructions; — *that* the adjudication by the justices as to the property was conclusive; — *that* the debtor having paid over the $6 into the hands of the justices, even if it was his own money, was sufficient, and neither he, nor his sureties could be liable for the misappropriation or error of the justices; — *that* the reason assigned by the justices, that the notes were "outlawed and worthless," was such a consideration of them as amounted to an appraisal, and was an appraisal that they were of no value; — *that* the creditor having renewed his execution and taken the personal property, on which the justices gave him a lien, did thereby waive his remedy upon the bond given on the former execution; — and *that* he had waived his right to the $6, by not making any demand for the same, either upon the debtor or the justices. Each and all which instructions the Judge declined to give; but did instruct them, *that* there was a breach of the bond and that they must find for the plaintiff for the amount of the money belonging to Rines, and for the value of the notes, if they found them of any value; — *that* they should consider the whole subject and the evidence, and return such verdict as in the whole matter the proof should satisfy them the plaintiff had sustained; *that* they must judge whether the $6 referred to in the disclosure, was the property of Rines, and if so, the plaintiff was entitled to damages to the amount of $3 or $6, as they might determine his interest in the money, or nothing, and for such further sum as they might find the value of the notes and the contract for hauling logs to be, if they found them of any value, and such other damages as the plaintiff was shown to have sustained.

A verdict was returned for plaintiff for $49,92, and the defendant excepted.

*Wilson,* in support of the exceptions.

*W. C. Crosby, contra.*

TENNEY, J. — This case is presented on exceptions to the rulings, and to the instructions of the Judge to the jury, and to the refusal to give instructions as requested by the defendants.

The disclosure of the debtor was properly admitted in evidence. The statute, c. 148, § 26, provides, that the creditor may, upon examination before the justices, propose to the debtor any interrogatories, pertinent to the inquiry, and they shall, if required by the creditor, be proposed and answered in writing, and the answers shall be signed and sworn to by the debtor, and the creditor may have a copy of the interrogatories and answers certified by the justices, on payment therefor. If there is any omission of acts of the debtor, or of the justices, in the examination and proceedings, essential to the rights of the creditor, so that he fails to be benefited by the property disclosed, upon which he has a lien, by the statute, a breach of the bond will take place. *Harding* v. *Butler,* 21 Maine, 191. And in order to ascertain, whether there have been such omissions, the disclosure becomes important, and was manifestly designed to be used in a suit upon the bond, if it should be deemed expedient by those interested.

By the disclosure, the debtor had in his hands the sum of six dollars in money, certain notes of hand, and personal chattels. The record shows, that the debtor paid this money to the justices; and it is perfectly evident that it was treated by him and by them as his property, when disclosed. The proof offered, that he stated this money to be that of another, and that the justices omitted to have that statement appear in the disclosure, was wholly inadmissible. Such proof would not become a part of the disclosure signed and verified by the oath of the debtor at the time required, and

would be contradictory to the import of that which was signed and authenticated, according to the provisions of the statute, and upon which the judgment of the tribunal, in allowing him to take the oath, was predicated. And it would be repugnant to well settled principles, to allow the statement of the debtor, thus solemnly made, and acted upon, to be contradicted, controlled or explained, by the evidence offered, to avoid the consequences of what was previously done or omitted.

The creditor's attorney is not prohibited by the statute from writing the debtor's answers to the creditor's interrogatories. And there is no limit during the examination, beyond which the creditor cannot proceed to reduce to writing the interrogatories and answers, where no objection is interposed, but the request is granted.

The disclosure shows, whether the debtor had property of any kind, to which the creditor could resort for the satisfaction of his execution, in any of the modes provided by the statute. And if the justices adjudged such property not subject to the creditor's lien; or omitted to do that which was required in order to make it available to the creditor, when by the disclosure it was clearly liable to be taken on execution, such adjudication is not conclusive, but is subject to revision in a suit upon the bond. *Butman* v. *Holbrook*, 27 Maine, 419.

Neither the disclosure, nor the justices' record show, that the six dollars in money, disclosed, was deposited with the magistrates, to be disposed of like other personal property, which it appeared by the debtor's statements that he had; but it was withdrawn from the articles disclosed, and *paid* to them, as is shown by the terms used, and on the authority just cited, was a breach of the bond, and the certificate is avoided.

The record declares, that the magistrates did not appraise any bank bills, notes, accounts, bonds or other contracts belonging to the debtor, and disclosed by him. Notes were shown to be owned by the debtor, and the omission to have

them appraised was a breach of the bond. *Harding* v. *Butler*, before cited. If upon their face, they appeared barred by the statute of limitations, a new promise might have been shown, if the creditor could have been heard on the appraisal as he was entitled to be. *Wingate* v. *Leeman*, 27 Maine, 194. The case does not find, that the justices adjudged them to be worthless, as is assumed by the defendants in their request for instructions, and nothing was done which was inconsistent with the record, that they were not appraised; but on the other hand, a record was made, that the creditor should have a lien thereon for thirty days, though there was no such assignment as the statute requires, c. 148, § 30, and when they were demanded by the officer, who had the alias execution, were not delivered.

The bond having been broken, it is difficult to perceive in what manner the taking of property disclosed, kept, and afterwards delivered to the officer and sold for a sum less than the amount of the execution, can cure the omissions and the irregularity of the proceedings, which constituted the breach of the bond. This was in nowise prejudicial to the rights of the debtor.

A demand of the money disclosed would have been useless, when by the debtor's disclosure and the magistrates' record, it was paid away before the oath was taken, and it was not treated by him or by them as property on which a lien was expected.

The instructions in relation to the damages were quite as favorable as the defendants were entitled to.

*Exceptions overruled.*

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

PAINE, *Administrator de bonis non, App't, versus* PAULK, *Administrator de bonis non.*

An allowance to the widow by the Judge of Probate, in the settlement of estates, can only be discharged from the proceeds of the personal estate.

If the allowance exceeds the value of the personal estate, for such excess it cannot be sustained.

An administrator, who, under license of the Probate Court, sells the real estate of his intestate, for the payment of debts and incidental charges, and makes use of the avails thereof in his business, is chargeable with lawful interest thereon, while thus using it.

ON FACTS AGREED.

APPEAL from a decree of the Judge of Probate for Penobscot County.

The defendant represents the estate of Erastus Learned, deceased, and the appellant that of Enoch Brown, deceased, who was a creditor of defendant's intestate.

Learned died in 1836, and administrators were appointed of his estate. They returned an inventory of real estate to a large amount, and of wearing apparel and household furniture $561, and other personal estate consisting of choses in action of over $12,000.

On petition of the widow, the Judge of Probate allowed her $1000. Starrett, one of the administrators, paid towards her allowance $560, which was charged and allowed in his final account. The administration of the estate was not closed before Starrett died, and the other resigned, when in April, 1842, the defendant was appointed administrator *de bonis non.*

In 1842, license was obtained by defendant to sell all the real estate, and the same was sold, in 1843, together with the reversion of the widow's dower.

The estate, in 1837, was represented to be insolvent, and commissioners were appointed to examine the claims. From their decision on one claim, the administrators appealed, and the same was finally decided by the Supreme Court in 1850. On account of this litigated claim no account was settled by the defendant until the decision; but the defendant made

use of the money belonging to the estate, in his business, during the pendency of that suit, and until the settlement of his account in 1853.

No part of the personal estate inventoried has become available to the administrator, save the wearing apparel and furniture, and the rest is entirely worthless.

In the account filed by the defendant in the Probate Court, in 1853, are credits for no other sums than for proceeds of real estate sold under license, out of which he charged for payment of the widow's allowance $500.

This allowance was objected to by the appellant, but the charge was allowed by the Judge of Probate.

At the time of this settlement, the appellant claimed, that the defendant should be charged with interest upon the money of the estate in his hands, used in his business operations, but the Judge decided otherwise.

The causes assigned for the appeal were:—

1. The allowance of $500, paid for balance of allowance to the widow of said Learned, it having been paid out of the proceeds of real estate.

2. The allowance of more than $440, on that item, that sum alone being due her if any thing.

3. The non-allowance or credit of interest on the balance found due from said Paulk remaining in his hands from the year 1843 to the settlement of his account, he having traded upon the same.

The Court were to render a judgment conformable to law.

*Paine, pro se.*

1. The defendant sold lands belonging to the estate, and received his pay therefor, which money he has ever since used in his business. Such use, it is contended, makes him chargeable with interest. *Wyman* v. *Hubbard,* 13 Mass. 233; *Stearns* v. *Brown,* 1 Pick. 530; *Boynton* v. *Dyer,* 18 Pick. 1; 1 Johns. Ch. 510; *Manning* v. *Manning,* 1 Johns. Ch. 535; *Brown* v. *Reckett,* 4 Johns. Ch. 303; *Kel-*

*lett* v. *Rathbun*, 4 Page, 102; *Griswold* v. *Chandler*, 5 N. H. 492; *McAllaster* v. *Bruce*, 1 McMellen's Ch. 275.

In England the courts uniformly recognize this principle. *Sutton* v. *Sharpe*, 1 Russ. 146; *Peety* v. *Starr*, 4 Vesey, jr., 620; *Millard* v. *Gray*, 2 Collyer's Ch. Cases, 295.

2. The fact that the funds were retained to await the decision of an appeal, then pending, does not excuse the charge. The reason of the rule is, that having made use of the money, the estate is entitled to the legal compensation which such use attaches to it.

3. It is further contended that from the facts presented, the defendant is chargeable with interest. All the authorities concur in this, that where there has been an unreasonable delay in accounting for trust funds, interest for that cause will be charged. The defendant was a party to the appeal for eight years, and then rendered no account until three years after its termination. Such delay is unjustifiable and makes him accountable.

4. The payment of the widow's allowance out of avails of the real estate was illegal. From the appearance of the inventory, the allowance made by the Judge was reasonable, but the personal assets all failed, excepting the sum of $560, all of which was delivered to the widow. The deficit the appellee paid from the proceeds of real estate.

The language of the statute authorizing allowances is explicit; they can only be made out of personal estate. R. S., c. 108, § 18.

The strictness with which courts guard the real estate is indicated by *Brazier* v. *Dean*, 15 Mass. 113; *Cram* v. *Cram*, 17 Pick. 427.

5. But if this *allowance* made by the Judge is correct, the payment by the appellee was too large; $440 was the sum due to the widow, and he has paid $500.

*Kent*, for appellee.

HATHAWAY, J. — The administrator is the legal personal representative, and has charge of the personal property of the deceased intestate.

The intestate's real estate goes to his heirs, subject only to its liability "for the payment of just debts, incidental expenses of sale, and charges of administration," and does not become assets in the hands of the administrator, unless it become necessary to sell it for those purposes; when, by special license from the court, he may be authorized so to do. R. S., c. 112, § 1.

In the settlement of an intestate estate, "the widow, besides her apparel and ornaments, shall be entitled to so much of the personal estate as the Judge shall determine to be necessary, according to the degree and estate of her husband, regard being had to the state of the family under her care." Stat. c. 108, § 18.

The case at bar finds that the whole value of the personal estate of the deceased was but five hundred and sixty-one dollars, and to that extent only, can the allowance of the Judge of Probate to the widow be sustained. The allowance was so much "of the personal estate," and could not, of course, exceed the whole amount of the fund out of which it was payable. It must, of necessity, have that limitation. The administrator, Starrett, paid her five hundred and sixty dollars, and hence it follows, that the payment of four hundred and ninety-nine dollars, of the item of five hundred dollars, paid her by the defendant, was a wrongful appropriation of the money which had been raised by the sale of real estate for another purpose, and so much of that charge cannot be allowed him.

The case finds "that the defendant has made use of the money belonging to the estate, in his business, during all the time, since he received it in 1843, and that the money was received for real estate sold under license of Court for the payment of debts, in which case the administrator must have given bond, as required by stat. c. 112, § 5, "that the proceeds of the sale should be truly applied and accounted

for according to law," and there can be no question that he is chargeable for lawful interest, on money thus raised and received, while he used it.

The decree of the Probate Court is reversed and the case is remanded for further proceedings accordingly.

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

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## BATTLES *versus* BATCHELDER.

Of the proofs as part of the *res gestæ*.

After a transaction is closed and the parties to it have separated, the declarations of others having no connection with the transaction, though relating to it, are not admissible in evidence, as part of the *res gestæ*.

ON EXCEPTIONS from *Nisi Prius*, APPLETON, J., presiding, and on motion for a new trial.

REPLEVIN, for a horse.

It appeared that the defendant and others bantered the plaintiff about his horse. He asked the defendant what he would give him for the horse, to which the reply was $40. Battles said, "hand over the money." Defendant said he "did not know as he had so much money, but could borrow it of Simpson Rollins," to which Rollins answered that "he only had 75 cents."

The plaintiff then said, "if either of you have got so much money, you may have him." The defendant then pulled out of his vest pocket $50 or $60, and counted out $40, and handed it to Battles. The plaintiff did not seem inclined to take the money, and it was laid upon his arm. There was some joking about it.

The defendant then went into the stable, near which the conversation was had, took out the horse and led him off.

There was some evidence offered by plaintiff that the horse was of a greater value.

The plaintiffs offered to prove, (as a part of the *res gestæ*, showing how the bystanders regarded the transaction on the

part of the defendant, and as showing the reason why plaintiff did not follow and reclaim his horse, and why the plaintiff did not forbid the defendant from taking the horse away,) that one or more of the bystanders who heard the whole conversation, said to Battles, after Batchelder had gone out of hearing with the horse, in substance, "you had better not go after him, it's all a joke; he will bring him back, and at worst it will only cost you a treat to get him."

The testimony was rejected. A verdict was returned for defendant, and plaintiff excepted.

*Knowles & Briggs*, in support of the exceptions.

*Peters, contra.*

TENNEY, J. — The evidence rejected was offered as part of the *res gestæ*. Declarations of a party at the time of the transaction, are expressive of the character, motive or object, and regarded as verbal acts, indicating a present purpose and intention, and are admitted in proof like any other material parts of the *res gestæ*. 1 Greenl. Ev. § 108. But the declarations of others having no connection with the transaction, after it has closed, and the parties have separated, can be nothing better than such *hearsay evidence*, as can never be held admissible. The proof excluded was of the latter character.

According to the evidence reported, the language used by the parties, and their acts done thereupon, were sufficient to constitute a valid contract, if intended by them as that language and those acts would import, independent of other circumstances. Whether they did so design, or whether the plaintiff did not intend to sell the horse for the price which he stated, and the defendant did not suppose he so intended, were questions which belonged to the jury to settle. This the jury have done, and the Court cannot properly interfere with the verdict which they have returned.

*Exceptions and motion overruled.*

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

## WHITCOMB *versus* SIMPSON *& al.*

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If notes, secured by mortgage on land, are paid when or before they are due, by an absolute deed of the land mortgaged and other land, the title under the *mortgage* is thereby extinguished.

If, after an attachment of an equity of redemption, the mortgager convey the premises to the mortgagee by an absolute deed, for the consideration of the notes secured by the mortgage and other land, such grantee cannot hold the estate which may be duly levied on by virtue of the attachment, against such attaching creditor of the mortgager.

*Such attachment*, after the mortgage has been canceled, is made available only by a levy upon the land.

And no fraudulent *intent*, in the creditor making the attachment, will authorize the original mortgagee to revive his title under the mortgage after it has once been canceled.

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

WRIT OF ENTRY. Plea, *nul disseizin.*

The plaintiff introduced a recorded deed from one Levi Green to himself, dated in 1827, of the demanded premises.

The tenant claimed title by a levy of an execution in his favor against John A. Whitcomb, the attachment on the writ having been made April 9, 1852. He also produced an office copy of a deed of warranty of the same from the plaintiff to said John A. Whitcomb, dated August 10, 1846, and recorded in Jan. 1851.

On April 2, 1852, Whitcomb mortgaged the premises to the plaintiff to secure payment of notes of between one and two hundred dollars, but it was never recorded, and was given up and canceled May 5, 1852, when a deed of the premises of that date was given by Whitcomb to plaintiff and duly recorded on May 6, of the same year. This deed was introduced by demandant.

It was in evidence by demandant, that the notes secured by the mortgage were paid by swapping places. When the absolute deed was given to the demandant, he gave up to Whitcomb the mortgage and notes as part consideration for the absolute deed. And then the mortgage and notes were canceled.

There was evidence tending to show, that the tenant knew of the mortgage before making his attachment.

The case was submitted to the Court, with power to draw inferences of fact as a jury might, and to render judgment according to the legal rights of the parties.

*C. P. Brown,* for tenant.

*Kent,* for demandant.

TENNEY, J. — At the time the tenants made their attachment, the demandant held a mortgage of land, a part of which is the premises in dispute, for the security of sundry notes, amounting to a sum between one and two hundred dollars, against John A. Whitcomb; and the equity of redemption was owned by the latter. After this attachment had become perfect in all respects, the mortgager conveyed to the demandant, by an absolute deed, the whole of the land covered by the mortgage, and received the consideration therefor in the notes secured by the mortgage, and another farm. This transaction was on May 5, 1852, and the notes were given up to John A. Whitcomb, with the mortgage, which was canceled. The mortgage was never recorded; but as the demandant relies upon evidence, that the tenants had actual notice of its existence, before their attachment, for the purpose of considering the respective rights of the parties in this suit, it may be treated as duly registered.

To entitle the demandant to recover, the facts reported must show that the right to do so is with him. And when it appears that the mortgage of April 2, 1852 was canceled and given up, and the notes treated as paid, under the new bargain of May 5, 1852, without any fact in the case that the condition of the mortgage was broken, the breach cannot be assumed. If there was no breach of the condition, it was saved by the payment of the notes, and the cases of *Abbot* v. *Upton,* 19 Pick. 434, and of *Holman* v. *Bailey,* 3 Met. 55, cited by the defendants, are applicable.

If the condition of the mortgage was broken when it was canceled, and the notes given up, what are the rights of the

defendants? The contract between the demandant and John A. Whitcomb, on May 5, 1852, was executed, and intended by them to be so, in all respects without any condition. The notes which the former had held, were supposed to be paid, as much as they would have been by the delivery of money for them. The attachment operated to the injury of the demandant no more than it would if there had been no mortgage and notes, and he had paid the money for the land. He chose to pay a part of the consideration of the land in the mode adopted, when he had constructive notice of the attachment, and must have known of his exposure to loss, if he did not possess himself of all the facts which could have been obtained at the office of the Register of Deeds.

The case is unlike that of *Crosby* v. *Chase*, cited in the argument for the demandant, where it was intended by the parties to the absolute deed, that the mortgage and the notes secured thereby should remain to prevent the tenant from obtaining the land by an attachment and subsequent proceedings, when the attachment could not then be known with certainty, the statute providing for the notice at the Registry, not then having been enacted. Statute 1838, § 344. The notes and the mortgage did remain with the mortgagee in pursuance of the agreement.

It was by a recital in the absolute deed taken by the mortgagee in the case referred to, that the tenant relied to hold the land under his attachment and subsequent levy. The Court decided, that if the demandant was embarrassed by any estoppel supposed to result from his acceptance of the absolute deed, containing the recital, he was relieved by the course taken by the tenant, who in the exercise of his legal right, so far as the deed operated upon him, rode over and defeated it; and that he could not be permitted to defeat the deed for one purpose, and set it up for another.

In the case at bar, the demandant introduced the deed of John A. Whitcomb, dated May 5, 1852. The tenants in no manner, or for any purpose relied upon this deed. They

proved the fact, which was not disclosed by it, that the notes were intended by the holder and the maker to be paid; that they were paid, by land, a part of which is holden by the demandant, unincumbered by the tenant's levy, and were given up with the mortgage, which was canceled. At the time of the attachment, the tenants had secured by it the right in equity of redemption of that mortgage. This could not be taken from them by other parties. After they recovered their judgment and took their execution, it was under the Statute, c. 114, § 31, that they took the course pursued to make that attachment available. The sale of the right in equity of redemption, as it was when the attachment on mesne process was made, would necessarily deprive them of all benefit of that attachment. The parties to the mortgage had treated it as paid and canceled. The tenants could not set it up as outstanding, in opposition to the contract of those parties. If the tenants had caused a supposed right in equity to be sold when none existed, there could be no basis for a bill in equity to redeem in favor of the purchaser, and the demandant would hold the whole estate unincumbered.

The tenants have in no event obtained any benefit by any unlawful and fraudulent design, which they may have entertained, before making their attachment. A grantee, by recording his deed, can derive no benefit over a prior grantee from the same grantor, of the same land, in a deed unrecorded, if he has actual notice of the former, because the statute, c. 91, § 26, expressly forbids it. And an attaching creditor stands in the same relation. But neither are precluded from obtaining a title, where an interest remained in the grantor, not conveyed, which was a sufficient basis for the second conveyance, or an attachment, and the first grantee voluntarily surrenders his claim without any fault of the second grantee or the attaching creditor.

If the tenants, having actual notice of the mortgage, attempted to step in with their attachment, before its registry, and the notes and the mortgage had remained in force till

after the levy, the attempt could have taken away none of the rights of the demandant. But however fraudulent the intention of the tenants may have been, in this respect, if the mortgage was canceled by the mortgagee, this fraudulent intent alone, could not restore it to its former vigor. The tenants by their attachment and levy, derived no benefit from any fraudulent intent. They caused to be attached the mortgager's interest in the land, whatever it was. The interest was the right of redemption, and that was attachable; and they had a right to secure it. When judgment was obtained, they took the course authorized by the statute, to satisfy their execution.

It may admit of doubt, whether the tenants had such notice of the mortgage deed from John A. Whitcomb to the demandant, as to affect them. But the view which we have taken of the law applicable to the case, on the hypothesis that he had actual notice, supersedes the necessity of deciding that question of fact. *Demandant nonsuit.*

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

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MANN *versus* EDSON *& al.*

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The *seizin* of the husband in the premises during coverture, is an essential prerequisite to entitle his wife to dower.

But *possession* is indicative of *seizin* until rebutted by evidence of a paramount title in the tenant.

If the husband paid the money for the land in which dower is demanded, and the deed was made to another in fraud of his creditors, and he received from the grantee a life lease and continued in possession till his death, this is no such *seizin* as will entitle his wife to dower.

In an action of dower, the declarations of demandant's husband as to his equitable title are immaterial and inadmissible in evidence.

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

WRIT OF DOWER. The tenant pleaded that demandant's husband was never seized of the premises.

The land formerly belonged to one Sullivan and by some arrangement between him and demandant's husband, William Mann, the latter went into the possession of it some years prior to 1835. Mann being poor employed a relative to pay for it, to whom the deed was made. The holder of the title wanting his pay, Mann found another person by name of Edson, to buy it, and to the latter the land was deeded in September, 1835. Edson was the son-in-law of Mann, and executed a life lease of the premises to Mann, who continued to live thereon until his death in 1850.

The plaintiff introduced evidence tending to show that the money paid by Edson belonged to Mann, and that the deed was made to Edson in fraud of Mann's creditors.

She also offered to prove the declarations of Mann, made about a year before his death, *concerning his interest in the land*, which were excluded by the Court.

The Judge instructed the jury, *that* if the deed to Edson was made in fraud of Mann's creditors, it would have been void as to those creditors, yet it was good between Mann and Edson, and would be as effectual, so far as the demandant's rights are concerned in this case, as if it were free from any such taint.

A verdict was returned for tenant, and demandant excepted.

*Knowles & Briggs*, in support of the exceptions, contended that a *fraudulent grantee* should not hold against the heirs and widow. That the testimony should have been admitted, they cited *Knight* v. *Mains*, 3 Fairf. 41.

*Rawson*, with whom was *Bartlett, contra*, that the instruction was right, cited *Hamlin* v. *Hamlin*, 19 Maine, 141; and that the evidence was properly rejected, *Crane* v. *Marshall*, 16 Maine, 27; *Alden* v. *Gilmore*, 13 Maine, 178.

APPLETON, J. — To entitle a widow to dower, she must show that during coverture her husband had either an actual or corporeal seizin, or a right to such seizin of the estate of which dower is demanded. It is true it was held in

*Knight* v. *Mains*, 3 Fairf. 41, that possession was evidence of seizin, and that when it appeared that the husband had been in possession during coverture, it was incumbent on the defendant to prove a paramount title in himself. This has been done in the case at bar. The jury have found that the husband of the demandant was not seized during coverture, so that the inference of seizin, which might have been drawn from possession, appears to have been rebutted.

At common law, the widow of a *cestui que trust* is not dowable of an estate to which the husband had only an equitable title. *Hamlin* v. *Hamlin*, 19 Maine, 141; Park on Dower, 124. Such being the law, where the trust is one which is lawful in itself and which a court of equity would enforce, it is not easy to perceive how the rights of the widow will be increased or enlarged, if the ingredient of fraud be added and the purposes of the alleged trust were to defraud the creditors of the husband. The husband could not, by the intervention of a court of equity, have enforced such a trust, nor have acquired that seizin, which is a prerequisite so indispensable, that without its existence, the widow must fail of her dower. *Whithed* v. *Mallory*, 4 Cush. 140.

The declarations of Mann were properly excluded. They were immaterial to the issue, the object of their introduction being to show the alleged trust estate of Mann, which, as has been already seen, could not have been of any avail to the demandant. Besides, the facts sought to be shown by his declarations seem to have been proved from other sources, and to have been established by the special finding of the jury. *Exceptions overruled.—*

*Judgment on the verdict.*

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

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

## WESTERN DISTRICT,

## 1854.

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## COUNTY OF FRANKLIN.

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LYFORD *versus* TOOTHAKER.

Trespass *quare clausum fregit*, cannot be maintained by the owner of land, for an injury done to the grass only, while in the occupation of his tenant at will.

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

TRESPASS *quare clausum fregit.*

The Court were authorized to draw such inferences from the testimony admissible as a jury might, and to enter a judgment according to the rights of the parties.

The Court found the premises, at the time of the alleged trespass, to have been in the *possession* of one Ross, who was tenant at will of the plaintiff. They also found that the trespass complained of, was by turning into the premises defendant's cattle and sheep and eating up the grass.

*May* and *H. Belcher,* for defendant.

*Linscott* and *J. S. Abbott,* for plaintiff.

HOWARD, J. — The consumption of grass by the defendant's cattle constituted the trespass proved. There is no evidence that the freehold, or any fixture upon it, was injured. For such trespass this form of action can be maintained only by the tenant in possession. The injury in such cases, is to him, by an invasion of his rights and property, but not to the landlord out of possession, though his title be indisputable.

From the evidence reported, it appears that Ross, at the time when the trespass was committed, was in possession of the premises, as tenant at will of the plaintiff, and not as his servant or agent. Assuming then, that the plaintiff was the owner of the land at the time, he cannot maintain this action for acts of trespass which did not affect the value of his property. The legal remedy is for him only who suffers by the wrong. *Bartlett* v. *Perkins*, 13 Maine, 87; *Davis* v. *Nash*, 32 Maine, 411.

As it has been suggested by the defendant's counsel that the report of facts is incomplete, we do not consider the question of title presented by the defendant's brief statement. *Plaintiff nonsuit.*

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

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ROSS *versus* PHILBRICK.

An officer who attaches property on mesne process and sells it thereon, without the consent of the creditor and owner, or otherwise than by the mode prescribed in c. 114, § 53, R. S., becomes a trespasser *ab initio*.

The pendency of the action, on which *such property* was attached, interposes no obstacle to an immediate suit by the owner.

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

TRESPASS for taking certain personal property belonging to plaintiff.

The defendant justified as a deputy sheriff that the property was seized on July 22, 1853, on a writ of possession

in favor of one John Rangely *v.* plaintiff, and disposed of according to law; also that on the 19th of August following, the same property was attached on a writ, Noah Burnham *v.* plaintiff, subject to the former seizure, and that the action was then pending in Court.

It appeared that Burnham, by his agent, directed the defendant to make sale of the property attached on said precepts, and gave a bond of indemnity to him for making the sale, which property was sold on the writ and the proceeds of the sale paid to him.

Evidence was given tending to show plaintiff's consent to the sale, and also that he forbade it, but there was no evidence that any portion of the property had been appraised before it was sold.

The counsel for defendant requested the Court to instruct the jury, that as the property sued for was lawfully attached by Burnham, and that suit still pending in Court, the plaintiff can maintain no action, to recover the value of that property while so pending, on account of defendant's having sold the same, although the sale was not conformable to the statute.

The Court refused the request, but did instruct the jury, that if the defendant legally attached the property, sued for on Burnham's writ, still, if he afterwards sold it by virtue of said writ, without complying with the requirements of law, he would be deemed a trespasser, (excepting as to that sold on the writ of possession,) unless the plaintiff agreed and consented to said sale; and that plaintiff would be entitled to a verdict for the value of the property so sold, to which the jury would be authorized to add as damages a sum equal to the interest on such amount since the sale, notwithstanding the pendency of said writ on which the property was attached.

A verdict was returned for plaintiff for $419,12 and defendant excepted.

*J. S. Abbott,* in support of the exceptions.

1. As the property was fairly sold, and the proceeds held

to be applied on the execution which may hereafter issue in the case in which the attachment was made, if the officer did conduct irregularly, only nominal damages should have been recovered. *Daggett* v. *Adams*, 1 Maine, 198.

2. The officer is liable to Burnham in case he prevails in his suit, and in case this verdict stands, the plaintiff obtains the full value of his property. The defendant will be obliged to pay the full value to Burnham in discharge of Ross' debt, and thus the plaintiff gets his pay twice for the property. Hence the remedy of plaintiff is suspended until the paramount right of his attaching creditor is settled. *Bailey* v. *Hall*, 16 Maine, 408.

*R. Goodenow, contra*, that defendant was a trespasser *ab initio*, cited R. S., c. 114, § § 52, 60; *Booker* v. *Baker*, 18 Pick. 408; *Allen* v. *Hall*, 5 Met. 263; *Coffin* v. *Field*, 7 Cush. 358; *Smith* v. *Gates*, 21 Pick. 55; *Adams* v. *Adams*, 13 Pick. 387; *Folger* v. *Hinckley*, 5 Cush. 266; *Williamson* v. *Dow*, 32 Maine, 559; *Blanchard* v. *Dow*, 557; *Mussey* v. *Cummings*, 34 Maine, 75.

That defendant was not liable to the attaching creditor, he cited *Jenney* v. *Delesdernier*, 20 Maine, 183; *Rice* v. *Wilkins*, 21 Maine, 562.

As to damages, *Brannin* v. *Johnson*, 19 Maine, 361.

CUTTING, J. — In *the six carpenters' case*, 8 Coke, 290, "it was resolved when entry, authority or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*." Or in other words, "where the law has given an authority, it is reasonable, that it should make void every thing done by an abuse of that authority, and leave the abuser, as if he had done every thing without authority." Bacon's Abr. Trespass, B.

This rule of the common law applies to all subordinate executive officers, and serves to confine them within the limits of their legal duties; and when we consider the constitutional protection given to property, the rule appears to be not an unjust one. In this case, it has not been pretend-

ed by his counsel, that the defendant, after satisfying the execution in favor of Rangely out of the property seized on that, and subsequently returned on mesne process, had legal right to sell the balance at auction without the consent of the creditor and debtor, or otherwise than by the mode pointed out in R. S., c. 114, § 53. Here then, was an abuse of authority, and the defendant, according to the rule, was a trespasser *ab initio*. This position is fully sustained by the authorities cited by the plaintiff's counsel.

But it is contended, that so long as the process, upon which the property in controversy was attached, is pending in Court, the plaintiff cannot sustain this action, because otherwise the defendant might be compelled to pay twice for the same property; to the plaintiff in the first instance, and subsequently to the attaching creditor. If it be so, it is not the only case where the *tort-feasor* is made liable to pay double or even treble damages. Consequences may be more properly the subject of consideration by the party before the fact, than by the Court subsequently in determining the law. An officer, who has been guilty of a trespass from the beginning, cannot invoke to his aid the process which he has abused; he places himself in the same situation he would have occupied, had he seized the property without any process, and taken it from the owner's possession; and what consequence is it to the officer or the attaching creditor, that the suit is pending, when the attachment is dissolved, and can no longer be made available to satisfy a subsequent execution?

In *Purrington* v. *Loring*, 7 Mass. 388, a deputy sheriff was declared to be a trespasser *ab initio*, and liable to the amount of the articles taken; because in his return, it appeared he sold them, after having advertised the time and place of sale twenty-four hours instead of four days, notwithstanding he had applied the proceeds of the sale on the warrant of distress against the plaintiff.

So, in *Wallis* v. *Truesdell*, 6 Pick. 455, an officer was held to be a trespasser *ab initio*, for selling property on

mesne process, without the consent of the debtor, and the termination of the original suit was considered for no other reason than to dispense with the necessity of a demand.

In *Smith* v. *Gates*, 21 Pick. 55, the Court conclude their opinion by saying, "The defendant, having failed to conform to the requisitions of the statute, has clearly made himself a trespasser *ab initio*, and the plaintiff is entitled to recover the value of the horse so taken and sold."

In *Allen* v. *Hall*, 5 Met. 263, it appeared, that previous to the trustee process, Hall had commenced a suit against one Tufts, attached his property and caused the same to be sold at auction, on mesne process, by the officer, under circumstances, similar to the case at bar, and Hall became the purchaser, and took the property into his possession, for which the Court held him to be the trustee of Tufts. Hall was not allowed to, or he did not, invoke the pendency of his suit; or that, the sale being illegal, the attached property was still in the custody of the law, or that the funds were held to be applied to his anticipated execution.

In *Blanchard* v. *Dow*, 32 Maine, 557, the defendant, being a collector of taxes, held a legal assessment against the plaintiff for $44,15, for payment of which, defendant seized and sold his horse for $65, but failing to show a compliance with the requirements of the statute, the defendant was held to be a trespasser *ab initio*, and the plaintiff recovered judgment for the value of his horse, without any deduction for the taxes.

Authorities might be multiplied to almost any extent, both to show what constitutes a trespass *ab initio* and its consequences as affecting the rights of the parties; but it is unnecessary to consider the rule as to damages in this case, inasmuch as there can be no legal appropriation of the funds derived from the illegal sale, towards satisfying the creditor's judgment, if he ever recovers one; it is not the case, that comes within some of the authorities, of an appropriation *already made*, and a debt or execution *already discharged*, but where funds are said to be held to be appropri-

ated upon a contingency. The statute authorizing a sale on mesne process under certain circumstances, admits of no such evasion.

It is true, that in *Kaley* v. *Shed*, 10 Met. 317, the defendant was permitted to show, that the property by him unlawfully taken, had been subsequently attached and taken from him by another officer, and being rightfully in the custody of the law, the plaintiff had suffered damages only for the intermediate detention. But in the case at bar no such subsequent attachment has been made, whereby to place the property in the custody of the law, and the two cases are wholly dissimilar.

So in *Perry* v. *Chandler*, 2 Cush. 237, and *Squire* v. *Hollenbeck*, 9 Pick. 551, where it was held that it might be shown in reduction of damages, that a third person had a paramount title; but in neither case did the person having the superior title claim under an officer who had abused his precept.

The case of *Bailey* v. *Hall*, 16 Maine, 408, cited by defendant's counsel, as an authority against the maintenance of the present action, does not sustain his proposition. It was proved in that case that crockery ware had been attached by the officer and deposited by him in a barn, and within three weeks it was destroyed by some person unknown. This did not make the officer a trespasser *ab initio*, as was decided on very similar facts in *Ferrin* v. *Symons*, 11 N. H. 363. A mere *non-feasance* will not make a man a trespasser *ab initio*, *Gardner* v. *Campbell*, 15 Johns. 401, consequently the attachment was not dissolved, and the Court very properly held, that until that time "the creditor's claim was paramount to that of the debtor."

But another answer to the creditor's claim on the defendant is the fact, that what was done, was by his procurement and bond of indemnity. Whether the bond be a valid security to the officer for doing an illegal act is not now under consideration, but it shows enough, or rather the act of giving such a paper, to release the officer from any further

claims of the creditor; and it shows further, that the creditor conspired with the officer to violate the law, and this creditor cannot complain, that his too great haste to handle the money, has discharged his legal security. We, therefore, do not perceive any valid objection to the Judge's instructions or refusals to instruct, and the exceptions must be overruled.

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

## COUNTY OF OXFORD.

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### CAME *versus* BRIGHAM.

Of the evidence necessary to establish the existence of a corporation.

The provisions of c. 76, R. S., attach to all railroad corporations, unless specially exempted therefrom by their charter.

And the individual members of such corporations are subjected to the special liabilities imposed by that Act.

In an action against a stockholder, for the neglect of the corporation to pay a judgment against them, *he* cannot interpose the defence, that there was a variance in the original suit between the proof and the declaration. It is enough that the record shows a good cause of action, and that no such objection was made by the corporation.

The by-laws of a corporation, not repugnant to the laws of the land, are obligatory upon all its members.

Where a corporation is properly organized, for the transaction of its business it may lawfully make and utter its promissory notes in accordance with its by-laws.

A judgment against a corporation, cannot be impeached for any defect in the service of the original process, by any party or privy to it. As to *such* it is valid until reversed.

The return of an officer upon an execution is sufficient evidence, that he held the execution for the purpose of collecting it.

Of the rights of a judgment creditor, under R. S., c. 76, against stockholders.

The stockholders of a corporation, for an unsatisfied judgment against it, are liable to such judgment creditor, although he is an *assignee* of the debt against it.

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

ACTION ON THE CASE to recover of defendant, as a stockholder of the Buckfield Branch Railroad Corporation, the amount due to the plaintiff on a judgment recovered against the corporation.

The Court were authorized to draw such conclusions as a jury might, and enter judgment by default or nonsuit, as the facts and law should warrant.

A copy of the judgment, execution and officer's return thereon were introduced and evidence that defendant was a stockholder, also the act of incorporation and the records.

The objections made to the plaintiff's recovery are all stated in the opinion.

*Ludden*, for defendant.

*Perry*, for plaintiff.

APPLETON, J. — The plaintiff in this case having recovered judgment against the Buckfield Railroad Company, and having failed to obtain satisfaction of the execution issued thereon, has brought this suit against the defendant, who is claimed to be a member of that corporation to recover of him the amount due, in pursuance of the provisions of R. S., c. 76, § § 18, 19, 20. To its maintenance numerous objections have been interposed, which it becomes necessary carefully to examine.

1. It is insisted, that there is no evidence of the existence of the alleged corporation. It is in general sufficient to give in evidence the Act of incorporation and the actual use and privileges of an incorporated company under the name designated in the Act, to entitle the plaintiff to maintain his action against such corporation. *Narragansett Bank* v. *Atlantic Silk Co.*, 3 Met. 282. The records of the corporation show an organization under their charter, and action for a series of years under such organization. The defendant took stock in the corporation, was present at its meetings, was elected one of its officers, was connusant of its proceedings, and when not present appears to have

given his proxy to others to act for him. The existence of the corporation is abundantly established by its records, and by its corporate acts as well as by the admissions of the defendant.

2. A more important question presented for consideration is, whether the Buckfield Branch Railroad Company is subject to the provisions of R. S. c. 76, by which stockholders are made liable for corporate debts in certain cases. The charter of this corporation provides, that it shall be subject to all liabilities arising under R. S., c. 81, respecting railroads. It is argued, that inasmuch as it is not declared in the charter to be subject to the Act regulating corporations, R. S., c. 76, that therefore it is exempt from its operation. In very many charters a clause has been inserted to the effect, that the corporation thereby established is subject to the provisions of that Act, and it is insisted, that when this clause is omitted, that the corporation and its members are relieved from its obligations and liabilities. But such is not the law. It is enacted by R. S., c. 76, § 18, that in all corporations, excepting banking corporations, created since Feb. 16, 1836, the stockholders shall be held liable for corporate debts, "unless otherwise specified in their charter." The general law attaches in all cases, unless special provisions to the contrary are made. The liabilities of stockholders arises from the Act of incorporation. This was deemed necessary for the protection of the public, and it is obvious, that the Legislature intended the general rule applicable to all corporations to be that stockholders should be liable, and that if in any case an exception was to be made, it should be specified in the charter of the corporation whose members were thus to be relieved. The repeal of this provision must be specially set forth in the charter. Mere silence on the subject is not enough. The assertion in the charter, that the corporation is to be subject to R. S., c. 76, was unnecessary. The omission of what was unnecessary cannot impair or diminish the rights of the public. This corporation must there-

fore, be regarded as subject to the general law applicable to corporations, and its members as subject to the special liabilities thereby imposed.

3. The name of the corporation, of which the defendant is a member, and in consequence of which membership the plaintiff claims, that he is liable for its corporate debts, is the Buckfield Branch Railroad Company. The original suit and judgment thereon was against the corporation by that name. The note in suit in that case purports to be that of the President Directors and Company of the Buckfield Branch Railroad, and is signed by the Treasurer. The objection taken is, that the note does not purport to be given by the corporation, there being a variance from the corporate name by the omission of the word company. The writ and the judgment in the suit describe the corporation correctly. It is well settled, that the notes or other proof used as evidence in ascertaining damages constitute no part of the record, and cannot be regarded in case error should be brought to reverse the judgment in which they were offered. *Storer* v. *White*, 7 Mass. 448; *Peirce* v. *Adams*, 8 Mass. 383. The record disclosing a good cause of action, and there having been a default, the defendant cannot now take the exception, that there was a variance, and that the proof did not sustain the declaration. The corporation of which he was a member, and by whose acts he is bound, interposed no such objection, and in this stage of the proceedings we do not think it open to the defendant.

4. Corporations have the right to manage and control their affairs, subject to the general laws of the land, as they may deem advisable, and as incident thereto, to make such by-laws as will best effectuate the objects proposed to be accomplished. Those duly made are obligatory upon all the members, and each one is bound to take notice of them. No objection can be taken to the ninth by-law, which provides how the promissory notes of the corporation are to be given.

5. It appears from a notice signed by this defendant and others, dated August 4, 1848, that before proceeding to organize the corporation, that its capital stock "as prescribed and established by the Act of incorporation, had been duly subscribed for and taken up agreeably to the provisions of said Act." Such being the case, they properly proceeded to organize.

But having duly organized, the ground is taken that if a corporation, still it is not competent for them to give their promissory notes, and to this point is cited *McCullough* v. *Moss*, 5 Den. 567. Upon examining this case, it will be found that the right of a corporation to make a promissory note in the transaction of its business, is expressly recognized. In *Mott* v. *Hicks*, 1 Cow. 513, it was held that it might give a note for a debt incurred in the course of its legitimate business; and the same doctrine was again affirmed in *Att'y Gen.* v. *Life and Fire Ins. Co.* 9 Paige, 470. The authority to sign a note, and the mode and manner in which notes shall be given to bind the corporation, distinctly appear in the by-laws, in accordance with which the note upon which the judgment was rendered, appears to have been given. Although the note may not appear under its appropriate date in the records of the treasurer, it does not follow that it was not properly given. It is not alleged that the corporation did not receive the funds, and that they are not justly responsible therefor. The omission of the word company in the descriptive portion of the note, furnishes no equitable ground for resisting its payment.

6. The cases cited establish the proposition that in many cases where judgment is rendered by default, it may be reversed where the service made has not been in accordance with the requirements of the statute. But while a judgment where the service has been defective may be erroneous, and may for that cause be reversed, it is still regarded as against all parties and privies, as a valid judgment till its reversal. The individual or corporation against whom it has been rendered, may not choose to take advantage of the errors

which exist in the process. It is true that it was held in *Downes* v. *Fuller*, 2 Metc. 135, that where a judgment recovered contrary to law is prejudicial to a third party, he may avoid it by plea and proof. But the defendant is not in condition to take advantage of this principle. It was decided in *Merrill* v. *Suffolk Bank*, 31 Maine, 57, that a stockholder in a corporation against which judgment has been recovered, and out of whose estate the execution issued thereon has been satisfied, is so far a privy in law that he may bring error to reverse it. That he has not done, and according to the authorities cited by the learned counsel for the defendant, the judgment is to be regarded as valid against him until it shall be reversed.

7. The return of the officer on the execution against the Buckfield Branch Railroad Co. is to be taken as true. The officer has made thereon his return. It sufficiently appears that he was the officer holding the execution, by the fact of his return. The necessary and unavoidable implication therefrom is, that it was in his hands and under his control, for the purposes of its legal enforcement.

The judgment creditor under R. S., c. 76, has a claim which he may enforce against any or all stockholders. He may take the preliminary steps against any or all, by making the requisite demand and giving the required notices of his intention, and enforce his rights by suit against any one he may select. Nor is it material that the individual against whom the suit may be brought, should own more or less than the amount of the judgment. His liability is fixed by the statute, and cannot be enlarged. *Stanley* v. *Stanley*, 26 Maine, 191. The return of the officer shows a compliance with the requirements of R. S., c. 76, § 18, 19, 20.

8. The remaining objection is that the plaintiff being an assignee of the demand in suit, is not entitled to the benefits of the provisions by which stockholders are made liable. The liability is "for all the debts of the corporation." No reason is perceived why the obligation of the stockholders is not equally great to pay the assignee of a debt, as if it

had remained the property of the assignor. The statute, neither in terms nor in its equities, limits the liability of the stockholder to the case where the suit is in the name of the original creditor. Its language is most general. All creditors, whether so originally, or by indorsement or assignment, are within its beneficial provisions.

The defendant became a member of this corporation by his own voluntary act. Great and severe losses would seem to have been suffered by its stockholders. If the speculation had been successful, the defendant would justly have been entitled to the rewards of his enterprise. Neither the principles of law nor of equity require that the plaintiff should bear the burthens resulting from ill advised or badly managed schemes of public improvement, to which he was not a party, and from which he was to derive no gains. As between him and the defendant, his equity is the greater, and he is entitled to judgment. *Defendant defaulted.*

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

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TRUSTEES OF MINISTERIAL AND SCHOOL FUND, IN ANDOVER, *versus* REED.

Under c. 246, § 12, of Acts of 1852, the decisions of the presiding Judge, of cases withdrawn from the jury by consent, in all matters of law, are open to exceptions.

The trustees of a ministerial and school fund, in an action in the name of the corporation, are competent witnesses, if they are not personally named as plaintiffs.

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

TRESPASS for a quantity of hay. Defendant claimed title to it.

The plaintiffs, to support their title, called one Sylvanus Poor, and also offered the deposition of one John Abbott. Both belonged to the board of trustees and the testimony was rejected for that cause.

Other testimony was in the case and it was withdrawn from the jury and submitted to the presiding Judge, the plaintiffs reserving the right to except to the foregoing ruling.

Judgment was entered for defendant.

*Virgin*, with whom was *May*, in support of the exceptions.

*Walton, contra*, cited Howe's Practice, 299; *Adams* v. *Leland*, 7 Pick. 62; 1 Greenl. Ev. § 333; *Rex* v. *St. Mary Magdalen*, 3 East, 7.

He also objected that in such a case exceptions do not lie.

HATHAWAY, J. — Any party thinking himself aggrieved by any opinion, direction or judgment of any Justice of the Supreme Judicial Court in the trial of a cause, is entitled to his exceptions, as provided by statute, c. 96, § 17. A similar provision was made for exceptions from the late District Court by statute, c. 97, § 18.

By statute of 1852, c. 246, § 12, it is provided, that "the Justice presiding at terms holden for jury trials shall hear and determine all cases whatsoever, without the intervention of a jury, when both parties shall have so agreed, and entered such agreement on the docket, and he shall direct what judgment shall be entered up in all cases so by him decided."

The object of this provision seems to have been to substitute the Judge for the jury, in the trial of a cause, whenever the parties should so agree; but the party aggrieved by any erroneous rulings of the Judge in matter of law, is not thereby deprived of his right to exceptions.

The statute merely requires the Justice presiding in such cases, to perform the duties of a jury in settling the facts, in addition to his ordinary duties as Judge in trying the cause, leaving the parties' rights to exceptions in all questions of law, presented to and adjudicated upon by the Judge, precisely the same as if the case had been tried by

the jury. In this case, the question of the legal admissibility of Poor and Abbott as witnesses, was distinctly presented to and ruled upon by the Judge presiding, and the party believing himself aggrieved by the ruling of the Judge, had a legal right to take exceptions.

By R. S., c. 20, § 3, "the selectmen, town clerk and treasurer, for the time being, of each town in the State wherein no other trustees for the same purpose are already lawfully appointed, shall be a body corporate and trustees of the ministerial and school funds in such towns forever, with the usual powers granted to similar corporations."

The plaintiffs appear by the case as presented, to have brought their action, as such corporation, and although the statute does not, in terms, declare the name of the body corporate, yet, its fair construction gives the corporate name which is used in the case. Nor was there any objection made to the plaintiffs' right to sue, by such name, for the plea was the general issue. The witnesses, Poor and Abbott, therefore, not being named as parties to the record, as was the case in *Adams & als.* v. *Leland*, 7 Pick. 62, cited by defendant, no judgment could be rendered against them personally.

If the plaintiffs fail in their action, judgment for costs can only be against the corporation of which Poor and Abbott were members. And they, as individuals, had no legal interest, which could lawfully exclude them as witnesses. *Miller* v. *Mariner's Church*, 7 Greenl. 51; 1 Greenl. Ev. § 333; and the case also comes within the provisions of stat. c. 115, § 75, which makes members of such a corporation witnesses, provided they have no other interest than as such members. The testimony of Poor and Abbott was therefore erroneously excluded. *Exceptions sustained,*

*and new trial granted.*

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

BUCKFIELD BRANCH RAILROAD CO. *versus* IRISH.

An agreement signed by defendant to *take* and *fill* one share in the capital stock of a railroad company, renders him liable, in an action of assumpsit, to pay the assessments legally made upon that share.

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

ASSUMPSIT, for the amount of one hundred dollars, the alleged value of a share in plaintiffs' company, upon defendant's subscription to their capital stock.

This agreement was part of the case. "The undersigned hereby agree to take and fill the number of shares set against their names respectively, in the capital stock of the Buckfield Railroad Corporation."

The question submitted to the jury was, whether the defendant signed any such agreement, and they found that he signed for one share.

Plaintiffs proved their road to have been built and in operation, and that the defendant's share with others, was duly assessed to the amount of $100.

The case was submitted to the full Court to determine, if in law, the action could be maintained, and judgment to be rendered by nonsuit or default. If by default the amount of damages to be determined by either member of the Court.

*Walton*, for defendant, cited *Ken. & P. R. R. Co.* v. *Kendall*, 31 Maine, 470, and *Jay Bridge Cor.* v. *Woodman*, 31 Maine, 573.

*Ludden*, for plaintiff, cited *Bangor Bridge Company* v. *McMahon*, 1 Fairf. 478.

CUTTING, J. — The only question, for the consideration of the Court, appears, from the arguments submitted, to be upon the construction of the original contract entered into by the respective parties, which is in these words: — "The undersigned hereby agree to take and fill the number of shares set against their names respectively, in the capital stock of the Buckfield Railroad Corporation," &c., to which the

verdict finds, that the defendant was a subscriber to one share.

In the case of *Bangor Bridge Co.* v. *McMahon*, 10 Maine, 478, this Court have decided, that the term "to fill," in a similar contract, is equivalent to an express promise to pay assessments legally made upon the share represented. And we are not aware of any decision in this State, which overrules that opinion, and no sufficient argument has been adduced, which inclines us so to do. More especially since that term had received a legal construction, and in contemplation of law, must have been known to the defendant, when he became one of the subscribers. Consequently, according to the agreement of the parties, a default must be entered, and the defendant is to be heard in damages before either member of the Court.

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

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## WOODMAN *versus* CHESLEY.

The construction of a written contract devolves upon the Court and not on the jury; but if left to the jury and they decide *correctly*, exceptions for that cause will not avail.

A promissory note given for a specific sum, for a cow, in which it is stipulated, that the cow shall remain the property of the promisee until the note is fully paid, is in the nature of a mortgage, and the promisee, where there is no provision to the contrary, is entitled to the *possession* of the property until the note is paid.

And where *such a note and contract* were made for *security only* of the payment of *another note* by the same maker, for a yoke of oxen, which note contained a *similar provision* as to the oxen, the taking *possession* of the oxen by the promisee, *before* the time for their payment had elapsed, although they were of the full value of the note, will not discharge his right to the possession of the *cow*, before the maturity of the notes.

REPLEVIN for a cow. The defendant claimed title to the property.

The action was originally brought before a justice of the peace, and was appealed to the late District Court, where a

trial was had before GOODENOW, J., a verdict returned for plaintiff and exceptions taken to the refusals to instruct, and instructions given to the jury. The cause was argued at May term, 1854.

The writ in this suit was dated Sept. 15, 1847, two days after the taking by defendant, whose title was derived from one Wm. K. Staples. The defendant had notice of the trade between plaintiff and Staples when the papers were assigned to him.

Wm. K. Staples, on April 6, 1847, sold to plaintiff a yoke of oxen for $60, and took the following note: —

"April 6, 1847. For value received, I promise to pay Wm. K. Staples, or order, forty-six dollars and interest, in eight months. The oxen for which this note is given remains the property of Wm. K. Staples till all this note is paid."

At the same time to indemnify him against loss by fall in the value of said oxen, in case he had to take them back, Staples received from the plaintiff another note of the following tenor: —

"Poland, April 6, 1847. For value received, I promise to pay Wm. K. Staples, or order, fourteen dollars and interest, in eight months. The heifer for which this note was given remains the property of Wm. K. Staples, till all the note is paid. The heifer is the same said Staples bought of E. G. Woodman."

On the first of June following, the note for the oxen was exchanged by the parties for another of a similar form, excepting that $60, was put in the place of $46.

Sometime in June, and before the 23d, in 1847, the right and interest of plaintiff in the oxen were sold, under defendant's direction, by one Strout, a constable, to defendant, for one dollar.

On June 23, 1847, the defendant paid to Staples the $60 and interest for the oxen and received an assignment from him of the two notes above mentioned, after he had seized and sold the plaintiff's interest in them.

The plaintiff called Staples as a witness, who was allowed to testify, against objection, that if Woodman paid the $60 and interest, in eight months from the date of the note, the bill of sale and the cow should be given up; that he understood from the writings that plaintiff was to have possession of said cow and oxen until the notes became due, and if the witness should take the oxen and they were of the value of $60, and interest, then the cow should be given up with the $14 note, and this was told to defendant when the papers were assigned.

Evidence of the value of the oxen was given by the plaintiff, tending to show that they were worth the amount of the note, and by defendant that they were worth less.

By the counsel for defendant, the Judge was requested to instruct the jury, *that*, unless the plaintiff was entitled to the property and possession of said cow at the time when his action was brought, as against the defendant, that action could not be maintained; *that*, if said oxen were not of the value of sixty dollars and the interest thereon, at the time when said sixty dollars was to be paid according to said notes, then this action could not be maintained, as the defendant had not been fully paid; but the instructions of the Court were, *that*, if said oxen were of sufficient value, with the use that defendant had had of said oxen, to pay what was due on said note in June, 1847, when defendant took possession of said oxen, then, if they believed the contract between said Staples and the plaintiff to be as had been testified, that said fourteen dollars and the cow were to be given up when said sixty dollars and the interest should be fully paid, the plaintiff was entitled to recover; *that* they would judge whether the testimony of Staples, that plaintiff was to keep possession of the oxen and cow until the sixty dollars should be due, as he understood was the case from the writings, was not in accordance with the intention of the parties, and the Court so understood the contract to be, and that as the proof was that the cow was taken by the defendant from the possession of plaintiff, he would be entitled to

recover, if the oxen were of sufficient value to pay the note and interest, when the oxen were taken by defendant in June, 1847, with the use the defendant had had of them before the eight months had elapsed.

*Perry*, with whom was *May*, in support of the exceptions, cited *Ingraham* v. *Martin*, 15 Maine, 373; *Tibbets* v. *Towle & al.*, 3 Fairf. 341; *Williams & al.* v. *Root*, 14 Mass. 273.

*Dunn, contra*, cited *Parks* v. *Hall*, 2 Pick. 211, and *French* v. *Stanley*, 21 Maine, 516.

TENNEY, J. — The cow having been taken by the defendant, on Sept. 13, 1847, from the possession of the plaintiff, was replevied on the writ in this action dated the 15th day of the same month.

The plaintiff gave to Wm. K. Staples a bill of sale of the cow, called in the instrument a heifer, dated April 6, 1847, and acknowledged payment therefor. And upon the same piece of paper, and at the same time, as was admitted, is the following: — "For value received, I promise to pay Wm. K. Staples, or order, fourteen dollars and interest in eight months. The heifer for which this note is given remains the property of Wm. K. Staples, till all the note is paid. The heifer is the same which said Staples bought of said Eben G. Woodman."

(Signed) "Eben G. Woodman."

Under date of June 23, 1847, this paper purports to have been assigned by Staples for a valuable consideration. And the subscribing witness to the assignment testified, that he saw Staples sign and deliver it to the defendant, with another paper signed by the plaintiff, in the following terms:

"Poland, April 6, 1847. For value received, I promise Wm. K. Staples or order, sixty dollars and interest in eight months. The oxen for which the note is given remaining the property of said Wm. K. Staples till all this note is paid. The oxen are the same which Staples had of John W. Dunn of Poland." This paper was assigned in terms

similar to the other, and the defendant paid Staples the sum of $60, and interest.

Staples was called by the plaintiff and testified, that in April, 1847, the plaintiff made a bargain with him, to purchase a yoke of oxen for the sum of $60 and interest, payable in eight months; that they were to remain the property of Staples till paid for; and to guard against any depreciation in their value, in the event of his being obliged to take them back, the note for the heifer and the bill of sale for its security was given; and that a note for the oxen was given at the same time for the sum of $46 and interest, payable in eight months, and the note and the condition therein were in the same terms as the one in the case for the oxen, excepting that it was for a smaller sum. And for this note, the one now produced was substituted the first of June, having the date of April 6, 1847; and that the defendant was informed at the time of the assignment, of the transactions between him and the plaintiff. When the note first given for the oxen was changed for the other, Staples signed and gave the plaintiff a writing as follows:—"Received of E. G. Woodman a note for fourteen dollars, to be paid in eight months, for which I have his cow for security. If E. G. Woodman pays my note I hold against him, for sixty dollars and interest, in eight months, then the note for the cow shall be given up to said Woodman."

Staples was allowed to testify, the defendant objecting, that he understood from the writings referred to, that the plaintiff was to have possession of the cow and the oxen, until the notes became due.

The Court instructed the jury, "that they would judge, whether the testimony of Staples, that the plaintiff was to keep possession of the oxen and the cow, until the $60 should be due, as he understood was the case from the writings, was not in accordance with the intention of the parties, and the Court so understood the contract to be. And that as the proof was, that the cow was taken by the defendant from the possession of the plaintiff, he would be en-

titled to recover, if the oxen were of sufficient value to pay the note and interest, when the oxen were taken by the defendant, in June, 1847, with the use the defendant had had of them before the eight months had elapsed."

The transaction between the plaintiff and Staples touching the oxen, may be regarded as a conditional sale, which the law will uphold, after the assignment as well as before. *Tibbetts* v. *Towle & al.* 3 Fairf. 341. It was competent for the parties to provide a further security of the payment of the purchase money, if they chose, and this they attempted, in a manner, not the most direct and appropriate; but it may, notwithstanding, be a valid contract. These questions are not reported in the exceptions to have been presented to the Judge, who tried the case, and were not made the subject of any rulings or instructions in law, under such facts as the jury should find established, and are not now before us for consideration.

The construction of the contract, under which the defence is attempted, and of the one in relation to the oxen, was exclusively for the Court. The evidence of Staples that he understood from the writings, that the plaintiff was to have possession of the oxen and of the cow, till the notes became due, was incompetent; but although erroneously allowed, would not have been cause for sustaining the exceptions, if such was the true legal construction of the contracts, which under the instructions, they must have found; for the Court, in the instructions, adopted the same, and stated, that it so understood the contract to be. It is well settled, if the Court permit the jury to decide a question, which is one of law, and not of fact, and their decision is correct, the verdict will not be disturbed for this cause.

By the contract in relation to the cow, of April 6, 1847, the property was to be that of Staples till the payment of the note therein mentioned. It was in the nature of a mortgage. It contained no provision, that the possession should be with the plaintiff till the maturity of the note, or that the right of Staples to take possession should be suspended.

The property being that of Staples, unless the note should be paid, the legal import of the contract, was, that possession should accompany it. And the writing given by Staples, in June following the time, when the contract was executed, was not intended to cancel the former, but the note for $14, and the security therefor, were to remain with Staples, as valid, but to be given up if the note of $60 and interest, which he held, should be paid in eight months.

The cow was taken by the defendant, before the maturity of either note, and this suit was commenced and the cow replevied, three months at least before the expiration of the time, within which the oxen and the cow could be redeemed, according to the terms of the agreement. And unless the sale, by the constable, vested the entire title of the oxen in the defendant, which from the report, we cannot assume, the condition in the sale of the oxen had not been broken, and the defendant's title to the cow was defeasible. If, before the assignment, Staples was entitled to hold the oxen and the cow for the security of his note of $60 and interest, by the assignment, his right passed to the defendant, and it was not defeated by the taking of possession of the oxen by him. *Exceptions sustained. — New trial granted.*

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

## COUNTY OF YORK.

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PIKE, *Petitioner for certiorari, versus* HERRIMAN.

Whether a writ of *certiorari*, to bring up the record of the proceedings of the justices of the peace and quorum, as to the disclosure of a poor debtor before them, can properly be granted; *quere*.

But under this writ *only the record* of the inferior tribunal can be brought up, and no facts to affect it, are admissible.

The adjudication of the magistrates, as to the notice given to the creditor, is conclusive, and cannot be re-examined under such a process.

PETITION for the writ of *certiorari*.

The petitioner was a creditor in an execution against the defendant, on which he had disclosed before two justices of the peace and quorum, and taken the oath prescribed by law.

The errors assigned were that no notice was left as certified by the officer at the place specified in his return, nor had the creditor or his attorney any notice *in fact* or *in law*, of the time and place of the debtor's disclosure.

With the petition were affidavits tending to show the errors alleged.

*Clifford & Ayer*, for respondent, submitted the case without argument.

*Wedgwood* and *D. Goodenow*, for petitioner, cited *Dow* v. *True*, 19 Maine, 46; *Little* v. *Cochran*, 24 Maine, 509; *Agry* v. *Betts & al.* 12 Maine, 415; *Hanson* v. *Dyer*, 17 Maine, 96; *Smith* v. *Rice*, 11 Mass. 512; *Thacher* v. *Miller*, 11 Mass. 413; *Blanchard* v. *Wild*, 1 Mass. 343; *Hart* v. *Hutchins*, 5 Mass. 262; *same* v. *same*, 6 Mass. 399.

SHEPLEY, C. J. — This is a petition for a writ of *certiorari* to bring up the record of the proceedings of two justices of the peace and of the quorum in taking the disclosure and administering an oath to the respondent as a poor debtor.

It is proposed, that certain facts *dehors* the record should be proved; and depositions are presented by the petitioner for that purpose.

A writ of *certiorari* can present only a record of their proceedings. No testimony can be received from the petitioner to affect that record, or to prove other facts not appearing in it. *Commonwealth* v. *Bluehill Turnpike Corp.* 5 Mass. 420.

The adjudication of an inferior tribunal upon facts presented by a record of its proceedings is conclusive. *Goodwin* v. *Inhabitants of Hallowell,* 3 Fairf. 271; *Hayward, petitioner,* 10 Pick. 358; *Starr* v. *Trustees of Rochester,* 6 Wend. 564.

The decision of the justices upon the sufficiency of the notice to the creditor, would, therefore, upon general principles, be conclusive upon this Court.

The justices must have decided upon the sufficiency of that notice before they proceeded to take the disclosure and to administer the oath.

It has been uniformly held, that their decision was conclusive upon the sufficiency of the notice, by virtue of the provisions of the statutes under which they have acted, unless all the facts have been submitted to the consideration of this Court by an agreed statement. *Hanson* v. *Dyer,* 17 Maine, 96.

In the cases cited for the petitioner, of *Dow* v. *True,* 19 Maine, 46, *Little* v. *Cochran,* 24 Maine, 509, the decisions were made upon errors disclosed by the record.

The first of those cases arose before the R. S., were in force. In the latter case the justices presented, "a document certified by them to be the record of their proceedings."

Whether under the present provisions of the statutes a writ of *certiorari* can in any case of this kind be properly issued, it is not necessary to decide. *Writ denied.*

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

## STATE OF MAINE *versus* WATERS.

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By article 1st, § 6, of the constitution of Maine, it is declared that in all criminal prosecutions, the accused shall have a right to have compulsory process for obtaining witnesses in his favor.

This provision is one of personal right recognized in the constitution of the United States, and in the organic law of most of the States, designed to guard against a particular wrong, practised under the government from which our country was severed.

But this provision does not authorize the accused in criminal prosecutions, to require of the State payment of the *fees* of the witnesses necessary in the defence; it is for the *process* only by which they may be summoned.

In § 29, c. 154, R. S., it is enacted that if any person, being armed with a dangerous weapon, shall assault another, with intent to murder, kill, maim, rob, &c., he shall be punished in the State prison, not more than twenty years.

By this provision the Legislature have recognized as distinct offences, an assault with *intent to murder*, and an assault with *intent to kill*, unknown to the common law.

An assault with *intent to murder* necessarily involves an assault with *intent to kill;* and where a party is accused of the greater, the jury are authorized to find him guilty of the lesser offence.

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

INDICTMENT, charging defendants with an assault with a drawn sword upon one Ivory Pray, with the intent feloniously and of their malice aforethought, him the said Pray to kill and murder.

Before the trial came on, John Waters, one of the respondents, represented to the Court that a large number of witnesses were material to his defence, that he was poor and unable of his own means to procure their attendance, and moved the Court for compulsory process for obtaining such witnesses in his favor as were necessary to his proper defence and to procure their attendance at the trial.

The motion was denied, but the Court ordered that respondents have compulsory process to bring in witnesses who had been summoned and did not attend, at respondents' expense and not at the expense of the State.

The jury returned a verdict that "John Waters is guilty

of a felonious assault with intent to kill but not to murder Ivory Pray."

A motion in arrest of judgment was filed.

1. Because the Court denied to the defendant compulsory process for procuring the attendance of witnesses in his favor.

2. Because the jury in their verdict did not find the defendant guilty of a felonious assault with intent to kill any person.

3. Because the jury did not find defendant guilty of any offence.

4. Because defendant has not been convicted of any offence.

5. Nor of any offence charged in said indictment.

6. Because the indictment charges two distinct offences in the same count and in each count.

7. Because the verdict is not legal.

This motion was overruled, and exceptions filed.

*Wells & Bell*, with whom was *Hayes*, in support of the exceptions.

The defendant was entitled to compulsory process at the expense of the government. Const. Maine, Art. 1, § 6; R. S., c. 167, § 2; *U. S.* v. *Moore*, Wallace, 23.

2. Under this indictment the defendant cannot be convicted of an assault with intent to kill and not to murder. The cases wherein one has been convicted of manslaughter, when he was indicted for murder, do not apply.

A similar statute to R. S., c. 166, § 7, in Massachusetts, has been decided not to vary the common law, except to allow one charged with a felony to be convicted of a misdemeanor. 12 Pick. 506; 2 Met. 193. The same rule should not be applied to an indictment for assault with intent to murder, as to an indictment for murder. The intent must be proved as laid. Roscoe's Cr. Ev. 329; 2 East's P. C. 514; 3 Greenl. Ev. p. 19, § 133, n.; 24 Wend. 520.

If this verdict is sustained, it will follow, that on this in-

dictment the defendant might have been found guilty of either of five offences.

3. This verdict cannot be sustained, because there is no such offence known in the law, as an assault with intent to commit manslaughter. The statute and common law definitions of murder or manslaughter are the same. R. S., c. 154, § § 1, 5. The words "kill and murder" in § 29, c. 154, are used as synonymous. Whenever one kills a human being unlawfully and intentionally, he is guilty of murder. Where malice and deliberation is shown, no matter how instantaneous it is, the killing is murder. *Com.* v. *Dougherty,* 1 Browne, App'x, 221; Addison's R. 257; *Commonwealth* v. *Smith,* Wharton's Dig. 148; Fost. 290; 1 Hale, 455–6; 1 Rus. Cr. 520; 3 Greenl. Ev. 112; *Commonwealth* v. *York,* 9 Met. 107.

An intent to commit manslaughter must be a newly invented idea; at the common law it is a moral impossibility; it is a perversion of language, and one might as well speak of an intent to commit an accident.

*Evans, Att'y Gen., contra.*

No visionary reformer has yet gone the length of holding it to be the duty of society to furnish, at its own cost, means of defence to those charged with violating its laws. It has been thought enough, in this country, to provide that such means shall not be withheld. Arbitrary power in government has been guarded against by various constitutional provisions.

In some States, where the punishment for the offence charged is capital, witnesses on behalf of the accused are paid by the government. It is so in Maine, but here rests on usage only "*in favorem vitæ.*" There is no statute requirement of this kind.

By R. S., c. 172, § 22, in certain cases of severe punishment, compulsory process at the expense of the State may be required, to obtain witnesses in behalf of the accused, but not to pay for the witnesses; the language is plain; the clerk can only furnish the process.

But the defendant's counsel relies upon no statute, but upon the constitution for the right claimed.

If the Judge erred and counsel were right, it is not easy to see upon what ground the judgment can be arrested. It is not alleged that defendant was deprived of any testimony he could otherwise have obtained. He has been injured in no way than by procuring witnesses at his own cost. What has that to do with his guilt or innocence? If he has been deprived of testimony which he might have had, it might furnish ground for a *new trial,* but not for arresting the judgment.

But the Judge did not err. The constitution of U. S., and nearly all of the States, contain similar provisions to the one cited. But they do not execute themselves, nor provide the means of their execution. They all require legislation to be made available, and yet neither the Congress of the United States, nor any State, has given to this clause the interpretation contended for.

This is one of the declarations of rights, which were of great value. They grew out of oppressions and grievances actually suffered.

Formerly, by the common law of England, parties accused in capital cases, and many offences were capital, were not allowed to examine witnesses at all in their defence, and of course no process could be had for obtaining their presence. At length they were permitted to be examined, but not on oath, and therefore obtained but little credit with the jury. 1 Chitty on Crim. Law, 624.

Soon after the revolution which expelled the Stuarts, an Act was passed giving to the accused in all *cases of treason* under that Act the right to have *like process* to compel the appearance of their witnesses as was granted against them.

The statute of Maine, of 1821, is nearly a transcript of this.

A few years afterwards, 1 Ann, c. 2, it was enacted that witnesses for the prisoner on indictments for treason and felony, should be examined on oath; but no provision was

made for compelling their attendance, and I am not aware that even to this day any such provision has been made.

These were the grievances and were provided for in our bill of rights. In misdemeanors merely, the rule was different in England, and we intended to abolish the distinction in all criminal prosecutions.

But it was never a question in England who should pay the expense of the witnesses; it was never complained that the government did not furnish the accused with the means of defence; the evil was that they were not allowed to have witnesses at all at their own expense, nor have them sworn.

The government of Great Britain did not formerly in general pay the expenses of the prosecution, at least of the witnesses; this was done by the prosecutor, although by several statutes the prosecutor and witnesses, by petition to the Judge, might obtain from the county their reasonable expenses, and if poor, an allowance for their loss of time. 1 Chitty's Crim. Law, 612. Later statutes have made further provision for their payment. Roscoe's Crim. Ev., 109.

The constitution in the section cited, secures to the accused the right to be heard in his defence by counsel. This also was designed to meet a practical evil; for until a recent period in Great Britain, parties accused of capital offences were not allowed counsel, except upon questions of law. This was a great defect. 3 Story's Com. on Cons. § 1787; 4 Black. Com. 356.

It is then manifest what were the great grievances which were intended to be guarded against by these American Declarations of Right.

They have fully met the emergency which called them forth, and no more was or is required. Why should they be extended to meet occasions which were never subjects of complaint?

The cases cited by the respondents' counsel are far from sustaining the position contended for.

*Universal practice*, I imagine, has settled this question.

Again, as to the objections to the verdict; if an assault

with intent to kill, be one offence, and an assault with intent to murder, be another and different offence, no reason is perceived why the verdict is not a perfectly good one for the former, and why it may not be found by the jury, although the indictment is for the latter. Nothing is better settled, than that the jury may find the accused guilty of part of the crime charged, and not guilty of the residue.

An assault with intent to murder, necessarily implies an intent *to kill;* and as one indicted for murder may be found guilty of so much of the offence as consists *in the killing*, and not of the residue, why may not one indicted for the assault with intent to murder, also be found guilty of the intent to kill?

This is expressly provided for in our statutes; c. 166, § 7, R. S. Nor is this finding a *misdemeanor* in an indictment for *felony*, but a felony of a lesser grade. *Commonwealth* v. *Griffin*, 21 Pick. 524; *Commonwealth* v. *Goodhue*, 2 Met. 193.

It is objected that two offences are charged in each of the counts, but in the argument the counsel admits that the terms used are synonymous in the statute. Such being the case the verdict is sustainable either as a *verdict for the whole offence charged*, or for a part of it and an acquittal for the residue.

If there be but one offence known to the statute, viz. the intent to murder, then notwithstanding the form of the verdict, it is really a verdict of guilty of the whole offence charged. The words "but not to murder," are unmeaning, and may be rejected. The jury find "a felonious assault *with intent to kill.*"

What makes homicide, murder? The malice aforethought. What is malice aforethought, but *the intention to do the deed?*

The counsel contend for this: — according to their position, the jury have found all the facts that in law constitute the offence charged; the intention to kill was to do that, which if done, is murder *by law*. The verdict may be re-

garded as in the nature of a special verdict, and the Court must pronounce what offence, upon such finding, has been committed.

Is it no offence by our law, to assault one with an intention to kill him, to take his life?

It is not contended that, at common law, there is any such offence as an assault with intent to commit *manslaughter,* to kill in the heat of blood; because *such intent* aggravates the crime to murder. But there is such an offence as assault with *intent to kill,* at common law, and the crime, if the intent be executed, would *not* be manslaughter.

In R. S., c. 154, § § 29, 30, between the words "kill" and "murder" is found a comma. Does this create two offences? It is quite immaterial in the case at bar how this question is answered. If two, the defendant has been convicted of the lesser, though indicted for the greater, as well he might be.

If one only, then he has been convicted of that one.

If the allegation in the indictment had been "kill or murder," there might be some plausibility in the objection.

The case in 8 Conn. 496, is direct authority, although grounded upon a statute of that State, to support this conviction.

If the verdict does not support the whole of the offence charged, it does of one known to the law, and may rightfully be returned on this indictment.

RICE, J. — The indictment charges, that John Waters, with two other persons named therein, "with force and arms, in and upon one Ivory Pray, with a dangerous weapon, to wit, the drawn sword of a sword cane, with which said John Waters, &c., were then and there armed, did make an assault, with an intention, him the said Ivory Pray, with the drawn sword aforesaid, then and there feloniously, wilfully, and of their malice aforethought to kill and murder."

As to the defendant, John Waters, the jury returned the following verdict, to wit, — "that the defendant, John

Waters, is guilty of a felonious assault, with intent to kill, but not to murder, Ivory Pray."

Before proceeding to trial, the respondents severally filed motions for issuing compulsory process for obtaining such witnesses in their favor as will be necessary for their proper defence, at the expense of the State.

The Court refused the motion, but ordered, that the respondents have compulsory process to bring in witnesses, who have been summoned and do not attend, at respondents' expense, and not at the expense of the State.

After verdict, the defendants severally moved, that judgment be arrested, because of the denial of the motion above referred to, as well as for other reasons set out in their several motions. These motions in arrest were overruled by the presiding Judge, and exceptions filed to said last rulings.

The right of compulsory process at the expense of the State, is claimed for the respondents under that clause of § 6, Art. I, of the Constitution, which provides, that in all criminal prosecutions, the accused shall have a right to have compulsory process for obtaining witnesses in his favor.

Section 22, c. 172, R. S., provides, that any person indicted for a crime, punishable with death, or by imprisonment in the State's prison for life, shall be entitled to have a list of the jurors returned, delivered to him or his counsel, a copy of the indictment, and process to summon his witnesses, at the expense of the State; all which it shall be the duty of the clerk to furnish without expense to the prisoner.

A fair construction of this section does not seem to give an accused person any right beyond that of having a list of jurors, a copy of the indictment, and the process for summoning witnesses at the expense of the State. That clause of the section making it the duty of the clerk to furnish these facilities to the prisoner without expense is in harmony with this construction. To furnish the list of jurors, the copy of the indictment, and the process for summoning

witnesses appropriately falls within the ordinary duties of the clerk. But to require that officer to furnish the funds necessary to pay the expenses of summoning, and the fees for the attendance of the defendant's witnesses, would seem to be requirements beyond the appropriate sphere of his official duties; nor is there any provision of law by which he could be reimbursed for such expenditures.

In capital trials, the practice has been, to tax and allow, as in ordinary criminal bills of cost in behalf of the State, the expenses for summoning and the fees for travel and attendance of the defendant's witnesses. The same practice has also prevailed in Massachusetts, from whence the rule was probably introduced into this State. In *Com.* v. *Williams*, 13 Mass. 501, the Court, in speaking of the practice say, that it was granted in capital trial only, in favor of life. The practice does not appear to have originated, either in Massachusetts or in this State, in any specific statute provision.

But were it otherwise, and did the statute already cited, extend the right of accused persons so far as to include the payment, by the State, of the expenses incurred by them in procuring the attendance of witnesses, it would not avail the defendants in this case, as the offence for which they are indicted does not fall within the provisions of that section.

But it is contended, that the constitutional provision, by its own force, gives this right to all persons accused of crime independent of statute provision.

Such is not the natural import of the language used in the constitution, and such cannot be its construction, unless there are circumstances connected with the insertion of the provision in that instrument, which will extend its meaning, by implication, beyond the ordinary signification of the words used.

In the early history of the common law, the means for defence allowed to persons accused of the higher grades of crime were much more limited than at present.

Thus, in capital trials the accused had no means of com-

pelling the attendance of witnesses, on his behalf, without a special order from the Court; and if witnesses attended, voluntarily, for such person, they could not be sworn. Except in the presentation of questions of law, he was not entitled to the aid of counsel in making his defence, nor was he entitled to a copy of the indictment against him.

Such unreasonable restrictions, in making defence against charges of an high and aggravated character, and where a conviction was followed with penalties involving both life and estate, early attracted the attention of the more enlightened jurists and statesmen of England, and were gradually made to yield to an advancing spirit of civilization, and more enlarged and correct views of personal liberty and individual right.

By c. 9, § 3, stat. 2, 1 Ann, provision was made that witnesses for the defendant, in case of treason or felony, shall be sworn in the same manner as witnesses for the crown; and by 7 William III., c. 3, § 7, that defendants in case of treason, shall have the same process to compel the attendance of witnesses for them, as was granted to compel witnesses to appear against them. The same statute provides that persons indicted for treason or misprison of treason, shall be entitled to have a true copy of the whole indictment, five days at least before trial, paying the reasonable fees for the writing thereof, not exceeding five shillings for the copy of every such indictment. The Court were also authorized to assign counsel for the accused.

Thus, though accused persons became entitled, by law, to a copy of the indictment against them, it was at their own expense, and though entitled to compulsory process for summoning witnesses, no provision was made for the payment of the expense, by the government. Indeed, at that time, the law provided no means for reimbursing or paying, the witnesses on the part of the prosecution. Such was the condition of the law until it was provided by 27th Geo. II., c. 3, § 3, "that when any poor person shall appear on recognizance, in any court, to give evidence against another,

accused of any grand or petit larceny, or other felony, it shall, and may be in the power of the Court, at the prayer and on the oath of such person, and in consideration of his circumstances, in open court, to order the treasurer of the county or place in which the offence shall have been committed, to pay unto such person, such sum of money, as to the said Court shall seem reasonable for his time, trouble and expense." The provisions of this Act for the payment of witnesses on the part of the government, were much extended by Geo. IV., c. 64.

It was in view of the history of the common law, that the founders of our governments, State and national, acted. They were fully aware of the practices by which the government of England had, in early times, crushed the individual rights of the subject, and of the long and severe struggle required to erect legal barriers against the encroachments of arbitrary power. It was the determination to preserve those barriers, and to mark distinctly the line between the legitimate powers of the government, and the personal rights of the citizen, that induced the founders of the American States to insert in their organic laws those solemn declarations of personal rights which are to be found in the Constitution of the United States, and of the individual States. Each assertion in the constitution, of a distinct personal right, was designed to repudiate some erroneous principle, or to guard against some particular wrong, which had been avowed or practiced by the government from which we had separated. The rights now claimed for the defendants, to have their witnesses paid by the government was never claimed in England or this country before the formation of our constitution. It was not one of the evils designed to be guarded against, nor a new right to be asserted by constitutional provision.

The question whether an accused person is entitled to compulsory process to bring in his witnesses before their fees have been paid, or tendered, has been discussed both in England and this country.

In *ex parte Chamberlain*, 4 Cow. 49, the Court decided, that in misdemeanors the defendant must tender his witnesses their fees as in civil cases, but in felonies witnesses were compellable to attend without fees. The question whether the defendant's witnesses were to be paid by the State was not raised in that case. The better opinion, in England, seems to be, that witnesses, (for the defence,) making default in criminal prosecutions are not exempt from attachment on the ground, that their expenses were not paid at the time of the service of the *subpœna*. 2 Russel on Cr. 947, *and note.*

The practice in this State, it is believed, has been different, and that compulsory process has been issued for defendants in criminal prosecutions in the same manner as in civil cases, and no good reason is perceived why there should be any distinction in the two classes of cases.

There was no error on the part of the Judge in denying the compulsory process as claimed by the defendants.

The verdict of the jury most distinctly answers the second cause assigned in the motion, when it says, "that the defendant, John Waters, is guilty of a felonious assault with intent to kill, but not to murder *Ivory Pray.*"

The third cause assigned is not sustained, certainly not to its full extent. That the verdict finds the defendant guilty of an assault, there can be no doubt. Nor can there be any doubt that it was competent for the jury to find the assault proved, and to negative the felonious intent. R. S., c. 166, § 7; *State* v. *Parmela*, 9 Cow. 259; *State* v. *Coy*, 2 Aik., 181; *State* v. *Burns*, 8 Ala. 313; *Bradley* v. *State*, 10, S. & M. 618.

The jury may acquit the defendant of part and find him guilty of the residue. 1 Chit. C. L. 637. Where the accusation includes an offence of an inferior degree, the jury may discharge the defendant of the higher crime, and convict him on the less atrocious. 2 Hale, 203. This rule applies in all cases where the minor offence is necessarily an elemental part of the greater, and when proof of the greater necessarily establishes the minor.

But a question of greater importance has been presented by the defence. The jury found that the defendant, John Waters, was guilty of an assault with intent to kill, but not to murder Ivory Pray. It is contended that this verdict is inconsistent and repugnant. If such be the fact it cannot stand. *Rex* v. *Woodfall*, 5 Burr. 2661.

That killing is a necessary element in murder, is apparent. Murder cannot be perpetrated without killing. But homicide is not, necessarily, murder; it may be a much less offence, and under some circumstances, not an offence.

But the question presented is, can an assault be made with intent to kill, which must not necessarily involve an intent to murder? Are not the terms in legal contemplation synonymous? By the counsel for the defendant, it is contended that they are. The statute, however, recognizes them as distinct offences. Section 29, c. 154, R. S. provides, that if any person being armed with a dangerous weapon, shall assault another, with intent to murder, kill, maim, rob, steal, or to commit arson or burglary, he shall be punished by imprisonment in the State prison, not more than twenty years." The same distinction is also made in the thirtieth section of the same chapter.

At common law there is no such crime recognized as an assault with intent to commit manslaughter, or simply to kill. Where an assault is made with intent to kill, the *intent* was supposed to imply malice, and therefore the offence was deemed to be an assault with intent to murder.

But in several of the States, as in this State, the statutes recognize an assault with intent to kill, and an assault with intent to murder, as distinct offences, the latter being of a higher grade and including the former. The existence of such a distinction has also been recognized by the Courts.

In *State* v. *Nichols*, 8 Conn. 496, the defendant was indicted for an assault with malice aforethought, with intent to kill and murder. The jury found the prisoner guilty *without malice aforethought*, of the crime whereof he stood

indicted. The Court held, that he was properly convicted of an assault with intent to kill, under the statute of 1830.

In *Scott* v. *Commonwealth*, 6 S. & R. 224, the plaintiff in error, had been indicted for an "assault with intent to kill and destroy." The jury returned a verdict of guilty of an assault with intent to kill. DUNCAN, J., in giving the opinion of the Court says, "the offence is assault and battery with intent to kill, an offence distinctly laid and punishable by law. * * * * If the party had been found guilty of killing, it would not rise higher than manslaughter."

In the case of *The Slave Nancy* v. *The State*, 6 Ala. 483, which was for an "assault with intent to kill and murder," the jury found a verdict of "guilty of an assault with intent to kill," and the Court refused to arrest the judgment on the ground, that it is a capital offence for a slave to assault a white person, with intent to kill, although if the intention had been consummated, the killing would have been manslaughter only.

In *State* v. *Burns*, 8 Ala. 313, the prisoner was indicted for an assault and battery with intent to kill and murder one David Walker. The jury found the defendant "guilty of an assault with intent to kill." The Court held, that the legal effect of this verdict was, (the defendant being a white man,) guilty of an assault and battery, only.

In *Bradley* v. *State of Miss.*, 10 S. & R. 618, the original defendant had been indicted for an assault upon Isham, a slave, "with intent wilfully, maliciously and feloniously, to commit manslaughter." The Court in considering this case, say, "this indictment can be construed only to be an indictment for an aggravated assault. It is not an indictment with intent to kill, by which is understood, and has been held, an intent to murder."

An examination of our statute will produce the conviction, that the Legislature did not have a very distinct conception of the nature of this offence. Thus, while the maximum punishment for manslaughter is imprisonment for a term of ten years in the State prison, the punishment for

an assault, with a dangerous weapon, with intent to kill, may be imprisonment twenty years in the same prison, thereby making the *attempt* to commit a crime much more highly penal than the commission of the substantive crime. The same apparent inconsistency may be found in the statutes of other States.

The intention of the Legislature probably was, to draw a distinction between that class of assaults which are the result of design and deliberation, and into which the element of legal malice is presumed to enter, and those assaults which are the result of sudden provocation, and where, in the heat of blood, the act so closely follows the intent, as to preclude the presumption of design, or deliberation, and consequently to exclude the presumption of malice.

If this be the true construction of the statute, and such apparently was the intention of the Legislature, it follows, as matter of necessity, that an assault with intent to *kill*, is a minor offence, but is included in the offence of "assault with intent to murder." The jury were therefore authorized to find the defendant guilty of a portion of the offence charged in the indictment, and not guilty of the residue. That finding was warranted, not only by the statutes, but by the authorities already cited in this case.

The exceptions and motion are overruled. —

*Judgment on the verdict.*

SHEPLEY, C. J., and CUTTING J. concurred. — HATHAWAY, J., concurred in the result only.

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STATE OF MAINE *versus* SCANNELL.

On an indictment for an assault with a dangerous weapon, with intent A. B. to kill and murder, a verdict that the accused was guilty of being *accessory before the fact*, of an assault with intent to kill A. B., cannot be sustained.

*Such an offence* is not necessarily included in the crime charged, and judgment will be arrested.

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

State *v.* Scannell.

INDICTMENT against Daniel Scannell and others for an assault with a dangerous weapon upon one Alexander Lewis Maxwell, with intent him to kill and murder.

A motion was made by Scannell for process to summon his witnesses, and at the expense of the State, which was denied.

The jury returned a verdict that "said Daniel Scannell is guilty of being accessory before the fact of an assault with intent to kill Alexander Lewis Maxwell."

A motion was made in arrest of judgment for the same causes enumerated in *State* v. *Waters, ante,* p. 54, with the additional reason, "because the jury have not found the said Daniel Scannell guilty of any offence charged in said indictment.

The motion was overruled and exceptions filed.

*Wells & Bell,* and *S. M. Hayes,* in support of the exceptions.

*Evans,* Att'y General, *contra.*

RICE, J. — The indictment charges the defendant with having made an assault, with a dangerous weapon, upon one Alexander Lewis Maxwell, with intent to kill and murder.

The jury at first returned a verdict of guilty as accessory, but subsequently amended their verdict as follows; to wit, "that the defendant, Daniel Scannell, is guilty of being accessory before the fact of an assault with intent to kill Alexander Lewis Maxwell."

After verdict, the defendant filed a motion in arrest of judgment, for reasons therein appearing, which was overruled by the presiding Judge, to which ruling the exceptions now before the Court were duly filed. The case was argued with *State* v. *Waters, ante,* p. 54.

It is not quite certain of what offence the jury intended to find the defendant guilty; whether of being accessory before the fact of an assault with intent to commit manslaughter, or with intent to murder. Nor perhaps is it material, as the result must be the same in either case.

If they intended by their verdict to find the defendant

guilty or accessory before the fact of an assault with intent to murder, judgment must be arrested, because that is not the offence with which he is charged in the indictment, nor is it, as a minor offence, necessarily included in the crime charged in the indictment.

If they intended to find him guilty of being accessory, before the fact of an assault with intent to commit manslaughter, judgment must be arrested, not only because that offence is not charged in the indictment, but for the additional reason that there is no such offence known in the law.

*Exceptions sustained and judgment arrested.*

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

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STATE OF MAINE *versus* WATERS.

On an indictment for an assault with a dangerous weapon upon A. B., with *intent to kill* and *murder*, a general verdict of guilty is sustainable.

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

INDICTMENT.

The facts are stated in the opinion.

*Wells & Bell* and *Hayes*, for prisoner.

*Evans*, Att'y Gen., for State.

RICE. J. — This is an indictment against the defendant for an assault with a dangerous weapon, upon one Alexander Lewis Maxwell, with intent to kill and murder. There was a general verdict of guilty against the defendant, and the matter is now before this Court on exceptions to the ruling of the Judge who tried the case, for overruling a motion in arrest of judgment, filed by defendant. All the principles involved in this case, were considered in *State* v. *Waters*, argued at the same time with this case. Ante p. 54.

For the reasons therein given the exceptions must be overruled, and *Judgment on the verdict.*

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

WENTWORTH, *Administrator, versus* LORD.

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It is provided by statute that in actions pending, an offer to be defaulted for a sum certain, *unaccepted*, is no admission of the cause of action or of any indebtment of the defendant; nor shall such offer be used as evidence before the jury in the trial.

If, when such offer has been made, the plaintiff proceeds to trial, the judgment in the case must depend on the verdict rendered. The *offer* will affect the *costs* only.

Thus where, after such offer was made upon the record, and the action tried and verdict rendered for defendant; *held*, that the plaintiff is not entitled to judgment for the offer upon the record.

The case of *Boynton* v. *Frye*, 33 Maine, 216, overruled.

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

ASSUMPSIT. The writ contained a count upon a note of hand dated Jan. 5, 1850, for $100, with interest. There was also a count upon an account annexed, and the common money counts.

The signature to the note was admitted to be genuine, but it was contended at the trial that the note had been materially altered since it was signed, without the knowledge of the defendant. The alleged alteration was the erasure of the syllable "out" from the last part of the note, so that it read at the trial *with interest*, when it was alleged to have been made and signed, *without interest.*

At the term this action was entered, the defendant offered in writing to be defaulted for $104 on note which was entered on the docket.

At a subsequent term, the death of plaintiff was suggested, and on defendant's motion, his offer to be defaulted was withdrawn by leave of the Court; but it did not appear that the other party had any knowledge of it.

On the trial, the plaintiff claimed the benefit of the offer to be defaulted.

Much evidence, on both sides as to the account, was introduced, and the plaintiff contended that the docket entries were competent evidence of indebtedness, and offered the same, which were rejected by the presiding Judge.

The jury returned a verdict for defendant.

It was stipulated, that if the evidence for the purpose for which it was offered was admissible, a new trial is to be granted; if not, the plaintiff claims judgment for the amount of the offer to be defaulted.

The Court were to render such judgment as the rights of the parties require.

*Kimball,* for defendant.

*D. Goodenow,* for plaintiff, for the effect of an offer to be defaulted, cited *Fogg* v. *Hill,* 21 Maine, 529; and that plaintiff is entitled to judgment for that amount, although he failed to establish any claim. *Boynton* v. *Frye,* 33 Maine, 216; *Putnam* v. *Putnam,* 13 Pick. 129; Colby's Practice, 221. As to the effect of a tender, he cited *Cox* v. *Robinson,* Strange, 1027; 5 Bac. Abr. 19; *Legrew* v. *Cook,* 1 Bos. & Pul. 332.

CUTTING, J. — The statute of 1835, c. 165, § 6, reënacted by R. S., c. 115, § 22, provided, that "in any action founded on judgment or contract, the defendant may offer, and consent in writing to be defaulted, and that judgment may be entered against him, for a specified sum as damages; and the sum shall be entered of record, and the time when the offer was made; and if the plaintiff shall proceed to trial, and recover no greater sum for his debt or damage, up to the time when the offer was made, the defendant shall recover his costs of the plaintiff, from the time of such offer up to the time of trial; and such costs shall be set off against *the sum so offered,* and judgment shall be rendered and execution issued for the balance for either party, which way soever the same may be."

The Court, in giving a construction to this Act, in *Jackson* v. *Hampden,* 20 Maine, 37, say: — "It is insisted, that the offer to be defaulted is an admission of the contract declared on. The statute c. 165, § 6, by virtue of which the offer was made, does not appear to have been designed to afford the plaintiff any advantages, beyond what he might derive from the offer itself. The reasons upon which the rule was

established, that a tender of a part admits the contract stated in the declaration, do not apply to an offer to allow the plaintiff to take judgment for a certain sum. Such offer may be made to avoid the risk of costs, where there may be a chance of the recovery of nominal damages, or a small amount, where the defendant thinks there is nothing due. The act determines the effect, that the offer is to have upon the rights of the parties; and to decide, that it admitted the contract, would be to change that effect and to defeat in a great degree the design of the Act."

Again, in *Fogg* v. *Hill*, 21 Maine, 529, the Court use the following language:—"By the offer to be defaulted, the cause of action must be regarded as confessed. Such offer, under the statute, is equivalent in its effect, in this particular, to bringing money into Court upon the common rule, which has ever been considered as leaving nothing in controversy but the *quantum* of the debt or damage which the plaintiff is entitled to recover. The evidence therefore, tending to prove a tenancy as lessee under the plaintiff, was, after such offer, superfluous; and the arguments of counsel thereupon are in the same predicament."

These two decisions, (a little conflicting, perhaps,) were made prior to August 2, 1847, when the Legislature gave their construction by an amendment of the Act, adopting and extending the principles of the first decision. By § 1, of that amendment, the original Act was altered so as to set off the defendant's against the plaintiff's costs, instead of "*against the sum so offered.*" And by the second section, "an offer to be defaulted as provided in said Act, if the same be not accepted by the plaintiffs, shall in no case be held as an admission of the cause of action, or of any promise or indebtedness on the part of the defendant; nor shall such offer be used as evidence before the jury on trial of the action."

Under the former Act, when the defendant made an offer and prevailed, judgment must notwithstanding be rendered against him for the amount of the offer, less his costs; for such is the language of that Act. But by the Act of 1847,

costs were to be set off against costs *only*, and judgment rendered and execution issued for the *balance*, and thus the offer now constitutes, by statute, no part of the judgment, when not accepted. If such was not the design of the Legislature, then the 1st § of the Act of 1847 is wholly superfluous. But it became necessary to make that alteration in order to introduce the 2d §, which provides that the offer, if not accepted, shall in no case be held as an admission of the cause of action, *or of any promise or indebtedness on the part of the defendant.*

When is the offer to be accepted? Certainly, before the cause "shall proceed to trial." The verdict establishes the rights of the parties, unless the plaintiff shall be entitled to judgment, *veredicto non obstante;* and if entitled, how, and upon what evidence? Surely, not without some proof of a promise or indebtedness, and the statute is imperative that the unaccepted offer shall not be received as such. And not received by whom? It would be absurd to say it might be received by the Court, and not by the jury. If by either, the latter would seem to be the most proper tribunal; but they, by a subsequent and independent clause, are expressly prohibited from receiving it, and to say that the preceding sentence was applicable only to the jury, would render the last and concluding sentence surplusage.

Any other construction would place the parties litigating in unequal positions; no offer, by way of compromise or of terminating a doubtful suit, could be safely made, for the plaintiff might by verdict recover the whole, and is certain by judgment to recover the amount offered, when perhaps the verdict may be against him, and being thus sure of a certain amount, he proceeds with renewed hopes and expectations of recovering the whole, regardless of the minor question, as to which party shall pay or receive costs.

The question as to the withdrawal of the offer becomes immaterial. *Judgment on the verdict.*

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

Dissenting opinion by

SHEPLEY, C. J. — The decisions made in the cases of *Jackson* v. *Hampden*, 20 Maine, 37, and of *Fogg* v. *Hill*, 21 Maine, 529, giving a different construction to the Act of 1835, c. 165, § 6, as reënacted in R. S., c. 115, § 22, with additional enactments, were made by the Court, when composed of different members. The first decision was made by WESTON, EMERY and SHEPLEY. The second was made by WHITMAN and TENNEY; SHEPLEY being at the time otherwise employed, and having no knowledge of it. The first decision had not been published when the last was made. When these conflicting constructions were published, it was deemed expedient to have the Legislature interpose, to declare what the effect should be of such proceedings.

The Act approved on August 2, 1847, appears to have been designed to prevent the possibility of such a construction of the 22d § of c. 115, as would make an offer to be defaulted for a certain sum, an admission of the plaintiff's claim.

To accomplish this effectually, the words "the sum so offered," were stricken out, and the words "the plaintiff's costs," were inserted in place thereof, because from the words stricken out an inference might be drawn, that the claim was admitted, and the contest was limited to the amount to be recovered.

By the second section it was provided that the offer "shall in no case be held as an admission of the cause of action, or of any promise or indebtedness on the part of the defendant; nor shall such offer be used as evidence before the jury, on trial of the action." The mischief to be provided for explains the amended enactment. It was to prevent its being regarded as an admission of the cause of action. If the purpose of the amendment had been to do more, and to destroy the whole effect of the offer, except for the recovery of costs, when not accepted, it would have been much easier to have declared simply, that an offer not accepted should

have no effect upon the rights of the parties, except for the recovery of costs. This construction is now proposed.

By the Act of amendment, c. 115, § 22, had been so amended as to provide, that in actions against towns under the provisions of c. 25, § 89, the town might avail itself of "an offer of judgment in Court, for any specified sum as damages, as is by law provided in cases of contract." By the proposed construction the whole effect of such an offer not accepted, will be upon the costs. The town can make it in all cases with entire safety, and place the plaintiff in a condition of double risk of costs by failing to maintain the action, and by failing to recover more than the amount offered. And such may be the result in cases of contract between individuals.

For what purpose does a trial take place, after an offer made of a certain sum, but to obtain a larger sum, if the suit can be maintained.

But the verdict, it is said, establishes the rights of the parties. The record shows not a verdict only, but the record of an offer made in writing to allow the plaintiff to have a default entered for a certain sum, and to have a judgment entered therefor. The right of the plaintiff to take a judgment for that amount, is by the record as clear as his right to take judgment upon the verdict, unless the statute as amended deprives him of that right. The jury might with great propriety be prohibited from receiving any information respecting the offer, when the question is, whether the plaintiff without any advantage from the offer can recover more, and yet he might be left in the enjoyment of his full rights upon the whole record after verdict. A verdict exhibits no clearer, and not so secure a right to judgment as the record of an offer in writing to be defaulted for a certain sum.

The provision, that the offer shall in no case be held as an admission "of any promise or indebtedness on the part of the defendant," when considered in connexion with the provision, that it shall not be an admission of the cause of

action, is perceived to be another form of words, designed to secure with more caution the same effect and no other. To insist upon a construction according to the letter, would deprive the offer when accepted, of all validity as the foundation of a judgment. If "in no case" it can be received as an admission of "indebtedness on the part of the defendant," the Court can no more render a judgment upon it, when accepted, than it can after a verdict.

The construction should be such as will remedy the mischief, which produced the amendment, and which will allow the offer to have the effect designed.

This is the construction, which was regarded as correct in the case of *Boynton* v. *Frye*, 33 Maine, 216.

It is very undesirable to have conflicting decisions respecting the construction of statutes, and a decision once made should not be overruled, especially by members composing but a minority of the Court as then or now organized.

It will be perceived, that there are now more members of the Court of opinion, that the case of *Boynton* v. *Frye*, was correctly decided, than there are known to be of a different opinion. I must, therefore, still regard that opinion as exhibiting the correct construction of the statute, although it receives in this case a different construction by a majority of those members of the Court, who can legally take part in this decision.

## COUNTY OF CUMBERLAND.

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### STATE OF MAINE *versus* CONLEY *& al.*

Whoever shall unlawfully kill any human being, with malice aforethought, either express or implied, shall be deemed guilty of murder.

By c. 154, § 2, R. S., whoever shall commit murder with *express* malice aforethought, or in perpetrating or attempting to perpetrate any crime, punishable with death, or imprisonment in the State prison for life, or for an unlimited term of years, shall be deemed guilty of murder *of the first degree.*

And by § 3, whoever shall commit murder, *otherwise* than is set forth in the preceding section shall be deemed guilty of murder *of the second degree.*

In a criminal proceeding it is proper for the Judge to inform the jury what constitutes the several degrees of crime included in the indictment; but the *mode* and *extent* are within his own discretion, and omissions of principles of law applicable thereto are not subject to exceptions, unless he is specially requested to state them.

Thus, where the respondents were indicted for murder, and the Judge, after explaining the elements of that crime, instructed the jury, that when a human being was unlawfully killed, without such malice, upon sudden provocation, and in the heat of passion, and under such circumstances that it could not be justified or excused, the crime would be manslaughter; and then described, in the language of the statute, murder of the first degree and that before they could find them guilty of that highest offence, they must be satisfied from the testimony, that the prisoners had a deliberate purpose and formed design to kill the deceased before the fatal wounds were inflicted; — that the unlawful killing of a human being without express malice, and under such circumstances as would not make the offence murder of the first degree, and not under sudden provocation and in the heat of passion or under such circumstances as would reduce the offence to manslaughter, would be murder *of the second degree,* and it would not be necessary, that they should more particularly consider under what circumstances malice aforethought would be *implied; — it was held,* that the elements of the lesser grade of murder were sufficiently set forth for the comprehension of the jury, nor was the question of malice thereby withdrawn from their consideration.

Whether, after a verdict against the respondents, the Judge will allow an inquiry of the jury, if they found the name of the person killed as alleged in the indictment, is within his *discretion,* and his refusal is not open to exceptions.

So also where two persons are indicted for the same offence, whether they shall be allowed *separate* trials, is within the *discretion* of the Court.

State *v.* Conley.

An indictment commencing "State of Maine, Cumberland, ss. At the Supreme Judicial Court begun and holden at Portland within the county of Cumberland," is sufficient to show, that the Court at which it was found, was holden for that county in the *State of Maine.*

In criminal pleading the *venue* must appear to be within the jurisdiction of the Court.

But where the material facts are alleged to have taken place "in said county of Cumberland," being the same county named in the margin, it is a sufficient reference thereto, and will authorize the Court to try the indictment in that county.

In an indictment for murder by the infliction of *wounds,* their *length, breadth* and *depth* may be omitted, if it is alleged they were *mortal.*

Where it is alleged that the defendants with a dangerous weapon struck and beat, giving mortal wounds of which the person died, it is unnecessary to add the words "by the stroke or strokes aforesaid."

It is essential, that the *time* of the mortal stroke and death should be stated in the indictment, but the old form "did suffer and languish, and languishing did live," may be omitted.

At the March term, 1854, the prisoners were tried before Shepley, C. J. on an indictment as follows:—

"STATE OF MAINE.

"Cumberland, ss.—At the Supreme Judicial Court, begun and holden at Portland, within and for the county of Cumberland, on the first Tuesday of March, in the year of our Lord one thousand eight hundred and fifty-four.

"The jurors for said State, upon their oaths present that Martin Conley and John Conley of Portland in the county of Cumberland, laborers, on the twelfth day of February, in the year of our Lord one thousand eight hundred and fifty-four, at Portland in said county of Cumberland, with force and arms, in and upon one Thomas Guiner, feloniously, wilfully and of their malice aforethought, did make an assault, and that they, the said Martin Conley and John Conley, then and there with certain dangerous weapons, to wit, certain wooden clubs, of the length of four feet and of the thickness of two inches, which they, the said Martin Conley and John Conley, then and there, in both of their hands had and held, the said Thomas Guiner, in and upon the front and upper part of the head of him, the said Thomas Guiner, then and there feloniously, wilfully and of their

malice aforethought, did strike and beat, giving unto him, the said Thomas Guiner, then and there with the said dangerous weapons, to wit, with the said wooden clubs, of the length of four feet and of the thickness of two inches, two mortal wounds, of which said mortal wounds he, the said Thomas Guiner, on the twenty-first day of February now last past, at Portland aforesaid in the county aforesaid, did languish and die. And so the jurors aforesaid, upon their oath aforesaid do say, that the said Martin Conley and John Conley, him, the said Thomas Guiner, in manner and form aforesaid, feloniously, wilfully and of their malice aforethought, did kill and murder, against the peace of said State, and contrary to the form of the statute in such case made and provided."

There was another count in the indictment which it is unnecessary to copy.

Before the jury was empanneled for the trial, the counsel for the prisoners moved that they might have a separate trial. This was denied. But each prisoner was allowed to challenge his number, allowed by law.

Testimony was introduced tending to prove, that the death of Thomas Guiner was occasioned by blows inflicted upon his head with a club. There was no testimony tending to prove that he was killed by any person while committing or attempting to commit some other offence.

The jury was instructed that murder was the unlawful killing of a human being with malice aforethought, either express or implied; *that* when a human being was unlawfully killed without such malice, upon sudden provocation and in the heat of passion, and under such circumstances that it could not be justified or excused, the crime would be manslaughter.

That murder was of two degrees. That murder of the first degree was the unlawful killing of a human being with express malice aforethought, when not done while committing or attempting to commit some other offence. That to find the prisoners guilty of this description of murder, they must

be satisfied from the testimony that they had a deliberate purpose and formed design to kill the deceased, before the fatal wounds were inflicted; that it was not necessary that they should be satisfied that they had such deliberate purpose and formed design for any definite time before the fatal wounds were inflicted.

That the unlawful killing of a human being without express malice, and under such circumstances as would not make the offence murder of the first degree, and not under sudden provocation, and in the heat of passion, or under such circumstances as would reduce the offence to manslaughter, would be murder of the second degree, and it would not be necessary that they should more particularly consider under what circumstances, malice aforethought would be implied. Other instructions were given.

There was testimony introduced for the prisoners, tending to prove, that the person killed did not bear the name of Thomas Guiner, but did bear the name of Thomas Guiney.

The jury returned a verdict of guilty of murder in the second degree. Immediately after the verdict was rendered, and before the jury were discharged, the counsel for the prisoners requested that inquiry might be made what their finding was, respecting the name of the person killed. This request was refused.

To these refusals, rulings and instructions the prisoners excepted.

A motion was also filed to set aside the verdict as against the charge of the Court, the evidence and the weight of evidence; and the evidence in the case was reported.

A motion in arrest of judgment was also drawn up and seasonably filed for the following reasons:—

*First.* Because it is not alleged in the said indictment, that the Court wherein the said indictment was found against them was holden within and for the county of Cumberland and State of Maine.

*Second.* Because there is no sufficient venue alleged in

the said indictment, or in either of the counts thereof, to give this Court jurisdiction of the matters therein set forth.

*Third.* Because the assault, which it is alleged in the said indictment, that they, the said Martin Conley and John Conley in and upon one Thomas Guiner, feloniously, wilfully and of their malice aforethought, did make, is not alleged in either of the counts of said indictment, to have been made in the county of Cumberland, and State of Maine.

*Fourth.* Because the venue alleged in the said indictment, and in each of the counts thereof, is bad and insufficient in law, and did not, nor does now, give this Court jurisdiction of the matters therein alleged against the said defendants, or either of them.

*Fifth.* Because it is not alleged in the said indictment, or in either of the counts thereof, what were the length and breadth, or the length and depth of the two wounds alleged in said first count, or what were the length and breadth, or the length and depth of the several wounds alleged in said second count, or of either of the wounds alleged in either of the said two counts, of which it is therein alleged that the said Thomas Guiner "did die."

*Sixth.* Because it is not alleged in the said indictment, or in either of the counts thereof, that the wounds therein alleged, or either of them, were given, caused or produced by the striking and beating therein alleged against the said Martin and John Conley, or either of them — the necessary averment, "by the stroke or strokes aforesaid," being entirely omitted in each of the said counts.

*Seventh.* Because it is not averred in the said indictment, or in either of the counts thereof, that the mortal wounds therein alleged, or either of them, of which it is therein alleged that the said Thomas Guiner "did die," were given, caused or produced by said Martin Conley or John Conley, or either of them, in the county of Cumberland and State of Maine, or within the jurisdiction of said Court.

*Eighth.* Because it is not alleged in the said indictment, or in either count thereof, that the said Thomas Guiner, "of the said mortal wounds," therein alleged, "on and from the said twelfth day of February, in the year of our Lord one thousand eight hundred and fifty-four, until the said twenty-first day of February, now last past, did suffer and languish, and languishing did live."

*Ninth.* Because it is not alleged in the said indictment, or in either count thereof, that the said Thomas Guiner died of the mortal wounds therein alleged, or either of them, at any place within the county of Cumberland and State of Maine, or within the jurisdiction of said Court.

*Tenth.* Because the said indictment is informal, and insufficient in law, to authorize the said Court to pass sentence and judgment against them, the said Martin Conley and John Conley, or either of them.

*Clifford,* for the prisoner, in support of the exceptions.

1. The instruction defining the crime of manslaughter, is greatly too restricted, and when considered in its proper connection with the definition of murder in the second degree, was fatally prejudicial to the prisoner. 4 Black. Com. 191; 1 Hale's P. C. c. 38, p. 466; 1 Hard. P. C., c. 30, § 1; 1 East's P. C., c. 5, § 2, p. 218; *Com.* v. *Webster,* 5 Cush. 304, 307; Foster's Cr. Law, c. 5, p. 291; 3 Co. Litt., 287, b. N. S.; *Wroth* v. *Wriggs,* Cro. Eliz., 276; 1 Russ. on Crimes, p. 485; Ros. Cr. Ev., p. 682; Arch. Cr. Pl., p. 488, (mar. 410.) 3 Chitty Cr. Pl., 727, c. 14, § 4; 1 Stark. Cr. Pl., 76; *Ex parte Taylor,* 5 Cow. p. 51; Russ. & Ry. C. C., p. 42; *U. S.* v. *Freeman,* 4 Mason, 514; *Com.* v. *York,* 9 Met. 102.

2. It is incorrect to define one crime by another, and therefore the 4th instruction is erroneous. 3 Co. L. 287, b. N. S.; 4 Black. 191; *Com.* v. *Webster,* 5 Cush. 304; Foster's Cr. Law, p. 302; *State* v. *Dowd,* 19 Conn. 388; *Com.* v. *Roby,* 12 Pick. 503; *Rex* v. *Jennings,* Russ. & Ry. C.C. 388; Arch. Cr. Pl. 46, (37*) 1 Chitty Cr. Law, 169; 2 Hale's P. C. 169.

3. The definition of murder, as given, is as much too comprehensive as that of manslaughter is too restricted. 1 East's P. C. c. 5, § 4; *Jackman* v. *Bowker*, 4 Met. 235; and the error is material. *Thacher & al.* v. *Jones & al.*, 31 Maine, 534; *Com.* v. *Kimball*, 24 Pick. 374.

4. It is necessary in the trial of every charge of murder, in order to an intelligent inquiry into the legal character of the act of killing, to ascertain with precision the nature of malice in its legal sense, and what evidence is necessary to establish its existence. *Com.* v. *Webster*, 5 Cush. 304; 3 Chitty's Cr. Law, 727.

5. The latter clause of the fourth instruction is erroneous in this; that it withdrew the question of malice entirely from the consideration of the jury. 2 Stark. Ev. 948; Foster's Cr. Law, 256–7; *Rex* v. *Greenacre*, 8 Car. & P. 35, (34 C. L. on p. 284.)

The law *allows* the malice to be implied if the jury can collect it from the circumstances. *State* v. *Smith*, 32 Maine, 369; *Regina* v. *Canniff*, 9 Car. & P. 359, (38 C. L. 154;) *Com.* v. *York*, 9 Met. 102 to 104; 1 Leach, C. C. 378, note; 1 Russ. on Crimes, 490; Hayward's case, 6 Car. & P. 157, (25 C. L. 331;) Thomas' case, 7 Car. & P. 817, (32 C. L. 750.)

6. That clause of the fourth instruction, if it did not withdraw the question from the consideration of the jury, at least had the effect to change the burden of proof from the State to the prisoner, and therefore is erroneous. *State* v. *Fly*, 26 Maine, 312; *State* v. *Merrick*, 19 Maine, 398; *State* v. *Tibbetts*, 35 Maine, 81; *Com.* v. *York*, 9 Met. 93; Arch. Cr. Pl. 123.

7. Malice aforethought is an essential element, as well of murder in the second degree, as of murder by express malice. R. S., c. 154, § 1; *State* v. *Honeyman*, 2 Dallas, 228; *Com.* v. *Gibson*, 2 Vir. cases, 70; 1 Hale's P. C. c. 36, § 3, p. 450; St. 23 H. 8th; 1 East's P. C. c. 5, § 116, p. 345; 1 Chitty's Cr. Law, 220; 2 Ch. Cr. Law, 738; Arch. Cr. P. 61; 2 Haw. P. C. c. 25, § § 55, 60; *U. S.* v. *Mills*, 7 Pet. 138;

Powlter's case, 11 Co. R. 30; *Bradley* v. *Banks,* Yelverton, 205; 7 Dane's Abr. 209, c. 218, art. 13, § 2; 4 Com. Dig. Indictment, G. 6, p. 688; *People* v. *Enoch,* 13 Wend. 173; 1 Stark. Cr. Pl. 76, 77; *White* v. *Com.,* 6 Binney, 179 to 183; Crown Cir. Comp. 497.

8. It being necessary that the indictment should allege, that the act was done and committed of malice aforethought, it follows that the proof must correspond with the allegation. Ros. Cr. Ev. 99; *State* v. *Rushing,* 2 N. & M. C. 560.

9. When considered in any point of view, the fourth instruction was calculated to mislead the jury, and therefore is erroneous. *Miller* v. *Marston,* 35 Maine, 153; *Pierce* v. *Whitney,* 22 Maine, 113.

10. The request to be tried separately was improperly refused. 1 Ch. Cr. Law, 535; *Charnock's Case,* 3 Salk. 81; *Com.* v. *Drew,* 4 Mass. 391; R. S., c. 172, § 33; *State* v. *Soper,* 16 Maine, 293; 7 Cow. 383; *U. S.* v. *Sharpe,* 1 Pet. C. C. R. 118.

To the motion in arrest of judgment, he cited for *cause* 1*st.* 4 Com. Dig. G. 2, p. 672, (*p. 524,) n. h.; 1 Star. Cr. Pl. 236; 1 Ch. Cr. Law, 327.

*Causes* 2, 3, 4, 7 and 9, *King* v. *Burredge,* 3 Will. 496; *Childs' case,* 1 Cro. Eliz. 606, part 2d; *Lenthal's case,* 1 Cro. Eliz. part 1, p. 137; *Rex* v. *Holland,* 5 Term, 607; *Rex* v. *Aylette,* 1 Term, 69; *King* v. *Haynes,* 4 Maule & Sel. 214; 4 Black. Com. 307; *Rex* v. *Tucker,* 1 Ld. Ray., 2; *U. S.* v. *Neal,* 1 Gall. 387; Co. Litt. 303, a. b.; 2 Hale's P. C. 166 and 180; 2 Haw. P. C. c. 25, § 34; 10 Petersd. Abr't, Tit. Indictment, B. 312, n. a.; *Queen* v. *Harris,* 2 Ld. Ray. 1304; *Queen* v. *Rhodes,* 2 Ld. Ray. 888; *Barnes* v. *the State,* 5 Yerger, 186; *U. S.* v. *Grush,* 5 Mason, 302; *Com.* v. *Springfield,* 7 Mass. 9.

*Cause* 5. 3 Ch. Cr. Law, 735–6; 1 East's P. C. c. 5, § 109, pp. 342–3; 2 Haw. P. C., c. 23, § 81. Unless there is a complete separation or perforation of some part. *Heydon's case,* 4 Co 41, a.

*Cause* 6. 1 East's P. C., c. 5, § 111, p. 343; Archb. Cr. P. 52, (42, margin;) *White* v. *Commonwealth*, 6 Binney, 179; 2 Hale's P. C. 186; 2 Haw. P. C., c. 23, § 82 and 83; *Turns* v. *Commonwealth*, 6 Metc. 225; *Rex* v. *Dale & als.* 1 Moody's C. C., p. 5.

*Cause* 8. The omission of those words is contrary to established precedents and is fatal. Davis's Prec. 172; Crown Cir. Comp. 483; 2 Hale's P. C. 186.

The motion for a new trial was also argued.

*Evans*, Att'y General, *contra.*

The prisoners had no legal right to separate trials. The full privilege of challenge was allowed. *State* v. *Soper*, 16 Maine, 295; *U. S.* v. *Marchant*, 12 Wheat. 480.

The instructions as to the different degrees of felonious homicide, were in accordance with the definitions in all the books on criminal law. No exceptions were taken to any instructions as to the name of the deceased, and the prisoners had no *legal right* to have the question as to how they found the name proposed to the jury.

As to the motion in arrest, the 1, 2, 3, 4, 7 and 9th are similar, and it is believed none of the causes have any foundation.

The caption is no part of the indictment. Arch. Cr. Pl. 33. PREBLE, J., in *Low's case*, 4 Greenl. 450; 13 Ver. 647; 18 Ver. 70; *Com.* v. *James*, 1 Pick. 375.

The venue was well laid. Arch. Cr. Pl. 23; 1 Ch. Cr. Law, 193. The 3d and 4th causes are equally unfounded; "said county" is the county named in the margin.

The 7th and 9th are of the same character, and the 10th is but a summary of the preceding. The words "then and there" repeated, sufficiently set forth the time and place. They necessarily refer to some time and place before named, and only *one* time and *one place* are before named. It is fully averred in what county, what State and under what jurisdiction the occurrences took place. See Arch. Pl. 48; 1 Ch. Cr. Law, p. 197; *State* v. *Slocomb*, 8 Black. 315, referred to in 10 U. S. Dig. p. 261, clause 4.

As to the 5th cause assigned, such a description is unnecessary. Arch. 487; *Rex* v. *Mosely*, 1 Mon. C. C. 97; *Commonwealth* v. *Webster*, 5 Cush. 296.

The 6th cause has nothing to rest upon; the allegations in the indictment are full and against it. Arch. 54; 1 Ch. Cr. Law, 242; *White* v. *Commonwealth*, 6 Bin. 179.

As to the 8th cause, that point has been expressly decided in *Penn.* v. *Bell*, Addison, 171.

The remaining motion was also fully argued.

TENNEY, J. — By the common law, felonious homicide is the killing of any human being without justification or excuse. 4 Black. Com. 188. It is divided into manslaughter and murder. Manslaughter is the unlawful killing of another without malice aforethought either express or implied, which may be either voluntary, in the heat of passion, and upon sudden provocation, or involuntary, in the commission of some unlawful act. 4 Black. Com. 191.

Murder is where a person of sound memory and discretion unlawfully kills any human being in the peace of the State, with malice aforethought either express or implied. 4 Bl. Com. 195.

By the Revised Statutes of this State, c. 154, § 1, whoever shall unlawfully kill any human being, with malice aforethought either express or implied, shall be deemed guilty of murder. By § 2, whoever shall commit murder with express malice aforethought, or in perpetrating, or attempting to perpetrate any crime punishable with death, or imprisonment in the State prison for life or an unlimited term of years, shall be deemed guilty of murder in the first degree, and shall be punished with death. By § 3, whoever shall commit murder otherwise than is set forth in the preceding section, shall be deemed guilty of murder in the second degree, and shall be punished by imprisonment for life in the State prison. By § 5, whoever shall unlawfully kill any human being in the heat of passion, upon sudden provocation, without malice aforethought either express or

implied, or in any manner shall be guilty of manslaughter at common law, shall be punished by imprisonment, &c.

The jury was instructed that murder was the unlawful killing of a human being with malice aforethought, either express or implied;—

That when a human being was unlawfully killed without such malice, upon sudden provocation, and in the heat of passion, and under such circumstances that it could not be justified or excused, the crime would be manslaughter;—

That murder was of two degrees;—that murder of the first degree was the unlawful killing of a human being with express malice aforethought, when not done while committing or attempting to commit some other offence;—that to find the prisoners guilty of this description of murder, they must be satisfied from the testimony that they had a deliberate purpose and formed design to kill the deceased before the fatal wounds were inflicted;—

That the unlawful killing of a human being without express malice, and under such circumstances as would not make the offence murder of the first degree, and not under sudden provocation and in the heat of passion, or under such circumstances as would reduce the offence to manslaughter, would be murder of the second degree, and it would not be necessary that they should more particularly consider under what circumstances malice aforethought would be implied.

It is contended in behalf of the accused, that the instructions defining the crime of manslaughter were greatly restricted; and when considered in their proper connection with murder in the second degree, were fatally prejudicial to the prisoners.

When a party is charged in an indictment with the crime of murder, the felony actually committed is the same, whether it has all the elements of murder in the first or second degree, or whether it is wanting in the criterion of murder, and is therefore manslaughter only. The two lower degrees of felonious homicide are embraced in the charge of the

higher offence, and a conviction of either of the three, or an acquittal under the charge properly made, is a bar to any other indictment for the same acts.

It is proper that the Judge should inform the jury, in his instructions, what constitutes the several degrees of crime included in the indictment. The mode and extent of doing this, must like other duties be submitted to his judgment and discretion. He may omit to state fully many legal principles, which if contained in the instructions might not be inappropriate. But few cases can be presented where the law applicable to the evidence introduced is entirely exhausted. And omissions are not a subject of exceptions unless they occur after a special request of a party for their supply. Exceptions can be alleged by a party thinking himself aggrieved only to any opinion, direction or judgment of the presiding Judge, in any action or process, civil or criminal. R. S., c. 96, § 17.

The definition of murder and manslaughter was given, in accordance with that contained in the authorities cited by the prisoners' counsel, in terms which could not fail to be understood by intelligent minds. To constitute murder, the jury were informed that the unlawful killing must be with malice aforethought, either express or implied; and that the unlawful killing without such malice, was manslaughter.

The first instruction given comprehended all murders, and the definition of the higher degree was full, specific and clear, so far as it became necessary under the evidence introduced. These instructions could not, and did not involve the prisoners in the crime of the first degree, they not being guilty thereof.

The statute creates the distinction between murder of the first and second degree, and has given no other definition of the latter than those murders which are not embraced in the definition of such as are of the first degree. No instructions defining the second degree of murder more particularly to the jury, are legally required unless specially requested.

The jury were informed in what express malice consisted, when the acts charged were not done while committing, or attempting to commit some other offence, of which no evidence was introduced. Then followed the instructions in reference to murder of the second degree. It was therein stated, as one element thereof, that it was the unlawful killing of a human being without express malice, and under such circumstances as would not make the offence murder of the first degree. Another element was, that the unlawful killing must not be under sudden provocation and in the heat of passion, or under such circumstances as would reduce the offence to manslaughter. And in the definition of manslaughter, in addition to the unlawful killing upon sudden provocation and in the heat of passion, was also included, "without malice aforethought either express or implied, and under such circumstances that it could not be justified or excused."

This definition of murder of the second degree, taken in connection with the instructions which the jury had previously received, excluded the killing with a deliberate purpose and formed design to take the life of the deceased before the fatal wounds were inflicted, and also whatever would reduce the felony below that of murder; and consequently would necessarily require the existence of implied malice aforethought.

It is contended, that the latter part of the instructions in reference to murder of the second degree, withdrew the question of malice entirely from the consideration of the jury.

The jury had been informed, that to authorize a conviction of the prisoners of murder, they must have done the acts alleged with malice aforethought, and to find murder of the first degree, they must be satisfied of the existence of express malice aforethought in the unlawful killing. If this express malice was negatived, the jury would be expected under other instructions before given, to inquire whether the mind was influenced by implied malice aforethought, and

if this question should be answered in the affirmative, it followed that there did exist sufficient to constitute the offence of murder in the second degree. Such findings would of necessity exclude the offence of murder in the first degree, and also the lowest species of felonious homicide. Consequently the intermediate crime would have been found to have been committed. The question of malice was not withdrawn from the jury, but on the other hand, to authorize a verdict for the highest offence, express malice was required to be found, and that a necessary ingredient in the crime of murder of an inferior grade, was malice aforethought, which was implied. And if they failed to find the former, and did find implied malice aforethought, the verdict must be against the prisoners, without a more particular consideration under what circumstances malice would be implied.

Again, it is contended, that the instruction, that it would not be necessary, that the jury should more particularly consider under what circumstances malice aforethought would be implied, if it did not withdraw the question of malice from the consideration of the jury, at least had the effect to change the burden of proof from the State to the prisoners. • Whether this change could be legitimately made upon proof of an unlawful killing, it becomes unnecessary to discuss; for it is apparent that the instructions do not authorize the proposition of the prisoner's counsel. Under the instructions, in reference to murder, both of the first and second degree, to justify a verdict for either, the jury were required to find affirmatively, that the unlawful killing was with malice aforethought, and that the extenuating facts and circumstances, if any existed, were insufficient to reduce the offence to that of manslaughter.

The omission of the Judge to inquire of the jury respecting the name of the person killed, according to the request of the prisoner's counsel, after the verdict of guilty was returned, is no ground of exceptions. He might or might not have made this inquiry in the exercise of his own discretion.

Another ground of exception is, that before the jury were empannelled for the trial of the prisoners, their counsel moved, that they be allowed separate trials, which motion was overruled, and separate trials refused. Each was allowed to challenge his number of jurors. It was held in *U. S.* v. *Marchant & Colson*, 12 Wheat. 480, that it was a matter of discretion in the Court to allow separate trials of those jointly indicted, and not of right in the parties. In *State* v. *Soper*, 16 Maine, 293, the Court denied such motion on the authority of the case cited from 12 Wheat.

The counsel for the prisoners object to the sufficiency of the indictment, and rely upon a motion in arrest of judgment.

The first cause assigned in this motion is, that the indictment contains no allegation, that the Court wherein the same was found against them, was holden within and for the county of Cumberland, and State of Maine. It has been determined by this Court, that the caption of an indictment makes no part of the finding of the grand jury. *Low's case*, 4 Greenl. 439.

The caption is conformable to general, if not universal practice in this and other States, and is sufficient to show, that the Court in which the indictment was found was holden in the State of Maine, at Portland, in and for the county of Cumberland. *U. S.* v. *Grush*, 5 Mason, 290; *Turns* v. *Commonwealth*, 6 Met. 224.

Another ground for arresting the judgment, as appears in the 2, 3, 4, 7, and 9th causes, is that it does not appear that the venue or any material fact alleged in the body of the indictment was at a place within the jurisdiction of the Court. In 1 Chitty's Crim. Law, 194, the author says, we are now to consider how the venue is to be stated, both in the margin, and in the body of the indictment. — The county is stated in the margin thus: — "Middlesex" or "Middlesex to wit." In the body of the indictment, also, the facts should in general be stated to have arisen in the county in which the indictment is preferred, so that it may appear, that the

offence was within the jurisdiction of the Court; and therefore, if a parish, vill or other place where the offence, or part of it occurred, be stated without naming the county in the margin, or expressly referring to it, by the words "the county aforesaid," the indictment will be defective. When only one county is named the words "county aforesaid" will have sufficient reference to the county in the margin. *Barnes* v. *State*, 5 Yerger, 186; *Turns* v. *Commonwealth*, 6 Met. 224.

The fifth cause for the arrest of judgment, is that the indictment contains no allegation of the length, breadth or depth of the wounds alleged to have been caused by the striking of the prisoners. When death is occasioned by a wound, it should be stated to have been mortal. It must appear from the indictment, that the wound given was sufficient to cause the death; and for this reason, unless it otherwise appear, that the length and depth must be shown; but it is not necessary to state the length, depth or breadth of the wound, if it appear that it contributed to the party's death. *Rex* v. *Mosley*, 1 Ry. & Moody, C. C., 97. In the case referred to, there were several wounds, and it was held by ABBOTT, C. J., BEST, C. J., ALEXANDER, C. B., GRAHAM, B., BAYLEY, J., PARK, J., BURROW, J., GARROW, B., HULLOCK, B. and GASALEE, J., to be unnecessary to describe the length, breadth or depth of the wounds. HOLROYD J. and LITTLEDALE, J. were of a contrary opinion.

In *Rex* v. *Tomlinson*, 6 Car. & P. 370, it is said by PATTERSON, J., "my brother recollects the case, [*Rex* v. *Mosley*,] perfectly well, and informs me that it was very much discussed; and that the ground of the decision was that as common sense did not require the length, breadth and depth of the wounds to be stated, it was not necessary that they should be stated; that case is therefore a direct authority against the objection, and in consequence the objection cannot prevail."

Another ground for the arrest of the judgment is, that it is not alleged in the indictment, that the wounds described

therein, or either of them, were given, caused or produced by the striking alleged, the necessary averment "by the stroke or strokes aforesaid" being omitted. It is averred in the indictment, that the prisoners then and there with the dangerous weapons, &c., which they then and there in both their hands, had and held, the said Thomas Guiner, in and upon the front and upper part of the head, &c., did strike and beat, giving unto him, &c., then and there with said dangerous weapons, &c., two mortal wounds, of which said mortal wounds, the said Thomas Guiner, on the 21st day of February, aforesaid, did languish and die. It is not easy to perceive in what respect the allegation fails to be sufficient. It is full, that the prisoners struck and beat the deceased, giving unto him two mortal wounds with the dangerous weapons, before described, which they in both their hands, had and held, of which said mortal wounds the deceased died. It necessarily follows, from the facts alleged in language sufficiently accurate and technical, that the strokes inflicted by the prisoners caused mortal wounds, which produced the death charged in the indictment.

The eighth objection to the indictment is, that it does not contain the allegation that the deceased, of the said mortal wounds, on and from the said twelfth day of February, &c., until the twenty-first of the same February, *did suffer and languish, and languishing did live.* The prisoner's counsel, in support of this objection refer to certain precedents of forms of indictment, without any other authority that this allegation is essential. It is held however, that the *time* both of the stroke and death should be stated on the record, the former because the escheat and forfeiture of lands relate to it, the latter in order that it may appear that the death took place within a year and a day after the mortal injury was received. 1 Chitty's Cr. Law, 222; 3 ibid. 736. It being alleged in the indictment now under consideration that the deceased did languish and die on the twenty first day of February, in the year of our Lord, 1854, of the mortal wounds inflicted on the 12th day of the same month,

in full, precise, and technical language, the reason of the principle is satisfied. And no rule of law which can be found being violated, the indictment is regarded sufficient in this respect.

A motion was filed that the verdict be set aside because as alleged therein it was against law, against the charge of the Court, against evidence, and the weight of evidence.

It does not appear from the case that the verdict was against law or the charge of the Court. The evidence adduced at the trial is reported. It is voluminous. Some portions are not in harmony with other portions. There was evidence on which the verdict was warranted if it were true and believed by the jury. They were the judges of the facts presented, and the evidence exhibits nothing showing necessarily that their verdict was improper, and it cannot with propriety be disturbed.

*Exceptions and motion overruled.*

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

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

## WESTERN DISTRICT,

## 1855.

PRESENT:

HON. ETHER SHEPLEY, LL. D., CHIEF JUSTICE.
HON. JOHN S. TENNEY, LL. D., } ASSOCIATE
HON. JOHN APPLETON, } JUSTICES.
HON. RICHARD D. RICE, }

## COUNTY OF CUMBERLAND.

39 96
62 427

### HEARN *& al. versus* WATERHOUSE.

A *verbal* representation or assurance concerning the character, credit, ability, trade or dealings of another, will not subject the party making it to an action for damages suffered thereby. The statute of this State has in this respect changed the common law.

THIS was an action on the CASE for false and fraudulent representations alleged to have been made to the plaintiffs by defendant, by reason of which they gave credit to one Heycock on April 25, 1853.

The cause was tried before SHEPLEY, C. J., and a verdict rendered for defendant, and exceptions taken to the rulings and instructions of the Judge.

The parties resided in Portland, and one Heycock living

in the eastern part of the State, an acquaintance of the defendant, wished to buy goods.

Heycock testified that "in April, 1853, defendant introduced me to plaintiffs, and told them 'he had sold me $600 or $700 worth on six months, and if they would let me have a bill of goods on four months, he would take them with his and get them insured.' He said he considered me perfectly safe; 'you will have my goods to make your money out of, as yours will become due before mine.'" Heycock thereupon selected about $200 worth of plaintiffs.

It also appeared by same witness that defendant went to Heycock's place of business the last of July of the same year, and attached his property on the debt contracted in April, and for $600 which he owed him for goods bought the fall previous, and for which he gave his notes on 60 and 90 days when he was there in April.

At that time, defendant said he was holden for plaintiffs' bill and had paid a part of it.

The goods were all given up to him, including the property bought of plaintiffs, excepting $30 worth which had been sold, and he made sale of them to one Freeman, and his demands were thereby settled.

There was evidence in the case as to the dealings between the parties to this suit after the failure of Heycock, tending to show that no claim was made upon the defendant as to this debt; and much other evidence not necessary to be stated.

The instructions of the presiding Judge are omitted, as the cause was decided upon a point not raised at the trial.

*Sweat,* for defendants.

*O'Donnell,* for plaintiffs.

APPLETON, J. — This is an action on the case for false and fraudulent representations made by the defendant to the plaintiffs respecting the solvency of one John C. Heycock, in consequence of which they were induced to give credit to him, and thereby sustained a loss to the amount of such credit.

The law upon this subject has been materially changed by R. S., c. 136, § 3, which enacts, that "*no action shall be brought and maintained* to charge any person upon or by reason of *any* representation or assurance made concerning the character, conduct, *credit, ability,* trade or dealings of any other person, unless such representation or assurance shall be made in writing and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." The design of this section is sufficiently apparent. It was to withhold legal protection from all, who are so heedless or inconsiderate as to rely upon verbal statements or representations. It is not for us to determine whether this provision is wise or not. It is sufficient that it is so written.

There is no pretence of any written representations having been made in this case. The plaintiffs' own evidence negatives the existence of any such proof. By their own showing they are not entitled to recover. It becomes therefore, unnecessary to examine the various authorities which have been cited to sustain the exceptions which have been taken.

*Exceptions overruled.*

*Judgment on the verdict.*

39 98
48 381
48 384
54 111

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MAXWELL *& al. versus* BROWN.

It is provided by law that no contract for the sale of any goods, wares or merchandize, 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.

Where the defendant verbally agreed for a cargo of coal, of a certain kind, at a price fixed per ton, the plaintiffs to procure a vessel in which to transport it to him, and the coal was not received on account of the vessel being wrecked; in a suit for the price, it was *held* that there must be an acceptance as well as delivery, and that the action could not be maintained.

ON EXCEPTIONS, HOWARD, J., presiding.

ASSUMPSIT to recover the price of two hundred and eighty

four tons of coal shipped on board the "schooner Gen. Hersey," at $3,65 per ton.

The plaintiffs resided at Delaware City, in the State of Delaware, and the defendant at Portland, in this State.

One of the plaintiffs called on defendant at his place of business and wanted to introduce their coal there; said it was the same kind that had previously been sold by the witness to Brown. Brown wanted some of the egg size and some broken coal. Plaintiff said the price of it was $3,65. The defendant said "well, you may send me one cargo."

Something was said about sending a vessel from Portland, but Brown said, "I suppose you can take up vessels at Delaware City as well as at Philadelphia;" and did not limit him as to the size of the vessel. The conclusion was that plaintiffs should send him a cargo.

The amount of coal charged was shipped by plaintiffs on board the "schooner Gen. Hersey," for which the captain signed shipping papers, and was consigned to defendant, he to pay the freight of $1,92 per ton.

The vessel went ashore on Cape Henlopen; part of the cargo was thrown overboard, the rest was taken back to Philadelphia, where a survey was called and it was decided to sell the balance at auction. Both parties were notified.

After the evidence on the part of the plaintiff was out, the presiding Judge ruled that the action could not be maintained, and ordered a nonsuit, to which order exceptions were taken.

*Shepley & Dana,* in support of the exceptions.

It was competent for defendant to constitute the plaintiffs his agents in putting the coal on board the vessel. *Elmore* v. *Stone,* 1 Taunton, 458. Where plaintiffs delivered the coal to the captain, it was a delivery to the defendant's own carrier and agent, selected by himself, and the property passed to him and was at his risk. *Dalton* v. *Solomonson,* 3 B. & P. 582.

The defendant might have insisted upon his right to exam-

ine the cargo before accepting it, but that right he could waive, and allow another to accept it for him. *Snow* v. *Warner*, 10 Met. 132; see 8 T. R. 230; 5 Bur. 2580; 1 T. R. 659.

These cases show that a delivery of goods upon a verbal order, to the carrier, is such an execution of the agreement as to preclude the vendor from taking advantage of the statute of frauds to reclaim the goods. See also *Kent* v. *Hutchinson*, 3 Bos. & Pul. 232.

*Rand* and *W. P. Fessenden, contra.*

APPLETON, J. — This is an action of assumpsit in which the plaintiffs seek to recover of the defendant the price of two hundred and eighty-four tons of coal, alleged to have been shipped at Philadelphia on board the schooner Gen. Hersey.

From the evidence, as reported, it appears, that one of the plaintiffs, who are merchants residing at Philadelphia, called on the defendant at Portland and proposed to sell him a quantity of coal; that the price was to be $3,65, per ton; that after some conversation on the subject the defendant said "well, you may send me a cargo;" that something was said about sending a vessel from Portland, but the bargain as finally concluded was, that the plaintiffs should procure a vessel and send defendant a cargo. There was no limit as to the size of the vessel.

The coal was shipped by the plaintiffs on board a vessel chartered by them and consigned to the defendant, and the master signed a bill of lading in the usual form, engaging to deliver the coal to the defendant upon his paying freight. The vessel was cast ashore on Cape Henlopen; part of the cargo was thrown overboard to lighten the vessel; the master then took the vessel back to Philadelphia, called a survey, and it being considered advisable to sell the balance of the cargo, it was done, and due notice was given thereof to the plaintiffs and defendant, neither of whom acknowledged the notice or made any answer thereto.

The defence rests upon the statute of frauds, R. S., c.

136, § 4, which is in these words, "no contract for the sale of any goods, wares or merchandize 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." The language of our statute is almost verbally identical with that of the 17th § of 29 Car. 2, c. 2, which is the English statute on the same subject. The construction therefore, which the English courts have given to similar language in their statutes must be regarded as of no slight authority.

From the language of this statute it is apparent, that when there is no written contract, a mere delivery will not be sufficient. There must further be an acceptance by the purchaser, else he will not be bound. In *Balding* v. *Parker*, 2 B. & C. 37, "it was formerly considered," observes RUST, J., "that a delivery of goods by the seller was sufficient to take a case out of the 17th section of the statute of frauds; but it is now clearly settled, that there must be an acceptance by the buyer as well as a delivery by the seller." In *Tempest* v. *Fitzgerald*, 3 B. & Ald. 680, the defendant, in August, 1817, bargained for a horse which he was to take away about Sept. 22, following. The parties understood it to be a ready money bargain. On Sept. 20, the defendant used the horse, gave directions respecting it and requested the plaintiff's son to keep it for him another week, which he engaged to do. The horse died on Sept. 26, and the defendant refusing to pay for the horse, an action for its price was commenced, but it was held, that no right of property passed till the price was paid, and that the action could not be maintained.

In *Holmes* v. *Haskins*, 9 Exch. 752, the defendant verbally agreed to purchase of the plaintiff some cattle then in his field. After the bargain was concluded, the defendant

felt in his pocket for his check book in order to pay for them, but finding he had not got it, he told the plaintiff to come to his house in the evening for the money. It was agreed that the cattle should remain in the plaintiff's field for a few days, and that the defendant should feed them with the plaintiff's hay, which was accordingly done. In this case it was held, there was no evidence of an acceptance of the cattle to satisfy the statute of frauds. In *Hunt* v. *Hecht*, 8 Exch. 814, it was held that there could be no acceptance and actual receipt of goods within the 17th section unless the vendor had an opportunity of judging whether the goods sent compared with the order. "In my opinion," remarks Martin, B., "an acceptance to satisfy the statute, must be something more than a mere receipt; it means some act after the vendor has exercised or had the means of exercising his right of rejection." In *Norman* v. *Phillips*, 14 Mees. & Wels. 278, the defendant, a builder at Wallingford, gave the plaintiff, a timber merchant in London, a verbal order for timber, directing it to be sent to the Paddington station of the Great Western Railway, to be forwarded to him at Wallingford, as had been the practice between the parties on previous dealings. The timber was sent and arrived at Wallingford station, April 19, and the defendant was informed by the delivery clerk of its arrival, and said he would not take it. An invoice was sent a few days after, which the defendant received and kept, without making any communication to the plaintiff till May 28, when he informed him that he declined taking it. It was held that although there might be a scintilla of evidence for the jury of the acceptance of the lumber within the statute, yet that there was not sufficient to warrant them in finding that there was such an acceptance, and the Court set aside a verdict for the plaintiff as not warranted by the evidence. "The true line appears to be," says Alderson, B., "that acceptance and delivery under the statute of frauds, means such an acceptance as precludes the purchaser from objecting to the quality of the goods; as for instance, if instead

of sending the goods back he keeps or uses them. In *Hanson* v. *Armitage*, 5 Barn. & Ald. 557, H. A., a merchant in London, had been in the habit of selling goods to B, resident in the country, and of delivering them to a wharfinger in London, to be forwarded to B. by the first ship. In pursuance of a parol order from B., goods were delivered to and accepted by the wharfinger, to be forwarded in the usual manner; but the Court held this was not a sufficient acceptance to take the case out of the statute. In *Mendith* v. *Meigh*, 2 Ell. & Black. 364, goods ordered by parol were shipped on board a general ship, consigned to a carrier named by the vendee, to forward them, notice being sent to the vendee of the shipment, and the bill of lading being also sent to the carriers, which was not returned, nor was any step taken to repudiate the bargain until after news arrived of the loss of the ship and the goods, and it was decided that there was no sufficient receipt and acceptance of the goods to satisfy the statute of frauds, in the absence of a written contract, and that the vendees were not liable for their price. "I am of opinion," says Lord CAMPBELL, C. J., "that there was no evidence to go to the jury in this case, on which they would have been justified in finding that the goods had been accepted and actually received, so as to satisfy the 17th section of the statute of frauds."

The language of the statute is unequivocal, and requires the action of both parties. There must be acceptance as well as delivery. The property of the goods must vest in the vendee as their absolute owner, discharged of all lien, and so that he shall be precluded from taking any objection to the quantity or quality of the goods sold. *Shindler* v. *Houston*, 1 Coms. 261; *Outwater* v. *Dodge*, 6 Wend. 400.

*Exceptions overruled.*

## FURBISH *versus* ROBERTS.

39 104
41 103

To authorize the arrest of the body under R. S., c. 148, § 2, the certificate must set forth that the debtor is *possessed* of property or means exceeding the amount required for his own immediate support, and that he is about to take with him *such property or means* and reside beyond the limits of the State.

An omission of either may avail the defendant on motion.

ON EXCEPTIONS to the ruling of HOWARD, J.

This was an action on a contract. The service of the writ was by an arrest of the body of defendant.

Upon the back of the writ was a certificate of a justice in these words: —

"Cumberland, ss. August 2, 1854. I do hereby certify that Nehemiah T. Furbish, the creditor and plaintiff within named, personally appeared and made oath that he has reason to believe, and does believe that Andrew Roberts, the defendant and debtor within named, is about to depart and reside beyond the limits of this State, and take with him property and means exceeding the amount required for his own immediate support, and that the demand within mentioned and described, or the principal part thereof, amounting to at least ten dollars, is due to said Furbish and unpaid."

At the return term the defendant appeared specially, and on the second day submitted a motion in writing to dismiss the action for want of a legal service; for want of jurisdiction in the Court, and because the certificate was defective.

That motion was overruled and defendant excepted.

*Fessenden* and *Butler*, in support of the exceptions.

*Gerry, contra.*

RICE, J. — It was decided by this Court in *Bramhall* v. *Seavey*, 28 Maine, 45, that the word "with" used in the following extract from § 2, c, 148, R. S., "when he is about to depart, and reside beyond the limits of this State with

property or means," must have been used in the sense of having or owning property or means, and not as indicating that he was about to take his property with him beyond the limits of the State.

The intention of the statute is, to authorize the arrest of a debtor, who is the owner of property or means exceeding the amount required for his own immediate support, and who is about to depart and reside beyond the limits of the State, and to take with him the property or means aforesaid, that is, the property or means of which he is the owner.

The affidavit in this case does not allege that the defendant is about to depart and reside beyond the limits of the State, *with* property or means, &c., that is, *having* or *owning* property, or means, &c., and to take the same with him, but simply, that he is about to depart and reside beyond the limits of the State, and to take with him property and means exceeding the amount required for his own immediate support. But who was the owner of the property which it is alleged he was to take with him does not appear. Therein the affidavit is defective, and for that reason the motion of the defendant must prevail.

*Exceptions sustained and action dismissed.*

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39 105
65 99

MAYBERRY *versus* MORSE.
SAME *versus* SAME.
MAYBERRY *versus* SAME *& al.*

More than one suit, where the parties are not the same, cannot be heard and examined in one bill of exceptions.

After a report of referees has been accepted, and before judgment, the presiding Judge, for good cause, has power to order the re-commitment of the report to the same referees.

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

REPORT OF REFEREES.

Two of these cases, viz. William Mayberry *v.* Benjamin

Morse, and Stephen P. Mayberry *v.* Benj. Morse & al., were referred under a rule of Court to the same referees. The other case of William Mayberry *v.* Benjamin Morse, was a submission entered into before a justice of the peace and before the same referees.

When the reports were presented for acceptance, the defendant, Morse, moved for a recommitment of the first two reports, and that the third be continued to await their result, upon certain evidence by him introduced of one of the referees.

After hearing the testimony, the Judge ordered the reports in each case to be accepted.

On a subsequent day of the same term, the defendant, Morse, moved for a new trial, on the ground of newly discovered evidence, which was set out in the motion; but the Judge declined to hear the evidence, and ruled that the motion did not lie, to which ruling and order the defendant excepted.

*Shepley & Dana*, in support of the exceptions.

*Clifford, contra.*

The opinion of the Court was drawn up by

APPLETON, J. — It was held in *Codman* v. *Strout*, 22 Maine, 292, not to be competent to blend two suits, where the parties are different, in one bill of exceptions, and thus bring them before the Court for determination. Each party aggrieved by any adjudication should file his several exceptions, and thus obtain the redress of his several grievances. The exceptions therefore must be regarded as having been improperly allowed.

As the questions here presented are of importance in practice, and may occasionally occur, it has been deemed expedient briefly to present our views of the law relating thereto.

Referees selected by the parties are final judges of the law and the fact. The Court can properly interfere with

their award, when corruption, gross partiality or evident excess of power is shown.

By our practice, judgment is ordinarily entered up as of the last day of the term, though a special judgment for cause shown, may be had at any time previous. Until the final disposition of an action by the rendition of judgment, it is within the control and subject to the order of the Court. The acceptance of the report of referees no more precludes the further action of the Court for sufficient cause, than does the recording the verdict of the jury upon its docket. After the acceptance of a report there may exist good reasons for its recommitment. If they exist and are disclosed to the Court, the presiding Justice has power to order a reinvestigation of the case before the same referees. The same causes which would suffice for the ordering of a new trial, might ordinarily require a recommitment. When such is the case, no reason is perceived why a party should be left to his petition for review, as the only effect of such a course of procedure would be to prolong litigation. If either party, therefore, after a report has been accepted, should for new reasons and on the ground of facts before unknown, move a recommitment, it is the duty of the presiding justice to hear any pertinent evidence relating thereto, which may be offered, and then to determine as in his judgment the legal rights of the party may require. There is no rule of law which prevents his hearing the motion, receiving the evidence and adjudicating thereupon.

*Exceptions dismissed.*

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STATE OF MAINE *versus* HALL.

Neither a physician nor an apothecary, unless appointed by the town as an agent, under the Act of 1851, c. 211, was authorized to sell spirituous liquors for mixture with medicinal ingredients by the purchaser, although the medicines were purchased at the same time with the liquor.

A request for an instruction that has no application to the issue may be refused.

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

INDICTMENT against the defendant for being a common seller of spirituous liquors, under c. 211 of Acts of 1851, between September, 1853, and November, 1854.

Testimony was introduced that he sold such liquors to one Owen on three different days in October and November, 1854. Also to one Crosman about the 10th or 12th of February, 1854. The latter applied to defendant, being a doctor, for medicine, and got some aloes and spirituous liquor to mix with them, and drank the mixture. The defendant kept medicines, most of them being liquids.

Another witness testified that he had taken medicine at defendant's shop for some months, and spirituous liquor was mixed with it, and he had paid something towards it.

Other testimony was before the jury.

The instructions given were not objected to. The following request by defendant was refused; — "that the administering of medicine, a part of which is spirituous liquors, in good faith, by a physician to a sick patient, does not constitute a selling of spirituous liquors within the meaning of the statute."

A verdict of guilty was rendered, and defendant excepted to the refusal above.

*Clifford*, for respondent.

*Abbott*, Att'y General, for the State.

The opinion of the Court was drawn up by

RICE, J. — The statute of 1851, c. 211, prohibits all persons, except agents appointed by cities and towns, from selling spirituous and intoxicating liquors. Such agents, when duly appointed, may sell these articles, to be used for medicinal and mechanical purposes, and no other.

It is contended, that from the fact, that the law authorizes the sale of spirituous and intoxicating liquors for medicinal purposes, it follows, that they may be lawfully used as medicines, and that when incorporated into medicinal compounds, their sale, in that form, is not a violation

of the statute, though made by persons who are not agents of cities or towns; or in other words, when these articles are made to assume the form, and become a component part of a medicinal compound, they cease to be spirituous and intoxicating liquors within the meaning of the statute.

That question does not appear to have been raised at the trial, and is not now open to the defendant. But however it may be decided when presented, it is very clear, that the law will not permit a person, who has not been appointed an agent by some city or town to sell therein spirituous and intoxicating liquors, whether such person be druggist, apothecary or physician, to sell such liquors *to be* compounded by the purchaser with medicinal ingredients, though such ingredients may be sold at the same time and place. To give such a construction to the statute would be, in effect, to repeal it.

The only cause of complaint relied upon at the argument, was the refusal of the Judge, who tried the case, to give the following requested instruction, to wit: "that the administering of medicine, a part of which is spirituous liquors, in good faith, by a physician to a sick patient, does not constitute selling of spirituous liquors within the meaning of the statute."

It was very urgently and most confidently contended at the argument, that it is impossible to controvert, successfully, the abstract truth of the doctrine embodied in this request. This may be so. But if the truth of the proposition be conceded, to its fullest extent, it is not perceived how it is to affect the case at bar.

The defendant was indicted as a *common seller* of spirituous and intoxicating liquors by retail, not for "administering medicines a part of which is spirituous and intoxicating liquors." The government was required to maintain the proposition that he *was* a common seller of such liquors. The determination of the question, as matter of law, whether the administering of medicine a part of which was spirituous and intoxicating liquors is or is not unlawful, could by

no possibility throw light upon the question before the jury. The evidence was that he sold liquors, to be, by the purchaser, mixed with medicinal ingredients. The request presented a mere abstract proposition, and was properly refused as having a tendency to divert the attention of the jury from the true issue before them.

*Exceptions overruled.*

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39 110
72 284

BAXTER, *in Equity, versus* CHILD *& ux.*

A failure to pay the debt secured by a mortgage at the time it is due, will, in a suit in equity, interpose no obstacle to a redemption by the mortgager according to the statute, although a provision is incorporated into the mortgage that the mortgagee shall hold the land free from the right of redemption, if the debt is not paid at maturity.

BILL IN EQUITY.

This bill was brought by the mortgager to redeem a parcel of real estate. The mortgage was given to secure the payment of $675, on the first day of September, 1854, and the bill alleged a tender of the amount due on the 16th of that month, with a demand for an account of the rents and profits, and a refusal.

The answer set forth the note and the mortgage, in which was this provision; "and provided also that if said Baxter shall fail to pay said sum at the time aforesaid, then said Mary shall have right to enter on said land, and hold said premises free from the right which the said Baxter would have to redeem the same," and that it was the understanding and agreement that the complainant should lose and waive his right to redeem the premises, if he should fail to pay the note when due; and that the trade was made with the respondent with a view that she might purchase a certain farm described in the answer, and in consequence of the non-payment of the note when due, she was deprived of the opportunity to complete that bargain, and lost a large amount by expenses in preparing to remove; and that

she was willing to receive said amount when tendered if the complainant would have paid her expenses in preparing to move, and indemnify her for the loss she suffered by his neglect to pay.

*S. & D. W. Fessenden*, for respondents.

1. The provision in the deed, if construed as a mortgage, should be construed in equity as a release from the complainant of his right to redeem the premises.

2. But the conveyance to Mrs. Child is not properly a mortgage, but construing the whole together, it must, in equity, be construed to be an estate on condition precedent, and in which time is of the essence of the contract. A failure therefore, to fulfil the condition, is a forfeiture of the estate, and the possession not being changed, an entry was unnecessary. *Erskine* v. *Townsend*, 2 Mass. 493; *Mellen* v. *Lees*, 2 Atkins, 494; 4 Dane, c. 112, art. 2, § 19; *Skim* v. *Roberts*, 1 Spencer, 43; *Lin. & Ken. Bank* v. *Drummond*, 5 Mass. 321.

3. But if it is a mortgage the respondent should be made whole.

4. In a contract in relation to real estate, a condition for the benefit of the party to be charged may be waived by him, and that too by parol. *Blood* v. *Hardy & al.*, 15 Maine, 61; 2 Bouvier's Law Dict. 640.

*Shepley & Dana*, for complainant, cited *Waters* v. *Randall*, 6 Met. 479; *Wilcox's heirs* v. *Morris*, 1 Murph. 117; *Henry* v. *Davis*, 7 Johns. C. R. 40; *Clark* v. *Henry*, 3 Cowen, 332; 1 Powell on Mort. 116.

The opinion of the Court was drawn up by

RICE, J. — On the ninth day of May, 1854, the plaintiff in equity purchased of the defendants the premises described in his bill, for the sum of eleven hundred and seventy-five dollars. Five hundred dollars of the purchase money was paid in cash, and a note for six hundred and seventy-five dollars, payable by the first day of September then next, with interest, given for the balance. To secure the payment

of this note a mortgage of the same premises was given. This mortgage is in the ordinary form, with this additional proviso, to wit; "and provided also, that if said Baxter shall fail to pay said sum at the time aforesaid, then said Mary shall have the right to enter on said land, and hold said premises free from the right which said Baxter would have to redeem the same."

This proviso, it is contended, was intended by the parties to cut off all right of redemption, unless the note described in the mortgage was paid on or before the first day of September, 1854. Though demanded, payment was not made on that day. The defendants therefore claim that their right in the estate has become absolute, and that the five hundred dollars paid has also been forfeited. By the rigid rules of the common law, that result might follow. But in equity the rule is different, and by its principles summary forfeitures are not encouraged.

In equity the character of the conveyance is determined by the clear and certain intention of the parties; and any agreement in the deed, or in a separate instrument, showing that the parties intended that the conveyance should operate as a security for the re-payment of money, will make it such, and give to the mortgager the right of redemption. 4 Kent's Com. 142; *Hughes* v. *Edward*, 9 Wheat. 489.

That the mortgage in this case was given as security for the note of six hundred and seventy-five dollars, is explicitly admitted by the defendants in their answer.

In *Waters* v. *Randall*, 6 Met. 479, it was remarked by HUBBARD, J., in giving the opinion of the Court, "I believe no case can be found, in which it has been determined, that the mortgagee can, by force of any agreement, made at the time of creating the mortgage, entitle himself, at his own election, to hold the estate free from condition, and cutting off the right in equity of the mortgager to redeem. Such an agreement would not be enforced as against a mortgager; nor is it to be confounded with a sale upon condition."

So inseparable indeed, is the equity of redemption from a mortgage, that it cannot be disannexed, even by an express agreement of the parties. If therefore, it should be expressly stipulated that unless the money should be paid at a particular day, or by or to a particular person, the estate should be irredeemable, the stipulation would be utterly void. 2 Story's Eq. § 1019.

The defendants' claim for damages, by the alleged loss of an advantageous contract for the purchase of a farm, is altogether too remote, uncertain and speculative, to be considered.

The plaintiff is entitled to redeem on payment of the amount equitably due on the mortgage, and may have a decree to that effect.

There is no sufficient evidence before us, to enable us to determine what allowance should be made, if any, for rents and profits. Unless the parties can agree between themselves, a master will be appointed to ascertain and report that fact. The plaintiff is entitled to his costs.

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BLAISDELL *versus* CITY OF PORTLAND.

The inhabitants of a town or city, having reasonable notice of a defect in one of their highways, are liable for any injury arising therefrom after it is constructed and opened for travellers, although the time in which they were allowed to build it after its acceptance had not elapsed.

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

CASE, for damages alleged to have been occasioned by a defect in Commercial street, in Portland, on Oct. 25, 1851.

The street, extending the whole length of the city, over tide water, and across the wharves and flats, was laid out by the city council, and duly accepted by the city on March 29, 1850, but no time was prescribed in which it should be constructed.

Upon such acceptance the city made a contract with the

Atlantic & St. Lawrence Railroad Co., to build the street, one portion of it in two, and the remaining in three years.

The evidence tended to show, that, for some months prior to Oct. 25, 1851, that portion of Commercial street extending many rods easterly and westerly of Commercial wharf, was so far made as to be used by the public for all purposes of business and travel as a public highway.

The injury was occasioned by a trench being opened by the proprietors of certain stores, to remove portions of the wharf upon that part of Commercial street covering the upper part of Commercial wharf. The trench had been opened for three or four days, and was not protected by any guard, into which in the evening the plaintiff fell, and received a severe injury.

Among other instructions to the jury, the Judge said, that when the location of Commercial street was accepted, in the manner stated, by the city, in March, 1850, it became a public street and way, and that the obligations and duties and liabilities of the city, in respect to it, as a public street and way, arose immediately; and that when any portion of it was made and used by the public as a public highway, if any person received any bodily injury, or suffered any damage in his property, through any defect or want of repair, in such portion of the street, the city would be liable for the damages sustained thereby, if they had reasonable notice of such defect or want of repair.

A verdict was returned for plaintiff, and the jury found specially, that at the place of the injury Commercial street had been in fact opened for public travel. The defendants excepted to this instruction.

*S. Fessenden,* in support of the exceptions.

1. At the time of the accident, Commercial street at that place was not such a street as the city was bound to keep safe and convenient. Special Acts of 1847, c. 25, § 1; Special Act of Feb. 28, 1832; 2d Vol. Special Laws of Maine, c. 248, p. 380; R. S., c. 25, § § 20, 57, 77, 89.

2. The plaintiff was in this street at his own hazard, the

time for building the street not having expired, and the public were bound to know when it was to be completed. *Lowell* v. *Inhabitants of Moscow*, 12 Maine, 300; *Drury* v. *Worcester*, 21 Pick. 44; *Ex parte Baring*, 8 Greenl. 137.

*Shepley & Dana, contra.*

RICE, J. — The case finds that the street, on which the injury occurred, was duly accepted by the city government, on March 29, 1850, by a vote ordering that such street had been duly and legally laid out, and that it be accepted, allowed, and established, and that it be known as Commercial street; but no time was stated in which the street was to be made; that the city immediately upon the acceptance and location of the street, as before mentioned, entered into a contract with the Atlantic and St. Lawrence Railroad Company, to construct and build the street, to be completed from ——— street to Union wharf, in two years, and the whole in three years; and the jury found, that at and before the time of the injury complained of, that part of Commercial street, where the injury was occasioned, had been in fact opened for public travel, and openly and publicly traveled by persons on foot, and in all kinds of vehicles.

The authority of the city government to locate and establish the street is not controverted.

The jury were instructed, that when the location of Commercial street was accepted by the city, in March, 1850, it became a public street and way, and that the obligations and duties and liabilities of the city, in respect to it, as a public street and way, arose immediately; and that when any portion of it was made, and used by the public, as a public highway, if any person received any bodily injury, or suffered any damage in his property, through any defect or want of repair in such portion of the street, the city would be liable for the damages sustained thereby, if they had reasonable notice of such defect or want of repair.

By the defence it is alleged that this instruction is errone-

ous, and that the liability of the city did not attach until the time had elapsed for the completion of the street, according to the contract, which had been made to build it, and that those who, anterior to that time, went thereon, did so at their peril.

It is provided in § 57, c. 125, R. S., that all highways, townways, causeways and bridges, laid out or being within the bounds of any town, or any plantation, such as is described in § 43 of this chapter, shall be duly opened and kept in repair, and amended from time to time, that the same may be safe and convenient for travelers and their horses, teams, carts and carriages.

For the construction of new roads, § 20 of the same chapter provides, that there shall be allowed to the county, town or plantation through which any such road is laid out, a time not exceeding three years within which to open and make the same.

By § 77, every town may authorize its surveyors or other persons, to enter into contracts for making or repairing the highways or townways within the same.

It is now contended, that the time prescribed in the contract with the Railroad Co., within which the street was to be constructed, was equivalent to a vote by the city council, when the road was accepted, allowing the same time in which to make it.

Such cannot be the legitimate construction of these acts. It will be observed, that the time within which roads are to be made, is to be prescribed by the County Commissioners, and not by the towns whose duty it is to make the same. The city council in establishing the street in question performed the function of County Commissioners. Contracts for making, or repairing ways, are made by towns, or by their authority, and such contracts are in no way connected with the duty of laying out, locating or establishing ways.

Nor does section 20 provide, that ways shall not be opened until the expiration of three years, or the time allowed by the County Commissioners within which to make them.

There is no prohibition against towns opening roads as much earlier than the time allowed, as they may think proper.

If no time is prescribed by the County Commissioners, then, according to general principles of law, the way must be opened within a reasonable time, which under our statute could not exceed three years.

But the question arises, what are the liabilities of the town in case a road is constructed and opened for public travel before the expiration of the time allowed for making it?

In *Loker* v. *Damon*, 17 Pick. 284, SHAW, C. J., remarked, "so if the town, intending not to take the whole time allowed them to make and complete the road, should finish it, and actually lay it open for travel, before the time fixed by the order, it might be considered as a highway from the time it should be so in fact laid open and offered to the public." And again, in *Drury* v. *Worcester*, 21 Pick. 44, "and should the town protest against the opening of a highway for use, if they take no measures to give effect to such protest, by keeping it closed, or by keeping up such bars and visible signs, as clearly to indicate to travelers, that it is not an open and public highway, they cannot justly avoid the responsibility which attaches to them. It follows as a necessary consequence, that whenever by positive act or tacit permission, they suffer a highway to be opened to public use, and to be actually used by the public, the town becomes responsible for its safe condition." And again, in *Bliss* v. *Deerfield*, 13 Pick. 102, "time must be allowed after the adjudication to do the needful work. If it is not done within the time allowed, or required, those whose duty it is, are to be compelled by the various modes known to the law. But when they have undertaken to do it, and profess to have done it, and remove the bars, and open it for public use, this is a permission and invitation to travelers to use it, and their liablity for damages attaches. * * * * *

The general fact to be proved is, that the road was opened for public use."

When a highway has been laid out and accepted, it is thence forward to be known as a public highway. *State* v. *Kittery*, 5 Maine, 259.

But the mere fact of establishing a highway by judicial action, does not of itself so open it to the public as to render towns liable for accidents that may occur to travelers thereon. After it is thus legally established, it is to be prepared for public use. Labor is to be performed upon it. Bridges are to be built, hills cut down, and valleys filled up; obstructions are to be removed and rough places to be made smooth. To do this, time is required, and as has been seen, for that purpose a reasonable time is allowed. But when this work has been performed, when the way has been made and thrown open for public use and travel, then the city or town must see that it is safe and convenient, and if injuries occur to those who are traveling thereon by reason of defects in such way, the town will be liable.

Nor is there any hardship in this rule, for in constructing new roads or in repairing old there is little difficulty, when they are not in such condition as to be safe and convenient to pass upon, in erecting barriers for the protection of travelers, or at least, by some signal, to admonish them of their danger.

To hold that travelers and strangers, before entering upon an open thoroughfare, should be required to search the public records to see if the time allowed for making them had expired, would be unreasonable, and still more unreasonable would it be to hold, that they should search out contractors to learn of them whether the time specified in their contracts for completing such ways had expired.

*Exceptions overruled.*

*Judgment on the verdict.*

## COLBY *versus* LAMSON.

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Where the wife is carrying on business on her own account and credit, no action can be maintained against *her husband* for purchases of personal estate made by her in such business, although made with *his* knowledge and consent.

Nor will the fact that she appropriated a portion of the proceeds of such purchase for the benefit of her husband and family, make *him* responsible for the price.

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

ASSUMPSIT to recover the value of a quantity of millinery goods, delivered to defendant's wife while living with him, at sundry times in 1852–3. The amount due plaintiff was $465,67, and the evidence tended to show that the goods were delivered to the wife with the knowledge and consent of defendant, and that defendant had received benefit from a portion of the proceeds of such goods thus bought and sold by the wife, some going to the support of his family, and some to repairs of his house, and that he had made one payment to plaintiff on account of these purchases and then promised to pay more, and had at different times exercised acts of ownership over the goods, and had mortgaged them as his own.

There was other evidence tending to show that plaintiff gave credit to the wife alone.

The jury were instructed, *that* under our laws the wife, living with husband, might carry on business on her own account, distinct from her husband; *that* he might have knowledge of the same, and even aid her in the business, as her clerk or otherwise, and yet it may be her business and he would not be chargeable; *that* she might make sales and purchases, and contract with reference to such business as a *feme sole* could, and if carrying on business upon her own account and credit, though with the knowledge and assent of the husband, the property by her purchased would be her property and not his, and she would be liable for the

purchase made, and not the husband; but if he authorized her to contract on his account, then he would be liable; *that,* if she was carrying on the business upon her own account and credit, she would have the right to apply the proceeds as she pleased, to the support of his family or otherwise, and it would not charge him; and *that* it was for the jury to consider, whether the wife did the business and made the purchases upon her own account and credit, or upon the account of the husband.

If upon her account he would not be liable, but if upon his account with his consent he would be.

A verdict was returned for defendant, and plaintiff excepted.

*Littlefield,* for defendant.

*Strout,* for plaintiff.

RICE, J. — The legislature of this State, during the last ten years, have made very important changes in the principles of the common law, applicable to husband and wife. The effect of these changes upon the existing legal relations of married persons, not only as between themselves, but also as between them and other members of the community, it is impossible to foresee. The law applicable to married persons, was, before these changes were made, well defined, and its application to all the existing relations in society, well understood. After the serious inroads which have been made upon the common law, it will require much time and patient labor to readjust its provisions, and adapt its principles to other existing laws so as to produce harmonious action, and cause the rights of parties who sustain different relations in life, to be fully understood. To accomplish this object must be the work of time, and it is also to be apprehended will be the occasion of much litigation.

The statute of 1847, c. 27, § 1, provides that any married woman may become seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase or

distribution, in her own name, and as of her own property, exempt from the debts or contracts of her husband.

It has been decided, that under this act a married woman may take a conveyance of real estate directly from her husband, and that such conveyance will be valid against all parties except the prior creditors of the husband. *Johnson* v. *Stillings*, 35 Maine, 427. There would seem to be less objection to her becoming the purchaser of personal property from a stranger.

But it is contended, that inasmuch as the promissory note of a married woman is void, therefore she cannot become the purchaser of personal estate. This Court did decide, in the case of *Howe* v. *Wildes*, 34 Maine, 566, that the statutes then in force relating to the rights of married women, did not remove the common law disability, which prevented a married woman from giving a valid promissory note. And in *Swift* v. *Luce*, 27 Maine, 285, it was decided that the common law was not so far altered by the Act of 1844, c. 117, as to enable a *feme covert* to sell her personal property without the consent of her husband. But the questions determined in those cases are not involved in the case at bar. The question now presented is whether a married woman is competent, with the consent of her husband, to become a purchaser of personal estate, in such manner that the husband shall not become chargeable with the price thereof. The statute in express terms provides that she may become seized and possessed of real or personal property, by purchase, in her own name, and as of her own property. To hold that she could thus become the absolute owner of property, over which the husband has no control without her consent, and yet that he should be liable to be sued for the payment of the value of such property, would involve an absurdity. Nor is it necessary to the validity of the contract with the wife, that she should be competent to give a valid promissory note. Payment may be made in many other forms.

Such being the situation of the parties, the question to

whom the goods were actually sold and credit given by the plaintiff, was distinctly presented to the jury. Whatever may have been said by the Judge in relation to the liability of the wife, or her right to employ her husband as clerk, were immaterial to the issue then before the Court, though it would be difficult to perceive why, if the wife has the power to release to the husband the right of control of her property, she might not employ him in the subordinate capacity of clerk. But the jury were simply asked to decide whether the credit was given to the husband, and they have decided that question in the negative. Whether the evidence warranted that decision, we are not called upon to determine. In the instructions no error is perceived. The exceptions are therefore overruled.

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FURLONG *& al., Petr's for Partition, versus* SOULE *& ux.*

Where the share of one of the heirs in his father's real estate was attached and levied on by the administratrix, a subsequent petition for partition by the other heirs, to the judge of probate, and a division of the estate thereon among *all* the heirs, is not a waiver of the levy. The heirs had no *legal* interest in the *land* levied on that could be waived.

Under the Act of 1817, c. 190, the judge of probate had full power, in such cases, to make a division among the heirs.

By the Act of Feb. 11, 1789, § 3, all *lands* levied on by the administrator, were held to the sole use and behoof of the *widow* and *heirs* of the deceased, and could only be distributed by the judge of probate as *personal estate*.

The heir whose interest in real estate was thus taken, under that Act had no right to a partition of such share in the *real estate*, nor could he convey any such right to another person.

Where it is agreed that *all* the right of an heir to an estate passed by levy to the administratrix, such heir has no right remaining in that set-off as dower.

PETITION FOR PARTITION.

ON FACTS AGREED, which are all stated in the opinion, which was drawn up by

SHEPLEY, C. J. — The petitioners' claim is to have partition of one undivided eleventh of the land described in their petition. It is admitted, that William Brown owned those lands, and that he died seized of them in the year 1816, leaving eleven children. The petitioners claim to be the owners of the share of John, one of those children.

By deed bearing date on Dec. 27, 1817, he conveyed "all the right and title which shall belong to me in my father's interest, now deceased, and which remains unsettled" to Joseph Mann, who on Dec. 8, 1848, conveyed to the petitioners certain lands "together with all the interest conveyed to me by John Brown by his deed of Dec. 27, 1817."

Before John Brown had conveyed his interest to Mann, "his part or share in the estate of his father, William Brown, deceased," was attached on Dec. 6, 1817, on a writ against him in favor of the administratrix on his father's estate. It is admitted, that judgment was recovered in that suit, and that an execution issued thereon was duly levied on "all the right, title and interest of said John in the estate of said William," and that his interest passed by that levy, which has never been redeemed.

It is also admitted, that all the heirs except John, presented a petition to the court of probate on September 16, 1818, for a division of the estate of William Brown; that commissioners were appointed, who made a division bearing date on June 19, 1819, which was accepted at a probate court holden on the first Tuesday of February, 1821. The tract of land first described in this petition is admitted to have been set off to John Brown.

1. The counsel for the petitioners contends, that the other heirs, by causing that division to be made and a share to be set off to John, "waived the levy and restored their brother John Brown to his original inheritance."

Although the share of John Brown had been transferred to another by the levy and had been also conveyed by deed, the judge of probate might, by virtue of the Act of 1817, c. 190, make a legal division of the estate of William Brown,

and the share assigned to John would be held by the title derived from him either by the levy or conveyance. *Proctor* v. *Newhall*, 17 Mass. 81. The course pursued by the heirs being legal and appropriate, cannot be regarded as a waiver of any legal rights. The title acquired by the levy did not vest in them; and they had no legal interest in the land that could be waived.

2. The counsel insists, that the petitioners are entitled to one eleventh part of the share of John, if it passed by the levy to the administratrix, as she would hold it for the use of all the children, including John.

By the then existing law, the administratrix would be seized of the land levied upon, "to the sole use and behoof of the widow and heirs of the deceased," to be distributed by the judge of probate as personal estate. Act of Feb. 11, 1789, § 3. The heirs had no legal title to it as their real estate. John could not have his interest in it set off by partition as his real estate; and his grantee can have no superior claim.

3. It is further contended, that the land assigned to the widow as dower was not divided; and that the petitioners are therefore entitled to one eleventh part of that tract.

It is agreed, that "by virtue of which levy all the right, title and interest of said John Brown in and to the estate of said William, then being in common and undivided, passed to said Anna Brown, administratrix." John, therefore, could have no interest not included in the levy in the land assigned to the widow as dower, which could be conveyed to Mann.

As the petitioners fail to exhibit any legal title, it will not be necessary to inquire, whether the respondents have acquired one by possession. *Petition dismissed.*

*Freeman*, for respondents.

*Morgan*, for petitioners.

## OXNARD *versus* SWANTON.

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One who had receipted for goods attached on writs, in which receipt was this stipulation, "that they are not to be demanded, except on the executions, which may be recovered in said suits," is not a competent witness for the defendant in the trial of the same actions.

A part of an instruction although in itself erroneous, which when connected with the remainder, leaves no ground for supposing that the jury were misled by it, and other instructions on the same point are *clearly* proper, will furnish no ground of exception.

A *feme covert* under the laws of this State may purchase and sell goods on her own account, and her husband be exempt from liability therefor, though she should dispose of a portion of the avails for the support of her children.

But where such *feme covert* purchases and sells goods with the knowledge and consent of her husband, and he knowingly participates in the profits of their sale, and that she professed to act for him; in an action against him for the value, it is competent for the jury to infer from such facts that the purchases were made upon his credit.

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

ASSUMPSIT for goods sold and delivered.

The defendant's wife kept a millinery establishment at Augusta, and she contracted for the goods sued for with the plaintiff, at Portland, and they were such as are kept in those shops. Her husband's name was C. W. Swanton, and her sign over her shop door was "Mrs. C. W. Swanton."

In the plaintiff's book of original entries, the charges were all made to "C. W. Swanton."

Evidence was introduced tending to show that defendant had in some cases bought goods which were delivered to his wife, for which he had been sued.

There was much evidence tending to show that she carried on the business on her own account. Her letters and orders were signed "C. W. Swanton."

It appeared that defendant was frequently in her shop, and sometimes took money out of the drawer; and that his business was blacksmithing, and that by reputation, neither defendant nor his wife were possessed of much property. He hired the building in which the shop was kept, over which his family lived.

The goods in the shop were attached on this and other writs against defendant, and he was active in procuring receiptors for the same. The receipt contained this stipulation "but they are not to be demanded except on the executions which may be recovered in said suits."

One of the receiptors was offered as a witness by defendant, who was objected to and excluded by the Court.

The plaintiff requested the following instruction, which was given, *that*, if the wife purchased the goods sued for with the knowledge and consent of her husband, and he received knowingly the proceeds of the sales of the goods thus purchased, and this was done while the parties were cohabiting together as husband and wife, the jury might presume that she was his agent, and had his authority to make the purchases.

The defendant requested this instruction, which was also given; *that*, if Mrs. Swanton carried on the business of a milliner, as a sole trader, with the assent of her husband, the profits or proceeds of that business was her property, and she might dispose of it as she pleased; and that she would have a right to dispose of it, or a part of it for the support of her children, or any other person, without impairing her right to the property so acquired; *that* if, as a sole trader, she acquired property, the creditors of the husband would not have any claim, unless she were allowed by the husband to become a sole trader by an understanding with the wife, to defraud the creditors of the husband.

The Judge likewise instructed the jury, that it was competent for the wife to act for her husband, as his agent, by his authority; that such authority might be conferred verbally or in writing, and might be proved directly, or be inferred from facts and circumstances proved; *that* they would decide the question of agency of the wife upon all the facts and circumstances appearing in evidence; *that*, if she was authorized to carry on trade for their joint benefit, or for him solely, the jury would be authorized to find, that she had authority to render him liable for her purchases; *that*

they would determine from the evidence, whether he knew of the business transacted by her in trade, and assented to it, or participated in it, or shared in the profits; *that*, if he did, they might infer, if they deemed it proper, that she acted as his agent, and had his authority to make the purchases shown. But, if the goods were purchased by her without his knowledge and assent, or without his authority express or implied, he would not be liable.

A verdict was returned for plaintiff.

The defendant excepted to the rulings and instructions and filed a motion to set aside the verdict as against law and evidence.

*S. & D. W. Fessenden*, in support of the exceptions.

1. The witness Buckley was improperly rejected by the Court. *Cushman* v. *Loker*, 2 Mass. 106; *Revere* v. *Leonard*, 1 Mass. 93; *Bliss* v. *Thompson*, 4 Mass. 488; *Ely* v. *Forward*, 7 Mass. 25; *Phillips* v. *Bridge*, 11 Mass. 242; *Worcester* v. *Eaton*, 11 Mass. 368; *Bean* v. *Bean*, 12 Mass. 20; *Brown* v. *Atwood*, 7 Maine, 356; *Eldridge* v. *Wadleigh*, 12 Maine, 371; *Butler* v. *Tufts*, 13 Maine, 302; *Pollard* v. *Graves*, 23 Pick. 86; *Johnson & al.* v. *Whidden*, 32 Maine, 230.

2. The instruction given in accordance with request of plaintiff was wrong, as there was no evidence for it to rest upon.

3. Under the laws of this State, the wife is authorized to conduct business on her own account, and the jury were not authorized to find that she had authority to render her husband liable for her purchases. Stat. 1844, c. 117; and 1847, c. 27, § 1; Stat. of 1848, c. 73; and 1852, c. 227 and 291.

They also objected to the instructions given by the Judge, and also that the verdict was against evidence.

*H. P. & L. Deane*, with whom was *G. F. Shepley, contra.*

SHEPLEY, C. J. — Buckley, called as a witness for defendant, was properly excluded. He had signed a receipt given to the sheriff for the goods attached upon this and other

writs, containing this provision; "but they are not to be demanded, except on the executions which may be recovered in said suits." The witness was thus directly interested to prevent a recovery of judgment by the plaintiff. For by his failure to recover, the witness would be relieved so far as it concerns this suit, from all liability upon the receipt.

The instructions given, whether on request of plaintiff's or defendant's counsel, or without request, constituted the rules of law and of duty for the government of the jury. If a single phrase in them considered alone and without regard to those combined with it might lead them into error, other instructions on the same point appear to have been so full and clear, as to remove any doubt which might have been occasioned by the use of that phrase.

The instructions of which complaint is more especially made, were "that they would determine from the evidence, whether he knew of the business transacted by her in trade, and assented to it, or participated in it, or shared in the profits; that if he did, they might infer, if they deemed it proper, that she acted as his agent and had his authority to make the purchases shown."

By the statutes of this State, a *feme covert* may purchase and sell goods on her own account, and for such dealings her husband may not be liable, although she does it with his knowledge and consent.

If such knowledge and consent extended no further than to the transaction of business on her own account and credit, and not to her doing it professing to act for him, or for herself and him, it would not authorize a jury to infer that she acted as his agent, and had authority to make purchases on his credit.

The jury were instructed, on request of defendant's counsel, "that if Mrs. Swanton carried on the business of a milliner as a sole trader, with the assent of her husband, the profits and proceeds of that business was her property, and she might dispose of it as she pleased; and that she

would have a right to dispose of it or a part of it, for the support of her children or any other person, without impairing her right to the property so acquired." Under these instructions and the former, the jury could not have understood that the mere knowledge and assent of the husband that she should carry on such a business, would authorize them to find that she was doing it as his agent, and had his authority for making the purchases.

Such knowledge and consent and acts of the husband as would authorize the jury to infer that his wife conducted the business for him, was more clearly stated by the instructions given on request of plaintiff's counsel. These authorized the jury, if satisfied that "the wife purchased the goods sued for with the knowledge and consent of her husband, and he received knowingly the proceeds of the sales of the goods thus purchased," to find that she acted as his agent.

Regarding all the instructions on this point as presenting the law to the jury, there does not appear to be any just reason to conclude that they could have been led into any error respecting their duty.

The testimony reported would authorize a jury to find a verdict for either party, without affording any good reason for imputing it to prejudice, bias or other improper influence; and in such cases the Court is not authorized to set a verdict aside. *Exceptions and motion overruled.*

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GROSVENOR *versus* TARBOX.

In an action of debt upon the judgment of a justice of the peace whose commission had expired for more than two years, if the minutes upon the justice's docket are such, as to enable the Court to perceive that they would authorize the record of a regular judgment in that case, they will be sufficient to sustain the suit.

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

DEBT, on a judgment of a justice of the peace.

The plea was *nul tiel record.*

To maintain the issue on the part of plaintiff, he introduced the justice as a witness, who testified that his commission expired some five years before, and he produced his docket containing the minutes of the suit between those parties, their names, the amount of debt and costs, the time when defendant was defaulted, and that this was all the record of the judgment he had. He read also therefrom the dates when eight executions had been issued by him thereon, and produced the original writ in that suit.

While the case was on trial, the justice who tried the original action extended his record and brought it into Court, and testified that the same was his record of the case.

The evidence was all objected to, and the cause was withdrawn from the jury and submitted to the full Court, to render a judgment according to the legal rights of the parties, upon so much of the testimony as was legally admissible.

*W. Bradbury,* for defendant, cited *Wentworth* v. *Keazer & al.* 30 Maine, 336; R. S., c. 116, § 28; *English* v. *Sprague,* 33 Maine, 440; *Porter* v. *Haskell,* 11 Maine, 177.

*J. C. Woodman,* for plaintiff, relied upon *Davidson* v. *Slocomb,* 18 Pick. 464; *Pruden* v. *Alden,* 23 Pick. 184; *Longley* v. *Vose,* 27 Maine, 179; *same,* 467; *Baldwin* v. *Prouty,* 13 Johns. 430; Starkie's Ev., part 2, § § 32, 33, and vol. 3, 1276.

SHEPLEY, C. J. — The action is debt upon a judgment of a justice of the peace. *Nul tiel record* was pleaded. The justice had ceased to be in commission more than two years before he made a copy of an extended record, and such attested copy was not legal testimony. R. S., c. 116, § 28. He was introduced as a witness, and produced a book kept in the form of a docket, and testified that it was his docket, and that it contained all the record he had of his judgments as a justice of the peace. He also produced the original

writ and the several executions, which had been issued on that judgment. The book contains the minutes of an entry before him of an action in favor of the plaintiff, against the defendant, on May 17, 1833, of a default of the defendant, of the amount of the debt and of the costs, of eight executions issued and returned without satisfaction.

It has been decided that minutes kept on a docket by one whose duty it is to make a record of a suit, must stand as the record, until an extended record can be made. *Pruden* v. *Alden*, 23 Pick. 184; *Longley* v. *Vose*, 27 Maine, 179.

When such minutes are sufficient to enable a Court to perceive, that they would authorize the record of a regular judgment to be made, they must be regarded as proof, when no mode is provided for more perfect proof. In this case they appear to have been of that character.

*Defendant defaulted.*

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39 131
43 178
43 179
39 131
92 247

STONE *versus* MCLANATHAN.

The writ, in which the plaintiff lives out of the State, is required by law, to be indorsed by a sufficient person, an inhabitant of this State, before entry of the action in Court.

And such requirement is satisfied by the indorsement thereon of the name of the attorney, being a sufficient person, although over his name, the words "from the office of" were previously printed by order of the clerk.

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

ASSUMPSIT, on account annexed. Plaintiff lived out of the State.

A plea in abatement was filed for want of an indorser of the writ before entry, on which an issue was made.

On the writ blank, as prepared by the clerk, were printed the words "from the office of." Underneath the attorney wrote his name when he made the writ, and testified that he intended it to be an indorsement.

After the plea was filed, the attorney erased the printed words over his name.

The cause was submitted to the full Court, and if they should be of opinion that the writ at the time of the entry was indorsed according to the requirements of the statute, a default is to be entered, otherwise the writ to be abated.

*Sweat*, for defendant.

*W. Goodenow*, for plaintiff.

SHEPLEY, C. J. — The words "from the office of" appear to have been printed on the back of the writ by direction of the clerk. They were not required by law. There is, therefore, no satisfactory evidence, that they were adopted by the plaintiff's attorney to limit the effect of his indorsement.

When an attorney does an act required by law, he must be regarded as having done it in obedience to the law.

The question presented appears to have arisen and to have been satisfactorily decided in the case of *State* v. *Ackley*, 8 Cush. 98. The indorsement appears to have been sufficient. *Defendant defaulted.*

39 132
76 600
79 52
81 106

JACOBS *versus* BENSON.

*Parol* evidence is admissible to correct an error in the name of the payee of a written order, where it is so connected with the testimony that the real owner may be clearly ascertained.

And that such an order was accepted for the benefit of the plaintiff is proveable by *parol*.

THIS was an action of assumpsit before HOWARD, J., on an order of the following tenor: —

"West Minot, April 10, 1849.

"Mr. W. B. Benson, please to pay Charles B. Jeques, or order, thirty-six dollars cash; charge the same to my account. "James Meaney."

On the back were these words — "Accepted, July 16, 1849. William B. Benson by Geo. Gregg."

The plaintiff, whose name is Charles V. Jacobs, alleged in his writ, that the order was made payable to him by name of Charles B. Jeques.

The drawer was called, who testified to his signature, and that he drew the order on the defendant.

Plaintiff proposed to prove by same witness, that the order was drawn for him as payee and for his benefit, and that when the witness wrote it, he thought it was written in plaintiff's name, and that as it was, it was a mistake; he also offered to show by same witness, that Benson was owing him, (the witness,) at the time the order was drawn; and that he never knew any other person than plaintiff by the name of Chas. B. Jeques. All this was objected to by defendant and excluded by the Court.

The plaintiff then called Geo. Gregg, and offered to prove by him, that he was the clerk and agent of said Benson on July 16, 1849, and that plaintiff then presented the said order to defendant for acceptance, and that he, as such agent, being authorized, accepted the same, and that he knew it was drawn and accepted for the plaintiff's benefit.

This being objected to, was ruled to be inadmissible by the Court.

A nonsuit was then ordered, which was to be taken off and the case to stand for trial, if in the opinion of the whole Court the rulings were erroneous, or the evidence excluded was material and admissible.

*Gerry*, for plaintiff, cited 1 Greenl. Ev. §§ 275, 282, 286; *Willis* v. *Barrett*, 2 Stark. R. 29; *Mead* v. *Young*, 4 T. R. 28; *Scanlan* v. *Wright*, 13 Pick. 523; *Hall* v. *Tufts*, 18 Pick. 455; *Johns* v. *Church*, 12 Pick. 557; *Miller* v. *Travers*, 8 Bing. 244.

*Shepley & Dana*, for defendant, cited *Stackpole* v. *Arnold*, 11 Mass. 31; *Wooddam* v. *Hearn*, 7 Ves. 218; Starkie's Ev. vol. 2, 755; Greenl. Ev. 399.

SHEPLEY, C. J. — The suit is upon an order drawn by James Meaney, in favor of Charles B. Jeques, on the defendant, purporting to be accepted for him by Geo. Gregg. The declaration alleges, that the promise was made to the plaintiff by the name of Charles B. Jeques. The case is not one of variance between the contract described in the declaration, and the one produced in evidence, as in the case of *Gordon* v. *Austin*, 4 T. R. 611.

Parol testimony could not be received to vary the contract. It appears to have been offered to prove the allegation contained in the declaration, that the order was drawn in favor of the plaintiff, and that the acceptance was made to him.

The general rule of law is, that a mistake made in the name of a grantee, devisee, or promisee, may be corrected by parol testimony. The grant, devise, or contract, is not thereby varied. The only effect is to ascertain the true grantee, devisee, or promisee. Yet there must be something found in the grant, devise, or promise, from which, connected with the parol testimony, the party beneficially entitled is clearly ascertained. Otherwise he might be arbitrarily designated by parol testimony without any written evidence, indicating that any particular person was intended.

A conveyance was made to Eliza Ann Castin, after she had been married more than a year to Thomas Scanlan, and parol testimony was received to correct the error. *Scanlan* v. *Wright*, 13 Pick. 523.

The rules respecting errors in the description of devisees, as well as respecting the description of estates devised, were fully considered in the case of *Miller* v. *Travers*, 8 Bing. 244. It is there said, that parol evidence should be received to correct an error, "where an estate is devised to a person whose surname or christian name is mistaken."

Parol testimony was received to prove that a note payable to Ebenezer Hall, was made to a partnership transacting business under that name. *Hall* v. *Tufts*, 18 Pick. 455.

A note was made to Elizabeth Willison, and an action was brought upon it by Elizabeth Willis. Parol testimony was received to prove that Willison was inserted by mistake for Willis. *Willis* v. *Barrett*, 2 Stark. 29.

Some of the testimony offered was not admissible; but testimony to prove that the order was drawn in favor of the plaintiff, that a mistake was made in writing his name, and that the order was in his hands, and was accepted as due to him, should have been received. *Exceptions sustained and nonsuit taken off.*

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HOLDEN *versus* BARROWS.

On the trial of an appeal from a justice of the peace, *copies* of the record and of all the papers filed in the case, excepting papers used as evidence, are required to be produced by the appellant.

And the copies duly authenticated are the legal and best evidence of the record, which cannot be explained or contradicted by parol testimony or extraneous documents.

Even the original writ cannot be admitted to contradict the copy.

ON EXCEPTIONS, HOWARD, J., presiding.

This was an appeal by defendant from the judgment of a justice of the peace in assumpsit. The general issue was pleaded.

When the copy of the writ was read to the jury, defendant's counsel presented what purported to be the original writ, and moved that the writ be abated and the proceedings quashed for want of a seal thereon. Testimony was received, against objections of plaintiff, as to the condition of the writ when made and served, and the original was inspected and was without any seal or any appearance of ever having one.

Whereupon the presiding Judge ordered that the writ abate and that the proceedings be quashed, to which plaintiff excepted.

*O'Donnell*, in support of the exceptions.

*S. & D. W. Fessenden, contra.*

SHEPLEY, C. J. — The suit was entered in this Court on appeal from the judgment of a justice of the peace. In such cases the original writ is not presented. It remains with the justice. The appellant is required by the statute c. 116, § 11, to "produce a copy of the record and of all the papers filed in the case," except depositions or other written evidence or documents, the originals of which are to be produced. The record is not liable to be explained or contradicted by parol testimony, or extraneous documents. A copy of the record regularly authenticated is the legal and best evidence of it.

If the motion might have been otherwise available it was made too late. *Shorey* v. *Hussey*, 32 Maine, 579; *Brewer* v. *Sibley*, 13 Met. 175.

*Exceptions sustained and action to stand for trial.*

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SMITH *& al. versus* BODFISH.

A deputy sheriff who attaches personal property on mesne process, is bound to keep it for thirty days after the judgment, and deliver it on demand to any officer having the execution, and authorized to receive it, notwithstanding he ceased to be a deputy after the attachment, and before judgment.

And where the same deputy who made the attachment, was a coroner when the execution was put into his hands, with orders to satisfy it from the property attached, and had ceased to be a deputy, and he did not apply the property to satisfy the execution; in an action against the *sheriff* for such neglect, his return upon the execution is admissible so far as it relates to a demand of the property.

But in *such action*, the acts and declarations of the deputy, after his official term had ceased, are not admissible, unless they refer solely to the official duty remaining upon him to perform. His declarations or his letters as coroner, respecting his *past acts* as deputy, cannot be given in evidence.

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

This was an action against the defendant, as sheriff, for the default of his deputy, Joseph Nudd, in neglecting to

keep property attached on the plaintiff's writ, against *Josiah P. Churchill & al.*, for thirty days after judgment.

The general issue was pleaded, and a brief statement filed, that the property attached belonged to Churchill alone, and was exhausted in satisfying the demands against him, on which it had first been attached.

The return of Nudd, on plaintiff's writ, showed that the attachment was made, subject to other attachments against *Josiah P. Churchill.*

After making those attachments, Nudd ceased to be a deputy, and when the plaintiffs obtained judgment in their suit against *Josiah P. Churchill & al.*, coroners only were authorized to serve writs and collect executions. Nudd was then a coroner, to whom was sent the plaintiff's execution, within thirty days from the rendition of judgment, with orders to apply in satisfaction the property attached on the writ.

Nudd made a return on the execution, as coroner, but dated more than thirty days after the judgment, setting forth that he "had made diligent search for property of defendant, within his precinct, and could find none wherewithal to satisfy the execution; that the property attached on the original writ was made subject to a previous attachment and had been appropriated to the payment of the execution issued upon the judgment recovered thereon."

This return was a part of the evidence offered by plaintiff, and received against the objection of defendant.

Nudd wrote a letter to plaintiff's attorney, acknowledging the receipt of the execution, within thirty days after the judgment, and in it stated that the property attached on the writ was subject to prior attachments on writs against *Churchill*, on which judgments had been obtained, and the property had been appropriated towards their payment, but was insufficient.

This letter was admitted against the objection of defendant.

Evidence was introduced tending to show that the pro-

perty attached was partnership property, and on the contrary that it was not.

The jury were instructed that if the goods were the property of the partnership at the time of the first attachment, the property should first be applied to the partnership debts; that objection was made that there was no demand on Nudd, who it appeared was a coroner; that if the execution was put into his hands, as a coroner, within the thirty days, with orders to apply the property on the execution, they were authorized to consider that as a sufficient demand on Nudd, the deputy sheriff, they being the same person; *that,* if the jury found that the property was partnership property, and these plaintiffs were creditors of the partnership when they made their attachment, they were entitled to have the property applied on their execution in preference to the defendants, and that the burden of proof was on the plaintiffs to show it was partnership property.

A verdict was returned for plaintiffs, and the defendant excepted to the rulings and instructions.

*Shepley & Dana,* in support of the exceptions.

*Fessenden & Butler, contra.*

SHEPLEY, C. J. — The suit is against the defendant as sheriff of the county of Kennebec, for the neglect of his deputy, Joseph Nudd, to keep and deliver certain property attached by him on a writ in favor of the plaintiffs against Josiah P. Churchill & al. When the attachment was made, on Jan. 7, 1853, the defendant was sheriff and Nudd was his deputy. Judgment was recovered on Nov. 4, and an execution issued thereon on Nov. 23, 1853. Before that time the defendant ceased to be sheriff and Nudd to be a deputy. The office of sheriff was then vacant, and Nudd was a coroner.

It was the official duty of Nudd, as a deputy, to keep the property attached for thirty days after judgment and to deliver it upon demand to any officer having the execution with authority to receive it, although he did not continue

to be a deputy. *Morse* v. *Betton*, 2 N. H. 184; *Morton* v. *White*, 16 Maine, 53; *Lawrence* v. *Rice*, 12 Met. 527. The two cases last named decide, that a demand may be waived by a deputy after he has ceased to be in office; and a demand or waiver of it must be proved, before the sheriff can be rendered liable for such default of his former deputy.

The return made by Nudd as coroner on that execution was properly received as testimony. Bearing date on Dec. 5, 1853, it did not show, that a demand of the property had been made within thirty days after judgment. The statement made in it, respecting the disposition of the property, was made by Nudd as coroner, for which the defendant was not responsible.

To prove a demand made upon Nudd for the property in season, or a waiver of it by him, a letter addressed by him to the attorney of the plaintiffs, bearing date on Sept. 30, 1853, was received as testimony, objection having been made to its introduction. It is signed by Nudd without stating the capacity in which it was written. It contains a statement, that he had received the execution with orders to satisfy it out of the property attached. It is evident, that this was not made as a deputy or agent of the defendant. In such capacity he had no right to receive the execution, or to make any acknowledgment respecting it. That statement appears to have been made in his capacity of coroner. He then proceeds to state how he had attached the property, and what disposition he had made of it. This presents him making declarations respecting his acts as a deputy, after he had ceased to be such, except for the special purpose of keeping and delivering the property. Such declarations made after his official agency had terminated, respecting his past official acts, might bind him, but the defendant could not be affected thereby. *Gooch* v. *Bryant*, 13 Maine, 386; *American Fur Company* v. *The United States*, 2 Peters, 358; *Cooley* v. *Norton*, 4 Cush. 93.

Letters of a deputy were admitted, in the case of *Tyler* v. *Ulmer*, 12 Mass. 163, to charge the sheriff; but they ap-

pear to have been written, while he was a deputy and had the execution for service.

In the case of *Mott* v. *Kip*, 10 Johns. 478, the declarations of a deputy were held to be admissible to charge the sheriff. But they appear to have been made "in relation to the business of the execution and while the obligation of executing it existed in full force."

In the case of *Savage* v. *Balch*, 8 Maine, 27, the declarations of a deputy were admitted, but they appear to have been made while he was acting officially in the execution of his precept.

The defendant is not responsible for any acts or declarations made by Nudd, when he was not his deputy, and which were not made respecting the only official duty remaining for him to perform. The statements made by Nudd, respecting his doings as a deputy, have reference to his past acts, and not to the only official duty remaining to be performed, that of keeping and delivering the property; and they were not therefore admissible as testimony. This distinction appears to have been disregarded at the trial.

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

39 140
66 250

THAYER *versus* COMSTOCK, *Administrator.*

Where an action is brought against an administrator, upon a claim disallowed by the commissioners, after the estate is rendered insolvent, the writ should contain no order to attach the goods of the intestate. An attachment made by such a writ would be illegal.

And such a writ is abateable, either on motion or by plea, if made or filed within the time allowed by the rules of Court; but if omitted, the objection to the form of the writ is waived.

ON FACTS AGREED.

ASSUMPSIT. The plaintiff, living in the county of Cumberland, brought this suit against the defendant, who lived in the county of Washington, as administrator of the estate of Taft Comstock, who died in that county.

The estate was represented insolvent, and plaintiff appealed from the decree of the judge of probate, with respect to plaintiff's claim disallowed by the commissioners.

The writ required the sheriff to attach the property of the intestate, and that the defendant be summoned to appear, &c.

On the writ was a return of the officer that he had attached a chip, the property of the intestate, and had summoned the defendant by giving him a summons in hand.

At the term this action was entered, upon the docket under defendant's name was this entry; "Shepley & Dana, specially."

At the same term, the plaintiff obtained an order of notice upon defendant, by serving him with a copy of the writ, which was subsequently done by leaving such copy and order at his last and usual place of abode.

If the Court should be of opinion that the action could be maintained, the defendant having the full benefit of a plea to the jurisdiction, the case is to stand for trial; otherwise, plaintiff to become nonsuit.

*Shepley & Dana*, for defendant.

The writ in this case should have been an original summons merely, and served by copy. Ch. 114, § 26.

The proceeding is under c. 109, § § 17, 20, and no execution could issue, except for costs, in case the plaintiff prevails.

Here was then no service as required by law; not even a defective one, and could not be aided by the power conferred by c. 114, § 48.

The order of the Court was of no avail, therefore the case stands as it did when first entered. The plaintiff has mistaken the form of his remedy, of which mistake, by entering only a special appearance, and taking no steps having a tendency to waive objections, the defendant has not lost the right to avail himself.

*Deblois & Jackson*, for plaintiff.

SHEPLEY, C. J. — An original writ may be framed with an order to attach property, and for want thereof to take the body, or it may in form be a summons to appear, with or without an order to attach property. c. 114, § 23.

All writs of attachment against administrators are to run against the goods and estate of the deceased, but the statute does not require that a writ of attachment should be used. c. 120, § 1.

The plaintiff has, in many cases, an election to use a writ of one form or of another, but he must select one appropriate to his case; one which may be lawfully executed.

When a party appealing from a judgment of commissioners on an insolvent estate commences an action and recovers a judgment against the administrator, no execution is to be issued to enforce the collection of the damages. The amount of the judgment therefor is to be added to the list of debts.

The statute making provision for an equal distribution of such an estate, all attachments made prior to a representation of insolvency are dissolved. An attachment made afterward would be illegal. A writ which commands an unlawful act is bad in form.

The service of the writ which was used, was a correct service for such a writ. *Blanchard* v. *Day*, 31 Maine, 494.

The writ in this case was abateable, but there does not appear to have been any motion made or plea filed to have it abated or quashed. It is now too late. By agreement of parties, the case will stand for trial.

39 142
92 227

## †McLANATHAN *versus* PATTEN.

Declarations of the vendor of personal property, while claiming title in whole or in part, and while in possession, are admissible in evidence to affect the title of those claming under him.

†In cases with this mark, SHEPLEY, C. J., took no part in their decision, the opinions being drawn up after his commission had expired.

REPLEVIN for a horse called *Fiddler*, tried before HOWARD, J.

The question was one of title in the plaintiff. He produced a bill of sale of the horse from John Goddard to himself, dated Feb. 3, 1854.

Defendant introduced a bill of sale of one-half of the horse from plaintiff to James T. Todd, dated Feb. 3, and another bill of sale of the whole, dated Feb. 10, 1854, and a bill of sale of the horse from Todd to himself, dated Feb. 25, 1854, and also proved a delivery of the horse, for which he gave a note of $200.

The defendant also produced a note for $100, given by Todd to plaintiff for the first bill of sale, which was paid by Todd in the bank and passed to plaintiff's credit.

After this evidence the plaintiff introduced a deposition, which was objected to but received, wherein the witness stated, that he had this horse several times of plaintiff between Feb. 3d and 10th, 1854, and rode after him with Todd, and he testified to several declarations of Todd at that time, tending to show that he had no claim to the horse.

The plaintiff also proved a conversation between Todd and himself in relation to the bill of sale of the horse, and Todd's declarations, that it was to go for nothing, against the objections of defendant. He also introduced a mortgage of a stock of goods from plaintiff to Todd, dated Feb. 22, 1854, which was resisted as being irrelevant.

The defendant excepted to these rulings.

*Strout*, with whom was *S. & D. W. Fessenden*, in support of the exceptions, contended, that the declarations of Todd, not being in possession of the horse, were not admissible according to the authorities. The mortgage was not relevant to the issue.

*Sweat*, with whom was *Shepley & Dana, contra.*

APPLETON, J. — It has been repeatedly held, that the declarations of a person in possession as the owner of per-

sonal property may be received to affect the title of those claiming under him. *Hatch* v. *Dennis*, 1 Fairf. 244; *Holt* v. *Walker*, 26 Maine, 109; *Parker* v. *Marston*, 34 Maine, 386. The declarations received, were made by the vendor of the defendant while having the title, in whole or in part, and while he was in possession of the horse in dispute. The effect of those declarations was for the jury under pertinent instructions. But no exceptions were taken to those given, and we must regard them, as having been given in accordance with the legal rights of the parties.

*Exceptions overruled.*

*Judgment on the verdict.*

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39 144
48 213
48 216

## (†) PARKER *versus* GODDARD.

N. let certain lands and buildings to F. for six years, and also gave him a permit to detach some of the buildings and erect others, and that he might take such new erections away or sell them upon the premises, at the determination of the lease, after the buildings had been restored to their original position, and not before. The change was made and a new building erected. After such erection and before the expiration of the lease, it was surrendered and accepted. After such surrender the lessee sold the new building to plaintiff, who, at a place distant from the premises and before the six years had expired, notified the lessor that he wished to take off the building, and was ready to comply with all the conditions of the permit. The lessor claimed the building as his own, and said he should hold it by force if there was any attempt to remove it. In an action of trover for the value of the building; it was *held*: —

1st. That for the purpose of complying with the conditions of his permit, no demand on the part of the lessee was necessary, and his rights could not be changed or enlarged by making a demand.

2d. That the obligations of the parties under the permit were not mutual and dependent, but to fulfil the conditions to entitle him to the building, all that was to be done, was on the part of the lessee.

3d. That if the lessee was rightfully on the premises at the proper time, and in the act of performing or attempting to perform his stipulations mentioned in the permit, and had then been refused that privilege, or resisted, it might have been evidence of conversion.

But 4th. The claim to the building, under the circumstances and nature of the demand, was no evidence of conversion. The lessee was bound to restore the buildings to their original position before he could take any away.

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

Trover, for a building.

After the evidence was introduced it was agreed to submit the cause to the determination of the full Court on the facts proved and admissible. A nonsuit or default to be entered as the legal rights of the parties might require.

The facts are all stated in the opinion.

*Fessenden & Butler*, for plaintiff.

*Shepley & Dana*, for defendant.

Tenney, J. — On Nov. 30, 1850, John Neal gave to Alexander Foss a written lease of Cape Cottage, and the land on which it stood, and which was connected therewith, for the term of six years from April 1st, 1851. On Sept. 22, 1852, the lessor gave to the lessee a permit in writing to erect a certain building upon the land, and to make certain changes in the house, and additions at his own charge and upon certain conditions. "Upon a strict compliance with said conditions, the said Foss to be allowed to remove and set back the present addition to the main building, and put in its place an addition of about eighty by thirty feet, to be finished for drawing rooms, parlors and sleeping rooms, at his own charge; and to take away or sell upon the ground, said building so erected at his own expense, at the determination of said lease, after said restoration has been made, and not before." On Nov. 18, 1852, this lease and permit were assigned by the lessee to Alexander Foss & Co.

Under the permit, Foss & Co. erected the buildings in controversy. The main building was eighty feet in length, and thirty feet in width, and was connected with the stone building, which formed the main part of Cape Cottage; a kitchen was connected with the stone building by a wooden addition, which was merely a covered passage way. They moved back the kitchen, and butted the new building against the said passage way, not connected with it or morticed to it, but built so as to be removed without injury to the other buildings, and with that view. The old kitchen was moved

back of the new building, but was not connected with it. A removal of the new building, and a restoration of every thing as it was before the erection, would have been attended with no difficulty. It was only necessary for this purpose to haul off the new building and restore the kitchen to its place.

On August 25, 1853, Neal conveyed certain lands, in and about Cape Cottage, to the defendant, subject to the right of the occupants at that time, to remove one building on a strict compliance with the conditions to be found in his permit, which was assigned to the defendant in the deed of the conveyance of the land.

On Oct. 25, 1853, Alexander Foss, and Alexander Foss & Co., in consideration of having forfeited the lease, and all rights acquired by it, of every description on or about the premises, by the nonpayment of rent, taxes, &c., and for other valuable consideration, gave up all their interest in or about the premises to the defendant, the owner thereof at that time.

On May 18, 1853, Alexander Foss & Co. gave a bill of sale to T. I. Tinkham and others, of the addition to the house, called Cape Cottage, erected by the former, and standing between the L part and the main body of the house, &c. And on Oct. 20, 1853, (but stated erroneously in the instrument to be Sept. 20, 1853,) these owners gave a bill of sale of the same property to the plaintiff.

On Dec. 5, 1853, M. M. Butler, as the agent of the plaintiff, demanded the buildings of the defendant, in Portland, several miles therefrom, telling him that he understood the lease had been given up, and he had taken possession of the premises; and that the plaintiff was the owner of the buildings and wished to take them off, and was ready to comply with all the conditions contained in the permit given by Neal to Foss. The defendant replied that the buildings were his, and that he should resist all attempts to remove them, and said in substance, that he should hold them by force, if an attempt to remove them should be made.

At the time the agent for the plaintiff made the demand of the buildings, the plaintiff had all the right to them which the original lessee of Neal would have had under the lease and permit, if the same had not been assigned, and the defendant stood in the place of a lessor. The plaintiff treated the lease as having terminated on Oct. 25, 1853, when those claiming under it surrendered their interest therein to the defendant. It is not denied by him that he accepted this surrender, and when told by the agent of the plaintiff, that he understood that the lease had been given up, and that he had taken possession of the premises, he made no answer inconsistent with these statements.

If the plaintiff had the right to take off the buildings upon a strict compliance with the conditions of the permit, when the demand of them was made, and it was his object to make the demand merely for the purpose of setting the main building erected under the permit, back, and leaving it on the ground of the defendant, in order to restore the original buildings to their former condition, the demand was entirely unnecessary. Under the permit he had the full power to remove the buildings, or to sell them upon the ground, by a compliance with the conditions. And this power could not be increased by a demand. Without such compliance, he could not legally remove or sell the building. After the determination of the lease, either by a surrender before its expiration, by its terms, or by the full completion of the term, the plaintiff had no right to the use of the buildings, so long as they stood upon the defendant's land, further than was necessary for the restoration of the original buildings.

The obligations of the parties under the permit, were not mutual and dependent, and requiring something to be done by each at the same time; in which case the one wishing to carry out the contract, or to do an act to entitle him to an action for its breach, must either show the act done, or if not done, at least that he has performed every thing that was in his power, and which he was bound to do.

Nothing was required by the permit to be done by the lessor for a complete execution of the contract, but all was to be performed by the lessee. He was to fulfil the conditions, and upon the performance, the right had been given in the permit to remove the buildings. For this purpose he was entitled to every reasonable opportunity. It was not in the power of the other party legally to throw in his way any obstacles to the accomplishment of those things necessary to be done, to give him the rights secured by the permit. These rights could not be taken away or diminished by the lessor, or the defendant who represented him, without some consent or neglect of the lessee, or some one who stood in his place, as to the buildings in question.

If the plaintiff had gone on to the ground at the proper time, neither too early nor too late, which is a matter that we find no occasion to decide, and was doing no more than was suitable to restore the original buildings, and the defendant had prevented him from performing these authorized acts, and had declared that he should not under any circumstances remove the building from the precise spot on which it was, and so was prevented from making the restoration, the defendant might have been liable for a conversion of the buildings. But it is proper to examine the evidence to ascertain whether this was the case.

Laying out of the case all questions whether the plaintiff had lost any right to remove the buildings, erected by those holding under the lease, after the surrender of the remainder of the term to defendant on October 25, 1853, and before December 5, 1853, when the demand was made; and also, whether any right to the buildings on a strict compliance with the conditions of the permit, till the determination of the lease by its own terms, accrued to the plaintiff, we are to ascertain whether the occurrences on December 5, 1853, between the plaintiff's agent and the defendant, amount to a conversion by the latter.

We understand from the proof, as the plaintiff's counsel appear in their argument to have done, that the demand

was not merely, that the main building should be allowed to be so far removed from those originally erected, which had been displaced and altered, that the latter could be restored to their former condition, but of the buildings to be taken away from the defendant's land, as the property of the plaintiff, upon the notice given by his agent, that he was ready to perform the conditions contained in the permit, as soon as it could be done after the main building should be removed. The intention of the defendant in his reply to the demand and the accompanying statement, must be gathered not only from the reply to plaintiff, but from the language used by the plaintiff's agent, and all the attending circumstances. The refusal of the defendant was the answer to the demand as it must have been understood at the time. The plaintiff having no right to remove the building as absolutely his own, the defendant might with propriety deny the right assumed in the demand, and object to the removal. The buildings being on his land and he being in possession, he might, as they were then situated, assert that they were his, and that he should effectually resist all attempts to remove them. All this was predicated upon the contract in the permit, that the lessee could "take away or sell upon the premises said building so erected, at the determination of the lease, *after said restoration had been made, and not before.*"

It is insisted on the part of the plaintiff, that "the restoration of every thing to its former condition, from the nature of the case, could not be performed until after the buildings were removed." If the lessee entered into a contract with the lessor, that in consideration that the buildings to be erected by him could be taken away, he was *first* to do acts, as a condition precedent, which were impossible. It cannot be admitted, therefore, that he would take away the building without any consideration first to be rendered. This would allow the removal and oblige the other party to abandon his security for the fulfilment of the condition, and trust to his promise that he would perform the stipu-

lated acts, and compel him to resort to the remedy of an action, upon the breach of that promise. But such a question does not arise upon the facts of the case. From the testimony introduced by the plaintiff there was no difficulty in removing the new building, and in restoring every thing as it was before its erection. If this building could be taken from the defendant's grounds entirely, nothing is presented in evidence which would prevent the plaintiff from taking it away, so far only as to enable him to restore the kitchen, and perform the other work about the original buildings required by the condition, and still leaving it in the defendant's possession for his security.

The plaintiff omitted to do those acts which he was bound to perform before he could take away or sell the building in controversy, and the demand and refusal constituted no evidence of a conversion by the defendant.

*Plaintiff nonsuit.*

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† STATE *versus* ROBINSON.

Chapter 211, of the Acts of 1851, forbids the sale of spirituous and intoxicating liquors in any quantity, whether imported or domestic, without license.

In an indictment under that Act against a common seller, if it contain averments, that the liquors were sold "by retail and in less quantities than the Revenue Laws of the United States prescribe for the importation thereof into this country," they need not be proved. Such averments may be regarded as surplusage.

Without proof direct or tending to establish that the sales were by the importer, or of imported liquors in the original packages, the Judge may withhold instructions as to the law in that contingency.

Under the Act of 1853, c. 48, § 6, it is unnecessary to set forth in the indictment the record in full of a previous conviction for a similar offence. It may be briefly stated, and the identity of the respondent with the one formerly convicted is a matter for the jury.

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

INDICTMENT, against the defendant for being a *common seller* of spirituous and intoxicating liquors, between the first

day of April and the last Tuesday of November, 1854, without an appointment.

The first count alleged the offence to be by retail, and in less quantities than the Revenue Laws of the United States prescribed for the importation thereof into this country.

The second count alleged, that he was a common seller of wine, brandy, &c. within the time fixed in the indictment.

And it was further alleged, that defendant at the November term, 1852, "was duly and legally convicted as a common seller of spirituous and intoxicating liquors in the county aforesaid, against the peace of the State and contrary to the form of the statute in such case made and provided."

Evidence was introduced of more than three sales of spirituous liquor, by defendant, within the time in the indictment, but the quantity was not stated, nor whether the liquors were imported or domestic.

The counsel for defendant requested the instruction, that, to convict him on the first count, the jury must be satisfied from the evidence, that he sold spirituous or intoxicating liquors, in at least three instances, in less quantities than the Revenue Laws of the United States prescribe for the importation thereof into this country, which request was refused.

The instructions were, that the prohibition of the statute was general, extending to all spirituous and intoxicating liquors, whether imported under the laws of the United States or not, and without regard to quantity; and that the allegation "by retail in less quantities than the Revenue Laws prescribe for the importation thereof into this country," was unnecessary and immaterial, and might be rejected as surplusage; *that,* if the evidence satisfied the jury that defendant had sold spirituous and intoxicating liquors in at least three instances within the period laid in the indictment, though such sales were of imported liquors, and in quantities not less than the Revenue Laws of the U. S. prescribe for the importation thereof into this country, still

they were authorized to find the defendant guilty upon both counts in the indictment, unless it appeared that he was duly and legally appointed, &c.

The county attorney then offered a record of the S. J. Court, of the same county, for Nov. Term, 1852, setting forth an indictment against a person bearing the same name of the defendant, for a violation of the same act alleged in the present indictment and for a similar offence; and for plea in that case, the record set forth, that he *would not contend*, and that he was sentenced and complied therewith.

This evidence was objected to —

1st. Because the sentence was upon the plea of *nolo contendere*, and not on a conviction within the meaning of the statute.

2d. Because the defendant did not appear to have been adjudged guilty of the offence charged, or of any other offence.

3d. Because it contained no words by which it could be identified as the record of conviction set forth in the indictment.

The jury returned a verdict of guilty.

*Clifford*, in support of the exceptions, cited 3 Greenl Ev. § 10; *State* v. *Noble*, 15 Maine, 476; *State* v. *Smith*, 32 Maine, 369; *U. S.* v. *Howard*, 3 Sum. 15; *Rex* v. *Edwards & al.*, Russ. & Ry. C. C. 497; Roscoe's Crim. Ev., (averments,) 101; *Ricket* v. *Solway*, 2 Barn. & Ald. 360; *Wilde* v. *Com.* 2 Met. 408; *and same*, 413; *Com.* v. *Briggs & al.* 5 Pick. 429; *Lee's case*, 1 Leach, C. C. 464.

*Abbott, Atty. Gen., contra.*

APPLETON, J. — The statute of this State, for the violation of which this indictment was found, prohibits, in the most explicit terms, all sales of spirituous and intoxicating liquors, and would be equally violated whether the liquors sold were imported or domestic — were sold in smaller or in larger quantities.

An indictment in the State Courts, regards only the law

of the State against which the offence is committed. It is not necessary to negative possible and contingent defences which may arise under the statutes of the United States, or under its treaties with other governments. The party justifying under such acts or treaties, must bring forward in his defence the facts necessary to make out his justification. *State* v. *Gurney*, 37 Maine, 149.

The first count in the indictment alleges the defendant to be a common seller of spirituous and intoxicating liquors, "in less quantities than the revenue laws of the United States prescribed for the importation thereof into this country." It is insisted that this averment must be proved precisely as alleged.

The true rule on this subject is this;—if an averment may be entirely omitted without affecting the charge against the prisoner, and without detriment to the indictment, it will be regarded as surplusage. Roscoe's Cr. Ev. 84. The averment referred to might be entirely stricken out, without in any way affecting the indictment.

The sales proved, were either in less quantities than the revenue laws of the United States prescribe for the importation of spirituous liquors, or they were not. If in less quantities, then the indictment was proved in its precise terms. If the sales proved were of amounts larger than the least amounts which may be imported, under the revenue laws of the United States, still the indictment must be regarded as proved. In *State* v. *Moore*, 14 N. H. 455, the indictment charged the sale of a pint of rum. The witness called by the government proved a sale of one quart, and did not remember he ever bought a pint of rum. "The rule," remarks Mr. Justice GILCHRIST, "is that it is not necessary to prove the whole of the property stated, if by the rejection of the part not proved, the offence would be complete." 1 Ch. Cr. Law, 236. If the indictment charge the stealing of nine books of the value of £9, and one book is proved to have been stolen, it would have been well enough. Ld. ELLENBOROUGH, in *King* v. *Johnson*, 3

M. & S. 548. If a man be charged with stealing ten sovereigns, he may be convicted of stealing five. Stark. Ev. 1529. If a man be charged with engrossing eight hundred quarters, he may be convicted of having engrossed seven hundred and fifty quarters. Ib. 1539. If a man be indicted for extorting twenty shillings, it will be sufficient to prove that the defendant extorted one shilling. HOLT, C. J., in *Rex* v. *Burdett*, 1 Lord Ray. 149. These are familiar principles and applicable here. Evidence of the sale of a quart of rum, *a fortiori*, proves that the defendant sold a pint, and whether he sold the one quantity or the other, the offence is complete. In either case the nature of the act and the quantum of punishment would be the same.

There is no evidence reported proving or tending to prove, that the defendant was the original importer of the liquors sold, and that the sales were of imported liquors in their original packages, so as to bring the case within the principle decided in *Brown* v. *Mayland*, 12 Wheat. 419. If there was no such proof, the Court was not bound to give instructions as to what would have been the law upon an hypothetical case. If the defendant intended to justify under Acts of Congress, he should have presented, by proof, a case within the provisions, and then have requested such instructions as would present such questions for our consideration as he might have desired to raise. This he has failed to do, and he therefore has no just ground of complaint.

The indictment alleges, that the defendant, at the term of this Court, "begun and holden at Portland, within and for the county of Cumberland, on the last Tuesday of Nov. 1852, was duly and legally convicted as a common seller of spirituous and intoxicating liquors, at Portland aforesaid," &c. By the Act of March 31, 1853, c. 48, § 6, it is enacted, that "in any suit, complaint, indictment or other proceeding against any person for the violation of any of the provisions of this Act, or that to which this is additional, other than for the first offence, it shall *not be requisite to set forth*

*particularly the record of a former conviction,* but it shall be sufficient to allege briefly that such person has been convicted of a violation of any provision of this or the said Act, or as a common seller, as the case may be, and such allegation, in any civil or criminal process legally amendable in any stage of the proceedings before final judgment, may be amended without terms and as a matter of right." The previous conviction is set forth with as much clearness and precision as the statute requires.

It is objected that the record of the former conviction, which was offered in evidence, should not have been received, because it contains no words by which it could be identified with the identical record of conviction set forth in the indictment. The record produced is of a conviction of the defendant of the same offence, at the same time and place, and before the same Court as is alleged in this indictment. It is difficult to perceive what more can be required within the letter or the spirit of § 6.

No motion has been made for a new trial. It does not appear that any question was made as to the identity of the defendant with the individual of the same name, in the record produced. If there was a question of identity, it was for the jury to determine. If any question of law arose at the trial, as to the sufficiency of the proof offered to show such identity, it has not been reserved and is not to be found in the exceptions before us.

The instructions requested were properly refused, and those given are not perceived to have been in any respect erroneous. *Exceptions overruled.*

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† SIMONDS *versus* HENRY.

A dentist is required to use a *reasonable degree* of care and skill in the manufacture and fitting of artificial teeth. The exercise of the *highest perfection* of his art is not implied in his professional contract.

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

ASSUMPSIT, for a full set of artificial teeth for defendant's wife.

The contract was made with the wife, for the manufacture of the teeth for a certain price, with the knowledge and assent of defendant.

When put into her mouth she complained that they felt odd and pained her. The plate was then somewhat filed, but she still complained, and declined to pay for them.

It was agreed, that she might take them away and return them on the Monday following, when she returned and said she knew she could never wear them. Something further was done to the teeth, but she declined to pay for them and left them, although plaintiff forbid her so doing and claimed his pay.

There was conflicting evidence whether the teeth fitted her mouth. By one it was testified, that they were a good piece of work; by another, that they were a fair average piece of work, and by a third that they were nothing extra.

Among other instructions the jury were told, *that* if the plaintiff had used all the knowledge and skill to which the art had at the time advanced, that would be all that could be required of him, and that they would determine from the testimony whether the teeth were properly made and fitted to the mouth.

The verdict was for the defendant, and exceptions were taken to the instructions.

*Barrows*, in support of the exceptions, cited *Lamphier & ux.* v. *Phips*, 8 Carr. & Payne, 475; *Sears* v. *Prentice*, 8 East, 348; *Hoacke* v. *Hooper*, 7 P. & C. 81; *McClellen* v. *Adams*, 19 Pick. 333; Chitty on Contracts, 553 and 4; 32 Eng. Com. Law, 512; *Edwards* v. *Cooper*, 14 Eng. Com. Law, 304; 3 Camp. 451, & 19; 6 Bing. 460.

*Gilbert, contra.*

APPLETON, J.—The law implies an undertaking on the part of apothecaries and surgeons, that they will use a reasonable degree of care and skill in the treatment of their

patients. Chitty on Contracts, 553. They are held responsible for injuries resulting from a want of ordinary care and skill. The highest degree of skill is not to be expected, nor can it reasonably be required of all.

The instruction given was, "that if the plaintiff has used all the knowledge and skill to which the art had at the time advanced, that would be all that would be required of him," &c. It is undoubtedly correct, that no more would be required of him. But upon legal principles could so much be required of him? We think not. If it could, then every professional man would be bound to possess the highest attainments, and to exercise the greatest skill in his profession. Such a requirement would be unreasonable.

The instructions given were erroneous and a new trial must be had.

*Exceptions sustained.*
*New trial ordered.*

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†HOLMES *versus* PORTER *& al.*

Of the evidence to establish a partnership.

Where the relation of partners is proved, although limited to a particular business, a note made in the name of the firm by one of the partners is *prima facie* for the debt of the firm.

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

ASSUMPSIT, on a promissory note, dated Dec. 30, 1851, signed by E. L. Porter & Co. The plea was the general issue. The promisors in the note were alleged to be E. L. Porter & William B. Benson, who were both made defendants.

The defendants, in the name of E. L. Porter & Co., according to the testimony, contracted to finish certain sections of the Atlantic & St. Lawrence Railroad, in March, 1851, and several receipts executed in the name of said Company by each of the defendants, between that time and December following, were produced. Some receipts made by Porter,

signed E. L. Porter & Co., were made in January and March, 1852.

There was evidence that notes signed similar to the one in suit were discounted at one of the banks in Portland, one of them dated January 2, 1852, which had been paid.

Defendants proved the execution of a paper, signed and sealed by E. L. Porter, dated Nov. 25th, 1851, and the same was admitted as evidence, purporting on the part of Porter to assume all the liabilities of E. L. Porter & Co. as such contractors, and to hold Benson harmless from all the debts of that firm. The latter part of the paper was in these words:—

"It is also understood, that all business connections of every nature, kind and description, are this day settled and cancelled, and the firm is dissolved between the parties, and by their mutual consent. In witness whereof, I have hereunto set my hand and seal, this Nov. 25, 1851."

The cause was then taken from the jury by agreement, on report to the full Court, with authority to find the facts and render judgment according to law.

*Shepley & Dana*, for defendants.

*Gerry & Ware*, for plaintiff.

TENNEY, J.—This action is against the defendants as late co-partners in business, under the firm name of "E. L. Porter & Co.," upon a note of hand, dated Dec. 30, 1851, purporting to be signed by that firm. It is not admitted, that the defendants were at any time co-partners; but if the evidence should satisfy the Court, that they are to be treated as having been a co-partnership, they deny that the note given by one of them, was within the scope of the partnership business; and they further contend, that all connection between them of a partnership nature had ceased before the note was given. It is in proof, that the note was given by Porter in the name of the firm.

In actions against several partners on a contract, "the proof of the partnership usually consists in evidence, that

they have acted as partners in the particular business. Less evidence is usually sufficient in this case, than is requisite when partners sue as plaintiffs, for they are cognisant of all the means, by which the fact is capable of being proved; but when they are sued as defendants, the plaintiff may not be able to ascertain the real connection between the parties; it is sufficient for him to show, that they have acted as partners, and that, by their habit and course of dealing, conduct and declarations, they have induced those with whom they have dealt, to consider them as partners." 3 Stark. Ev. 1070. And Mr. Greenleaf, in his Treatise on Evidence, vol. 2, § 483, says, "If two persons have traded jointly in many instances, this will be admissible evidence towards the proof of general partnership, and sufficient, if the instances of joint dealing outweigh the instances of separate dealing, to throw upon the defendants the burden of proving that it was not such a partnership. And though the partnership was established by deed, yet, against the parties, it may be proved by oral evidence of partnership transactions."

Evidence was introduced, that the defendants were doing business together, as railroad contractors, under the firm and style of E. L. Porter & Co. It was shown that Benson, in March, 1851, signed a contract to do work on the Atlantic & St. L. Railroad, E. L. Porter & Co. A bid was introduced in evidence, by which it was proposed to do work on the same road, signed "E. L. Porter & Co.," by Benson; this was made in Dec. 1850. Several receipts were in evidence, signed in the same manner by Benson, between March 18, 1851, and May 29, 1851; also several other receipts purporting to be signed "E. L. Porter & Co," in the handwriting of Porter, between July 1, 1851, and March, 1852, were introduced by the plaintiffs. It was shown, that several notes were signed and indorsed by E. L. Porter & Co., and discounted at a bank in Portland; one dated Sept. 2, 1851, wherein Wood, Black & Co. were principals, payable to, and indorsed by "E. L. Porter &

Co.," another dated Jan. 2, 1852, signed "E. L. Porter & Co." The note in suit was discounted Jan. 7, 1852, and other notes were discounted at the bank, signed E. L. Porter & Co. Notes so signed and indorsed were paid. It does not appear which of the defendants made the notes that were in the bank, with the exception of the one in suit. A receipt was given by Porter, in the following words and figures: — "Portland, Dec. 5, 1851. Received of John A. Holmes his note for five hundred dollars, payable in sixty days, which I agree to pay, as it is for my benefit."

(Signed) "E. L. Porter & Co."

No explanation of these transactions of the defendants is attempted, and no proof adduced to show, that they were not at one time co-partners in the business of railroad contracts; and the evidence is satisfactory, that at the time of some of these transactions, they did hold to each other the relation of partners in business and adopted the firm name of E. L. Porter & Co.

It is contended, that the partnership being one of limited extent, the note in suit was not within its scope, and therefore Porter, who signed it, is alone responsible. "When the contract is made in the name of the firm, it will, *prima facie*, bind the firm, unless it is *ultra* the business of the firm. Where the firm imports on its face a company, as A. B. & Co., or A. B. & C., then the contracts made by the partners in that name bind the firm, unless they are known to be beyond the scope and business of the firm." *U. S. Bank* v. *Binney & al.* 176; *Livingston* v. *Roosevelt*, 4 John. 251. In *Etheridge* v. *Binney*, 9 Pick. 272, it was said by the Court to the jury, "if a purchase is made in the name of a firm, or money borrowed on a note given or indorsed in that name, this is *prima facie* evidence of a debt from the firm, and it can only be rebutted by proof in the defence that this was fraudulently done by the individual partner for his private use, and that it was known to the creditor." These instructions were sustained by the

whole Court as correct. This doctrine has been recognized in *Barrett* v. *Swann & al.* 17 Maine, 180, and may be regarded the settled law of this State.

The remaining ground of defence is, that at the time the note in suit was given by E. L. Porter in the name of the firm, the partnership had ceased to exist. It is not attempted to be shown, that any notice was given to the plaintiff or to the public of the dissolution of the firm, so early as the time when this note was given. What effect a dissolution before the date of the note, would have upon the right of the payee without such notice, we do not find it necessary to discuss. We are satisfied that the evidence relied upon to show a dissolution prior to Dec. 30, 1851, the date of the note in suit, is insufficient for that purpose. The instrument introduced to show that the defendants were no longer copartners, is dated Nov. 25, 1851, and executed by Porter alone; attached to it is a receipt signed by him, to the other defendant, of $1000 in full of all demands to the date, purporting to have been given at the same time. These papers are shown to have been executed on Nov. 25, 1851, in no other way than by their dates, though the subscribing witness testified to the signing of them. It often happens, that written documents bear a date anterior to the day on which they became effectual. But assuming that these papers were as they now appear on November 25, 1851, the evidence that they were delivered to Benson at that time, or any other time afterwards, is entirely wanting. Both the parties to those instruments, as they appear upon their face, are before us as defendants, denying their liability on the note in suit. The production of these papers by Benson even, would not authorize the presumption that they had become a binding agreement between the defendants, as they would, if the parties thereto held an adversary relation to each other in this action. But it does not appear, that they came from the hands of Benson, or that they were in any manner made known to him before the date of the note. Without some proof more than is here exhibited, it would

be establishing a dangerous precedent to give them full effect, as sufficient evidence of a contract executed between the parties to the copartnership. But the positive acts of one of the defendants, and the silence of the other in relation to these acts, which if known to him would be acquiescence therein, are wholly inconsistent with the dissolution of the partnership. We find that Porter was using the firm name, after Nov. 25, 1851, as he had done before, in several and various transactions. He gave company receipts for money months afterwards. Notes passed through the bank with the name of the firm upon them, which were discounted and paid after the time when it is insisted the firm had no existence. No evidence is produced that Benson, if he did not himself use the name of the firm upon contracts, ever denied his liability upon such contracts, excepting the one in suit, made by the other defendant. He may not have known that the name of the partnership was used by Porter, yet as it was so used, it is evidence that the latter did not treat the partnership as terminated; and the want of evidence that the other partner made objection, is at least a circumstance that he was in reality no party to the instrument bearing date Nov. 25, 1851.

*Defendants defaulted.*

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† CHENERY *& ux., Petr's for Partition, versus* DOLE *& als.*

A division among the heirs of the realty, *by parol,* and a subsequent occupation in severalty, interpose no obstacles to the process of *partition* by either of the heirs.

An heir who has sold and conveyed her part of the estate, so assigned by parol, may, after the title has revested in her, maintain this process for her share.

And one who has conveyed all his interest, excepting his right in the dower, is rightfully made a party to the proceedings.

ON FACTS AGREED.

PETITION FOR PARTITION.

This petition was entered April term, 1853.

The title to the lands described was in Daniel Dole, who died seized in 1815; and descended to the female petitioner and the respondents, as his heirs, subject to the right of dower of his widow, who is still alive.

The widow and heirs continued to occupy the premises, in common, until June 30, 1837, when all the heirs became of age, at which time it was agreed between them and their mother, by parol, to have her dower set off and the rest of the property divided.

The persons agreed upon made the division and run out the portions and made a plan which was in the case, and in addition to the part set off for dower to the widow, two of the respondents were to pay her forty dollars annually, which they have ever since paid.

The several heirs built fences upon most of the division lines and continued to occupy, to the filing of this petition, the portions thus set out.

The petitioners in 1848, conveyed a part of the premises to B. S. Foster, by deed of warranty, and took back a mortgage which was foreclosed before making this petition.

Andrew T. Dole, one of the respondents, conveyed long ago all his interest in the premises to two of the heirs, excepting his right in his mother's dower.

The Court were authorized to render judgment upon these facts.

*S. & D. W. Fessenden and Deblois & Jackson,* for petitioners, cited *Porter* v. *Hill,* 9 Mass. 34; *Porter* v. *Perkins & al.* 5 Mass. 233; *Swett & al.* v. *Bussey & al.* 7 Mass. 503; *Perkins & al.* v. *Pitts,* 11 Mass. 125; *Potter* v. *Wheeler,* 13 Mass. 504; *Calhoun* v. *Curtis,* 4 Met. 413; *Cogswell* v. *Reed,* 3 Fairf. 198; *Duncan* v. *Sylvester,* 4 Shep. 388; *Deane* v. *Hooper,* 31 Maine, 107; *Tilton* v. *Palmer,* 31 Maine, 486; *Wood* v. *Little,* 35 Maine, 107.

*W. P. Fessenden,* for respondents.

TENNEY, J. — The petitioners are owners and tenants in common of one-fifth part of the premises, described in the petition.

The title of B. S. Foster under the conveyance of the female petitioner and Catharine Dole, on May 13, 1848, ceased on the foreclosure of the mortgage given to them at the time of the conveyance.

The proceedings in the attempt to set off the dower of the widow, and make division among the heirs at law of Daniel Dole, the intestate, were not in accordance with the provisions of law, and were void, according to the authorities cited for the petitioners.

Separate occupation from the time of this attempt, to that of filing of the petition, was productive of no rights in one against the others, which would interpose an obstacle to the judgment prayed for. The possession was by mutual consent.

All the respondents are interested in the land, though in unequal proportions. Moses, Daniel and Catharine each hold one-fifth as the heirs of their father; and Moses and Daniel together as the grantees of Andrew. The latter is properly a party by the exception of "his interest in his mother's dower." Interlocutory judgment must be entered.

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† HOLT *versus* KIRBY.

A party in whose favor an award is made under a rule of Court, is entitled to judgment thereon, notwithstanding his creditor may have attached the same, after the acceptance of the award, by a trustee process.

Under such circumstances, the debtor under the award is not chargeable as trustee.

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

This was a report of a referee under a rule of Court in favor of the plaintiff, which was ordered to be accepted at the October term, 1854.

After that acceptance a suit was commenced by J. M. Adams against the plaintiff, returnable at the January term, 1855, in which the defendant was summoned as his trustee, and disclosed his indebtedness in the amount of the award.

The plaintiff's counsel moved for judgment on the award, on the ground that defendant was not chargeable as trustee; but the Court overruled the motion and charged the defendant on his disclosure.

*O'Donnell,* in support of the exceptions, cited 7 Mass. 413; R. S., c. 138, § § 9, 13; *Lothrop* v. *Arnold,* 25 Maine, 136; *Barnard* v. *Spofford,* 31 Maine, 39; *Phelps* v. *Goodman,* 14 Mass. 252; R. S., c. 119, § § 13, 64; *Strout* v. *Clements,* 22 Maine, 292; *McCaffrey* v. *Moore,* 18 Pick. 492.

*J. M. Adams, contra.*

TENNEY, J. — No opportunity is given to the defendant in an action as principal, to avail himself of his disclosure and proceedings thereon in an action against the plaintiff, in which he is summoned as trustee, excepting in the mode pointed out by the statute. This mode is by introducing the disclosure and proceedings in evidence, on the *trial* of the action against him as principal. R. S., c. 119, § 13.

If the indebtedness of the party who is principal in one action and trustee in the other, has been fixed by the award of a referee in the former, the parties in that action having agreed that judgment on the report shall be final, the Court have no power to interpose to prevent judgment thereon, unless for some other cause the report should be rejected. This has been decided by this Court, to be the obvious meaning of the statute. *Strout* v. *Clements,* 22 Maine, 292.

*Exceptions sustained. Trustee discharged.*

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100 145

† LIBBEY *versus* STAPLES *& al.*

The owner of real estate may transfer his land by a lease executed by him unconditionally, and the lease will be effectual, although it contains covenants intended for the execution of the lessee by signing and sealing, but was not in fact signed and sealed by the latter. The lessor may waive the covenants on the part of the lessee.

Where one occupies and improves real estate which is manifestly beneficial, and a lease to such occupant, for a nominal rent, from the owner, is found upon the records of the county, in the absence of testimony, it is presumed the occupant holds under the lease.

And where such lessee was a married woman, one entitled to dower in the premises may enforce her claim against both husband and wife.

ON REPORT.

ACTION OF DOWER, against husband and wife.

The respondents pleaded in abatement, that they were not tenants of the freehold when, &c. The demandant replied, that they were, when, &c., and tendered an issue to the country.

Demandant introduced from the registry of deeds a life lease of the premises, from W. B. L. Staples to the female respondent, dated before the demand of dower, the lease being duly acknowledged and recorded. He also showed the yearly rents and profits of the farm to be from $60 to $100.

The lease, after describing the premises, contained this provision, "to hold for the term of her natural life from the day of the date hereof, yielding and paying therefor the rent of one dollar per year." It also contained covenants on the part of the lessee to pay the rent yearly, and quit and deliver up the premises at the end of the term and not suffer any strip or waste, and if she failed to pay, the lessor might enter and expel, &c., but the lease was *only signed and sealed by the lessor.*

The respondents introduced testimony tending to show, that the lease was made at the request of the lessor and no woman was present, and gave evidence of her declarations that she knew nothing about its existence; that the lessor made it for the benefit of his father and mother, as

he was about going to sea on a long voyage. The lessee lived on the farm before it was made and continued so to do afterwards.

The evidence was subject to all legal objections, and it was agreed, that if upon the facts this action can be maintained, the demandant shall have judgment for her dower in the premises and for such damages as the parties may agree to. But if the parties cannot agree as to the premises in dispute and damages, then these two facts shall be submitted to a jury. If the action is not maintainable, demandant to become nonsuit.

*E. L. Cummings*, for demandant, that the lease was effectual, cited *Blethen* v. *Dwinel*, 34 Maine, 133; *Doe* v. *Knight*, 5 Barn. & Cress. 671; 2 Black. Com. p. 307, note 17. That it was not necessary for the grantee to be present or accepted by him personally when made. *Hatch* v. *Hatch*, 9 Mass. 307; Co. Litt. 36, note 223; 5 Barn. & Cress. 671; *Church* v. *Gilman*, 15 Wend. 656.

That the registration and subsequent assent of lessee was equivalent to an actual delivery. *Hedge* v. *Drew*, 1 Pick. 141; *Copeland* v. *Weld*, 8 Maine, 411; *Chess* v. *Chess*, 1 Penn. 32; *Wheeler* v. *Sumner*, 4 Mason, 183; and that when a beneficial grant is made to a party his acceptance is presumed unless the contrary appear. *New England Bank* v. *Lewis*, 8 Pick. 118; 12 Eng. Com. Law R. 357, and cases before cited.

*Gerry*, for respondents.

TENNEY, J. — Under the pleadings and agreement of parties, the only question for the Court in this case is, whether defendants at the time dower was demanded, and on the day of the date of writ, were tenants of the freehold.

A lease of the farm out of which dower is claimed, was executed on August 18, 1853, and recorded on the same day, from William B. L. Staples to the defendant Lydia L. Staples, for the term of her natural life. She had lived upon

the farm before the lease was executed, and has lived upon it since, and carried it on.

The liability of the defendants in this action is denied, on the ground that the lease is ineffectual, because it is executed by the lessor only, when from its form it was evidently designed that it should be executed by the other party also. The transfer of the land by the lease is unconditional; and the covenants therein intended for her execution by signing and sealing the instrument are independent. The right of the lessor to have such covenants executed by her, might be waived by him. He put the lease upon record, and this must be regarded as a waiver of this right, and a treatment of the lease as being in all respects valid to pass the land described; and she cannot for this reason treat it as a nullity, when called upon to assign dower to the demandant.

It is insisted in defence, that Lydia L. Staples was ignorant of the existence of the lease, until after the demand of dower upon her by the demandant, and that she therefore could not have accepted the same. All the testimony in the case was received, subject to legal objections. The only evidence, that Lydia L. Staples had no knowledge that such a lease existed, is from her declarations made in the absence of the other party, which were incompetent.

It must have been the design of the lessor to provide means for the livelihood of the lessee, who was his mother, when he gave the lease; and no good reason is suggested for his doing so, and going to sea on a long voyage immediately after, if he withheld from her entirely a knowledge of his bounty. It is equally unnatural, that she should, upon the execution and recording of the lease, undertake the business of carrying on the farm, unless she had satisfactory information that she had an interest therein, according to the terms of the lease.

The lease being for a nominal consideration only, and the yearly rents and profits of the farm by the lowest estimation, being of the value of fifty or sixty dollars, must

have been considered beneficial to the lessee; and the presumption is, that she held under it at the time of the demand of dower, and so continues to hold. *Church* v. *Gilman*, 15 Wend. 656.

It is contended, that unless both defendants are freeholders in the land, they cannot be answerable in this action. From the pleadings, it appears that Jacob Staples was the husband of the other defendant; and that he defends in the right of his wife, and she in her own right. This is in accordance with the provision of the statute of 1848, c. 73, § 1, and the action cannot fail on this ground. The demandant is entitled to her dower in the premises; and according to the agreement of the parties, the action must stand for the settlement of some questions which are to be submitted to a jury, if the parties do not succeed in an adjustment themselves.

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76 288

† WILBUR, *prochien ami, Pet'r for Review, versus* DYER.

In petitions for partition a review may be granted by law, whenever the Court deem it reasonable and for the advancement of justice.

Where, in such process after final judgment, it was discovered that the commissioners had made a mistake in their division; it was held to be reasonable and for the advancement of justice, that a review should be granted.

THIS was a petition for a review, before HOWARD, J.

In the process sought to be reviewed the respondent was a petitioner for partition of certain real estate owned in common by him and the parties represented by petitioner for review.

After due proceedings had, the interlocutory judgment was entered, commissioners appointed, and a division made by metes and bounds, and their return accepted and final judgment entered.

The petitioner for review offered to prove by the commissioners, that they determined to divide a certain parcel

into two equal parts, and to set out one half to the present respondent and the other half to the heirs represented by the petitioner, and supposed they had so done; that owing to the irregular shape of the land and an error in calculation, occasioned by taking an improper base line, the lots in fact were not equal, but the part set out to present respondent exceeded the other by 1860 square feet; that the error was not discovered until after the acceptance of the report.

But the presiding Judge intimated, that the evidence was inadmissible, and that question was submitted to the full Court.

If the evidence is admissible and presents a good cause for a new trial, the cause is to be heard; otherwise the petition to be dismissed.

*Deblois & Jackson*, and *S. & D. W. Fessenden*, for defendant, cited *Sturdivant* v. *Greely*, 4 Maine, 534; *Elwell* v. *Sylvester*, 17 Maine, 536.

*Shepley & Dana*, for plaintiff, cited R. S., c. 123, § 1; *Haskell* v. *Beckett*, 3 Maine, 92.

The authority relied upon by the other side was one based upon the statute of 1821, § 2, and had been overcome by the provision of R. S., cited.

TENNEY, J. — If the facts offered to be shown should be established, and the Court have no power to grant the review, the party who made the offer is not prejudiced by the exclusion of the evidence, but must abide the loss arising from the mistake of the commissioners. If on the other hand the review prayed for may be legally granted upon proof of the facts offered, and they should be deemed a good cause for a new trial, the matter is to be heard.

Reviews may be granted in all civil actions, including petitions for partition, whenever the Court shall deem it reasonable, and for the advancement of justice, without being limited to particular cases. R. S., c. 123, § 1. The statute of 1821, c. 57, § 2, contained a similar provision; and the case of *Sturdivant* v. *Greeley & als.*, 4 Greenl. 534, which

was decided and the review denied when that statute was in force, is relied upon by the present respondent as conclusive in the question before us. In that case, as in this, the ground for the application for a review, was for errors in the doings of the committee, appointed to make the division; and those errors were not discovered, till after the acceptance of the report and judgment thereon. On that petition for partition however, the interlocutory judgment for the division was entered upon a hearing by the Court of a question of law arising on a demurrer to the petition, which was an admission by the respondent in that process, of all material facts alleged therein. A review was refused, on the ground that upon the trial of the review the case is entirely opened; and "each party shall have the liberty to offer any further evidence, and the whole cause shall be tried in the same manner as if no judgment had been given thereon." Statute of 1821, c. 57, § 4. The trial referred to in the quotation just made, is manifestly one of fact, and not of law. And it was further held by the Court in that case, that when the facts had been admitted by the respondent in the process for partition, as alleged, in a demurrer, that there was no power in the Court under the statute, to deprive the petitioner of the benefit of this admission, and the law deliberately settled thereon, which a review by a full opening of the whole case, upon a plea to the country, or a rehearing of the question of law raised by the demurrer would do, when no suggestion was made that the facts were not truly admitted, and the law upon those facts correctly decided. The Court ask, "who can inform us, how on review, the whole of such a cause can again be tried? Law and facts are intermixed; and yet not one of those facts is tenable by a jury. Again, can we grant a review of one third, or one half of a cause, and leave the residue undisturbed? This would be a judicial novelty."

Under the statute of 1821, and the pleadings of that case, we think the views taken by the Court were correct.

The Court were more restricted by that statute, than by the one now in force on the subject of reviews. No power was given by the former to change the pleadings, if they had once been made, on the review. But in the latter, "the Court may allow amendments in any of the pleadings as they might have done in the original action, or they may admit additional issues or brief statements." § 6.

This case is materially unlike the one cited by the defendant. It is to be understood, from the petition for review, that there was no denial that the land was owned and occupied in the proportions alleged in the petition for partition, but no expression admissive of those facts was made. Consequently on a review, no such "judicial novelty" would be presented, as in the case cited. If there were pleadings on the original petition, they were those presenting an issue to the country, upon which issue the parties could introduce their evidence as at the former trial. If the cause was disposed of by default, or without any issue joined, the proper pleadings could be made on the trial of the review, and the cause be tried thereon. § 7. Here is given the full authority on a review of a case like the present, to introduce all the evidence, in the same manner that it could have been done in the trial of the original action; and the petitioner for review has agreed to no facts, which should restrict him in presenting his whole case.

2. We are next to see, whether the evidence offered by the present petitioner, if true, presented a good cause for a new trial. The commissioners supposed they made an equal division of the land according to their intention. But the land being of an irregular shape, they adopted an erroneous principle of calculation, by taking an improper base line; and it was found after the acceptance of their report, that they had given the present respondent a considerable quantity of land more than was assigned to the other party. The land, we suppose was valuable, and in the small parcel divided, this excess given to the one party more than to the other was too important to be disregarded.

The commissioners were appointed by the Court, as competent to discharge the duties devolving upon them, and may be presumed entitled to the confidence of the parties, as having the requisite scientific skill. It would not have been expected, that every act and calculation of the commissioners would have been inspected by the parties, or some one whom they might employ for such a purpose; but it is reasonable to suppose, they could well trust something to those persons, without being chargeable with negligence themselves.

The Court having the power to grant a review in this case, and it not being perceived that the present respondent can be injured by any exposure to a less favorable interlocutory judgment, it is thought, as the only mode in which the error can be corrected, that the prayer of the petition should be granted, as being reasonable and for the advancement of justice. ***Review granted.***

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† GREAT POND MINING & AGR'L. CO. *versus* BUZZELL.

Where certain personal property was leased to the defendant, and persons were agreed upon to appraise a *portion of it*, their appraisal in writing of the whole property, without other proof, is not legal evidence in an action against him, although it is stipulated that the whole shall be *appraised*.

Of the acts and omissions of the lessor that will excuse a breach of the covenants of the lessee.

The construction of the language of a written contract is within the province of the Court, and when the determination is left to the jury, exceptions lie, unless it clearly appears they have construed it correctly.

A levy upon property leased for the debts of the lessor, without any fault on the part of the lessee, or any agreement on his part to pay them, will excuse the latter from performance of his covenants to manage such property, after it is so taken.

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

COVENANT BROKEN. The pleadings were the general issue, and a special plea by leave of Court in excuse and avoidance.

The instrument on which the suit was founded was a lease, dated in June, 1852, to the defendant, of the real and personal property of plaintiffs', at Cape Elizabeth, for three years, on the condition that he should perform all his covenants in the lease.

The covenants of the lessee were, that he should immediately commence operations on the company's works in digging, preparing and forwarding to market and selling the peat, on the lands of the company, for the purposes of a deodoriser and fertiliser and also for fuel; that he would make such advances of money as might be necessary to keep said works in efficient operation, up to the full extent of the capacity of such works as were then on hand, and such greater extent as in his judgment would be mutually advantageous to himself and the company; that he would keep an accurate account of sales and expenses open to the directors; and that he would pay over to the treasurer one-half part of all the nett profits of the sales and operations, which should be estimated as follows:—

First, an inventory shall be taken of all the peat now on hand, whether manufactured as deodoriser or partly manufactured, to be appraised by a committee of the board of directors, the basis of said appraisal to be *pro rata* what it shall cost the said Buzzell to produce the same amount, and the said Buzzell to account upon the sale of the same, as well as for one-half of the nett profits made on the sale over and above its present value.

Second, an inventory shall be taken of all the other personal property now in possession of the company and an appraisal of its value, and the said Buzzell to return the same at the end of the lease in like good order and condition, excepting reasonable use, or to account for the value thereof.

Third, after reimbursing himself for expenses, to pay over monthly one-half the nett profits over the cost of manufacture, transportation and sales.

The plaintiffs introduced their records, showing the appointment of one Buzzell and Rich, as a committee to take the inventory and appraise the property.

They then offered an inventory and appraisal made by that committee of all the personal property, both peat and other property, amounting to over $2400. This was objected to by defendant, but was admitted.

The plaintiffs also offered evidence showing, that the company were largely indebted prior to the making of the lease, and that defendant knew it, and that defendant had sold the peat on hand and had made no return of his proceedings in any manner to the company, and had not restored to them the personal property or paid them any money.

It was in evidence, that the defendant did nothing to the premises in 1853, but rented a part of the upland for $25, and came back in the fall and gathered the cranberries.

Defendant showed by the records of the county, that all of plaintiffs' real estate was under attachment prior to the execution of the lease, and that a large portion of it with the buildings were set off on execution, Dec. 9, 1852, and the remainder on other executions, June 8, 1853.

The presiding Judge in his charge, among other things, referred to the following clause in the lease, viz. that he, defendant, will immediately commence the operations at the works of said company and make such advances of money as may be necessary to keep said works in effective operation up to the full extent of the capacity of such works as now are on hand, and to such further and greater extent as may be in his judgment mutually advantageous to himself and the said company, and in connection with this clause the Judge said, that if the defendant knew the plaintiffs were owing debts at the time of making the lease, and if he agreed at the same time to pay these debts, and if by reason of his neglect to pay them the suits for their recovery matured to judgment, and executions were levied upon the property of the plaintiffs, that this would afford no such occasion for complaint as to excuse or justify a breach of his

covenants. That the subsequent breaches of covenants or agreement of the plaintiffs, would not excuse prior breaches of the defendant's covenant, but that the defendant was not answerable for breaches caused by the plaintiffs' neglect.

The jury returned a verdict for plaintiffs for $3000, and the defendant excepted to the rulings and instructions.

*H. P. & L. Deane,* for defendant.

*Sweat,* for plaintiffs.

TENNEY, J. — Certain covenants of the defendant, contained in an indenture between the parties, dated June 30, 1852, are alleged in the writ to have been broken. By the indenture a large tract of land in the town of Cape Elizabeth was leased by the plaintiffs to the defendant for the term of three years. This land was cultivated to some small extent as a farm; but a considerable portion of it was composed of peat; and it appears to have been the original design of the company to make use of the peat for fuel, and by certain processes to convert other parts of it into an article called *deodorizin,* to be used as a fertiliser of the soil. At the time of the execution of the indenture, the company had carried on its works to a considerable extent, and had on hand quantities of peat, suitable for fuel, and quantities of the same in its various stages of manufacture, as deodorizin. This the defendant was to take and dispose of according to the terms of the indenture. Various articles of machinery owned by the company, and used in their operations, and tools and other property of different descriptions were also leased to the defendant in the same indenture; and he was to carry on the operations promotive of the general object, which the company had in view when they obtained their charter.

Among other things to be done, in carrying out the purposes of the contracting parties, was the following in the indenture. — "First an inventory shall be taken of all the peat now on hand, at the works of said company, whether manufactured as *deodorizin,* or partly manufactured, or what

is merely dried and stored, or in whatever form the same may now be in. Such property to be appraised by a committee of the board of directors," &c. "Second, an inventory shall be taken of all the other personal property, now in the possession of the company, and an appraisal of its value, and the said Buzzell hereby covenants to return the same to the company at the end of this lease in like good order and condition as the same now is," &c., "or account to the company for the value thereof." It is for the alleged breach of the covenants just quoted, that the plaintiffs prosecute this suit.

A committee of the directors, duly chosen, as appears by the records, made an appraisal of the peat, in its various conditions as mentioned in the indenture, and also of all the other personal property leased by the plaintiffs to the defendants. A schedule of all these articles, with their appraised value upon the same paper, and signed by the committee, was introduced in evidence against the objection of the defendant, without further proof, as evidence, that the defendant had the articles, and also of their value. So far as this committee took the inventory of the peat, and its value, it was in pursuance of the contract in the indenture, and was unobjectionable; but it was not agreed by the parties, that the inventory of the other articles of personal property should be taken by a committee of the directors; and when the whole of the contract upon this subject is examined, we think that such a construction is inadmissible, and this part of the inventory was not competent evidence without some other proof.

In another part of the indenture, the defendant covenants, that he will immediately commence the operations at the works of said company, and make such advances of money, as may be necessary, to keep said works in efficient operation, up to the full extent of the capacity of such works as are now on hand, and to such further and greater extent, as may be in his judgment, mutually advantageous to himself and the company.

Evidence was introduced by the plaintiffs, that prior to the making of the lease, the company was largely indebted, and the matter of indebtedness was talked over before the defendant. And it was shown by records, introduced by the defendant, that all the real estate of the company was attached prior to the execution of the lease, and that a large portion of it, with the buildings thereon, was set off on an execution, Dec. 9, 1852, and the residue was set off on other executions, June 8, 1853.

The Judge in his charge to the jury referred to the part of the lease, in which the defendant agreed to make advances of money, &c., and in connection therewith said, if the defendant knew the plaintiffs were owing debts, at the time of making the lease, and if he agreed at the same time to pay these debts, and if, by reason of his neglect to pay them, the suits for their recovery matured to judgment, and executions were levied upon the property of the plaintiffs, that this would afford no such occasion for complaint, as to excuse or justify a breach of his covenants. That the subsequent breaches of covenants or agreements of the plaintiffs would not excuse prior breaches of the defendant's covenants, but that the defendant was not answerable for breaches caused by the plaintiffs' neglect.

If the Judge referred to an agreement, independent of the indenture, that the defendant was to pay debts of the company that he knew they were owing, which we presume he did not, the case furnishes no evidence that he did so agree, and there was no basis for the instruction. But if it was designed to refer to the written contract, as we doubt not it was, from the reference to the portion of the indenture, where the defendant contracted to make such advances, &c., the question was presented to the jury, whether he knew of the indebtedness of the company, and if so, whether he agreed to pay the outstanding debts or not.

It cannot be doubted that the Judge erred in submitting the last question to the jury. It was the province of the Court to give a construction to the language of the inden-

ture, and inform the jury of its true import. This instrument contains nothing which shows that the property of the company was attached on pending suits, or that the company was indebted. And when the defendant covenanted to make such advances of money as might be necessary, to keep said works in efficient operation, up to the full extent of the capacity of such works, &c., by a proper construction, these advances were to be limited to such as the works themselves in their ordinary operations, as under the contract they were to be used, would require, independent of advances, necessary to satisfy claims of creditors upon them, which if unpaid might be the cause of suspending the business undertaken by the defendant. This part of the indenture cannot reasonably be construed to mean, that the money to be advanced, should be the sum necessary to pay the debts of the company to an unknown amount, which were secured by attachments upon the real estate leased to the defendant, in addition to that required to carry out efficiently the objects of the plaintiffs under their charter.

Had the Judge given this construction to the indenture, there would have been no ground for the instruction, that if by reason of the defendant's neglect to pay these debts, the suits for their recovery matured to judgment and executions were levied upon the property of the plaintiffs, that this would not excuse or justify a breach of his covenants.

If the jury had found, that the defendant did not agree to pay the debts of the company, and this had clearly appeared in the case, it was the true construction, and the defendant is not injured by the submission of this question to the jury. But this does not appear from the case, but from the amount of the verdict, it is rather to be presumed that the jury found that he did so agree. And if the jury further found, that by neglecting to fulfil this agreement, judgments were obtained against the plaintiffs and all their real estate taken to satisfy them before the lapse of a year from the time of the execution of the indenture, they were

to hold the defendant responsible without any excuse for a breach of his obligations.

The defendant not having agreed to pay these debts of the company, but the real estate having been taken wholly by its own fault, he was early deprived of the benefit of his lease, for the works could not be carried on after the land, which was the basis of the whole contract and undertaking, passed into the hands of the company's creditors. By remaining there after the levies, he was a trespasser upon those creditors. The extent upon the land being made in consequence of indebtedness of the company, before the lease, and without his agency, and not having agreed to pay those debts or any part thereof, he was excused for an omission to perform his covenants to carry on the works afterwards, so far as the omission was the consequence of the land passing from his control.

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

# COUNTY OF YORK.

THORNTON *versus* TOWNSEND.

In an action to recover a forfeiture for a horse being allowed to go at large without a keeper, in the *highway or road*, the plaintiff may rightfully be allowed to amend his writ by striking out "*highway or*," notwithstanding the objection of defendant.

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

DEBT, to recover a forfeiture given by R. S., c. 30; tried originally before a justice of the peace, and brought up by appeal.

The writ alleged, in two counts, the defendant to be the owner and possessor of a certain ungelded male horse, of one year old and upwards, found going at large, without a keeper, in the *highway or road* in said Biddeford, as an estray.

Defendant objected that the declaration was insufficient, and that no cause of action was set forth.

A motion was made to amend by striking out the words "highway, or," which was allowed against the obje3tion of defendant.

A verdict was returned for plaintiff.

It was agreed by the counsel, "if the counts were sufficient or are amendable under objections of defendant, the verdict is to stand, otherwise a new trial is to be granted."

*Tapley*, for defendant.

The counts as originally made disclosed no cause of action. One of the offences described in the statute must distinctly be set forth. The allegation *in the highway or road* discloses no offence. Roads and highways are not the same. *Cleaves* v. *Jordan*, 34 Maine, 9.

An *estray* is an animal going at large, whose keeper is unknown. Bouvier's Law Dict. Vol. 1, estray. This is repugnant to the allegation of ownership in defendants.

*Estrays* are particularly provided for in the statute.

There is no sufficient description of the place where the beast was at large. A recovery upon such a declaration would be no bar to an action when the place was particularly designated. Nor is there any description of the beast.

The amendment was improper, because a new cause of action, if any thing, was thereby allowed. As the writ stood there was none whatever, and under such circumstances no amendments are allowable.

But after the amendment, there is still no cause of action. The count reads "in the road *in* said town of Biddeford." To incur the penalty there must be a running at large in a road "*of* the town" of Biddeford. There may be many roads in that town over which they have no control. This may have been a private road. It should appear that the town had control of the road where the beast is found.

*Luques*, for plaintiff.

SHEPLEY, C. J. — The counsel do not agree respecting the questions presented by the report prepared by themselves. There can be no reasonable doubt that the intention was to present for the consideration of the Court of law what rulings were made at the trial, and nothing else. The words "are amendable," were evidently used with reference to the counts in their original condition, and not to their condition after they had been amended. Motions in arrest of judgment in civil cases, being forbidden by statute, c. 115, § 80, the Court cannot be expected to make such a construction of the language cited in the report, as would give to the defendant such an advantage.

The questions presented are whether the amendment of the first and second counts was properly permitted, and if not, whether the declaration was sufficient without amendments.

The cause of action designed to be set forth in those counts, was the right of the plaintiff to recover seventy-five cents, forfeited by the defendant as owner of a horse found

going at large without a keeper in the highways or roads of the town of Biddeford. The forfeiture would be the same and the plaintiff's right to recover the same, whether the horse were so found in the road or in a highway.

The terms road and highway not having the same meaning as used in our statutes, those counts were regarded as defective, because they did not positively allege the offence to have been committed in either. After the amendment was made, they allege it to have been committed in a road. The amendment introduced no new cause of action, and it was properly allowed. It is not therefore necessary to consider whether those counts would have been sufficient without amendments. *Judgment on the verdict.*



## POWERS *versus* INHABITANTS OF SANFORD.

Without it appears from the proceedings of a legal meeting of the members of a school district, to raise money for a specific purpose, that the majority were opposed to raising *any* sum, or a *less* sum than that proposed, there is no such disagreement as will authorize the town to assess a tax upon the district for the purpose designated. The mere refusal to vote for one sum named will not confer jurisdiction upon the town.

Thus a tax assessed upon the polls and estates of the members of a school district, by authority of the town, where no *such disagreement* appeared, is unauthorized and void.

And a member of such district whose property is taken to pay such illegal tax, may recover it back of the *town*.

Such action would only lie against the *district* where it was proved that the tax had been received and applied to the use of its members.

By c. 14, § 56, as amended, the assessors of towns who are required to assess any tax upon a school district are liable only for their own personal faithfulness and integrity, and further liabilities, if any, shall rest solely with such *school district*.

This enactment imposes no responsibility upon the district, for the errors committed by the town.

ON REPORT from *Nisi Prius*.

ASSUMPSIT.

The plaintiff's property was taken and sold for a tax

assessed against him, under a warrant from the assessors of Sanford.

He was an inhabitant of School District No. 5, in Sanford, and was assessed for his poll and estate to the amount of $27,31, and refused to pay it.

At a meeting of that district, called on March 19, 1851, under an appropriate article in the warrant was this vote: "Second, on motion, voted to see if they would raise the sum of three hundred dollars to defray the expenses of building a school house in said district the present year. Nine in favor and nine against."

Other articles as to the building and location of a school house received a similar vote.

Within thirty days after this meeting, more than five voters of the district made application in writing to the selectmen, to insert in the warrant calling the next annual meeting of said town, an article requiring the opinion of the town on the subject of the said disagreement.

In the warrant for the next annual meeting, was this article:—"To see if the town will grant the petition of Geo. Chadbourne and others, requiring the opinion of the town on this subject of disagreement, as to raising money for the erection and building a school house for School District No. 5, in said town, and that said town may take such action as law and justice shall appertain."

Under this article the town "voted to raise $250,00 on School District No. 5, in Sanford, to build a school house in said district.

The assessment was made in pursuance of this vote, and no question arose as to the time of making it or demand of the taxes, nor that plaintiff demanded it of the treasurer of the town while the money was in his hands.

If the action could be maintained, defendant was to be defaulted for $27,81, and interest and costs; if not, plaintiff to become nonsuit.

*Eastman & Leland,* for defendants.

1. The town were empowered to assess this tax by virtue

of the school district proceedings of March 19. Ch. 193 of laws of 1850, art. 2, § 12.

The requirement to appoint in writing three suitable men of the district, a committee to superintend the expenditure, is merely *directory*. If the tax is properly assessed, an omission of the latter requirement will not make the previous act void.

2. The money raised in the case at bar, was not raised, collected or appropriated to the use of the *town* in its corporate capacity. The town was the mere trustee of the money thus raised. Ch. 193 of Acts of 1850, art. 3, § 7.

The duties required of towns in cases of this character are merely *ministerial*. *Perry* v. *Dover*, 12 Pick. 206.

3. But if there are irregularities in the proceedings, no action can be maintained against the town; the remedy, if any, is against the school district. *Perry* v. *Dover*, above; *Little* v. *Merrill*, 10 Pick. 543; *Gage* v. *Currier & al.*, 4 Pick. 399; *Inglee* v. *Bosworth & al.*, 5 Pick. 498; *Trafton* v. *Alfred*, 15 Maine, 258; *Soper* v. *Livermore*, 28 Maine, 193; *Tucker* v. *Wentworth*, 35 Maine, 393; *Taft* v. *Wood*, 14 Pick. 362.

*Kimball*, with whom was *N. D. Appleton*, for plaintiff, that the action was properly brought against the town, cited R. S., c. 14, § 56; *Stetson* v. *Kempton*, 13 Mass. 272; *Sumner* v. 1*st Parish in Dorchester*, 4 Pick. 363; *Nelson* v. *Milford*, 7 Pick. 26; *Perry* v. *Dover*, 12 Pick. 206; *Little* v. *Merrill*, 10 Pick. 543.

That the vote of the town was unauthorized and illegal. Ch. 193 of Acts of 1850, art. 2, § 12. It did not appear the town had jurisdiction. There was no subject of *disagreement* presented.

SHEPLEY, C. J. — In a meeting of the voters of school district No. 5, in Sanford, holden on March 19, 1851, called by virtue of a warrant containing articles to see if they would build a school-house the present year, and to see if they would raise a sufficient sum of money to defray the

expenses of building it, a motion appears to have been made to raise the sum of $300 for that purpose, upon which there was an equal division.

When at a legal meeting of a school district called for raising money for any particular purpose, "a majority of the legal voters present shall be opposed to the raising of any sum of money deemed by the minority sufficient for that purpose," the selectmen of the town upon a proper application, are by statute required to insert in their warrant for calling the next town meeting on town affairs, an article requiring the opinion of the town on the subject of disagreement in the district. "And if the town at such meeting shall think it necessary or expedient, they may require a sum sufficient for the purpose aforesaid, if exceeding what said district were willing to raise, to be assessed on the polls and estates in such district." Act of 1850, c. 193, § 12, art. 2.

The opinion of the town is to be required "on the subject of disagreement, * * * * for raising money for any particular purpose." The only disagreement in the district respecting raising money, was upon a motion made to raise $300. There does not appear to have been any vote or disagreement, whether $250, or any other sum less than $300 should be raised.

The town is not authorized by the statute to act except by way of appeal, and upon a question on which the district has acted. The town in such case may require a sum to be assessed, which it may deem sufficient, although it may exceed the amount which the district was willing to raise. If by its refusal to raise a smaller sum an inference might be drawn that it had also refused to raise any larger sum than the town deemed expedient; a refusal to raise a larger sum would not authorize an inference, that it had refused to raise any less sum.

It does not appear in this case to have been the subject of disagreement in the district, whether any sum less than

$300 should be raised. Nor does it appear, that the district refused to raise any sum whatever.

The town does not therefore appear to have acted upon any subject of disagreement in the district, and its acts in requiring an assessment of $250 were unauthorized and illegal. It does not appear from the article inserted in the warrant for calling the town meeting, what the disagreement in the district was, upon which the opinion of the town was required.

It having been illegally raised and assessed, not by the district, but by the authority of the town, the money never became the property of the district. It was not held by the town or its treasurer as the property of the district. No action could be maintained against the district to recover any part of it without proof that it had been received and applied to its use.

By the provisions of the statute, c. 14, § 56, as amended, the assessors of a town, who are required to assess a tax upon a school district, are exempted from any personal liability, when they act with faithfulness and integrity; and any further liability is to rest solely upon the district. But this does not exempt the town from liability incurred by its own acts, or make the district liable for the errors of the town.

Nor does the case of *Trafton* v. *Alfred*, 15 Maine, 258, or that of *Perry* v. *Dover*, 12 Pick. 206, decide, that an action could not be maintained against a town upon facts similar to those presented in this case. In each of those cases the money was raised by vote of the district; and the assessors of the town made the assessment upon presentation of a certificate of the clerk of the district. The town had not voted to raise the money; and it was not assessed or collected by authority derived from it.

*Defendants defaulted.*

39 188
43 367
61 510
71 276

## MANUFACTURERS' BANK *versus* COLE.

Upon a promissory note made payable to the president, directors and company of a bank, or their order, which was never discounted or negotiated by the bank, but which was sold by the principal to a third person, no action can be maintained by the holder against the *surety* thereon, although the bank authorize a suit to be prosecuted in their name.

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

ASSUMPSIT, to recover the amount of a note of hand of $100, on four months, signed by one Greenleaf as principal, and the defendant as surety, payable to the plaintiff bank or order.

The principal applied to the defendant to sign a note with him to the bank for $75, to raise money, with which to purchase lumber. Greenleaf being indebted to defendant and his partner, he proposed to make the note for $100, and that $25 of it should be paid towards the store debt against Greenleaf, which was agreed to.

Greenleaf owed one Albert A. Day $22, and on the day of the date of the note carried it to him, saying that he wished to get the money on it, and to pay his bill, and that he could not get into the bank. Day deducted the amount of his bill, paid him the balance in money, and took the note.

Greenleaf had presented the note to the bank for discount which had been refused. After Greenleaf failed, the defendant called at the bank to see if the note was there, and not finding it, requested them not to take such a note.

The bank never had any interest in the note, but at the request of the counsel for Day, voted to authorize him to prosecute a suit, in the name of the bank, on said note.

It was agreed, that the Court might enter such judgment as the rights of the parties required.

*Goodwin*, with whom was *J. Shepley*, for defendant, cited *Woodford & ux.* v. *Darwin*, 3 Verm. 82; Chitty on Bills, 187, note 1; *Chamberlain* v. *Hoff*, 8 Verm. 94; *Camp* v. *Tompkins*, 9 Conn. 545; *Bennett* v. *Pownell*, 1 Camp. 130

and note; *Adams Bank* v. *Jones*, 16 Pick. 574; *Allen & al.* v. *Ayer & al.* 3 Pick. 298; *Starrett* v. *Barber*, 20 Maine, 457; 3 U. S. Dig. 278, § 558; *Bank Chenango* v. *Hyde*, 4 Cowen. 567.

*Eastman & Leland*, for plaintiff. Upon whom the loss should fall in this case, the principal having failed, they cited *Lickbarrow* v. *Mason*, 2 Term R. 63. That the action was maintainable, they also cited *Bradford* v. *Buckman*, 3 Fairf. 15; *Harriman* v. *Hill*, 14 Maine, 127; *Starrett* v. *Barber*, 20 Maine, 457; *Lime Rock Bank* v. *Macomber*, 29 Maine, 564; *Cross* v. *Rowe & als.*, 2 Fos. 77; *Elliott* v. *Abbott*, 12 N. H. 549; *Bank of Chenango* v. *Hyde*, 4 Cowen, 567; *Powell* v. *Waters*, 17 John. 176; *Thompson* v. *Armstrong*, 5 Ala. 383; *Com. Bank* v. *Claibourne*, 5 Howard, 301; *Trible* v. *Bank of Grenada*, 2 Smedes & Mar. 523.

RICE, J. — It is contended by the counsel for the plaintiff, that the note in suit was made for the purpose of raising money, and therefore it is immaterial to the defendant, who is surety thereon, of whom the money was obtained; to whom the note was delivered, or in whose name the action is brought, or whether the plaintiff now has, or has ever had any legal or equitable interest therein.

To sustain this position reliance is placed upon that principle of law which authorizes an assignee to use the name of his assignor, when it is necessary to enforce equitable rights which would otherwise be lost.

Cases are cited by the plaintiff, to show that the principle is applicable to the case at bar. Some of these cases will be noticed.

The case of *Harriman* v. *Hill*, 14 Maine, 127, was sustained by the Court, upon the ground that the plaintiff in interest, was the assignee of the nominal plaintiff, and though the note then in suit was taken, perhaps unnecessarily, in the name of the nominal plaintiff, by an officer in adjusting the demand which had been originally assigned, yet as the proceeding was in good faith, and not prejudicial

to the just rights of the defendant, the Court held, that the nominal plaintiff, whose rights were not endangered, should not interfere to the destruction of the equitable rights of his assignee.

In *Starrett* v. *Barber & al.*, 20 Maine, 456, which was an action in the name of Starrett, the payee of the note, for the benefit of one Davis, to whom it had been negotiated, the jury were instructed that if it was the understanding between Barber and the sureties, at the time of the making of the note, that it was to be thrown into the market, and used generally for the purpose of raising money, Barber had a right to dispose of it as he chose, and the parties would be bound. Under these instructions the verdict was for the plaintiff.

In *Lime Rock Bank* v. *Macomber*, 29 Maine, 564, the note in suit was made payable to the bank, but for the benefit of one Williams, under an agreement between him and the defendant, that the bank should hold the property as the trustee of Williams, for whose use the action was brought.

It will be observed that in each of the above cases, the defendants, either expressly or by necessary implication, consented to the disposition which was actually made of the notes to which they were parties.

In *Powell* v. *Waters*, 17 John. 176, the note was payable *at* the bank of Newburg *to* the defendant, and by him indorsed.

In *Thompson* v. *Armstrong*, 5 Ala. 383, the promise was to pay Andrew Armstrong, Esq., cashier, or bearer, *at* the Branch of the Bank of the State of Alabama, at Mobile.

In *Com. Bank of Natchez* v. *Claibourne & al.*, 5 How. Miss. 301, the note was payable to the plaintiff bank, but was discounted by one Briggs, the bank having no interest therein. The action was sustained. The Court remarked, "this was an accommodation note. In this respect it is to be considered a letter of credit, for the amount specified on its face, and is consequently valid and binding against

the makers, in the hands of any holder who comes fairly to the possession of it for a *bona fide* consideration."

In the case of *Chenango Bank* v. *Hyde & als.*, the note was made payable to the bank, but not being in proper form the bank refused to discount it. The money was then advanced at the bank by Birdsoll, with the agreement that the note should be delivered to the bank to be retained, as the agent of, and as security to Birdsoll for the money advanced by him, and another note was to be made, which was designed to be discounted by the bank, and from the proceeds Birdsoll was to be paid. This transaction appears to have occurred in presence of the officers of the bank. The new note was never executed. Under these circumstances the Court held that Birdsoll was entitled to recover in the name of the bank.

In *Cross* v. *Rowe*, 2 Fost. N. H. 77, the note was originally payable to the South Berwick Bank, or order, and was intended to be discounted for the benefit of Cross, to pay for a horse which he had sold to Rowe. But the bank refused to discount the note, and it was received by Cross in payment for the horse, instead of the money. After it fell due, and not being paid, the bank, on being indemnified, indorsed the note to Cross, who brought an action thereon.

Upon this note the Court remarked, "its design has not been perverted to the injury of any one of the signers, nor has it been put to any purpose that can properly be regarded as a change from its original intent."

In the case of *Clinton Bank* for use of *Rhodes* v. *Ayer & al.*, 16 Ohio, 282, one Niel signed a note for six hundred dollars as surety for Ayer, payable to the Clinton Bank or order. The bank refused to discount the note, and Ayer turned it over to Rhodes in payment of a preëxisting debt, without the knowledge of Niel. Upon that note an action was brought in the name of the bank for the benefit of Rhodes. The Court held that the action could not be maintained. The Court say, "we are of opinion that the New York case, (above cited,) is not sustainable upon prin-

ciple. Niel might be willing to become surety for Ayer to the Clinton Bank, when he would be utterly unwilling to have his note in the hands of Rhodes. He might be willing to aid him in procuring a loan for ready cash, when he would have been unwilling to become surety for an old debt. If the note was a letter of credit in any sense, it was a letter filled up and directed to a particular person, and no one had a right to advance any credit upon it but the person to whom it was addressed. Niel agreed to become surety to no one else. The note had not been negotiated. It had not in fact acquired a commercial character, and there is nothing in the case to bring it within the law merchant."

The principles laid down in the above extracts from the opinion of the Court are sound, and apposite, and apply to the case at bar.

The principles of the above case are also sustained in *Allen* v. *Ayer*, 3 Pick. 298, and *Adams Bank* v. *Jones*, 16 Pick. 574.

In the case at bar, the note was not only payable to the Manufacturers' Bank, but it was to be discounted for a specific purpose, and part of the proceeds were to be appropriated to the payment of a debt due to a firm of which the defendant was a member. He might well be willing to become surety on a note payable to a bank, to enable Greenleaf to raise money to prosecute a new business, and to pay an existing debt to his firm, when he would be unwilling to become a party to a note to be sold in the market, to pay other old debts of Greenleaf, or to raise money for him for other purposes. From the fact that the defendant was willing to become surety to a particular party, to raise money for particular objects, it would be unreasonable to infer that he consented to assume a general liability to any party, and for any purpose. The Court cannot say that it was immaterial to the defendant to whom the note was delivered, or for what purpose it was used.

The liability of a surety is not to be extended by implication, beyond the very terms of his contract. It is not sufficient that he sustain no injury by the change in the contract or that it may be for his benefit. He has a right to stand upon the very terms of his contract, and any variation without his consent is fatal. *Miller* v. *Stuart*, 9 Wheat. 703.

Indorsers and sureties are not bound by any new contract prejudicial to them, to which they are not parties. *Cross* v. *Rowe*, 2 Fost. 77.

The note was never discounted by the bank, and consequently there never was any valid contract between them and the maker thereof. *Adams Bank* v. *Jones*, 16 Pick. 574.

It was diverted by Greenleaf from the purposes for which it was executed by the defendant, without his consent. Thus to divert it was fraudulent on the part of Greenleaf. 16 Pick. 574.

It did not come into the hands of Day by a proper transfer, and in the regular course of business. He therefore took it at his peril, subject to all its infirmities, and to every existing and legal defence. There has been no such delivery to Day as will create any privity of contract between him and Cole, without the consent of the latter, and there is nothing in the case from which such consent can be inferred.

*A nonsuit must be entered.*

39 193
46 485
46 523
39 193
85 281

## Bryant *versus* Inhabitants of Biddeford.

Whether alleged obstructions or defects in a highway render it unsafe, although not in the traveled part of it, is for the consideration of the jury.

And in determining its safety, the *width* of the way, is, under some circumstances, an essential element.

Whether in some particular localities the highway should not be made *safe and convenient* for its *entire width*, is a question for the jury to determine.

The Sabbath, as established by statute, commences at midnight preceding, and ends at sunset on the Lord's day.

Traveling *after* sunset on that day is not illegal.

Nor is it any defence in an action for damages against a town, for injuries to plaintiff's horse by a defect in one of their highways, received *after* sunset on the Sabbath day, that the plaintiff let his horse on *Sunday*, and at the time of the injury the horse was being used under such contract.

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

CASE, to recover damages to plaintiff's horse and chaise, by reason of a defect in a road or way in the town of Biddeford.

The general issue was pleaded.

The defence was that the place of the accident was not that part of the highway the town were bound to keep in repair; nor were the town liable in any event, the plaintiff having let his horse and chaise on Sunday, and the injury being suffered during the letting under that contract.

It appeared that the plaintiff, on Sunday, Oct. 3, 1852, let his horse and chaise to one Wakefield, to go from Kennebunk to Saco, and back that night, without specifying the hour he should return; and that on the same evening, between six and seven o'clock, in going from the Biddeford house out into Main street, in the direction of the depot, the horse fell into a hole in a culvert, and broke his back and injured the chaise.

The street from the Biddeford house to Main street, was called Chesnut street, and was built by the Saco Water Power Company, six or seven years previously. The place of the accident was in the culvert where it intersected with Main street, and was made by the Saco Water Power Co.

The evidence tended to show that the traveled part of Main street at that place was forty one feet wide, and the defect was fifteen feet from the nearest part of it, but was about thirteen feet within the exterior line of Main street.

The instructions to the jury were, *that* there did not appear to be any testimony to prove that Chesnut street had been legally laid out as a town way, or as a highway, and if the town had not expended any money upon it, it would be under no legal obligation to keep it in repair; *that*, if

satisfied the Saco Water Power Company had laid out and dedicated it to the public use, the town would not thereby become liable to repair it, unless it had in some way accepted or adopted it as a way; *that* the burdens of the town and its liabilities could not be increased or varied by the acts of the Saco Water Power Co. without its consent; *that* they would consider whether the culvert was within the limits of Main street, and whether if within its limits the street was made sufficiently wide and smooth to be safe and convenient for travel, being regarded as unaffected by the opening of Chesnut street; *that* there might be places in our towns and villages, where it might be the duty of towns to make a street or road safe and convenient for travel over the whole width as laid out, as where one or more streets cross each other, or in public places; whether the one now under consideration was such a place, they would judge:—*that*, if satisfied the injury was occasioned on Sunday, after sunset, the fact that the plaintiff had let the horse and chaise, and it had been used during an earlier part of that day, would not prevent a recovery if otherwise entitled.

The jury returned a verdict for plaintiff.

The defendants excepted, and also filed a motion to set aside the verdict as against the evidence.

*Luques,* in support of the motion, cited *Smith* v. *Inhabitants of Wendell,* 7 Cush. 498; *Shephardson* v. *Colerain,* 13 Met. 55, and contended that the last clause of the instructions was erroneous. R. S., c. 160, § 26.

The letting the horse was a matter of business, and traveling upon Sunday by Wakefield was unlawful, unless from "necessity or charity," which plaintiff has failed to show. *Bosworth* v. *Inhab'ts of Swansey,* 10 Met. 363.

The plaintiff must be free of all negligence or fault to maintain this action. *Smith* v. *Smith,* 2 Pick. 621; *Howard* v. *North Bridgewater,* 16 Pick. 189. The act of plaintiff, in doing which the accident occurred, was unlawful, and no person can seek assistance of the law who founds his claim upon a contravention of the law. *Pattee* v. *Greeley,* 13 Met. 284; *Gregg* v. *Wyman & al.,* 4 Cush. 322.

*Bourne, contra,* cited *Baldwin* v. *City of Bangor,* 36 Maine, 518; *Church* v. *Cherryfield,* 33 Maine, 460; *Cassedy* v. *Stockbridge,* 21 Verm. 391; *Snow* v. *Adams,* 1 Cush. 443; *Cobb* v. *Standish,* 14 Maine, 198; *Cogswell* v. *Lexington,* 4 Cush. 307. He also contended that the case of *Gregg* v. *Wyman & al.* did not apply to this case.

APPLETON, J. — The instructions "that there did not appear to be any testimony to prove that Chesnut street had been legally laid out as a town or as a highway, and if the town had not expended any money upon it, it would be under no obligation to keep it in repair; that if satisfied the Saco Water Power Company had laid out and dedicated it to the public use, the town would not thereby become liable to repair it, unless it had in some way accepted or adopted it as a way; that the burden of the town and its liabilities could not be varied by the acts of the Water Power Company without its consent;" were in all respects as favorable to the defendants in any aspect of the cause, as they had any right to claim, and therefore furnish no just ground of complaint.

It was held in *Smith* v. *Wendell,* 7 Cush. 498, that towns are not liable for such obstructions on portions of the highway not constituting the traveled path, and not so connected with it that they affect the security or convenience for travel of those using it. It is for the jury to determine whether the alleged obstructions or defects do in fact render the highway unsafe.

The width of the road is a matter especially for the determination of the constituted authorities to whose charge this matter is entrusted. *Baldwin* v. *Bangor,* 36 Maine, 518. Where the existence of a road is proved by its user alone, the width of the road, whether co-extensive only with the actual travel, or extending to the fences on each side, is a matter for the jury. *Lawrence* v. *Mt. Vernon,* 35 Maine, 100. Whatever may be the width of the road, it is for the jury to determine whether at a given time and place

it is safe and convenient. The town is liable for injuries occasioned by obstructions in a highway, though not on the traveled path, whether placed there by the owner of the soil or by others. *Snow* v. *Adams*, 1 Cush. 442; *Coggswell* v. *Lexington*, 4 Cush. 308; *Cobb* v. *Standish*, 14 Maine, 198. So the width of the part prepared for travel is a most essential element in determining its safety and convenience. A width, which under some circumstances would meet all the exigencies of the public, might under a change of circumstances be entirely insufficient for that purpose.

The jury were directed to find "whether the culvert was within the limits of Main street and whether, if within its limits, the street was made sufficiently wide and smooth to be safe and convenient for travel, *being regarded as unaffected by the opening of Chesnut street;* that there might be places in our towns and villages, where it might be the duty of towns to make a street or road safe and convenient for travel over the whole width laid out, as where one or more streets cross or in public places; whether the one now under consideration was such a place, they would judge." These instructions are in entire conformity with the law as established in *Smith* v. *Wendell*, 7 Cush. 498, and in *Shepardson* v. *Colerain*, 13 Met. 55, which have been cited in the defence. They are clear and precise and accurately define the legal liabilities of the defendants. If the defendants are held liable, it is because, under such instructions, the jury have found that the road was not "safe and convenient" at the place where the injury of which the plaintiff complains, was occasioned.

It was held in *Bosworth* v. *Swansey*, 10 Met. 363, that a person who travels on the Lord's day, neither from necessity nor charity, could not maintain an action against a town for an injury received by him while so traveling, by reason of a defect in a highway which the town was by law obliged to keep in good repair. By R. S., c. 160, § 28, the Lord's day, so far as relates to the prohibition "to travel or do any work, labor, or business on that day, works

of necessity or charity excepted," includes "the time between the midnight preceding and the sun's setting of the same day." In the case of *Bosworth* v. *Swansey*, the plaintiff was traveling in the forenoon of the Lord's day, in direct and open violation of the laws of the State. In the present case, the bailee of the plaintiff was not traveling on the Lord's day as defined by law, nor was he, at the time when the injury occurred, traveling in contravention of the laws of this State.

The verdict of the jury must be regarded as having established the following facts: that the plaintiff's horse was injured while passing over a road which the defendants were bound to keep in repair, in consequence of its defective and unsafe condition, and without fault or neglect of the person driving; that the horse was driven with ordinary and common care, and that the injury was done at a time when all might lawfully travel over the road in question.

It is immaterial to the defendants whether the horse when injured, was driven by the plaintiff or some one else. It only concerns them that it should be driven by a careful and prudent driver. The time when the injury happened was not on the legal Sabbath, it being no more against the law to travel after the sunset of that day than on any day in the week. The defence is that the plaintiff, having loaned his horse on the Lord's day as established by law, cannot recover for any injury to the same during that bailment, because the contract of bailment, having been made on the Lord's day, was illegal and void. The proposition relied upon, is, that when property is bailed on the Sabbath, the owner cannot claim the protection of the law for any injury it may receive on the following Monday, or any other day during the continuance of the bailment, because the property bailed was originally taken under a contract, which the law declares null. The defendants have by their neglect occasioned a loss to the plaintiff, at a time and under circumstances which would render them liable to respond in damages to any other citizen of the State, who might have

been traveling there at the time. To an injury arising solely from their neglect, they interpose as a bar an antecedent void contract with which they have no connection whatsoever. When the injury happened no law was being violated. Nor is the plaintiff to be placed without the protection of the law because he may at some previous time have made a contract which it refuses to lend its aid in enforcing. If the contract of bailment was void, no rights could be acquired under it. To set it up in defence, is to rely upon it as a valid contract, which the law declares it is not. A void contract is to be so far regarded as subsisting, that its very invalidity is to be made to constitute a valid defence to parties in the wrong. Such a proposition is as devoid of law as it is destitute of logical consistency.

The learned counsel for the defence places great reliance upon the case of *Gregg* v. *Wyman*, 4 Cush. 322, where it was held that if the owner of a horse knowingly lets him on the Lord's day, to be driven to a particular place, but not for purposes of necessity or charity, and the hirer injures the horse by immoderate driving, in consequence of which he afterwards dies, the owner could not maintain an action against the hirer for such injury, though it was occasioned in going to a different place and beyond the limits specified in the contract. The authority of this case has been denied by Mr. Justice PERLEY, in a learned and elaborate opinion in *Woodman* v. *Hubbard*, 5 Foster, 67, where the directly contrary doctrine was held to be law. In the present case however, it does not become necessary, in this judicial conflict of authorities, to determine what, upon the particular point in those cases, may be the law in this State, inasmuch as the principles there decided are not perceived to have any important bearing upon the rights of the parties now before us.

In the case of *Gregg* v. *Wyman*, the suit was between the parties to a contract which the law declared void. Such is not the case here.

It is argued that "the plaintiff's own illegal act forms one

link in his chain of title; that is a defective link, which cannot hold the chain together, and the whole must fail." But the bailment, whether valid or invalid, constitutes no link in the chain of facts upon which his right to recover must depend. His right to recover is in no way connected with the inquiry whether the driver was bailee or not. It equally exists in either event, if the horse was prudently driven and the other facts necessary to establish his cause are satisfactorily proved.

The instruction therefore, that "if satisfied the injury was occasioned on Sunday after sunset, the fact that the plaintiff had let the horse and chaise and it had been used during an earlier part of that day, would not prevent a recovery, if otherwise entitled," was in entire conformity with the law as applicable to the facts of the case.

This cause was submitted to a jury with clear and accurate instructions as to the law. The facts were peculiarly for their consideration. There is nothing indicating intentional misconduct or such gross error on their part as seems imperatively to call for our interference.

*Exceptions and motion overruled.*

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NEWBEGIN *versus* LANGLEY *& al.*

A conveyance of land and a mortgage back to secure payment of the consideration, constitute but one contract; and if the mortgage is void the other deed must be void also.

Thus, where the demandant conveyed a tract of land to a *married woman*, and for it received her note with her mortgage of the same premises to secure its payment, he is entitled to recover possession of the land, the note and mortgage being void.

*Non tenure* can only be pleaded in *abatement*, and within the time prescribed by the rules of Court.

ON REPORT.

WRIT OF ENTRY.

The defendants pleaded the general issue, and, by brief statement, Jane C. Langley alleged that, at the time of the

execution of the mortgage deed, she was, and, at the time of the trial, continued to be a married woman, the wife of Robert Langley, and that the premises are her own freehold.

Hiram Cole, the other defendant, by way of brief statement, alleged that Jane C. Langley was the lawful owner of the premises, and that he was her lessee and tenant.

The premises were conveyed by demandant to Jane C. Langley, one of the defendants, on Feb. 27, 1851, and by her reconveyed to him in mortgage, on April 5, 1851, to secure her note for the same. The deed was delivered at the execution of the mortgage.

At the time this mortgage was made, Jane C. Langley was a married woman, and so remains; and the evidence tended to show that the demandant knew it.

The case was submitted to the full Court for a decision.

*Emery & Loring*, for tenant.

1. The plea of coverture is maintained.

2. A contract cannot be rescinded excepting in cases of fraud or palpable mistakes. *Thompson* v. *Jackson*, 3 Rand. 504; *Cross* v. *Peters*, 1 Maine, 376.

3. Want or failure of consideration, cannot in a Court of law be shown in avoidance of a deed. *Taylor* v. *King*, 6 Munf. 358; *Vroom* v. *Phelps*, 2 Johns. 177; and same, 179, in note; *Green* v. *Thomas*, 11 Maine, 318.

4. There is no failure of consideration in this case. The note is not denied or avoided. *Grant* v. *Townsend*, 2 Denio, 336.

5. The Court has no power to set aside the deed from plaintiff to tenant, no fraud or mistake being alleged.

*J. M. Goodwin*, for demandant.

1. The two deeds constitute but one instrument. *Dana* v. *Coombs*, 6 Greenl. 89; *Hubbard* v. *Cummings*, 1 Greenl. 11; *Roberts* v. *Wiggin*, 1 N. H. 73; *Bigelow* v. *Kenney*, 3 Verm. 359. If one deed is void, the other is also, as appears by the same authorities.

2. The two deeds constitute one contract, in the nature of a condition subsequent. If a married woman take real

estate upon condition, she takes it *cum onere.* Cruise, Title, B. c. 2, § 19; Law Reg., Feb. No. 1855, p. 240.

3. The deed to Mrs. Langley is void on account of mistake in fact. 2 Kent's Com. 491; Story on Cont., Title "mistake in fact."

4. As to Hiram Cole, he shows no defence. His brief statement is in the nature of a plea of *non tenure,* and can only be pleaded in abatement. Besides it was not seasonably filed.

RICE, J. — The demandant conveyed the premises, by deed dated Feb. 27, 1851, to Jane C. Langley, one of the defendants, who then was, and still is, a married woman; and said Langley re-conveyed the same, in mortgage, to the demandant, by deed dated April 5, 1851, to secure the payment of her promissory note given in payment for the premises in controversy. These deeds, though of different dates, were delivered at the same time, and in law constitute one contract. *Holbrook* v. *Finney,* 4 Mass. 566; *Hubbard* v. *Cummings,* 1 Maine, 11; *Dana* v. *Coombs,* 6 Maine, 89; *Bigelow* v. *Kinney,* 3 Vermont, 359.

These deeds became operative, if at all, from the time of their delivery. *Harrison* v. *Phillips Academy,* 12 Mass. 456; *Dana* v. *Coombs,* 6 Maine, 89.

The deed and mortgage being one contract must stand or fall together. They cannot be void in part and good in part. *Richardson* v. *Boright,* 9 Ver. 368; *Roberts* v. *Wiggin,* 1 N. H. 73, and cases above cited.

The promissory note of a married woman, in this State, at the date of this transaction, was absolutely void. *Howe* v. *Wildes,* 34 Maine, 566.

It is a general rule, (the exceptions to which do not apply in this case,) that the deeds of married women are void. 2 Bright's Husband & Wife, 38; Greenl. Cruise, Tit. Deed, c. 11, § 25; Hill. Ab't, c. 25, § 49; *Page* v. *Page,* 6 Cush. 196; *Shaw* v. *Russ,* 14 Maine, 432; *Fowler* v. *Shearer,* 7 Mass. 14.

It was suggested in the argument, by counsel for the demandant, that the two deeds might be construed as one deed upon condition *subsequent.* If they were to receive that construction, the tenants would be entitled to judgment, as the demandant exhibits no right of entry for condition broken. The whole contract is more analogous to a deed from demandant with condition *precedent* unperformed. But they do not constitute a deed upon condition, but a deed with a defeasance. Greenl. Cruise, Tit. Deed, c. 7, § 25.

Both the defendants have pleaded the general issue, with brief statements, which, though not in form, are in substance, pleas of non tenure. In all writs of entry, the defendant may plead that he is not tenant of the freehold, in abatement, but not in bar. Stat. of 1846, c. 221. These pleas cannot avail as pleas in abatement, being informal, and not having been filed within the time prescribed by the rules of Court, and they are not authorized as pleas in bar.

*The demandant must have judgment.*

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AUSTIN *versus* SMITH.

By c. 213 of Acts of 1851, it is provided that no action shall be maintained on any demand or claim which has been settled, canceled or discharged by the receipt of any sum of money less than the amount legally due thereon, or for any good or valuable consideration however small.

By the term *settled* in this Act, is meant an intention to *extinguish* the claim, and not a *liquidation* of the amount due.

Where payment of *part* only of an acknowledged debt is made, and no consideration is disclosed for an agreement to forbear to collect the amount *not paid*, an action lies to recover such balance.

ON REPORT, RICE, J., presiding.

ASSUMPSIT. The writ contained two counts, one for money had and received, the other for goods sold, money paid, &c.

The following paper signed by both parties was the evidence of plaintiff's claim: —

"Biddeford, March 12, 1852.

"I have paid twenty-five per cent. on the amount of one hundred and forty-five dollars to Mr. A. Austin, which was the amount of his claim on me, and he has consented to discharge me until I can pay the balance without distressing my family and from costs."

Evidence in favor and against defendant's ability to pay debts was received.

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

*Goodwin*, for defendant, cited c. 213 of Acts of 1851; Chitty on Bills of Exchange, 135; *Ex parte Tootle*, 4 Ves. 372; *Roberts* v. *Peake*, 1 Bar. 323; Chitty on Contracts, 821, and cases cited in note; *Lonsdale* v. *Brown*, 4 Wash. 148.

*Tapley*, for plaintiff.

The law cited on the other side, as to conditional promises, does not apply to this case. The paper introduced by plaintiff was an admission of liability. The consent to *discharge*, until defendant could pay the balance without distressing his family, was *without consideration*. It was a void agreement; defendant promised nothing.

If considered a contract, nothing was to be done but to pay the money. In such cases a declaration on the money counts is sufficient. 2 Greenl. Ev. (assumpsit.)

But the evidence shows an ability to pay.

SHEPLEY, C. J. — By the memorandum subscribed by the parties and bearing date on March 12, 1852, the defendant admits, that he was indebted to the plaintiff to the amount of $145. And the plaintiff admits, that twenty-five per cent. thereof had been paid, "and that he has consented to discharge" the defendant, until he can pay the balance without distressing his family. The word "discharge," as thus used, can mean no more than giving a day of payment for the balance, until payment could be so made.

Payment of a part received as payment of the whole of a debt would not by the common law prevent a recovery of

the amount not paid, because there would be no consideration for the discharge of that part. So in this case there is no consideration disclosed for the agreement to forbear to collect the amount not paid. The defendant suffered no injury by a payment of part of a debt, admitted to have been justly due. The plaintiff acquired no new rights, and received only part of what was due him.

It is not contended that the case comes within the provisions of the Act of 1851, c. 213, which declares, that no action shall be maintained on any demand or claim "which has been settled, canceled or discharged by the receipt of any sum of money less than the amount legally due thereon, or for any good or valuable consideration however small." By the word "settled" as thus used was not intended a liquidation or adjustment of the amount due, but such a settlement as was intended to extinguish the claim or demand. An agreement not to sue or for delay of payment is not embraced by the statute or affected by its provisions.

*Defendant defaulted.*

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PIERCE *& al. versus* ROBIE.

Where the funds of a voluntary association are put under the control and management of trustees, and are loaned to some of its members, an action may be maintained in the name of the trustees, though all the parties of record are members of the same association.

And where the trustees, who had taken a note as such, for such a loan, had been superseded by others, the latter may prosecute a suit on such note, at the request of the association, in the name of the former, and the plaintiffs of record are not authorized to release or control the suit.

But such plaintiffs of record may require indemnity against costs.

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

ASSUMPSIT, on a note signed by defendants of the following tenor:—

"Biddeford, Dec. 13, 1850.

"For value received, we, Frederic Robie as principal, and T. P. S. Deering as surety, jointly and severally promise

to pay Morris E. Palmer and William Pierce, trustees of York Tent, or their successors in office, the sum of $50, in six months after date on demand and interest."

At the time this suit was commenced, Samuel Moore and Henry H. McKenney were trustees of the York Tent, and while the action was pending, on motion of defendants, were required to indorse the writ.

The plaintiffs offered one Leonard Andrews as a witness, who was objected to as interested, being a member of the York Tent of Rechabites.

He executed a release to Moore & McKenney and also deposited $20 in Court to pay for any costs he might be subjected to. He was then allowed to testify.

It appeared that the Tent was a voluntary association where funds were raised by quarterly contributions of its members; that such associations have officers known as trustees, whose duties are to receive and manage the funds, to invest them and pass over the vouchers to their successors; that the payees of the note were trustees and members with the defendants of the association, and that Moore and McKenney were trustees at the time this suit was commenced, and that a vote had previously been passed authorizing the trustees to collect the funds due the "York Tent."

Defendant introduced a release from the plaintiffs of record of all demands due, with a request to the Court, that this suit might be discontinued, and denying that they had authorized its commencement.

The defendant requested these instructions:—*that* if the jury shall find that the release in this case by said Pierce and Palmer to said Robie was in good faith, then that it would control this suit, and that defendants would be entitled to their verdict: also *that* if they should find that the plaintiffs are joint creditors with others, of said Robie, then they had the right to release the demand, and that their release would be binding.

Defendant's requests were refused and these instructions given:—

If the jury should be satisfied of the existence of an association known by the name of the York Tent, and that said association had entrusted the management of its financial affairs, and the collection of its debts to trustees, and that, at the time this suit was commenced, Samuel Moore and Henry H. McKenney were the regularly constituted trustees of said association, and were authorized to act as the successors of Pierce and Palmer in that capacity, and that the authority of Pierce and Palmer to act as trustees had ceased, and that the note in suit was the property of the above named association, and not of Pierce and Palmer, and that said Moore and McKenney had been instructed by said association to commence and prosecute this suit against the defendant, then this action could be maintained, notwithstanding the objection of said Pierce and Palmer.

A verdict was returned for plaintiffs.

Defendant excepted to the instructions and the refusal; and also filed a motion to set aside the verdict as against the evidence and the law governing the case.

*Luques,* in support of the exceptions.

1. The plaintiffs had the right to control the suit, and their release should have been allowed to operate. The words "trustees of York Tent" being merely descriptive. *Buffum* v. *Chadwick,* 8 Mass. 103; *Clapp* v. *Day,* 2 Greenl. 305; *Moshier* v. *Allen,* 16 Mass. 450.

2. The plaintiff had at least a joint interest with others, and their release was valid unless it was fraudulent. *Loring* v. *Brackett,* 3 Pick. 403; *Eastman & al.* v. *Wright & al.,* 6 Pick. 323.

3. The note belonged to the York Tent, and the action should have been in the names of all the owners. But if the trustees can maintain the action, it should have been in the name of Moore and McKenney, who are alleged to be the "successors." *Fisher* v. *Ellis,* 3 Pick. 322.

The first request should have been complied with, and that the second should also, he cited *Bradley* v. *Boynton,*

22 Maine, 287; 3 Kent's Com. 48 and 49; Chitty on Contracts, 673.

That the instructions given as a whole were erroneous, he cited *Adams Bank* v. *Jones*, 16 Pick. 574.

*Goodwin, contra,* that the action may be maintained in name of the trustees of such an association, cited *Metcalf & al.* v. *Bruin*, 12 East, 400; *Davis* v. *Hawkins*, 3 M. & S. 488; *Bedford & al.* v. *Britton & als.*, 1 Bing. 399; *VanNess* v. *Forest*, 8 Cranch, 30; *Clapp* v. *Day*, 2 Greenl. 305; *Binney* v. *Plumley*, 5 Verm. 500; *Davont* v. *Guerard*, 1 Spear, 242; *Ingersol* v. *Cooper*, 5 Black. 426.

That the plaintiffs of record, as trustees, could not successfully object to the use of their names, he cited 1 Chit. Plead. 9; *Mountstephen* v. *Brooks*, 1 Chitty, 290; *Hickey* v. *Burt*, 7 Taunt. 49; *Innell & ux.* v. *Newman & al.*, 4 B. & Ald. 419; *Legh* v. *Legh*, 1 B. &. P., 447 and note; *Payne* v. *Rogers*, Doug. 407; *Eastman & al.* v. *Wright & al.* 6 Pick. 322; *Manning* v. *Cox*, 17 E. C. L. 87.

That the successors of plaintiffs to the trust alone could institute the suit, and they only in the name of the original payees, he cited *Ingersol* v. *Cooper*, 5 Blackf. 426; U. S. Digest, 900; *Davont* v. *Guerard*, 1 Spear, 242; Hill on Trustees, 387, note; *Clapp* v. *Day*, 2 Greenl. 305.

The instructions requested and refused were not applicable to the case and the evidence. *Jewett* v. *Lincoln & al.* 14 Maine, 116.

Exact justice has been done between the parties by the verdict under the instructions, and in such case, a new trial will not be granted on account of immaterial errors, if there are any. *Smith* v. *Richards*, 16 Maine, 200; *Kelley* v. *Merrill*, 14 Maine, 228; *Marshall* v. *Baker*, 19 Maine, 402.

Rice, J. — The "York Tent" is a benevolent, voluntary association. Its funds were raised by voluntary contribution of its members, and by the organic rules of the association, were under the exclusive management of trustees, in whose name they were invested. The plaintiffs at the

date of the note, which is payable to them, or their successors in office, were trustees of the association. The defendant, at the time the note was given, was also a member of the association and borrowed of its funds the amount of money for which the note was given. At the time this action was brought, the plaintiffs had ceased to be trustees, and were succeeded in that office by Moore and McKenney, who under instructions from the association caused this action to be brought. These facts are either conceded by the parties or found by the jury.

At a term of the Court prior to the trial, on motion of the defendant, Moore and McKenney were required to, and did indorse the writ as assignees of the note in suit.

After the action had been for some time pending in Court, the defendant procured releases from the plaintiffs of record, in which said plaintiffs disavow and disown this suit, and request that it may be discontinued, and state that they are not aware that they have assigned the note to any person.

The case is now before us on exceptions, and a motion for a new trial on the ground that the verdict is against law and evidence.

The first requested instruction was properly refused. The true question was whether the plaintiffs had a *right* to release the defendant and discharge the writ, not whether they acted in good faith. They may have acted honestly but erroneously.

It is not the duty of a Judge to give instructions upon a point purely hypothetical. Such instructions would tend to divert and distract the attention of a jury, and be productive of injury rather than benefit. Reference must always be had to the existing state of the proof, to determine whether instructions requested or given are proper or otherwise.

The funds of the association, as the evidence fully shows, were under the sole management and control of the trustees. In them was vested the *legal* title, held it is true, in trust, for the benefit of the association. That associa-

tion is neither a corporation, nor a copartnership. Its members, therefore, who are not trustees, though they may have a beneficial interest in the funds of the association, as members, are not for that reason legally the joint creditors of the defendant. The nominal plaintiffs could not therefore discharge the defendant simply because they were members of the same association. In their capacity as members they have no control over the funds.

The right of the nominal plaintiffs to control this action, if any they have, arises by virtue of their being parties. The promise was to them; and their control over this suit was absolute, unless their authority had been determined by the expiration of their term of office. The second request was therefore properly withheld.

The questions raised by the instructions given were, whether the action was properly brought in the name of the plaintiffs, and if so, whether by their release to this defendant, the action was discharged.

The note is in terms payable to the plaintiffs. The promise is to them. The conditional words, "Trustees of the York Tent," is merely *discriptio personæ*. *Innell & ux.* v. *Newman & al.* 4 B. & Ald. 419; *Binney* v. *Plumbley*, 5 Ver. 500; *Ingersoll* v. *Cooper*, 5 Blackf. 426; *Clapp* v. *Day*, 2 Maine, 305.

The jury have found that the plaintiffs of record had ceased to be trustees. With the expiration of their office their legal right to control the note expired. The note is found in the hands and under the control of Moore and McKenney, their successors in office. By the act of succession, they are to be treated, so far as a right to control the property of the "tent" is concerned, as the equitable assignees of the plaintiffs. *Ingersoll & als.* v. *Cooper*, 5 Blackf. 426. They had the possession of the note, and were exercising control and dominion over it. This is evidence of ownership. *Harriman* v. *Hill*, 14 Maine, 127.

There is no suggestion that the defendant has ever paid this note, nor that he did not receive a full consideration

therefor at its inception. On his motion, the trustees who are now prosecuting this suit have indorsed the writ as assignees, under the provisions of the statute. He was therefore secured by having a responsible party to whom he might look for his costs, if he had succeeded in his defence.

The plaintiffs of record do not suggest as a reason for desiring to discontinue this suit, any apprehension of being subjected to costs. Had that been the fact, the Court would have seen that they were amply protected from any loss. In reviewing this case, we think the remarks of the Court in the case of *Harriman* v. *Hill*, cited above, are particularly appropriate when they say, "in the case before us we are satisfied that the defence set up is without merits, and is an attempt to escape from the obligation of a promise fairly made, upon a legal and adequate consideration. And we are further satisfied, that the course taken by the nominal plaintiffs is inequitable on their part; that they are in no danger of sustaining loss or injury, and that they have nothing to gain by the suppression of this suit, or its termination in favor of the defendant."

We do not think that the case at bar is favorably distinguished, for the defendant, from the case above cited, by the consideration that he is attempting to withhold funds which he has borrowed from a charitable association, and which were accumulated by voluntary contributions for benevolent purposes, by a defence founded at best upon legal technicalities, not to designate it by any harsher name.

The Court did not err in admitting the witness Andrews. *Pond* v. *Hartwell*, 17 Pick. 272.

We do not perceive any error in the instructions given, and think the verdict is sustained by the evidence, and is in conformity with both the law and the equity of the case.

*Exceptions and motion overruled.*

*Judgment on the verdict.*

## STATE OF MAINE *versus* HOBBS.

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The twenty-sixth rule of the Court, promulgated in 1820, requiring motions in arrest of judgment to be filed within two days after the verdict was rendered, had reference only to *civil* cases. Criminal matters are exempted from its limitation.

If a *positive charge* verified by the complainant's oath, *according to the best of his knowledge and belief*, is made in the complaint before a magistrate, it will authorize him to issue his warrant to arrest thereon.

The facts disclosed on oath by a complainant, to the magistrate, to satisfy him that a warrant should be issued, need not be stated in the complaint or warrant, excepting in those cases specially required by statute.

Prosecutions on penal statutes in behalf of the State, are limited to two years after the offence has been committed, where no exception is found in the statute.

Under what circumstances judgment in criminal cases will be *arrested*.

ON EXCEPTIONS, SHEPLEY, C. J., presiding.

THIS was a complaint for unlawfully selling spirituous liquors, originally made before a justice of the peace.

The sale was alleged to have been made on March 5, 1852. The complaint was made on May 20, 1854. The justice certified that the complainant made oath to the truth of the complaint "according to the best of his knowledge and belief."

Before the justice, defendant was convicted, and appealed to the Supreme Judicial Court, where he was also convicted. He then filed a motion in arrest, for the following reasons, but it did not appear to have been done within two days after the verdict was rendered.

1. Because the complaint was not duly sworn to.

2. Because the justice did not carefully inquire into the circumstances of the case before issuing his warrant.

3. Because the warrant was issued without probable cause, supported by oath or affirmation.

4. Because the complaint is sworn to "according to the complainant's best knowledge and belief," and not positively.

5. Because it was not commenced within the time prescribed by law, after the offence charged in said complaint is therein alleged to have been committed.

This motion was overruled, and defendant excepted.

*Emery & Loring*, in support of the exceptions, for the 1st, 3d and 4th reasons, cited *Com.* v. *Phillips*, 16 Pick. 211; *Fogg* v. *Fogg & al.*, 31 Maine, 302. For the 2d and 3d, c. 48, § 11, Acts of 1853; R. S., c. 170, § 3; c. 171, § 2. For the 5th, c. 146, R. S., § § 15, 16; c. 211, § 5, Acts of 1851.

*Abbott*, Att'y General, *contra*.

SHEPLEY, C. J. — The case is presented on exceptions overruling a motion in arrest of judgment. An objection is made, that the motion was not presented within two days after verdict, as required by the twenty-sixth rule of the Court.

That rule was established at April term, 1822, when the Court for trials by jury was required to be holden by a majority of the Justices. No provision having then been made for exceptions, alleged misdirections in matters of law were presented by motion for a new trial. Motions in arrest, and for new trials coupled together, were required to be presented within two days after verdict, while by a proviso, motions for new trials for matters of law, might be presented at any time before judgment. When the rule is considered with the proviso, and with the recollection that no provision had then been made for exceptions or revisions of the law in criminal proceedings, it appears to have had reference to civil proceedings only. Such, it is believed, has been its uniform construction.

In the case of *State* v. *Soule*, 20 Maine, 19, the Court appears to have acted upon a motion in arrest made in this Court, in a case brought into it by exceptions from the District Court.

The first, third and fourth causes for arrest, have reference to the form of the oath, made in verification of the complaint.

The statute giving justices of the peace jurisdiction of offences, requires them to "carefully inquire of the com-

plainant on oath," c. 170, § 3, to satisfy the magistrate whether the person accused committed the offence. The oath and inquiry are not expected to be sufficient to insure a conviction. They are expected to present a probable cause. 1 Chitty's Crim. Law, 34. The complaint in this case contains a positive allegation, that the offence was committed by the accused. A foundation for conviction, and notice to the accused of the alleged offence, are formally presented.

In this respect it differs from the case of *Commonwealth* v. *Phillips*, 16 Pick. 211. In that case the complaint alleged only, that there was "probable cause to suspect" the accused to be guilty.

The verification of a positive charge by an oath, according to the best knowledge and belief of the party, may be sufficient, upon inquiry into the circumstances, to satisfy the justice that an offence has been committed, and it may therefore be sufficient to authorize him to issue his warrant.

The second cause assigned is also insufficient. It is not necessary that a complaint or warrant should set forth the facts, disclosed on oath to the justice of the peace, to satisfy him that it has become a duty to issue his warrant, unless the case be one in which it is required by statute, as in warrants issued for the search of dwellinghouses. The *King* v. *Wilkes*, 2 Wilson, 151.

The fifth cause assigned, is, that the prosecution was not commenced for more than two years after the offence is alleged to have been committed.

By statute c. 146, § 15, it is provided, that actions for penalties or forfeitures on a penal statute shall be brought by a person to whom given in whole or in part within one year. And by § 16, if not so prosecuted by any individual, a prosecution by suit, indictment or information may be commenced by the State within two years after the offence was committed, and not afterward. If this language were considered without reference to previous enactments, from which it was derived, it might receive a construction,

that the limitation of a prosecution to two years, did not extend to all penal statutes, but did to such only as provided for a penalty to be given in whole or in part to a private prosecutor.

The commissioners to revise the statutes refer in their report to the Act of 1821, c. 62, § 14, as containing the like provisions without any intimation of a change. That statute did contain the same provisions in substance, with a provision also, that "if any action, suit, indictment or information for any offence against any penal statute shall be brought after the time in that behalf limited, the same shall be void and of none effect." This includes prosecutions for offences against any penal statute, whether any part of the penalty be or be not given to an individual prosecutor. That provision was but a reënactment of a like provision contained in the Act of Mass., passed on June 19, 1788; and that appears to have been derived in substance from the statute 31 Eliz. c. 5, which declares, "that all actions, suits, bills, indictments or informations, which after 20 days next after the end of this session of parliament shall be had, brought, sued or exhibited for any forfeiture on any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the Queen, her heirs or successors, only shall be had, brought, sued or exhibited within two years next after the offence committed or to be committed against such act penal, and not after two years; if brought after that shall be of none effect."

The commissioners and Legislature appear to have considered, that the effect of this prohibitory clause would be preserved by the use of the words "and not afterwards," without noticing that the clause contained words making it applicable to all penal statutes, and thus relieving the preceding enactments of the absurdity now presented in them.

When the history of these enactments is noticed, there can remain little of doubt that the Legislature intended to limit all prosecutions by the State on penal statutes, to two years next after the offence has been committed.

A complaint or indictment, which alleges the offence to have been committed more than two years before the complaint is made or indictment found, is insufficient to sustain a conviction, unless the statute contains an exception preventing the operation of it upon a certain class of persons, such for example as those out of the State. In such case the judgment cannot be arrested, for there may have been proof that the person convicted came within the exception.

But if the complaint or indictment alleges the offence to have been committed more than two years before, and also that it has been committed within two years of the time of filing the complaint, or finding the indictment, and the accused be convicted, judgment cannot be arrested. For the conviction may have been upon proof of an offence within two years. The principle upon which a judgment is arrested, is, that all which has been alleged in the complaint or indictment, may be true, and may have been proved, and yet the person convicted may not have committed any offence. *The People* v. *Santvoord*, 9 Cow. 655; *State* v. *Watts*, 10 Iredell, 369; *State* v. *Rust*, 8 Black. 195.

The offence in this case appearing by the complaint to have been committed more than two years before this prosecution was commenced, and there being no exception in the statute, judgment must be arrested.

*Exceptions sustained*
*and judgment arrested.*

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50 266

HAM *& als., Petitioners for Partition, versus* HAM.

The commissioners appointed on a petition for partition, have no power to determine any question of title to any of the property embraced in their warrant, and where they have thus exceeded their authority, their report should be re-committed.

After the *interlocutory* judgment has been entered in a petition for partition, no questions can be raised by any of the tenants, as to any betterments in the common property, while that judgment remains in force.

Nor has the law been changed by the Act of 1855, c. 157, but the *rights* of the tenants in the common property must be determined now as formerly *before* the entry of the interlocutory judgment.

Whether exceptions lie to an order of the presiding Judge, directing a recommitment of the report of commissioners in partition; *quere*.

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

PETITION FOR PARTITION.

The commissioners appointed to make partition made their report, which was objected to by the petitioners, because a large and valuable barn standing on the common property, but not on that part assigned to them, was not appraised by the commissioners, it being regarded by them as the sole and exclusive property of the respondent.

The defendant offered to prove that the conclusion of the commissioners was correct, and prayed that an issue might be framed for a jury to try it, if the full Court adopt the opinion of the presiding Judge, who ordered the report to be recommitted.

To this order the respondent excepted.

*D. Goodenow* and *N. D. Appleton*, for the exceptions.

1. The interlocutory judgment only settled the right to have partition. It settles no equities between the tenants in common. The respondent could not plead any thing which did not deny the right. R. S., c. 121, § § 11, 12.

2. The commissioners are the most competent to settle any equities, arising from a separate occupation and improvement. This Court having no equity powers upon such partitions, the Legislature undoubtedly intended to change their powers to a court of law. Ch. 157 of laws of 1855.

3. It would be an useless expense to recommit the report, if under the statute of 1855, the commissioners would be authorized to do precisely what they have done. That statute gives no new rights. It may give a new mode of remedy in proceedings after the interlocutory judgment.

4. But without this statute, from the analogies of the law it was competent for the report to be made as it is.

The barn was built by the respondent on a part occupied by him exclusively, with the consent of co-tenant.

*J. Shepley, contra,* thought the power exercised by the Judge was a discretionary one, to which no exceptions would lie, but he waived the objection, and in support of the ruling, cited R. S., c. 121, and c. 145; *Tilton* v. *Palmer,* 31 Maine, 487; *Baylies* v. *Bussey,* 5 Greenl. 153; *Treat* v. *Strickland,* 23 Maine, 234; *Austin* v. *Stevens,* 24 Maine, 520; *Russell* v. *Blake,* 2 Pick. 505; *Brackett* v. *Norcross,* 1 Greenl. 89; *Liscomb* v. *Root,* 8 Pick. 376.

RICE, J. — By observing carefully the provisions of the statute relative to the partition of real estate, on petition for partition, and the acts to be performed at the different stages of the procedure, it is believed that no difficulties will be encountered, nor will any uncertainty as to the proper mode of reaching given results, arise. Section 11, and those immediately following, of c. 121, R. S., provide the manner in which the right of the petitioner to have partition, and the extent of that right, shall be tried and determined. After the rights of the parties are thus determined, the interlocutory judgment for partition is entered up, in conformity with such determination.

Section 19, of the same chapter provides, that the Court, having entered the interlocutory judgment, shall appoint three or five disinterested persons, as commissioners, to make the partition, and to set off to the petitioners the share or shares belonging to them; which shall be expressed in the warrant.

Thus it will be seen that the duties of the commissioners are plain. They are simply to make partition of the estate, assigning to the petitioners the share or shares belonging to them, *as expressed in their warrant.* They have no authority to try the question of title, or to determine what portion of the estate to be divided belongs to either party. The whole question of right is determined before their appoint-

ment, and the interlocutory judgment is the evidence of the rights of the parties.

The commissioners in this case, having erroneously undertaken to determine a question of right to a portion of the estate to be divided, therein exceeded their authority, and their report was properly recommitted for the correction of that error.

The question whether Rufus Ham is entitled to betterments made by him on that part of the common estate which he claims to have occupied in severalty, cannot be legitimately raised at this stage of the proceedings. All questions touching the *extent* of his right in the common property should have been settled before the interlocutory judgment was entered, and the Court has no power to frame an issue of fact for the determination of a jury, by which the rights of the parties can be affected while that judgment remains in force.

Nor does the Act of March 16, 1855, make any change in the law in this respect. Under that Act, the *rights* of the parties in the common property, must be determined before the interlocutory judgment is entered. The commissioners are not authorized to try and determine the questions whether there has been a sale and exclusive possession and occupation of a part of the lands or real estate to be divided by any one or more of the tenants in common, by mutual consent; nor whether improvements had been made by buildings or otherwise, by such tenant or tenants, on the parts so occupied by them, exclusively; otherwise most important controversies concerning property might be settled without giving the parties thereto the right to a trial by jury, in derogation of an important constitutional guaranty. Such, we apprehend, could not have been the intention of the Legislature.

We have not considered the question whether exceptions would properly lie in this case, such having been the desire of both parties. *Exceptions overruled.*

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## JUNKINS *versus* DOUGHTY FALLS UNION SCHOOL DISTRICT.

By R. S., c. 1, § 3, art. 3, words importing a joint authority to three or more officers, or other persons, shall be considered as giving authority to the *majority* of such officers or persons, unless it shall be otherwise expressly declared in the law giving such authority.

A committee of three or more persons duly appointed by a school district to superintend the erection of a school-house, and the laying out and expending the money raised by the district, if they employ another person to build the house, cannot maintain an action in their own names for such services, but the action must be brought by the one rendering the services to the district.

And a majority of such committee may employ *one of their own number* for such service, and unless there is fraudulent or corrupt dealing, *such person* may in his own name recover of the district the amount of his claims.

Where the district raised a certain sum of money *towards purchasing land* and *erecting a school-house* of prescribed dimensions, they can interpose no objection to a claim made against them under a contract with their committee, that a larger sum was expended by the committee, than that named in the vote.

Nor is it any defence to such a claim, that the school-house was worth no more than the money voted.

But such contractor can only recover for his own services, not for what he has paid to another for his bill against the corporation.

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

ASSUMPSIT, to recover on account annexed to plaintiff's writ.

It appeared that at a regular meeting of the defendant district, under a warrant containing appropriate articles, it was voted to purchase a lot of land and erect a school-house with suitable out-buildings; also "to raise four hundred dollars towards purchasing land and erecting school-house, out-buildings, &c." and the plaintiff and two others were chosen a committee, under the article, "to see if the district will choose a committee to decide upon the description of school-house and out-buildings necessary for the accommodation of said district, purchase or rent land whereon to locate the same, superintend the erection thereof, and of laying out and expending the money raised by said district."

The committee, after advertising for proposals to do certain work, received none, and employed the plaintiff. The

plaintiff also did work, not included in that contract, amounting to $34,38, which was approved by the committee. He also paid one Butler $18, for work and materials furnished by him in building the school-house. For these two sums this suit was brought.

Evidence of the services rendered, and of the sum paid Butler was submitted. Butler's claim was mainly for lumber furnished for the house.

The cost of the house was $506,14.

Evidence was introduced by defendants tending to show that the house was not worth more than $350.

The case was submitted to the full Court to decide upon so much of the testimony as might be legal.

*N. D. Appleton*, for defendants.

1. All of the committee should have joined in the suit. It was a *joint* committee, with one trust to perform a specific duty, and to draw the pay from a common fund by their *joint order*. Stat. 1850, c. 193, art. 2, § 9; 1 Saunders, 153; 1 Chitty's Plead. 8; *Nelson* v. *Milford*, 7 Pick. 18; *Shearman* v. *Akins*, 4 Pick. 283; *Darling* v. *Simpson*, 15 Maine, 175; *Moody* v. *Sewall*, 14 Maine, 295.

The committee cannot divide and split their accounts and subject the district to several suits. *Keyes* v. *Westford*, 17 Pick. 275: *Scammon* v. *Proprietors of Saco Meeting-house*, 1 Maine, 262.

2. It was not competent for the committee to contract with one of their number. They were *agents* to whom was confided a *personal trust*. Story on Agency, 11, 199 to 203; 2 Kent's Com. 618; 4 Kent, 438; *Mills* v. *Goodsell*, 5 Conn. 251; *Church* v. *M. Ins. Co.*, 1 Mason, 341; 4 Mass. 522; *Keyes* v. *Westford*, 17 Pick. 273.

3. They were limited in their power, and had no right to build a house more expensive than that contemplated by the district. *Davis* v. *School District in Bradford*, 24 Maine, 349.

4. The actual worth of the house was not over $350, and

the money raised by the district was ample. In any aspect the charge of $18, paid to Butler, cannot be included.

*Eastman* and *Leland*, for plaintiff.

SHEPLEY, C. J. — At a meeting of the district holden on April 26, 1851, called by virtue of a warrant containing appropriate articles, a vote appears to have been passed "to purchase land and erect a school-house and out-buildings thereon for the district." And a vote "to raise four hundred dollars towards purchasing land and erecting a school-house, out-buildings, &c." Also a vote "to have a committee of three," and "chose Haven A. Butler, Albert Junkins, Oliver Thurrell, committee."

From the testimony of Butler it appears, that the committee procured a lot, a frame for the house, and some lumber; that they then made out a specification for the building, and put up notices for proposals to build it; that no proposals were presented within the time allowed; that a person proposed to perform the work as required for $200, on condition "that the committee would become personally liable to pay him," which they declined to do; that he then agreed to perform the same work for $190; that the plaintiff was employed to perform other work, including the painting, not included in his contract, for which he presented his bill of $34,38, which was allowed by the other members of the committee.

For the recovery of that amount, and for an additional sum paid by him to Butler, this action has been commenced.

Butler states that the whole cost of the house was $506,14. The district contends, that its committee was not authorized to expend more than the $400; that the house was not worth that sum; and it interposes other objections to a recovery.

1. The first is, that all the members of the committee should have united in the suit.

Where money is jointly expended by a committee, and where they jointly enter into a contract, they should join in

an action to recover the money or to enforce the contract. Where a committee employs another person to labor for their principal, they are not obliged to commence a suit to collect the amount due to such person, and pay it to him. The person employed may, by a suit in his own name, recover of their principal the amount due to him.

Assuming that a majority of the committee might lawfully employ one of its own members to work upon the house, he would have the same right as another person to maintain a suit against the district to recover compensation for it.

2. It is insisted, that the committee could not lawfully employ one of its own members to do such work; that the trust was a personal one to be performed by all.

A majority of a committee so composed is authorized by statute to act. Ch. 1, § 3, art. 3. A majority having such authority to do what all its members might, constitutes a party capable of employing; and one of the members of the committee, not acting as such, but as an individual, constitutes another party capable of contracting or of being employed. In such case the contract is not made or the person employed by a committee attempting to make a contract or incur a liability with itself.

A committee might thus act corruptly and fraudulently, by two different members making contracts with each of the others, so that each should have a contract in the performance of the work entrusted to all. In such case their contracts would be set aside. There is in this case no proof authorizing an inference that there has been fraudulent or corrupt dealing.

3. The third objection is, that the committee were not authorized to expend more than $400.

The vote was to raise $400, "towards" purchasing land and erecting a school-house. Instead of imposing a limitation, it holds out an intimation that more might be required. The votes under which the committee acted, authorized them to procure land, and to erect a school-house upon it of certain dimensions.

4. It is objected that the house was not worth $400; and testimony is presented to prove it.

The authority conferred upon the committee, was not to erect a house and to receive for it what it might be adjudged to be, or be really worth. When, in the exercise of their authority to build, they employed a person to work upon the house, it would be wholly immaterial to his right to recover, whether the house was or not worth its cost. He entered into no contract, that it should be.

There is one item in the plaintiff's account, for which he is not entitled to recover. It is the sum of $18, paid to Butler for work and materials furnished for the house.

The plaintiff cannot pay the accounts of others against the district, and recover the amount so paid in a suit in his own name.

Deducting that amount and the amount credited, there appears to be due to the plaintiff $32,14, for which, with interest from the date of the writ, he will be entitled to judgment. *Defendants defaulted.*

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HOOPER *versus* TAYLOR.

The book of a party, containing his original entries of charges fairly and honestly made, in the regular course of his business, and at or about the time of the transactions to which they refer, with his suppletory oath, is admissible as testimony in support of the items therein.

What may be the *form* or *construction* of the book, or of what *material* it may be made, if capable of perpetuating a record thereon, is immaterial.

Thus, if such entries are *thus made* upon a slip of paper, that paper, with the suppletory oath of the party, is *competent* evidence.

Nor is it an insuperable objection to the competency of such entries, that the *quantity* and *weight* of the articles charged, are omitted.

But the nature of the charges to be supported in this manner is well defined by law, and it is well settled, that no charges for cash above forty shillings can be thus proved.

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

ASSUMPSIT. The case was referred. The referee reported, that plaintiff ought to recover eighty-two dollars in full of all demands, unless the charges contained in the paper annexed to his report, which was produced by plaintiff, as containing original entries, should be considered with the suppletory oath of plaintiff, proper and legal evidence as original entries in support of said charges, amounting, exclusive of the first charge, to the sum of one hundred and three dollars and twenty cents.

If the Court should be of opinion that the referee ought to have admitted that paper and it was legal evidence, then the plaintiff ought to recover one hundred and three dollars and twenty cents in addition to said sum of eighty-two dollars, amounting to one hundred eighty-five dollars and twenty cents; otherwise the sum of eighty-two dollars only.

The paper annexed was a small piece by itself headed thus, "In 1849, to Mr. Dimond Taylor," and contained about fifty different items, from Nov. 6, to Sept. 21, 1852. The first item was "Nov. 6, cash, $36,00." Under the different dates was charged flour, pork, tea, rice, &c., but the quantity was not specified. Among them were several items of cash, two of which were over forty shillings each.

The presiding Judge accepted the report and ordered judgment for the larger sum stated.

Exceptions were taken to this ruling.

*J. Dane, jr.*, in support of the exceptions.

1. The ruling was wrong, because the referee no where in his report gave the plaintiff a greater sum than $82,00.

2. If the referee had the right to make an alternative report, he has not in fact made such a one as to justify the judgment for the larger sum. He should have reported the facts proved by the evidence. *Kempton* v. *Stewart*, 31 Maine, 566. He gives no reason for rejecting the evidence. He submits to the Court to decide the matter of admissibility upon inspection, and therefore annexed the original

paper to his report. It does not appear that it was offered as the plaintiff's book of accounts, and he therefore rightfully rejected it.

To make the party's book admissible for any purpose, it must contain the original entries of the party made by himself; it must be an account of his daily transactions; the charges must be specific, they must denote the particular work or services charged, and the quantity, number, weight, or other distinct designation of the materials sold or furnished, and attach the value to each item. *Cogswell* v. *Dolliver*, 2 Mass. 220; *Prince, Adm'r*, v. *Smith*, 4 Mass. 458; *Mathes* v. *Robinson*, 8 Met. 270; *Gibson* v. *Bayley*, 13 Met. 538; *Eastman* v. *Moulton*, 3 N. H. 156; *Jones* v. *Jones*, 3 Foster, 223.

But there are obvious objections to the admissibility of this paper.

1. It requires explanation. The name of defendant appears indeed, but who can tell whether as creditor or debtor? Of itself it shows no indebtedness.

2. The charges are entered on one sheet of gilt edged note paper. See cases before cited.

3. It is obvious that the entries are not original entries; that is, were not made at the times they purport to have been made.

4. The articles are not charged by weight, number, or measure.

5. There are two charges among the cash items larger than can be proved in this mode. One being for $7,00 and the other for $8,00.

*Emery & Loring, contra*, cited *Cogswell* v. *Dolliver*, 2 Mass. 221; *Faxon* v. *Hollis*, 13 Mass. 427; *Prince, Adm'r*, v. *Smith*, 4 Mass. 455; *Witherell* v. *Swan*, 32 Maine, 247.

RICE, J. — This case comes before us on exceptions to the ruling of the Judge, in accepting a report of a referee. The referee stated in his report, that the plaintiff ought to recover against the defendant, eighty-two dollars, in full of all

demands, unless the *charges* contained in the paper annexed to his report, which was produced by the plaintiff, as containing original entries, should be considered, with the suppletory oath of the plaintiff, proper and legal evidence, as original entries in support of said charges, amounting, exclusive of the first charge of thirty-six dollars, to the sum of one hundred and three dollars and twenty cents. And if the Court should be of the opinion that the referee ought to have admitted said paper, as containing original entries, and legal evidence in the case, then, in the opinion of the referee, the plaintiff ought to recover the said sum of one hundred and three dollars and twenty cents, in addition to said sum of eighty-two dollars. The Court accepted the report for the largest sum.

The paper referred to, contains many charges for cash and merchandize, and among them two charges for cash, one for seven, and the other for eight dollars.

The powers of the referee in this case were unrestricted. The whole case, both as to law and fact, were submitted to his determination. It was competent for him to have admitted or rejected the testimony, according to his views of the merits of the case, and the legal rights of the parties. But he has not exercised his full powers, but has presented certain legal questions for the decision of the Court. This course was also legitimate and proper. The questions thus submitted are, substantially, whether the paper annexed to his report was competent testimony, and proper to be considered by him; and if so, whether the charges thereon could be legally established by that paper, and the suppletory oath of the party introducing it.

The rule authorizing parties to introduce their books of original entries, supported by their suppletory oath, has long prevailed in this country, and, under different degrees of strictures, is believed to be an established rule of practice in nearly every State in the Union.

This species of evidence, has not, however, ordinarily been looked upon by the Courts with much favor, but has only

been admitted when other and more satisfactory evidence could not be obtained, from the necessity of the case, and to prevent an entire failure of justice.

Some degree of uncertainty exists as to what shall be deemed *books*, within the meaning of the rule. The reason or necessity which would authorize the introduction as evidence, of the regularly kept *shop book* of the merchant or small trader, would seem to apply with equal force, at least, to the less formal *book* of the mechanic or common laborer. In practice, Courts have felt the force of this necessity. Hence, in the case of *Cogswell* v. *Dolliver*, 2 Mass. 218, the Court admitted two small memorandum books, not kept in the form of a day or waste book, which contained items of the account filed, intermixed with various charges relating to dealings with other persons, alike irregular, in whatever blank space the defendant could find, without reference to order, or to dates or pages.

In *Mathes* v. *Robinson*, 8 Met. 269, a "*time book*," kept in tabular form, with the suppletory oath of the party, was admitted to prove the number of days' labor performed by the plaintiff.

In *Smith* v. *Smith*, 4 Harrington, the plaintiff offered several scraps of paper, as his book of original entries, to sustain an action for work and labor, goods sold and delivered, &c. The Court remarked, "that long practice, and perhaps necessity, required the admission of such evidence." These scraps of paper were permitted to go to the jury, the plaintiff swearing to them, as original entries.

In *Hall* v. *Field*, 4 Harrington, the defendant offered a sheet of paper, sewed together in octavo, as his book, with his suppletory oath, which was admitted by the Court. READ, C. J., remarked, "one instance, thirty years back, occurs to me; since which I have not objected to such exhibits. It was a bit of paper about two inches square, and entered some time after the transaction, but was the only evidence, and it was admitted on argument, at Dover."

In *Rowland* v. *Burton*, 2 Har. 288, the plaintiff, (a negro)

was sworn on *voir dire*, to prove his books; when he produced, as his book of original entries, a small stick, cut and notched in various ways, by which he undertook to prove an account running through two or three years, and consisting of a large number of items. The Court permitted the stick to go before the jury, with the oath of the party that the notches were made at the time the work was done, and the plaintiff had a verdict.

This case finds that the plaintiff was fully examined on his *book*, and the accuracy of his entries tested by an account made out from it some time before. They corresponded with the exception of one item, and it was afterwards ascertained that one of the notches had been defaced by breaking the stick.

In this State, in the case of *Kendall, Adm'r*, v. *Field*, 14 Maine, 30, the plaintiff offered in evidence a shingle, on which it was proved that his intestate entered from day to day, in the woods, an account of the timber hewed by him, under a contract with the defendant, which was admitted by the Court. WESTON, C. J., in delivering the opinion of the full Court, remarked, "considering the nature of his employment, and the place where he was, and that the shingle contained daily minutes of the business in which he was engaged, we think it was legally admissible. It was a substitute for a memorandum book, which answered the purpose at the time, and was, perhaps, as little liable to obliteration or erasure, without being detected by the eye, as if made on paper. And we are of opinion that it was proper evidence to be submitted to the jury."

The principle on which this kind of evidence has been admitted is carried, in some of the cases above cited, to the utmost verge to which it can be extended, without relying entirely upon the oath of the party.

But these and other cases of a like character, clearly show, that it is not important what may be the construction or form of the book or material used, if it be capable of perpetuating a record of events, and the charges thereon are

fairly and honestly made, in the regular course of business, and at or about the time of the transaction to which they refer. Such *books*, thus kept, are competent evidence, with the suppletory oath of the party, as books of original entries.

If the referee is satisfied that the paper offered by the plaintiff, is of such a character, then it is competent evidence for his consideration. But if from the statements of the party, the nature of the charges, or the appearance of the paper itself, he is not thus satisfied, the paper should be rejected.

As was well remarked by SEWALL, J., in *Cogswell* v. *Dolliver*, "the law has prescribed no mode in which the book shall be kept to make it evidence. The question of competency must be determined by the appearance and character of the book, and all the circumstances of the case indicating that it has been kept honestly and with reasonable care and accuracy, or the reverse."

If the paper referred to be found to be admissible, on the principles already stated, is it competent evidence with the oath of the party, to prove the *charges* thereon? Without going into an examination of what may or may not be proved in this manner, it is sufficient to say, that we do not perceive any charges on that paper, which from their character may not be proved by this kind of evidence, except those items of cash which exceed forty shillings, or six dollars and sixty-six cents; that being the largest item of cash which, by the common law of Massachusetts and of this State, can be thus proved. 3 Dane's Ab. 321; *Union Bank* v. *Knapp*, 3 Pick. 96; *Dunn* v. *Whitney*, 1 Fairf. 9. The items of cash found upon that paper exceeding $6,66, cannot therefore be proved by the book and suppletory oath of the party, according to the rules of evidence existing in this State.

The exceptions must therefore be sustained and the report be committed, to be disposed of by the referee, according to the principles herein indicated.

HERRICK *versus* OSBORNE.

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Objections to the allowance of amendments of writs, unauthorized by law, can only be made available, by filing exceptions.

In writs founded upon § 49, c. 148, R. S., all the material elements necessary to give the plaintiff a right of action, must be *affirmatively* and *distinctly* alleged in his declaration. That such elements may be *inferred* from other parts of the declaration, is not enough.

Unless the defendant is charged with knowingly aiding and assisting the debtor, in the fraudulent concealment or transfer of property liable to seizure by attachment or levy by the plaintiff, the declaration is insufficient.

ACTION on the CASE.

A general demurrer was filed to the declaration, which consisted of two counts. Under leave of Court a third count was added.

The pleadings not being withdrawn, there was a joinder in demurrer after the amendment.

The nature of the action, and substance of the several counts, appear in the opinion of the Court, which was drawn up by

RICE, J. — This case comes before us on a general demurrer to the declaration. The declaration contains three counts, two of which were in the writ as originally drawn, and the third subsequently added as an amendment by leave of Court. The demurrer was filed before the amended count was introduced. At the next term after the amendment was allowed, the demurrer not having been withdrawn, was joined by the plaintiff.

The defendant now contends that judgment should be rendered upon the original counts, without regard to the amendment, as that was allowed, as he affirms, in his absence and without his knowledge or consent.

Amendments in matter of form, or for circumstantial errors or mistakes, are allowable by the provisions of sections 9 and 10, c. 115, R. S. Such amendments are admissible, though the declaration be so defective that no sufficient cause of action be exhibited, when the intended cause of

action may be clearly perceived, and no new cause of action is introduced. *Pullen* v. *Hutchinson*, 25 Maine, 249.

The granting of such amendments is matter of discretion with the presiding Judge, and if prejudicial to other parties, reasonable terms will be imposed, and the adverse party will be permitted to amend his pleadings as matter of course. Amendments, unauthorized by law, cannot be taken advantage of by general demurrer, but may be by exceptions. The question whether this amendment was properly admitted, is not, therefore, now properly before the Court.

This action is founded upon R. S., c. 148, § 49. To entitle the plaintiff to recover, he must allege in his writ, and prove that his debtor was possessed of property liable to attachment or levy on execution, which was by him fraudulently concealed or transferred, to secure the same from creditors, and to prevent the seizure of the same by attachment or levy on execution; that the defendant did knowingly aid and assist in such fraudulent concealment and transfer; and that the plaintiff was at the time of such fraudulent concealment and transfer, and at the time the action was commenced, a creditor of such debtor.

These elements are substantive and material, and must all exist, to authorize the maintenance of an action under this section of the statute, which though remedial, is also penal in its character. These elements being material, must be affirmatively and distinctly alleged in the declaration, before a party can be put upon his defence. It is not sufficient that they are stated argumentatively, or may be inferred from other allegations in the writ.

A general demurrer admits the truth of all facts which are well pleaded. Every substantive fact, therefore, which is distinctly set out in the declaration in the plaintiff's writ, must, for the purposes of this examination, be deemed to be true.

The first count alleges that on the 11th day of August, 1849, John Tabor of Wells, was indebted to the plaintiff in the sum of twenty-six dollars and forty-four cents, but it

does not allege that there was a continuation of that indebtedness, nor that it existed at the time of the alleged fraudulent concealment, or transfer of property, nor at the date of his writ, nor that the property transferred to the defendant was in the possession of the debtor and liable to attachment or levy on execution for his debts.

The second count is liable to the same objections.

In the second and third counts, it is alleged "that the said James Osborne took and received said conveyances of said real estate, knowingly aiding and assisting said John Tabor, the debtor of the plaintiff, in the fraudulent transfer and concealment of his property, to secure the same from his creditors and to prevent the seizure of the same by attachment or by levy on execution," &c.

This is not a distinct allegation that the defendant did knowingly aid and assist said Tabor, in the fraudulent concealment or transfer of any property of the debtor, which was liable to seizure by attachment or levy on execution by the plaintiff. It does not therefore appear that the plaintiff was in any manner injured by the acts of the defendant, as they are set out in any of the counts in the plaintiff's writ.

The declaration is therefore adjudged insufficient on demurrer, and judgment that plaintiff take nothing by his writ.

*Bourne & Son,* in support of the demurrer.

*Goodwin, contra.*

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96 490

† BURBANK *versus* HORN.

In actions of slander, the time when it was uttered may be alleged with a *continuando.*

And the *place,* when alleged with a *videlicit,* is sufficient, and even its omission would only be a fault in form.

The allegation that the slander was uttered in the presence and hearing of *divers persons,* or in the hearing of certain persons, (*by name*) sufficiently sets forth its publication.

† In cases with this mark, SHEPLEY, C. J., took no part in their decision, the opinions being submitted for concurrence after his commission had expired.

Of the declaration in actions of slander.

To charge one with having "stolen boards," without any qualification, implies the crime of larceny, and no *innuendo* is necessary to explain its meaning.

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

Action of Slander.

The defendant filed a general demurrer to the writ and declaration. The presiding Judge ruled that the writ was insufficient, to which the plaintiff filed exceptions.

The declaration and the objections sufficiently appear in the opinion of the Court, drawn up by

Tenney, J. — The defendant filed a general demurrer to the declaration in the plaintiff's writ, and in its support it is insisted that the material allegations therein are not well pleaded, and consequently are not admitted; and the plaintiff is not entitled to judgment.

It being alleged in all the counts that the words were spoken on days named, with a *continuando*, it is objected that the time is too indefinite to enable the defendant to prepare his defence.

The statement of the time of committing the injuries, *ex delicto*, is seldom material. It may be proved to have been committed either on a day anterior or subsequent to that stated in the declaration. When however the act complained of is single in its nature, as an assault, it would be bad on *special demurrer*, to state that it was committed on divers days and times. *English* v. *Purser*, 6 East, 396; *Michell* v. *Neal & ux.*, Cowp. 828. But this rule has been restricted to actions of trespass; and in case, it has been held proper to state the time with a *continuando*. *Macfadzen* v. *Olivant*, 6 East, 387; *Benson* v. *Swift*, 2 Mass. 50.

The objection to *place*, as stated in the declaration, has no foundation in fact. In two of the counts, the words are alleged to have been spoken at "Milton," to wit, at said Alfred, the latter having been used in the writ as the town in which the Court, to which the writ was returnable was to be holden. In the third count, the words are stated to

have been spoken "then and there," after the time had been specified in the same count, without alleging therein at what particular place it was done; but the word Milton, to wit, Alfred, had been used in the preceding counts, to which the term "there" may well have been understood to have reference. In the fourth count, Alfred is alleged to be the place where the words were spoken.

The precise place is only material to be stated in the writ in local actions. 1 Chitty's Pl. 383 and 384. In the counts where the place is stated with a *videlicit*, it indicates that the party does not undertake to prove the precise place, and he would not be holden to prove it, under a plea to the merits. 1 Greenl. Ev. § 60.

The omission of the *day*, when the time is immaterial, and *place* in transitory actions are only faults in form, (Gould's Pl. c. 9, part 1, § § 9, 10 and 18,) and are aided on general demurrer.

It is contended that the declaration is defective, in alleging that the words were spoken in the presence and hearing of "divers persons," or of persons specifically named, when it should be in the presence and hearing of "divers good and worthy citizens." No case is cited as authority, that this distinction is material under a general demurrer. The statement, that the words were spoken in the "presence" of divers persons is sufficient, without stating in the "hearing" also. *Hall* v. *Hennesley*, Cro. Eliz. 486. S. C. Nay, 57; *Kellan* v. *Mannesley*, Cro. Jac. 39; *Smart* v. *Easdale*, Cro. Car. 199.

When the action is for words spoken, evidence of the speaking before any third person, will be sufficient, although the declaration allege them to have been spoken before an individual named, and others. Buller's N. P. 5; 2 Stark. Ev. 844; 2 Greenl. Ev. § 414. If it is unnecessary that it should be proved, that the words were spoken in the presence and hearing of good and worthy citizens, when so alleged, it is not perceived how it becomes essential to make such statement in the declaration, instead of alleging that the words

were spoken in presence of divers persons, or of a person or persons named.

It is usual to commence the declaration, either for a libel or for words, with inducements of the plaintiff's good character, and of his innocence of the crime imputed to him by the defendant, but they may be omitted and the declaration may commence with a statement of defendant's malicious intention to injure the plaintiff. When the libel or slander does not affect the plaintiff in his moral character, but merely imputes to him insolvency or incapacity in the way of his trade, &c., this inducement of good character is inapplicable, and the declaration should commence with an inducement, respecting his trade, &c. 1 Chitty's Pl. 364; 2 Chitty's Pl. 255, note (o.) When the slander is *prima facie* actionable, as calling a person directly a *thief*, or charging him with having been guilty of *perjury*, a declaration stating the defendant's malicious intent, and the slander concerning the plaintiff, is sufficient without any prefatory inducement. 1 Chitty's Plead. 381; 2 ibid. 255, notes (q) and (r.)

Where the words themselves are such as can *only* be understood in a criminal sense, no inducements of any extrinsic matter is requisite, but if the charge is not necessarily slanderous, the plaintiff must by way of introduction or inducement, state that some fact has taken place, to which the defendant alluded, and to which the innuendoes must afterwards refer. 2 Chitty's Plead. 256, note (s.)

It is said by Lord KENYON, in *Holt* v. *Scholefield*, 6 D. & E. 691, which was an action of slander, for the charge against the plaintiff, made by the defendant, that he had *foresworn* himself, "either the words themselves must be such as can only be understood in a criminal sense, or it must be shown by a colloquium in the introductory part, that they have that meaning, otherwise they are not actionable."

In Massachusetts, before the separation of this State therefrom, it was held that a general count in an action of

defamation, as charging the plaintiff with stealing, is good; and when one said, "he would venture any thing the plaintiff had stolen the book," being proved to have been spoken maliciously, would support a verdict for damages. *Nye* v. *Otis*, 8 Mass. 241. This doctrine has been affirmed in many decisions in Massachusetts and in Maine, and may be regarded as established.

The allegation in all the counts is, that the defendant charged the plaintiff with having "stolen boards," and the accompanying language as stated in some of the counts, does not qualify the offensive import of that charge. The word "stole," has a well known and definite signification, and when one is charged with having stolen any thing of value, and the charge in these words is not mitigated by others used in the same conversation, they necessarily impute the crime of larceny. In R. S., c. 156, § 10, such meaning is given to the word "stolen," in making it a crime to buy or to receive, &c., "stolen goods," knowing them to have been stolen. When the word is so used, the charge is made no more definite by the innuendo, to explain it as being the crime of theft.

The word "boards" is well understood in its meaning, and implies that the owner has property therein of value, and it is not necessary that the declaration should contain any innuendo expressive of the true signification of the term.

*Demurrer overruled. —*
*Declaration adjudged good.*

39 237
56 255
67 34
39 237
87 223

*D. & J. H. Goodenow*, in support of the demurrer.
*Low, contra.*

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HUNTRESS, *Petitioner for Partition, versus* TINEY *& al.*

By R. S. c. 94, § 24, it is required that the officer state in his return of a levy of real estate "that they appraised and set off the premises, *after viewing the same*, at the price specified."

Huntress *v.* Tiney.

Although the return does not contain the words "after viewing the same," yet if it appears that the *premises were shown to the appraisers*, the statute requirement is satisfied.

In an action or petition relating to land set off on execution, parol evidence, to contradict or vary the officer's return, is inadmissible.

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

PETITION FOR PARTITION. The respondents pleaded they were sole seized of the premises as tenants in common, each of one half.

The petitioner's title was derived from the levy of an execution in his favor against one John D. Pillsbury, and he offered the original writ, judgment, execution and levy made within thirty days after the judgment, as evidence. The attachment was made April 23, 1850.

In October following, Pillsbury conveyed his interest in the premises to one of the respondents.

The respondents objected to the return of the appraisers and officer, as insufficient, because it did not appear that the *appraisers first viewed the land* levied upon, or that they ever viewed the premises, either before or after their appraisal.

Petitioner asked leave for the officer to amend his return, to show that the appraisers viewed the premises before making the appraisal.

The respondents also offered to prove by one of the appraisers, that he had been deceived in signing the appraisal, and that the premises described in the return were never appraised by them.

The amendment proposed and the parol evidence were rejected.

It was then agreed, if the return be sufficient and the evidence offered by respondents inadmisible, judgment for partition may be entered, and the same judgment if the return be insufficient and the officer has a right to amend so as to affect the title of one of the respondents; but if the officer cannot amend, then judgment to be rendered for respondents.

In case the evidence was admissible the cause to stand for trial.

*N. D. Appleton,* for petitioner, maintained, that the return was sufficient according to R. S., c. 94, § 24, as it *substantially* conformed thereto. The return says "*the same having been shown to us,*" and they necessarily *viewed* the premises. 13 Maine, 154; 15 Maine, 153; 31 Maine, 546; 34 Maine, 463.

If the return be insufficient it is then amendable. 6 Maine, 162; 23 Maine, 498; 27 Maine, 557; 31 Maine, 120; 34 Maine, 463; 35 Maine, 207.

That the testimony was not admissible, he cited 1 Greenl. Ev. 275; 2 Starkie, 544; *Bott* v. *Burnell,* 11 Mass. 163; Comyn's Dig. Return, G.; *Barney* v. *York,* 8 Maine, 272; *Waterhouse* v. *Gibson,* 4 Maine, 230; *Tibbets* v. *Merrill,* 12 Maine, 122; *Crommett* v. *Pearson,* 18 Maine, 344; *Carey* v. *Osgood & al.,* 18 Maine, 152; *Wheeler* v. *Lothrop,* 16 Maine, 18; *Lovett, Pet'r,* 16 Pick. 84; *Allen* v. *Kingsbury,* 16 Pick. 235; *Bamford* v. *Melvin,* 7 Maine, 14; *Cowan* v. *Wheeler,* 31 Maine, 439; *Withington* v. *Warren,* 10 Met. 431; *Bigelow* v. *Maynard,* 4 Cush. 317; *Clark* v. *Burt,* 4 Cush. 396; *Leonard* v. *Smith,* 11 Met. 330; 3 Verm. 420; 19, 334; 5 Conn. 400.

*D. Goodenow,* for respondents, maintained, that the testimony should have been admitted, on the ground that a gross fraud was perpetrated to which the petitioner was a party. That the return was insufficient, he cited 9 Mass. 92; 9 Mass. 96; 11 Mass. 163; 1 Greenl. Ev. (new ed.) 120.

That it could not be amended, *Williams & al.* v. *Bracket,* 8 Mass. 240; *Haywood* v. *Hildreth,* 9 Mass. 396; *Waterhouse* v. *Waite,* 11 Mass. 207; 13 Mass. 483; *Howard* v. *Turner,* 6 Greenl. 106; *Buck* v. *Hardy,* 6 Greenl. 162; *Thacher* v. *Miller,* 13 Mass. 271; *Bates* v. *Willard,* 10 Met. 64; *Hovey* v. *Wait,* 17 Pick. 196.

APPLETON, J. — The petitioner, having a demand against one John D. Pillsbury, and having attached his real estate

on mesne process, obtained judgment, and before the expiration of thirty days therefrom proceeded to extend his execution upon the real estate attached. The validity of this extent is contested by the respondents, and upon the determination of this question, the rights of the parties must depend.

The objection taken, is that the return of the appraisers and of the officer is insufficient because it does not appear that the appraisers first viewed the land levied upon, or that they ever viewed it.

The oath administered to the appraisers was, "that they would faithfully and impartially appraise such real estate of the within named John D. Pillsbury as should be shown to them to satisfy the within execution and all fees." The appraisers certify, that after having been sworn as above, they have appraised and do *hereby* appraise the following described premises, setting them forth particularly in their return, "the *same having been shown us* by Samuel Thompson, the attorney of the creditor, to satisfy this execution and all fees.

The R. S., c. 94, § 24, require that the officer shall state in his return on the execution, *substantially*, the following facts, among others. "*Fourth*, that they appraised and set off the premises after viewing the same, at the price specified."

It is undoubtedly the better course to follow the language of the statute, though in the present case special provision is made for a variation, and for the use of equivalent terms. The appraisers were sworn to appraise what should be shown them. It appears that the premises having been shown were appraised by those to whom they were thus shown. If shown, they were viewed. To show, according to the best lexicographers, is to "exhibit to view," to make to see," to "make to know," to "make to perceive." The degree of examination is no more indicated by the word viewed, than by the word shown. The premises upon which a levy is made, may be shown to or viewed by certain per-

sons, and their opportunities of observation, and their means of judging of its value, may be alike in either case.

The return must be regarded as necessarily implying that the premises appraised have been viewed. The return of an officer, that the debtor refusing to choose an appraiser, two appraisers were chosen by himself, has been held equivalent to the statement that the debtor was notified to choose. *Sturdivant* v. *Sweetsir*, 12 Maine, 520; *Bugnon* v. *Howes*, 13 Maine, 154; *Fitch* v. *Tyler*, 34 Maine, 463. Upon an examination of the return of the appraisers, which the sheriff adopted, we think it appears, "*substantially*," that the appraisers have viewed the premises which they have set off before the same were appraised, and that the levy must be sustained.

2. The return of the sheriff, as between the parties in litigation, is conclusive, and cannot be contradicted by them or their privies. *Brown* v. *Davis*, 9 N. H. 76; *Parker* v. *Guillow*, 10 N. H. 103. The sheriff's return is conclusive as to the formal proceedings by the appraisers and himself, and cannot be controlled by other evidence. *Bott* v. *Burnell*, 11 Mass. 163. Where the appraisers erroneously deducted one third part of the actual value of the land for the possibility of dower existing in the debtor's wife, it was held that parol evidence could not be received to prove this fact. *Boody* v. *York*, 8 Greenl. 272. Nor can it be received to show that certain buildings standing on the land were not included in the appraisement. *Waterhouse* v. *Gibson*, 4 Greenl. 230. The return of the officer, on the levy of real estate, that the appraisers were discreet and disinterested men, is conclusive of the fact. *Grover* v. *Howard*, 31 Maine, 546. So an officer cannot be allowed to contradict his return, that he has delivered seizin to the creditor. *Cowan* v. *Wheeler*, 31 Maine, 439. Indeed, in *Bamford* v. *Melvin*, 7 Maine, 14, MELLEN, C. J., says, it is an incontestable principle of law, that "the return of an officer can never be contradicted, except in an action against the sheriff who made such return." Such indeed seems to be the concurrent doc-

trine of all the authorities. *Root* v. *Colton*, 1 Met. 345; *Stevens* v. *Brown*, 3 Ver. 421; *Metcalf* v. *Gillett*, 5 Conn. 400.

The evidence of Baker, as offered, is to the entire contradiction of the most material parts of the officer's return. It cannot be received without entirely overruling all the adjudged cases bearing upon this question. "If the land is undervalued," remarks WESTON, J., in *Boody* v. *York*, 8 Maine, 272, "the debtor has a year within which to redeem; which is a much less exceptionable mode of correcting an error to his prejudice, than that sought now to be enforced."

If the officer has made a false return and one which is injurious to the interests of the defendants, or either of them, the law affords ample means for the vindication of their rights. If, then, a wrong has been committed, there are abundant remedies by which the wrong can be redressed and compensation therefor be had.

*Partition ordered.*

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

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SMITH *versus* TAYLOR *& al.*

Where a note was given for the interest on a bond, and afterwards another bond and note was made in lieu of the former; in an action on the latter note, it is proper for the jury to examine both bonds, to ascertain if the interest had been paid otherwise than by the note.

A note given in renewal of one, which in fact had been paid, is without consideration.

The relinquishment of an *attachment* is a sufficient consideration for a note.

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

ASSUMPSIT, on a promissory note. The general issue was pleaded.

Evidence was offered in defence tending to show that the note in suit was given for a former note, signed by Taylor,

the principal defendant, to one Nathaniel Smith, deceased, of whom plaintiff was administrator. That Nathaniel, the deceased, in May, 1849, gave to Taylor a bond to convey to him a farm occupied by him, on the fulfillment of the conditions therein specified. That an attachment had been made of Taylor's real estate by suit on the former note. That two days before that bond expired, the attachment then existing, the old note was given up, and the note in suit given in lieu of it. That Taylor protested at the time there was no consideration for it, and that the old note had been paid.

The defendant insisted that the former note was given for the interest on the bond, and when the interest was paid the note was to be given up, and that the interest had all been paid on the bond. To prove this he offered another bond of nearly the same tenor of the one above, dated prior thereto, on which $120 had been indorsed at different times, both bonds being conditioned for the payment of the interest on the sums of money therein set forth from February 12, 1847.

The instructions, which were excepted to by plaintiff, are recited in the opinion of the Court.

*Bourne,* in support of the exceptions.

*Tapley, contra.*

APPLETON, J. — Both bonds, with the indorsements thereon, were properly before the jury. They were instructed that, " for the purpose of ascertaining whether the whole interest has been paid, otherwise than by the note, for which the one in suit was said to be given, they might examine both the bonds and the indorsements made upon them." To this there can be no objection. The jury may have erred as to the probative force of the testimony, but that error cannot be corrected by us upon exceptions.

It is difficult to perceive any well grounded cause of complaint to the instruction " that if satisfied the note in suit was given for the note of July 12, 1849, for $150, and that

the last named note was given to be applied to pay the interest and principal on the bond, and that the whole amount of that interest and principal had been paid without the application of that note, the plaintiff would not be entitled to recover."

The jury were further instructed "with respect to the attachment, that the relinquishment of an attachment by which any valuable interest was secured, would be a sufficient consideration for a note; that they would consider whether the testimony proved, that the relinquishment of the attachment constituted any part of the consideration of the note of 1849, and whether the note was due at the time, and if they should be satisfied, that the relinquishment of the attachment did not constitute a part of the consideration of the note in suit, or if it did, that the attachment was made on a writ founded on a note not due, that then the relinquishment by giving a new note for that one would not constitute a sufficient consideration."

The jury must have found that the relinquishment of the attachment constituted no part of the consideration of the note in suit, and that the attachment was made on a writ founded on a note not due, for had not both these facts been found adversely to the plaintiff, the verdict must have been in his favor.

If the relinquishment of the attachment formed no part of the consideration, that relinquishment must be regarded as unimportant in its bearing upon the case. Whether it did or did not enter into the consideration of the note was properly left to the jury.

If the note for which the one in suit was given, was not due, the relinquishment of the attachment forming no portion of its consideration, then it will be difficult to perceive in what its consideration consisted. In *Wade* v. *Simeon*, 2 C. B. 548, TINDALL, C. J., said "it is almost *contra bonos mores*, and certainly contrary to all principles of natural justice, that a man should institute proceedings against another, when he is conscious he has no good cause of action. In

order to constitute a binding promise, the plaintiff must show a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be if he has no cause of action; beneficial to the defendant it cannot be; for in contemplation of law, the defence upon such an admitted state of facts *must* be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damages he may sustain. The consideration therefor altogether fails." In *Wilbur* v. *Crane*, 13 Pick. 284, the note in suit was given to settle a bastardy process, commenced by and in the name of a married woman, and for the settlement of which she gave a discharge. It was urged that the process was at any rate only voidable and not void, and that the surceasing the suit was a sufficient consideration. "We consider it," remarks WILDE, J., "immaterial whether the process was void or only voidable by plea of abatement. If the defendant had a legal right to defeat the process, the surceasing the suit was not a valid consideration to support the note." The same doctrine was held in *Gould* v. *Armstrong*, 2 Hall, 266. The case, as presented by the instructions, is simply one of giving a note in renewal of one without consideration, or which had been paid, in which case, the new note is clearly without consideration.

The compromise of a suit, where the legal right is doubtful, is undoubtedly a valid consideration for a promise to pay a sum of money for its abandonment. In such case the inequality of consideration constitutes no valid objection. But in the present case no such question is presented for our consideration. *Exceptions overruled.*

*Judgment on the verdict.*

† WOOSTER *& al. versus* GREAT FALLS MANUFACTURING CO.

By c. 126, R. S., it is provided that any man may erect and maintain a water-mill and a dam to raise water for working it, upon and across any stream that is not navigable, upon the conditions therein named, and when such dam is lawfully erected, the person sustaining damages in his lands by being overflowed by such dam, may obtain compensation by *complaint*, and that no action shall be sustained at common law for the recovery of damages for such overflowing of lands, except in the manner provided to enforce the payment of damages, after they have been ascertained by complaint.

To entitle the owners of a dam and mill to the benefits of this statute, the *mill* as well as the dam must be situated within the limits of this State.

And where the owner of land is damaged by its overflow, by means of a dam erected to operate a mill situated in another State, across a river, the boundary of the two States, he may maintain an action for his indemnity at common law.

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

CASE to recover damages for flowing land.

Salmon Falls river is the boundary line between Maine and New Hampshire. The defendants are a corporation under an Act of New Hampshire, and are also recognized as such by an Act of Maine. Across this river, in August, 1846, they commenced to build a dam upon their own land, and finished it in the autumn of 1848. They built a grist-mill in 1847, in Somersworth, N. H., which was operated by means of this dam, but none whatever in this State.

The plaintiffs, in November, 1846, built a dam across Hilliard's brook in Berwick, in this State, and erected a small building, and used the water for machinery to turn wood. This brook discharged itself into Salmon Falls river. No dams had previously been erected on the sites of either party.

By means of defendants' dam, the flow of the river was so obstructed as to cover the plaintiffs' dam several feet, and to destroy his building and appendages.

The defence was that they were entitled to the benefit of c. 126, R. S., and that this action could not be maintained.

But the jury were instructed that the defendants were not entitled to the benefit of that statute, and that this action might be maintained upon proof of such flowing upon plaintiffs' land, occasioned by defendants' dam.

To these instructions defendants excepted, the verdict being returned for plaintiffs.

*Leland,* in the opening argument, to sustain the positions taken at the trial for the defence, cited the various Acts in relation to mills, passed in Massachusetts from 1709 down to the time of the separation, and our statutes upon that subject, from which he argued, that the common law remedy for flowing lands is taken away, and the remedy is by complaint alone under the statute c. 126, R. S. *Stowell* v. *Flagg,* 11 Mass. 364.

He also argued the rights of riparian proprietors and mill owners.

*Kimball, contra,* argued, that defendants were not the owners of a mill within the purview of c. 126, and were liable only at common law. *Fitch* v. *Stevens,* 3 Met. 426. That their mill being beyond the jurisdiction of this State, the lien contemplated by the statute was ineffectual, and the plaintiffs are compelled to resort to the common law. That the judgment recovered upon a complaint is a charge upon the dam, land, mill and appurtenances, to which it attaches, even against the assignee of the estate. *Pierce* v. *Knapp,* 34 Maine, 402; *Knapp* v. *Clark,* 30 Maine, 244. But the defendants have built no such mill within reach of the process of our Courts, and they cannot extend their power into a foreign territory. *Farnham* v. *Blackstone Canal Co.,* 1 Sumner, 62; *Slack* v. *Walcott,* 3 Mason, 508. Without this form of action the plaintiffs are remediless. Bill of Rights, art. 1, § 1.

*Clifford,* in reply, argued, that the fact of the dam extending across the stream into New Hampshire, did not make it less a dam upon a stream of this State, as one-half of it was actually in this State, and that consequently the remedy of the party was fixed by our laws. But it was not necessary that the dam should be immediately connected with the mill in order that it should be under the protection of the statute, and it has been held to apply to reservoir dams remote from the mills, and not even on the same stream. *Nelson*

v. *Butterfield*, 21 Maine, 220; *Walcot Man. Co.* v. *Upham*, 5 Pick. 292; *Whitney* v. *Gilman*, 33 Maine, 273; *Shaw* v. *Wells*, 5 Cush. 537.

The provisions in the Act relied on furnish ample means of compensation. The lien extends not only to the mill and mill-dam with its appurtenances, but to the land *under and adjoining the same and used therewith.*

When the defendants come here to defend their rights, they place their rights, so far as the remedy and the proceedings to enforce it are concerned, under the laws of Maine; and the remedy and proceedings to enforce it are governed by the laws of this State. Story on Conflict of Laws, § § 556, 576; *Furgerson* v. *Fyffe*, 8 Clark & Fennelly, 121; *De la Vega* v. *Kanna*, 1 Barn. & Adol. 284. The very purpose of the mill Act was to encourage the improvement of water power and to relieve it from the vexatious litigation to which it was formerly subjected.

APPLETON, J. — It appears that the defendants built a dam across the Salmon Falls river, on their own land, and erected a grist-mill connected therewith, and receiving its power from the water flowed thereby. The river, at the place where the dam was built, is the boundary line between this State and New Hampshire. The mill is in Somersworth, in the latter State. The land of the plaintiff in Berwick, in this State, having been flowed and his real estate injured by the defendants' dam, he brought an action on the case against the defendants to recover damages for the injuries thereby sustained.

The law seems to be well settled, that for all injuries to real estate, the remedy must be sought for in the jurisdiction where the wrong was committed. It was held in England, that trespass could not there be maintained for breaking and entering a house in Canada. *Doulson* v. *Mathews*, 4 D. & E. 503. The law was so held by Mr. C. J. MARSHALL, in the famous controversy relating to the batture at New Orleans. *Livingston* v. *Jefferson*, 1 Brock. 203. It was decided

by the Supreme Court of New York, that an action will not lie for an injury done by the diversion of a water-course, when the premises injured are situated in another State. "It appears to be conclusively settled," remarks NELSON, C. J., in *Watts' Adm'r* v. *Kinney*, 23 Wend. 484, "that an action on the case for diverting a water-course, so far savors of the realty as to be classed with local actions, and must be tried in the county where the injury happened. It stands on a footing in this respect with real and mixed actions, such as *trespass quare clausum fregit*, ejectment, waste, &c., where, if the lands lie in a foreign country, they cannot be tried here." The judgment of the Court in this case, was subsequently affirmed by the Court of Errors. *Watts' Adm'r* v. *Kinney*, 6 Hill, 82. It was decided in New Hampshire, that an action on the case to recover damages for flowing the plaintiff's land is local, and must be brought in the county where the land lies. *Worster* v. *Winnepiseogee Lake Co.*, 5 Foster, 525. It is apparent, therefore, that the plaintiff can maintain no action in New Hampshire for any injury he may have sustained, and that unless he can seek and obtain redress in this State, he is without remedy.

An action on the case has been regarded as the appropriate remedy at common law for any injury arising from an unlawful diversion or misuser of a water-course. This seems to be the form of action in use in New Hampshire, for any injury occasioned by flowage. *Woodman* v. *Tuffts*, 9 N. H. 88; *Worster* v. *Winnepiseogee Lake Co.*, 5 Foster, 525. But in Massachusetts, as well as in this State, this mode of obtaining redress has been superseded by Acts in these States regulating mills and mill-dams. *Stowell* v. *Flagg*, 11 Mass. 364.

It is well settled law that whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which appeal is made. The learned counsel for the defendant, relying upon this principle of law, insists that this case is within the provisions and entitled to the benefits of R. S., c. 126, § 28, which pro-

vides that "no action shall be sustained at common law for the recovery of damages occasioned by the overflowing of lands as beforementioned, except in the special cases provided in this chapter, to enforce the payment of damages after they have been ascertained by process of complaint, as aforesaid." As there has been no previous ascertainment of damages by complaint, if the statute is to be held to apply to a case circumstanced like the present, this suit is distinctly within the statutory prohibition. The question for determination, therefore is, whether, when the mill to be benefited by the dam is in another State, the party whose land is flowed by its dam, can maintain an action on the case for such flowage, or is restricted to the statutory remedy by complaint.

All legislation is necessarily territorial. The statutes of a State are binding only within its jurisdiction. The Legislature cannot, if they would, authorize acts to be done in a foreign territory. "Every Legislature," remarks Mr. Justice STORY, in *Farnham* v. *Blackstone Canal Corp.* 1 Sum. 62, "however broad may be its enactments, is supposed to confine them to cases or persons within the reach of its sovereignty." They cannot affect or control property elsewhere, and it is not to be presumed they intended to exceed their jurisdiction.

From a perusal of R. S., c. 126, concerning mills and milldams, it is abundantly apparent that the design of the Legislature was only to affect lands and mills within the limits of the State. The right to erect mills — the provisions as to the height to which the water may be raised, and the length of time during which it may be kept up each year — the appointment of commissioners, and the proceedings under the commission — the right to require security for yearly damages — the lien given upon the dam and mills — the mode of enforcing that lien, and the effect of a sale under the process provided by statute — the right of redemption — the right of either party if dissatisfied with the annual compensation to file a new complaint — each and every

provision of the statute, from the commencement of proceedings under it, to their final conclusion, contemplate action within our territorial jurisdiction. The dam which causes the flowing — the mill for the benefit of which such flowing is permitted, and the land overflowed, or the property otherwise damnified by these erections, are assumed to be within the boundaries of the State, and within legislative jurisdiction.

It is provided by § 1, that "any man may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream that is not navigable, *upon the terms and conditions, and subject to the regulations* hereinafter expressed." The license to erect is upon certain terms and conditions, and subject to certain regulations. If the terms and conditions are not complied with, and the regulations, *subject to which* the right is granted, cannot be enforced, the right to "erect and maintain a water-mill, and a dam to raise water for working it," is not given. To hold otherwise would be to decide that the right is not upon terms and conditions, and subject to regulations, but that it is unqualified and without limitation. The statute itself is a liberal exercise of power on the part of the Legislature over the property of one citizen for the benefit of another. The party, therefore, seeking protection under this Act must show his erection to have been upon the terms and conditions, and to be subject to the regulations which the statute has prescribed for the benefit and protection of the land owner, else he does not bring himself within its plain and obvious meaning.

The relief of the mill owner from the multiplicity of suits to which, by the common law, he would have been exposed, was an object, the attainment of which the Legislature had in view in the passage of the Act under consideration. But the mill owners, to be relieved, must be those who were subject to such suits. The statute neither gives nor purports to give to the inhabitants of New Brunswick or New Hampshire any right within the limits of those governments to

build mills and erect dams for their use, by which the lands of citizens of this State may be flowed. The right is given to those only against whom the terms and conditions of the statute can be enforced, and when the mills and mill-dams are subject to the regulations prescribed.

The prohibition of section 28, is against the maintenance of any action at common law "for the recovery of damages, occasioned by the overflowing of lands as before mentioned." But the cases before mentioned are those to which the previous provisions of the statute apply. As to all such, the land owner receives the protection intended by the Legislature. But when, from the nature of the case, he cannot derive any benefit from the various provisions of the statute for his security, the section cannot apply. These proceedings are against the property, and protect the land owner by giving him a lien for his damages upon the same. When the mill upon which the security is given is without the State, all these statute proceedings are unavailing. As the land owner cannot obtain any of the benefits given him in lieu of his common law rights, he must be regarded as remitted to those rights.

The construction here given is in entire conformity with the authorities bearing upon the subject. In *Fisk* v. *Framingham Manufacturing Company*, 12 Pick. 68, Mr. Chief Justice SHAW says, "It is well settled, that in all cases where the party is entitled to his damages upon complaint, under the statute, his common law remedy is taken away." It is obvious, that when the party cannot proceed by complaint, as where the mill is without the State, that unless the party aggrieved can proceed at common law, he is without remedy. So when the mill has ceased to be used or has been removed and not replaced, the dam ceases to be a mill-dam, under the protection of the mill Acts, and the remedy for the owner of the land which is flowed by it, is by an action at common law. *Baird* v. *Hunter*, 12 Pick. 556. To entitle a party to the protection of this statute, it is not enough that he erect a dam across a stream run-

ning through his own land. There must be a mill in connection with his dam, or an intention forthwith to erect one, else he is not a mill owner within the purview of the statute, and is liable at common law in an action on the case for damages occasioned by means of his dam flowing the dams of others. *Fitch* v. *Stevens*, 4 Met. 426. There is no mill in this State connected with the defendants' dam, and the defendants are not within the spirit or meaning of the statute which they invoke in their aid; for they have not afforded the plaintiff, by any erection of theirs, the security which the statute contemplates. *United States* v. *Ames*, 1 W. & M. 76.

It is not contended that the Legislature of New Hampshire have authorized the raising of the dam within that State, whereby the waters of the river may be flowed back to the injury of land situated in this State. The important and delicate question which might be presented in case the defence rested upon the local law, is not presented because the dam is partly in this State, and the defendants justify under no special legislation of New Hampshire.

Upon a careful examination of the statute, the conclusion is, that mills without the jurisdiction of the State, not being subject to the terms, conditions and regulations of the statutes, are not entitled to its benefits; and that the common law remedy remains unaffected by its provisions. The instructions given were in conformity with the unquestioned intentions of the Legislature, and the just construction of the statute, and the exceptions thereto must be overruled. *Exceptions overruled.*

*Judgment on the verdict.*

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† ROCKINGHAM MUTUAL FIRE INS. CO. *versus* BOSHER.

Where property insured is wilfully and maliciously burned by a third person, no action can be maintained against the wrongdoer, for the money paid by the insurer in his own name.

TRESPASS ON THE CASE.

The plaintiffs insured one Shannon in a certain sum upon his store or shop and goods therein, which was burnt during the life of the policy.

The loss was adjusted by the parties to the policy and paid; and this action was brought to recover the amount so paid, of the defendant, who was alleged in the writ to have wilfully and maliciously set fire to the building for the purpose of defrauding Shannon, the owner, and the plaintiffs.

A general demurrer was filed to the declaration.

It was agreed, that if in the opinion of the Court the action is maintainable, the demurrer may be withdrawn and the cause stand for trial.

*Clifford* and *J. M. Goodwin*, in support of the demurrer, cited *The London Assurance Co.* v. *Sainsbury & al.*, 3 Doug. 245; *Mason* v. *Sainsbury & al.*, 3 Doug. 61; 2 Phil. on Ins. 4th ed. § 2001; Marshall on Ins. 691; Arnould on Ins., Perkin's ed. 1180; *Clark* v. *Inhabt's of Blything*, 2 Barn. & Cress. 254; *Yates* v. *Whyte & als.*, 4 Bing. N. C. 272; *Hart & als.* v. *Western Railroad Cor.* 13 Met. 105.

*Eastman & Leland*, in support of the action, cited R. S., c. 162, § 13, and contended, that the English authorities referred to, were made under the Riot Acts, and the Acts creating the "Hundred," and that under them, was no such remedy given to *the party injured* as by the statute of our State.

TENNEY, J. — This action is trespass on the case for the recovery of money paid by the plaintiffs to one Shannon, on their policy of insurance against damage by fire on a store, in the town of Saco, and merchandize therein, alleged to have been damaged from a fire wilfully and maliciously kindled by the defendant for the purpose of injuring the said Shannon and the plaintiffs. The defendant filed a general demurrer to the declaration, and the parties agree to submit the question, whether the action can be maintained in the name of the company.

The contract of insurance is one of indemnity between the parties thereto; and so far as the question before us arises, it does not differ essentially from other contracts of indemnity or guaranty. "When the owner who *prima facie*, stands to the whole risk and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and insurer are in respect to that ownership, and the risk incident to it, in effect one person, having together the beneficial right to an indemnity. If therefore the owner demands and receives payment of that very loss, from the insurer, as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the insurer. It is one and the same loss for which he has a claim of indemnity, and he can equitably receive but one satisfaction." *Hart & als.* v. *Western Railroad Corp.*, 13 Met. 99.

By the contract of insurance, in the case of loss, the assured having a claim upon the underwriters, to bear the whole or a part of it for him, according to the terms of the policy and the extent of the loss, the privity is between the parties to that contract alone. And payment to the owner by the insurer, does not bar the right against another party originally liable for the loss, but the owner by recovering payment of the underwriters, becomes trustee for them, and by necessary implication makes an equitable assignment to them of his right to recover in his name. This principle is recognized in *Randall* v. *Cochran*, 1 Vesey, sen., 98; *Mason* v. *Sainsbury & als.*, 3 Doug. 61; *Yates* v. *Whyte*, 4 Bing., N. C. 272; *Clark* v. *The Hundred of Blything*, 2 B. & C. 254; *Cullen* v. *Butler*, 5 M. & S. 466, and in the case cited from 13 Met. In the case of *Mason* v. *Sainsbury*, which was an action to recover damages caused by the mob, brought upon the Riot Act against the hundred, the plaintiff had an insurance on the property injured, and had received payment for the loss of the insurers. The action was in the name of the owner by his consent, for the

benefit of the underwriters. Lord MANSFIELD and the whole Court held the action maintainable. BULLER, J., is reported to have said, "it was to be treated as an indemnity, in which the principle is, that the insured and the underwriter are as one person." And PARK, J., in *Yates* v. *Whyte*, says, "It has been laid down by text writers, that when the assured has been indemnified for a wrong, recovers from the wrongdoer, the insurers may recover the amount from the assured. In *Randall* v. *Cochran*, it was said they had the clearest equity to use the name of the assured."

An attempt was made in the case of *The London Assurance Co.* v. *Sainsbury*, 3 Doug. 245, by the office, which having paid the assured the amount of the loss sustained by him, in consequence of a demolishing by rioters, sued the hundred, under the statute of 9 George I., stat. 2, c. 5, § 6, in *its own name*. But it was held by Lord MANSFIELD and BULLER, J., (WILLES and ASHURST dissenting,) that the office was not entitled to recover, and judgment was given for the defendants, which was unanimously affirmed in the Court of Exchequer Chamber. 2 Phil. on Ins. 607, 2nd ed. This case has not been overruled by any cited for the plaintiffs, or which we have been able to find. And the reason of the doctrine of the cases, in which it was held that an action may be maintained in the name of the owner, as the trustee of the insurer, who has paid the loss, against the wrongdoer or party first liable as principal, is wholly inconsistent with the principle that the insurer can in his own name recover for money paid on the contract of insurance in an action against the wrongdoer. For the insurer and assured being in effect one person, each cannot maintain an action at the same time, and for the same loss, where there can be but one satisfaction.

But the plaintiffs rely upon the provisions of R. S., c. 162, § 13, that if any person shall wilfully or maliciously injure, destroy or deface any building or fixture thereto, not having the consent of the owner thereof, or wilfully or maliciously destroy, injure or secrete any goods or chattels,

&c., he shall be punished, &c., and shall also be liable to the party injured in a sum equal to three times the value of the property so destroyed or injured, in an action of trespass. A little consideration will alone be sufficient to satisfy the mind, that this provision cannot be construed, so as to give a right of action to a party, who had none before, at common law. It was designed to increase the liability in the amount to be recovered of one who should wilfully or maliciously destroy, injure or deface, or secrete the property of another person, by the owner thereof, and not by the one who should have no interest in the property, but who might be remotely prejudiced by virtue of some contract with the owner.

The damages to be recovered are clearly designed to be for the loss of the property itself, and not for that which was the indirect consequence of that loss. Damages to be recovered are measured by the value of the property destroyed or injured, alone. The loss or diminution in the value of the property may be greater than that which the insurer may be obliged to pay under the contract of insurance. But the underwriter, if he can recover at all, is not restricted in his damages to the simple amount paid by him to the assured, for the money so paid is not the property destroyed or injured, but he is entitled to damages equal to three times the value of that property. And when the wrongdoer has satisfied a judgment for the damages to that amount in favor of the underwriter, he is discharged from all further liability; and it is not perceived in what mode the owner can obtain remuneration for his loss, above the simple sum paid by the insurer. The proposition which might lead to such consequences cannot be admitted.

*Demurrer sustained.*

*Declaration adjudged bad.*

† INHABITANTS OF SACO *versus* WOODSUM *& als.*

By § 13 of c. 48, of Acts of 1853, it is provided, that if any person shall claim an appeal, as specified in § 6, of c. 211, of Acts of 1851, the Judge or justice shall grant his appeal and order him to recognize in the sum of one hundred dollars, with sufficient sureties, for his appearance, and for prosecuting his appeal, and he shall stand committed until the order is complied with, *and he shall also give a bond as therein provided.*

So much of this section as requires the giving of the bond, is in violation of the provisions of the Constitution, and inoperative and void.

And any sale of spirituous or intoxicating liquors by the principal obligor, during the pendency of the appeal, in connection with which such bond was given, creates no liability on the part of the obligors.

But where an action is commenced upon such a bond, and the selectmen of the town interested indorsed upon it their approval of the suit, no costs are recoverable by the defendants.

ON FACTS AGREED.

DEBT, ON A BOND.

The principal obligor was convicted before a magistrate, on Aug. 17, 1853, of a violation of § 4, c. 211, of Acts of 1851, and was sentenced; from which he appealed and gave the bond in suit, and during the pendency of that appeal, sold spirituous liquor without any authority under the laws of the State.

The conclusion of the bond was in these words:—Now, therefore, if the said Moses Woodsum, shall not, during the pendency of said appeal, violate any of the provisions of said Act, then this bond shall be void; otherwise, to remain in full force.

The Court were authorized to enter such judgment as the law required.

*Hayes,* for defendants.

*Tapley,* for plaintiffs.

TENNEY, J.—Section 6, of c. 211, of the statutes of 1851, entitled "An Act for the suppression of drinking houses and tippling-shops," is essentially changed in some respects by the additional Act of 1853, c. 48, § 13. The part requiring a recognizance, with certain onerous conditions,

before an appeal could be allowed, is expressly repealed. And it is provided in the same section of the latter statute, that "if any person shall claim an appeal, as specified in said sixth section, the Judge or justice shall grant his appeal, and order him to recognize in the sum of one hundred dollars with sufficient sureties, for his appearance and for prosecuting his appeal, and he shall stand committed until the order is complied with, and he shall also give a bond, as therein provided." All Acts and parts of Acts inconsistent with the Act of 1853, referred to, are thereby repealed.

It is insisted in behalf of the plaintiffs, that the allowance of an appeal from the decision of the Judge or justice of the peace, which is imperatively required, upon a claim therefor, is inconsistent with the requirement of a bond, as a condition upon which an appeal could have been obtained, and therefore, this condition is to be treated as no longer existing in the law.

By the additional statute of 1853, a recognizance is not requisite to entitle the accused to an appeal, but if he claims it, he is to stand committed till the order to furnish the recognizance is complied with. But there being no provision in the statute of 1851, or that of 1853, that he shall stand committed, till he furnish the bond, it is quite clear, that the omission to perform this part of the statute requirement, can be attended or followed by no disadvantage to him in any respect, upon the construction contended for, on the part of the plaintiffs. For the appeal being claimed, secures that to the appealing party, though he fail to recognize. It can hardly be supposed, unless the language used will admit of no other reasonable interpretation, that the Legislature intended a construction, which must practically dispense with a solemn provision of the Act. To avoid this, it is insisted, that the accused is required to give the bond, on the principles of preventive justice, such as is provided in R. S., c. 168, § 5, and in c. 169. By this construction no greater inducements are presented for a fulfillment of the provision. No mode is provided to compel the

party to produce the bond; as there is no power given to the Judge or justice of the peace to order him to be retained in custody until the bond shall be filed, as in the statutes referred to, where it is provided that the party charged shall recognize with sufficient sureties to keep the peace, &c. And it cannot be inferred with any degree of certainty when the bond shall be as provided by the former statute, that the purpose of the Legislature was so essentially changed, as is contended. In order to ascertain the meaning of the provisions of the Act of 1853, touching appeals from the decisions of Judges and justices of the peace, it is proper to examine every thing in the section having reference to that subject. The party wishing to appeal shall give a bond as is provided by the Act of 1851, § 6. This provision is in the same sentence with the subject, treating of the appeal. To be "a bond as therein provided," it must be for the same sum, with similar conditions, executed by the appellant, with two good and sufficient sureties, other than the sureties who recognize for his appearance, and for prosecuting the appeal.

The person accused by the former statute, was required to give the bond, "before his appeal shall be allowable." If this was indispensable to secure the appeal, it is difficult to perceive that a bond given *after* the appeal is fully secured, can be such as is "therein provided." The part of the sixth section, making it necessary that the bond shall be given before the appeal can be allowed, is as imperatively demanded by the thirteenth section of the statute of 1853 as that it shall be for the sum of two hundred dollars, and be executed by two good and sufficient sureties. The requirement that the appeal shall be allowed, if claimed, and that the appellant shall give the bond before it can be allowed, are in no respect inconsistent, upon a fair construction of this part of the statute. The former was not intended to give an unconditional right of appeal, but to secure to the party a right to be tried by a jury, and in a Court where a jury is in attendance; the latter was designed as

the condition on which the appeal could be allowed. But the construction insisted upon in behalf of the plaintiff, must necessarily dispense with an essential part of the provision, that the bond under the statute of 1853, shall be such as is provided by that of 1851.

A bond under the statute of 1851, required by the justice, against the protest of the appellant before the appeal was allowed, was held by this Court to be in violation of the constitution, as impairing the right to a trial by a jury. *Saco* v. *Wentworth & als.*, 37 Maine, 165. In this case, the Court is to enter such judgment upon the report, as the law and the facts require. It appears from the condition of the bond, that the principal therein was adjudged guilty of a violation of the provisions of § 4, of an Act entitled "an Act for the suppression of drinking-houses and tippling-shops," approved June 2, 1851, and had appealed from said judgment; and therefore, if the said Woodsum should not during the pendency of said appeal, violate any of the provisions of said Act, then this bond should be void, otherwise to remain in full force.

The bond was to prevent the principal from violating the Act of 1851, or oblige him and his sureties to incur the penalty of the bond. No other Act is mentioned or referred to. That Act required the bond to be given before the appeal should be allowed. The Act of 1853 required the same thing. The bond in this case was given as we must presume, because the statutes in their terms required it, for the purpose of enabling the accused to have a jury trial in an appellate Court. To suppose it to have been given independently of the statutes, and the order of the justice, is not in accordance with the facts of the case and every reasonable inference. The statute, so far as it required the bond given in this case, was a violation of the provisions of the constitution, and that provision was inoperative and void. And any sale of spirituous or intoxicating liquors during the pendency of that appeal by the principal

obligor, did not create a liability upon the bond against the defendants, under the facts of this case.

*Plaintiffs nonsuit.*

But the selectmen having indorsed their approval of this suit upon the writ, under the provisions of the statute of 1853, c. 48, § 13, no costs are allowed to the defendants.

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† STATE OF MAINE *versus* SPIRITUOUS LIQUORS AND JOHN S. CARTER.

39 262
41 257
39 262
85 472

Unless the warrant issued under § 11 of c. 48, of statutes of 1853, shows upon its face that the testimony required before its issue, was not only reduced to writing, but *signed and verified by the oath of the witnesses*, proceedings under it are invalid and void.

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

COMPLAINT, under § 11, of c. 48, of Acts of 1853, to search defendant's dwellinghouse. The warrant alleged, "it having first before the issuing this warrant been shown to me, the undersigned magistrate, by the testimony of witnesses upon oath, that there is reasonable ground for believing that spirituous and intoxicating liquors are so kept and deposited in said Carter's dwellinghouse or its appurtenances, intended for unlawful sale, which testimony has been reduced to writing by me."

Liquors were found in the dwellinghouse, the respondent being convicted before the justice, appealed, and was convicted at the trial in the Supreme Judicial Court.

After verdict, a motion in arrest of judgment was made for several causes, among which was the following: — that the complaint, warrant and record in the case does not show that the justice had jurisdiction.

The motion was overruled and exceptions filed.

*Low*, in support of the exceptions.

*Abbott*, Att'y Gen., *contra*.

TENNEY, J. — It appears upon the face of the proceedings, in this case, that before the warrant was issued, by the magistrate, it was shown to him, by the testimony of witnesses upon oath, that there was reasonable ground for believing, that spirituous and intoxicating liquors were kept and deposited in said Carter's dwellinghouse, or its appurtenances, intended for unlawful sale, which testimony had been reduced to writing by the magistrate.

In addition to the proof so certified in the warrant, it was necessary, that it should further appear upon the face of the proceedings, that the magistrate had caused the testimony of the witnesses given upon oath, and so reduced to writing, *to be signed and verified by the oath or affirmation of such witnesses.* This last requirement appears not to have been complied with before the warrant was issued; and for this reason the warrant was fatally defective; and the

*Exceptions are sustained and judgment is arrested.*

39 263
51 367
39 263
f94 279
39 263
91 87
92 224

† HAM *versus* HAM, *Adm'r.*

Practice.

Of the rules in granting new trials.

ASSUMPSIT.

In this case a verdict was returned, and a motion made to set it aside, and for a new trial, on the ground of surprise at the testimony given, and on account of newly discovered evidence.

The facts and nature of the testimony are stated in the opinion of the Court, which was drawn up by

TENNEY, J. — The plaintiff brought his action to recover the amount of a note of hand, concerning which it does not appear that there was any controversy, and he obtained a verdict therefor. But he failed to recover on another claim, which was for contribution, on account of a note given by him and the defendant's intestate, as principals, to one Dar-

ling Huntress, alleged to have been paid wholly by him. The defence to the claim for contribution was, that the note was given to obtain the means to pay the consideration for the conveyance of a parcel of land to the two principals on the note, and that the payment was made by the plaintiff from the avails of timber cut from this land, which was owned in common.

The plaintiff filed a motion that the verdict should be set aside and a new trial granted, on the ground that he was surprised at the testimony of John Goodwin, William Emery, jr. and Walter Gowen, witnesses introduced by the defendant; and that he has since discovered that he can prove by Oliver Hutchins, Mary E. Hutchins, Whiting Stevens, William Sayward, Levi Bragdon and Moses Abbott, facts which are specified in the motion, inconsistent with the evidence of said Goodwin, Emery and Gowen. And he has taken and introduced the depositions of Oliver and Mary E. Hutchins, Stevens and Bragdon.

1. The first point taken in the argument for the plaintiff is, that the defence set up at the trial was not indicated in the brief statement. It does not appear that the evidence in defence was objected to for this cause. If it were the subject of objection, it was admitted, and the only mode of presenting the question of the propriety of its admission was by exceptions. This has not been done, and this point is not open.

2. It is insisted, that the testimony at the trial, when carefully weighed, is insufficient to establish the defence. The motion is not upon the ground, that the rejection of this part of the plaintiff's claim was against the evidence of the case, and the defendant is not supposed to come prepared further than to answer the objections to the verdict, which appear in the motion. But the evidence adduced by the parties at the trial has been presented without objection, and it may not be improper to indicate our views upon this point. One part of this evidence is not in perfect harmony with another. There was, however, testimony introduced

by the defendant, if uncontrolled entirely, which might authorize the jury to find, that the money with which the plaintiff paid the note given to Darling Huntress, was the proceeds of what was owned in common by him and the defendant's intestate. And there was testimony tending to prove a different state of facts. It was a question peculiarly proper for the determination of a jury. It grew out of a transaction, which had its origin many years before, and touching which witnesses in no wise interested to recollect the facts, might honestly differ. They did differ essentially. Many things relied upon in proof by each party were attempted to be shown by the statements of one and the other, at times, when those present might not have fully known, understood or recollected their true import. Such evidence is always exposed to attack, on the ground of its uncertainty, when the declarations of the party are recently made; but when a long time has elapsed between the statements, and the evidence of what they were, it is not strange, that they should be received by a jury with some degree of distrust, unless fortified by some unusual circumstances. In looking at the evidence, given at the trial, if the question was before the Court upon this motion, the propriety of disturbing the verdict on this account might be properly regarded as very doubtful.

3. On a comparison of the evidence introduced by the plaintiff at the trial, to do away the effect of the evidence introduced in support of the defence, and that taken under the motion, we are to ascertain, whether it is newly discovered, and if so, what would be its probable effect if presented to a jury, and also, whether it is to be treated as cumulative, in reference to that first introduced by the same party.

Mary E. Hutchins deposes, that in July, 1851, Thomas Ham went to Samuel Pray's to settle for some plank after the death of Pray; on his return he said, they would do nothing about it, he expected he should lose it, and must lose it, and that it was between twenty and thirty dollars.

Before the death of Pray, he said he was going to Pray's to take up something, so that his debt should not be outlawed. The deponent testified, that she stated this conversation to the plaintiff, after the trial of the action, and had not mentioned it to him before.

The deposition of Mary E. Hutchins is the only evidence introduced to sustain the motion, which is proved to have first come to the plaintiff's knowledge since the trial. And this does in no respect show, that the defendant's witnesses testified erroneously; and if introduced at the trial, must have had no more than a doubtful tendency to change the result with the jury.

The facts disclosed by the other depositions were in several respects inconsistent with the facts stated by the defendant's witnesses, Goodwin, Emery and Gowen, but most, if not all the facts therein are similar to those, which were in testimony at the trial, from witnesses called by the plaintiff, and may be treated as cumulative evidence.

The Court can take judicial notice of the lines of counties, and the towns embraced therein. The depositions taken in support of the motion are of persons living in Shapleigh, a town adjoining that in which the trial took place. In the absence of any proof or suggestion, that an attempt was made to obtain the evidence of Oliver Hutchins, Stevens and Bragdon, in season to be used, it cannot be assumed that the plaintiff could not have availed himself of its benefit.

The rule is well settled, that a verdict will not be set aside, upon the proof of the existence of evidence, which was previously known to the party making a motion for that purpose; nor upon newly discovered evidence, which is purely cumulative.

It is not only promotive of the peace of the community, but for the interest of the parties themselves to suits at law, that litigation in every case should be speedily terminated. And to secure this desirable object, encouragement should not be given to remissness in the preparation for trials.

The law does not permit a party, to introduce a portion only of his proof, which is known, or which by reasonable diligence may become known to him, from an honest conviction that this portion may be sufficient for his purpose, and when he is disappointed at the result of his experiment, to introduce the part which he has reserved, on another trial.

*Motion overruled. — Judgment on the verdict.*

*J. Shepley*, for defendant.

*J. Goodenow*, for plaintiff.

## COUNTY OF ANDROSCOGGIN.

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61 34

† HOUGHTON *& als. versus* LYFORD *& als.*

To prevent a breach of the condition of a poor debtor's bond, by making a disclosure and taking the oath prescribed by law, the proceedings must be had before justices of the peace and quorum of that county in which the arrest was made.

But where, before any breach of the conditions of his bond, the poor debtor is allowed to take the oath prescribed, before justices of the peace and quorum of another county than that wherein the arrest was made, in a suit upon the bond, the creditor can only recover the real and actual damage by such breach.

Whether justices of the peace and quorum, living in another county than that in which they were appointed, may, before the term of their commissions has expired, exercise jurisdiction under their commissions; *quere.*

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

DEBT, on a poor debtor's relief bond. The brief statement alleged a performance of one of the conditions of the bond.

The principal debtor lived, was arrested and gave the bond sued, in the county of Cumberland. Soon after, that part of the county of Cumberland in which he lived was set off and formed a part of the new county of Androscoggin.

In the life of the bond he cited the creditors, disclosed and was permitted to take the oath referred to in his bond, before two justices of the peace and quorum, for the county of Androscoggin. But they lived in that part of the county of Androscoggin which was formerly in Cumberland, and were commissioned as such justices for the county of Cumberland, being authorized to act in their official capacity for the county of Androscoggin, only by virtue of the Act incorporating the new county.

The disclosure made a part of the case.

It was agreed that the Court might draw inferences as a jury, and enter such judgment as the law requires.

*Morrill & Fessenden,* for defendants. 1. The justices were in fact justices of the peace and quorum of the county of Cumberland, where the debtor was arrested, although it does not appear from the record that they acted as such. The Act establishing Androscoggin deprives these justices of no former power.

2. But if there is a breach, the plaintiffs have suffered no damage. *Hathaway* v. *Stone & al.,* 33 Maine, 500.

*Record,* for plaintiffs, cited R. S., c. 148, § § 21, 24; *Haskell* v. *Green,* 15 Maine, 33; *Fales* v. *Goodhue,* 25 Maine, 423; *Knight* v. *Norton,* 15 Maine, 337; *Barnard* v. *Bryant,* 21 Maine, 206.

The justices had no jurisdiction. Constitution of Maine, art. 5, § 8.

TENNEY, J. — The arrest of the principal obligor in the bond was made in the county of Cumberland, before the establishment of the county of Androscoggin. The disclosure was made and the oath taken by him before two justices of the peace and quorum, for the county last named, after the Act creating it had gone into full effect, as appears by the certificate, introduced in defence. It is a material question, whether these magistrates had the jurisdiction, which they assumed to exercise, so that their certificate is

evidence of a performance of one of the conditions of the bond. We think they had no such jurisdiction.

A person, who has given bond upon arrest, on execution, may make application in writing to any justice of the peace of the county in which he is arrested, to have the privilege and benefit of the oath, &c., and the examination shall be had before two justices of the peace and quorum, "for the county." R. S., c. 148, § § 21 and 24. From this it is manifest, that the debtor is to have the examination before magistrates, authorized to act in the county, in which the arrest was made; and he cannot cite his creditor and be heard with effect before those for any other county.

The arrest of the debtor having been made in the county of Cumberland, it was wholly immaterial, whether it was in one part or another of that county, as it was then constituted, so far as his subsequent rights and obligations were concerned. He could have cited his creditor, and have been examined by any magistrates of that county authorized for such a purpose. Nothing is found in any statute enacted since the arrest, which takes from the debtor the right to be heard before magistrates of the county of Cumberland; or which confers upon him the power, to be examined before those of any other, and thereby to fulfill one of the conditions of the bond by taking the oath. It follows, that the oath to be effectual, should be administered by justices of the peace and quorum, for the county of Cumberland.

When the law establishing the county of Androscoggin went into effect, the former lines of the county of Cumberland, so far as they were changed by that law, ceased to exist in reference to any thing future, not provided for to the contrary. The sheriff and other executive officers, commissioned before, for that county, could have no authority afterwards beyond its new boundaries. All judicial officers were under equal restrictions. A justice of the peace or a justice of the peace and quorum, commissioned for the county of Cumberland, as it formerly was, who should fall into the limits of the county of Androscoggin, upon its or-

ganization, would have no greater authority to perform judicial acts in the former county, as now constituted, than he would have, if he resided in any other part of the State. How far any justice of the peace and the quorum may legally exercise jurisdiction under a commission, not having expired by its terms, for one county, in the performance of acts required to be done in, or by magistrates for that county, when he does not reside therein, is not important to decide in this case; for those, who have signed the certificate introduced, have taken no jurisdiction, excepting as justices of the peace and quorum of the county of Androscoggin. And their acts, purporting to have been done by them under their authority as magistrates of that county, cannot be treated as having been performed by virtue of any jurisdiction, which they had power to exercise, as justices of the peace and quorum in the county of Cumberland, under the commissions which they held previous to the change of the limits thereof, even if they had the right to the exercise of such jurisdiction, which may be doubted.

Nothwithstanding the breach of the condition of the bond, the case falls within the provisions of the statute of 1848, c. 85, § 2, which restricts the damages to the amount, which shall be the real and actual damage.

The only evidence before the Court upon the question of damages, is the disclosure of the debtor, and the documents annexed thereto. From this evidence, the Court is satisfied, the plaintiffs have sustained no damage, and no costs can be allowed either party. Statutes of 1848, c. 85, § 3. The judgment to be entered is, that the instrument declared on, is the deed of the defendants; that the condition thereof has not been performed; but the plaintiffs have sustained no damage by reason of the breach thereof, and neither party recovers costs.

## † HERSEY *versus* VERRILL.

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If during the progress of a trial evidence is admitted against the objections of one of the parties, and subsequently the cause is left to the determination of the presiding Judge, *such objections* must be considered as *waived.*

Where the action is referred to the *determination* of the presiding Justice, exceptions do not lie to his rulings of the law, unless such right is reserved by the parties.

Where the plaintiff conveyed to defendant a house by deed with a covenant against incumbrances, and occupied it afterwards for a certain time, parol evidence that the plaintiff was to possess it rent free and that defendant agreed to pay the taxes assessed before the conveyance, is not contradictory to the deed and is admissible.

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

ASSUMPSIT, on an account annexed; one of the items was for the payment of defendant's money tax.

An account was filed in set-off, one of the items of which was for use and occupation of defendant's house from Sept. 6, to Nov. 1st, 1852. Proof of the occupation and value of the rent was introduced. And the plaintiff showed the payment of the tax.

The plaintiff conveyed to the defendant by deed, a house, on September 6, 1852, in which he covenanted against incumbrances.

He called a witness, who wrote the deed, and by him proved, against the objection of defendant, that the defendant told him before the deed was written, that he was to give a certain sum for the house; was to pay the taxes on it that year, and that plaintiff was to occupy it rent free until he completed a house he was then building. And after the deed was executed he heard a similar contract stated in a conversation between the parties, and that they thought it unnecessary to incorporate it in the deed.

The cause was then taken from the jury, and by agreement of parties submitted to the determination of the presiding Judge, who allowed the plaintiff's claim for money paid for taxes, and disallowed the claim in set-off for use and occupation, and rendered judgment for plaintiff. If the

testimony objected to, should not have been admitted, the judgment would have been for defendant.

To the ruling of the Judge, in admitting the testimony, the defendant excepted.

*J. Goodenow*, in support of the exceptions, cited *Rich* v. *Jackson*, 4 Brown's Chan. 384, and notes, (Perk. ed.) as to parol agreement to pay taxes; 1 ibid. *Irnham* v. *Child*, 84; Chitty on Contracts, 107; 1 Greenl. Ev. § 304; *Wheeler* v. *Cowan*, 25 Maine, 283; *Emery* v. *Chase*, 5 Greenl. 232; *Ryan* v. *Hall*, 13 Met. 520; 11 Met. 556; *Larrabee* v. *Lambert*, 34 Maine, 79; 12 Maine, 506.

*Morrill & Fessenden, contra*, cited *Tyler* v. *Carleton*, 7 Greenl. 175; *Emmons* v. *Littlefield*, 13 Maine, 233.

TENNEY, J. — After all the evidence was introduced, by the agreement of the parties, the action was submitted to the determination of the Court, and judgment was rendered in favor of the plaintiff; a deduction from his claim of a sum not considered as established, and a sum was found due to the defendant upon his account filed in set-off. A charge of the defendant for use and occupation of a house for a certain period was not allowed.

The presiding Judge having been made a referee by the parties, to *determine* the controversy, the result to which he came is conclusive upon the questions involved; and the objections interposed during the trial to the competency of certain evidence allowed to be introduced on the part of the plaintiff, must be regarded as waived. Exceptions therefore, in this action, do not lie to rulings of the Judge in matters of law, any more than to his conclusions in those of fact. The case is essentially unlike that of *Trustees of Ministerial and School Fund in Andover* v. *Reed*, *ante* p. 41, which was withdrawn from the jury, and submitted to the presiding Judge, the right of the plaintiff to except to his previous rulings, being reserved.

But in looking at the case, as presented in the exceptions, it may be proper to remark, that we are not satisfied, that

the testimony of Howard, which was objected to, was legally incompetent. It did not contradict or vary the import of any thing in the deed, from the plaintiff to the defendant, of the sixth day of September, A. D. 1852. When the defendant called upon the witness to write the deed he informed him, that he was to pay the taxes upon the property to be conveyed, for the year 1852, and that the plaintiff was to occupy the house, free from rent, until the completion of the one which he was building. At the time the deed was executed, in a conversation between the parties, the defendant made the same statement; and on a suggestion, by the witness, of the propriety of having this agreement inserted in the deed, they considered it unnecessary, "and a mutual agreement."

The parol lease of the house, under which the plaintiff held, according to its terms, was not contradictory to the deed. The tax assessed upon the land conveyed, which the defendant agreed to pay, was certainly not of necessity an incumbrance. If no agreement, that the defendant was to pay the taxes, had been made, and they had remained outstanding, whether they would constitute an incumbrance upon the land would depend upon facts, which have not been disclosed or attempted to be disclosed in this case. No legal presumption arises, that a tax upon real estate creates an inchoate right therein, without some evidence of the basis of the tax, and the correctness of all the proceedings which have resulted in the assessment.

*Exceptions dismissed.*

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† NORRIS *versus* ANDROSCOGGIN RAILROAD COMPANY.

Railroad corporations required by their charter to keep and maintain legal and sufficient fences on the exterior lines of their road, for neglecting that duty, are made liable to a forfeiture of one hundred dollars per month by c. 41 of Acts of 1853.

This Act being remedial and for the protection of property peculiarly exposed by the introduction of locomotive engines, applies to corporations existing before its passage.

A *neglect* by the corporation to erect or maintain such a fence, renders them liable to reimburse any person suffering injury in his property thereby, in an action at common law.

Thus, where the plaintiff's horse, by reason of a defective fence upon the line of a railroad, well known to the company, escaped from his pasture upon the track, and was injured by the engine, the railroad company are responsible for the damages, notwithstanding the engineer was in the exercise of due care, and the fence was originally *imperfectly* built by the plaintiff for the company.

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

CASE, to recover for an injury done to plaintiff's horse.

The defendants' railroad is made through improved land of the plaintiff, and, through a defect in the fence on the line of the railroad, his horse escaped from his pasture on to the track, and was injured by the locomotive of the defendants while running an evening train. The testimony of the engineer showed that he was exercising due care; that he was running twenty-five miles an hour, and that after seeing the horse, the collision could not be avoided.

About two years prior to the accident the defendants employed the plaintiff to build the fence between his land and the track, a part of which was stone wall, and paid him therefor.

Several days before the injury there was a gap in the wall of five feet long, where the top stones of the wall were down, leaving the remaining stones in the wall 22 inches high and 18 inches thick, over which the horse escaped.

The full Court were authorized to render such judgment as the law and facts required.

*May*, for defendants, denied that they were liable at common law. *Rust* v. *Low*, 6 Mass. 90; *Little* v. *Lothrop*, 5 Maine, 356; American Law Reg., vol. 3, No. 6, p. 341 and cases there cited.

The defendants, being in the exercise of their lawful rights, cannot be held liable for injuries without their fault any further than made so by statute. *Chapman* v. *Atl. &*

*St. Lawrence Railroad*, 37 Maine, 92. Neither are defendants liable for this injury by any statute. It is not found in their charter, and the only liability imposed upon them, when in the exercise of due and ordinary care, is found in § 5, c. 9, of laws of 1842, in regard to fires communicated by their engines.

If it is said they are liable at common law for the neglect of some duty imposed by statute, by reason of which a loss occurs, must not the declaration so allege it? The suit is merely for killing the horse through want of ordinary care.

The defendants are under obligation to support fences on the exterior lines of their road; but before they can be held liable for slight defects in their fences, they must have reasonable notice of such defects, and according to the evidence, the defect here is not such a want of care as would make the defendants liable in this action. *Trow* v. *The Vermont Central Railroad Co.*, 24 Verm. 488.

Even if there were neglect here, it was too remote to make them liable for the horse. There must be want of care at the time the damage is done.

*Ludden*, for plaintiff, contended, that defendants were bound by the common law to maintain fences sufficient to keep cattle from their track, and a neglect to do so, renders them liable for the damages. *Quimby* v. *Vermont Central Railroad Co.*, 23 Verm. 387; *Trow* v. *same*, 24 Verm. 488; *Bridge* v. *Grand Junction Railway Co.*, 3 Meeson & Wel. 244; *Dean* v. *Sullivan Railroad Co.*, 2 Foster, 316.

As the defendants were bound to erect and maintain the fence, so are they bound to know the condition of the fence. *Carter* v. *Becher*, 3 Burr. 1905; *Lynch* v. *Decoster*, 14 East, 494.

But we need not rely upon the common law. The statute liability is clear. The statute and defendants' charter required the fences to be kept up, and they were guilty of negligence in not doing it. And this was *proximate* to the

injury. *Sherrod* v. *London & North-western Railroad Co.*, Railway & Canal Cases, vol. 6, p. 245.

TENNEY, J.—By the charter of the defendants, c. 184, § 11, of the special laws of 1848, they are required to keep and maintain legal and sufficient fences on each side of their railroad, when the same passes through enclosed lands, or lands improved, or lands that may be improved afterwards, and for the neglect of this duty they are liable to pay a fine, sufficient to erect and repair the same.

By the statute of 1853, c. 41, § 20, a neglect in any railroad company, which is bound, by the provisions of its charter, to make or maintain fences bordering on its road, when by such neglect, the owner of the land, through which the railroad passes, is liable to suffer damages, after certain proceedings by the owner of the land, subjects the company to the forfeiture of the sum of one hundred dollars, for each month it shall neglect to make and maintain the fence, to be paid to the owner of the land. This statute was enacted after the Act of incorporation of the defendants. But it being one of those remedial Acts passed for the effectual protection of property peculiarly exposed by the introduction of the locomotive engine, applies to corporations existing before its passage. *Lyman* v. *Boston and Worcester R. R. Co.*, 4 Cush. 288.

A railroad company, as passenger carriers, are bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track and all the subsidiary arrangements necessary to the safety of passengers. *McElroy & ux.* v. *Nashua and Lowell Railroad Company*, 4 Cush. 400. And, for the security of persons or property exposed to injury by being upon or near the railroad track, at the time of the passage of the engine, the principles of the common law require that the agents of the company shall exercise common and ordinary care; and if they are guilty of neglect in this, and damages are occasioned to individuals in conse-

quence, the company will be liable, notwithstanding the injured party may be a wrongdoer in being upon the railroad.

In Vermont, where railroad companies are not required by statute provisions to make and maintain fences on each side of the land taken by them for the road, the Court say, in the case of *Trow* v. *Vermont Central R. R. Co.*, 24 Ver. 488, "the duty of maintaining fences and erecting cattle guards, is imposed on the corporation, not only as a matter of safety, in the use of their roads and running their engines thereon, but also as matter of security to the property of those living near and contiguous to the road. And this arises from the consideration, that they must know and reasonably expect, that without such precautions, such injuries will naturally and frequently arise. And where, for the distance mentioned in this case, no precautions of that kind were used upon the road, and in a place so public and common, we think, as a matter of law, there was that neglect, which will render the corporation liable for injuries arising solely from that cause."

And where the charter of the company and the general statute provide for the safety of property, not in the transportation thereof upon the railroad, but being in an exposed situation in its vicinity, by certain requirements, and by the neglect of these requirements, the property is destroyed or injured by the engine upon the road, the liability cannot be denied. If the charter imposes upon the company the obligation, at certain crossings, to place men to guard the passages across the track, and to prevent persons or domestic animals from passing when the trains are approaching, and this requirement should be neglected to the injury of a party, from the engine, no doubt could be entertained, that compensation for such injury could be legally claimed. And where it is required, for a like object, that the railroad passing by improved land shall be enclosed by a good and sufficient fence, and this shall be neglected by the company, and horses or other animals in consequence of this omission stray upon the track, and are killed or injured by the engine

or its appendages, the company is liable in damages. In such case, it is a neglect to construct the road in the manner prescribed, for the very purpose of giving to the owners of this kind of property the security designed, and the omission is the proximate cause of the damages sustained. *Sherrod* v. *London & North-western R. R. Co.*, 6 Railway and Canal Cases, 245. The owner of the contiguous improved land is entitled to remuneration for his losses so occasioned, equally with the passenger in the cars, who should be injured by reason of the omission of the company to construct the road in the mode required. As such defect was the cause of the injury, the great moderation with which the engine was driven, the extreme care of the engineer and the agents in attendance, would be no answer to the claim for damages received.

In the case before us, the company was guilty of a neglect, in suffering the fence between the plaintiff's pasture and the railroad to be out of repair, for several days. It is not exonerated from liability, as by the throwing down of the wall immediately before the escape of the plaintiff's horse, if such would excuse it; for it is presumed to have had ample notice of the defect. It was not the duty of the plaintiff to be upon the lookout, to see if the fence was entire, as it was not required of him to make, or to maintain it; and there is no evidence, that he had knowledge of its condition when the injury took place.

The defendants were wrongdoers, and no fault is attributable to the plaintiff. The injury to the horse was the consequence of a disregard of an express requirement of the law, and the company must answer in damages, unless they are relieved by other facts which appear in the case.

The fact that the plaintiff originally constructed the fence for the company is no defence. He received payment for that service, without objection, and his acts therein became the acts of the company. If he had constructed an insufficient fence, after its adoption by the company, his defaults cannot be set off against the liability of the other party.

The objection to the sufficiency of the writ cannot avail the defendants. It does not purport to be an action by authority of any statute provision, such as is provided by R. S., c. 25, § 89, but is an action at common law, though the liability of the company may arise by reason of its charter and statutory provisions.

*Defendants defaulted.*

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DAVIS *versus* TIBBETTS.

A conveyance of land for a valuable consideration, made by the grantor with the intent to defraud his creditors, but without that knowledge on the part of the grantee, is an effectual transfer of the legal title.

And although *such grantee* conveys the land to a third person, and the consideration is paid in fact by the original *fraudulent grantor*, the *legal title* is in the grantee of the deed.

A levy upon land thus situated, as the property of the original *fraudulent grantor*, by his creditor, gives to him no legal title or right of possession.

And for any acts of ownership upon such land under such levy, the creditor is liable in an action of trespass to the owner of the legal title.

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

TRESPASS *quare clausum.*

The acts of trespass were proved and the plaintiff's title by deeds introduced, and the presiding Judge intimating that the facts proposed to be proved in defence would not constitute one, the cause was agreed to be reported for the full Court, and if they were of opinion that the facts offered to be proved would constitute a legal defence, the action was to stand for trial, but if not, a default was to be entered and judgment for $3,00, damages with costs.

The facts offered to be proved, and the title of the parties, appear in the opinion of the Court, which was drawn up by

RICE, J. — Trespass *quare clausum.* Both parties claim title to the *locus in quo*, from Asa Merrill. The plaintiff derives his title by deed from Asa Merrill to Thos. Hodg-

kins, dated March 6, 1846; deed Thos. Hodgkins to Alvin Merrill, June 6, 1849; deed Alvin Merrill to himself, dated April 15, 1850.

The defendant derives his title by a levy of an execution, Josiah F. Longley against Asa Merrill, upon the land as the estate of the said Asa, Dec. 15, 1851, and a deed from said Longley to himself, dated July 15, 1854.

The deposition of Thomas Hodgkins, introduced by the defendant, shows, that the deed from Asa Merrill to him was for a valuable consideration, and so far as the witness was concerned, made in good faith. The defendant offered to prove, that so far as Merrill was concerned, the conveyance to Hodgkins was made for the purpose of defrauding his (Merrill's) creditors, and that the conveyances made by Hodgkins to Alvin, and from Alvin to the plaintiff, were all made at the instance and request of said Asa, and the considerations paid therefor were paid by the said Asa. But neither the testimony introduced, nor that offered, showed that Hodgkins had any knowledge of the fraudulent purposes of said Asa. The levy of Longley was made when the legal title to the land was in Alvin Merrill. From the time Asa conveyed to Hodgkins, to the time of trial, he has had no legal title to the estate.

Whatever effect that levy may have had upon the supposed equitable interest of Asa, it did not reach the *legal title* to the land. The right of possession follows the legal title. The defendant shows neither possession nor legal title. If he has any remedy against Asa Merrill it must be in equity. A default must be entered, and judgment as per agreement.

*Morrill & Fessenden,* for defendant.

*Moody,* for plaintiff.

MORRILL *& al. versus* DUNN.

On an acknowledgment in writing by a deputy sheriff, that he has money in his hands, arising from a sale of property assigned by the owner to plaintiffs for the benefit of his creditors, and a promise to account to them as such assignees upon certain contingencies, no action is maintainable by the assignees after their fiduciary character has ceased, although the contingencies in the writing have arisen, unless they have some interest in the money, or furnish proof that the suit is prosecuted at the request of the party entitled to it.

ON REPORT, RICE, J., presiding.

ASSUMPSIT for money had and received.

After the evidence was introduced, it was agreed by the parties that upon so much as was admissible and upon the facts admitted, the full Court might order a nonsuit if the action was not maintainable, otherwise to stand for trial.

The facts all appear in the opinion of the Court which was drawn up by

SHEPLEY, C. J. — It appears, that Joseph D. Davis and John A. Briggs were partners in trade. That partnership was dissolved by agreement on October 16, 1851, and all the interest of Davis in the property of the partnership was assigned to Briggs; who on October 22, 1851, made an assignment of his own property and of the property of the late firm, to the plaintiffs for the benefit of creditors under the provisions of the statutes respecting such assignments.

A part of the partnership property appears to have been subsequently attached and sold by the defendant, as a deputy of the sheriff, on certain writs against the former partners. By an agreement bearing date on August 28, 1852, he admitted that the sum of $631,48, remained in his hands, and he engaged to account to the plaintiffs as assignees for it at such times as certain suits named should be adjusted and settled.

The plaintiffs having performed their trust as assignees were on their own request discharged by the Judge of Probate, at a Court holden on the third Tuesday of July, 1853. "It is also admitted, that the plaintiffs have no interest in

the suit or in the paper named, direct or indirect." The suit was commenced on March 7, 1854, after they had been discharged as assignees.

They claim to maintain it for the benefit of another, who may have title to the money. The officer does not appear to have any title to it; but he must be careful, that he accounts to the true owner.

Assignees under the Act of 1844, c. 112, and the additional Act of 1849, c. 113, are required to give bond to the Judge of Probate to return an inventory of the property assigned to them and to account to him for its disposition. When they have thus accounted and have been discharged of the trust, any of the property remaining will revert to the assignor or true owner; and their title as assignees and trustees will be extinguished.

As the plaintiffs have no private interest in the money in the hands of the defendant, and as their official character and trust has been determined, without any proof that this suit upon defendant's contract is prosecuted at the request of the party legally entitled to the money, the action cannot be maintained. *Plaintiffs nonsuit.*

*J. Goodenow,* for defendant.

*Morrill & Fessenden, pro sese.*

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MOODY, *Petitioner for Review, versus* LARRABEE *& al.*

By c. 246, § 13, of the Acts of 1852, it is provided, that all petitions for review may be heard and determined by the presiding Justice at any term held for the trial of jury cases, subject to exceptions to any matter of law by him so decided and determined.

The facts established by the testimony on such petition, and the ascertainment of those facts are solely for the determination of the presiding Justice, to which exceptions do not lie.

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

PETITION for a review.

After hearing the evidence offered on the petition, the presiding Judge ruled, that he saw no cause for disturbing the verdict.

The petitioner filed exceptions, which were allowed for the purpose of bringing the question before the full Court, the presiding Judge doubting if they would lie.

*Moody, pro se.*

*May*, for defendant, submitted the case without argument.

APPLETON, J. — The granting or refusing the review of an action is a mixed question of law, and of judicial discretion, to be determined according to the varying facts of each particular case. By R. S., c. 123, § 1, the Justices of the Supreme Judicial Court are authorized to "grant a review in all civil actions, including petitions for partition originally commenced in the late Court of Common Pleas or District Court, and in which judgment has been or shall be rendered in that Court, whenever *they shall judge it reasonable and for the advancement of justice without being limited to particular cases.*" It was enacted by § 2, of the same chapter, that "any Justice of the District Court may, concurrently with the Supreme Judicial Court, grant reviews of actions of the kinds and in the circumstances mentioned in the preceding section in which judgment was rendered in said District Court," &c. It will be perceived, that while the authority to grant a review was conferred on the Supreme Judicial Court, as a court of law, and to be exercised by them at the terms appointed for hearing and determining questions of law, that a single Justice of the District Court might, at his discretion, grant or refuse a review without power of appeal by the aggrieved party or the right to exceptions in case any question of law had been erroneously decided. The anomaly existed of conferring on a single justice of an inferior Court powers, which were denied to a Justice of the highest judicial tribunal of the State.

No reason was perceived why a power which had been safely intrusted to, and satisfactorily exercised by a Justice of the District Court, might not be judiciously conferred on a single Justice of the Supreme Court. Accordingly, to facilitate the speedy determination of this class of questions, among other changes made by the Act approved April 9, 1852, c. 246, it was enacted by § 13, that all petitions for review might "be heard and determined by the presiding Justice at any term held for the trial of jury causes, subject to *exceptions to any matter of law by him so decided and determined.*" All matters of fact or of discretion are left entirely to the determination of the presiding Justice, whose decision is final.

But it was perceived, that in the hearing of reviews, as in the trial of other causes, questions of law might arise. The evidence offered, if legally admissible, might determine the legal rights of the parties. The presiding Justice might grant or refuse a review, accordingly as he should adjudge the evidence offered competent or not competent. If it were legally admissible he would grant it, if not, he would refuse it. So it might be a question of law, whether the facts proved would constitute a defence, and he would grant or refuse a review according to his decision of the law upon the facts thus proved. If in cases of this description the presiding Justice should decide the law erroneously, a review might be granted or refused, when but for this error as to the law, his decision would have been the reverse of what it was. Intending to decide according to law and mistaking the law, his decision would be the reverse of what it would have been were it not for such mistake. To meet this contingent danger the decision of the Justice before whom the review was heard, was made "subject to exceptions to any matter of law by him so decided and determined," so that if a review should be granted or denied through any misconception of the law, the error might be rectified by the full Court without the trouble and expense of a jury trial.

To accomplish this purpose, the facts must be determined by the presiding Justice and if any question of law arises upon those facts, according to the determination of which the review is to be granted or denied, it is to be definitely decided, and to such decision the party aggrieved may except.

The question submitted in this case to the presiding Justice, being whether it was reasonable, and for the advancement of justice, that a review of the original action should be had, the testimony of L. Larrabee was peculiarly proper to show the circumstances under which the payment of three hundred dollars was made, to enable him to appreciate the equities of the case and satisfactorily to determine what was required in the exercise of a sound discretion.

After hearing the evidence the Judge ruled, that he saw no cause for disturbing the verdict. This can only be regarded as a simple statement of the conclusions to which, after the hearing, he had arrived. It is neither the decision nor the determination of any matter of law.

*Exceptions overruled. — Review denied.*

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MORSE *versus* ANDROSCOGGIN RAILROAD COMPANY.

A bailee of goods upon which labor is to be performed for a sum of money, and they are not to be converted into something essentially different in their character, has only a *special* property in them, which is terminated by the performance of his labor and a delivery to the general owner.

And when *such bailee* has completed his work, and delivered the goods to a *common carrier* for the general owner, and the goods are lost or damaged, *he* can maintain no action against the carrier therefor.

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

CASE, against defendants as common carriers.

The plaintiff delivered a box containing thirteen coats, directed to "Saroni & Goodheim, No. 40, 42, North, formerly Ann St., Boston," to the depot master of defendants at Livermore, and paid the freight thereon.

The box was lost, but was found after the commencement of this suit at a station on another line of railroad, and when sent to Boston the property was damaged, and a part of it missing. The plaintiff was notified by Saroni & Goodheim that they would not receive it without a discount.

Saroni & Goodheim sent the cloth cut into coats, to the plaintiff, to be made, finished and returned to them, for a price agreed.

The cause was submitted for the decision of the full Court; if the action is maintainable, a default to be entered for $34, otherwise a nonsuit.

*May,* for defendants.

*Knapp,* for plaintiff.

SHEPLEY, C. J. — The plaintiff claims to recover damages for the injury and loss of the contents of a box delivered to the defendants' agent at Livermore Falls to be transported to Boston. It is denied, that he has such an interest in the property as will enable him to maintain the action. From the case, as presented, it appears, that Saroni & Goodheim, of Boston, caused some cloth to be cut and prepared to be made into coats, "and sent it to the plaintiff, in Dixfield, to be made and finished and returned to said Saroni & Goodheim to Boston; and when made and finished they were accordingly left with and delivered to the depot master of the defendants to be so forwarded." The coats appear to have been put into a box properly marked, and the plaintiff paid sixty-one cents for its carriage.

This was a species of bailment denominated *locatio operis faciendi,* where work is to be performed for a pecuniary recompense upon the thing delivered. In such case the property does not pass from the general owner to the workman, unless the thing is to be deprived of its original character and converted into something essentially different; as an ingot of gold into personal ornaments.

In this case the general property was in the owners of the cloth, while the plaintiff acquired a special property in

it, to enable him to retain and protect it for the performance of the work to be done upon it. The plaintiff would not be liable to the general owners for the loss of it while in his possession, unless it was occasioned by his negligence or fault. He was responsible for ordinary care and diligence respecting it, while it was in his possession, and for its delivery to the common carrier to be returned. There is no testimony presented tending to prove any liability for its safe return by the carrier to the general owner. It cannot be presumed, that such a bailee would become an insurer to the general owner of the risks of transportation. When the plaintiff had performed his work, had properly enclosed the property, delivered it to the carrier and paid for its carriage, his whole duty had been performed. His responsibility respecting it, and his special property in it terminated, when he ceased to have possession or any right to possession of it.

Having ceased to be bailee, and to have any special property in the coats before they were injured or lost, the plaintiff cannot maintain the action.

*Plaintiff nonsuit.*

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## MOULTON *versus* SCRUTON.

In an action on a warranty for the soundness of a horse, a witness who testifies for plaintiff as to the appearance and action of the horse, but who is not an *expert*, cannot be asked on cross-examination whether he had observed the same appearances in horses who had been hard driven and then exposed.

In such an action, the measure of damages is the difference in value of what the horse was warranted to be, and what it actually was at the time of the sale. The jury are not allowed to add interest or what would be equivalent to interest from the date of the writ.

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

CASE.

The suit was for an alleged breach of warranty for the soundness of an horse.

One witness, called by plaintiff, testified, that he saw the horse in controversy three days after the exchange, and she appeared sore in the feet; would keep stepping up first one foot and then the other and appeared stiff when turned short on the floor, and was some lame.

On cross-examination, he was asked if he did not know, that other horses which had been hard driven and then exposed, were often found to appear or be in the same condition as this horse was when he saw her. This being objected to was excluded by the Court.

In the instruction to the jury, the measure of damages given, was the difference occasioned by the unsoundness between what the horse would have been worth if she had been what she was represented and warranted to be, and what she actually was, at the time when the exchange was made, with what would be equivalent to interest on that sum from the date of the writ.

Verdict for plaintiff and exceptions taken.

*May*, in support of the exceptions.

*Morrill & Fessenden, contra.*

RICE, J. — The question proposed to the witness, Dennett, was properly excluded. It referred to matters in no wise connected with the issue then before the Court. Dennett does not appear to have been an expert. If the question had been answered in the affirmative by the witness, it does not appear that all the horses observed by him might not have been unsound. To render the evidence of any practicable value, even by way of comparison, the character and condition of each horse, the manner in which it had been driven and the degree of exposure to which it had been subjected, must have been inquired into, thus raising many distinct, collateral issues, none of which could the other party be supposed to be in a condition to meet, besides thereby protracting the trial indefinitely. Such testimony is inadmissible. 1 Greenl. Ev. § § 52, 448; *Cushing* v. *Dorchester*, 6 Met. 396; *Aldrich* v. *Pelham*, 1 Gray, 510.

The measure of damages, in case the jury should find a breach of warranty, was stated by the Court to be, *as the report finds*, the difference occasioned by the unsoundness, between what the horse would have been worth, if she had been what she was represented and warranted to be, and what she actually was, at the time when the exchange was made, with what would be equivalent to interest on that sum from the date of the writ.

This rule, it is contended, contains a direction to the jury to allow a sum equal to interest from the date of the writ, beyond the real damage sustained by the breach of warranty, and therein is erroneous. Such we think is the fair construction of the language used in the report.

There has been much uncertainty as to the measure of damages in this class of cases, both in this country and in England. The rule laid down by Greenleaf, in his work on Evidence, vol. 2, § 262, is as follows: — "In assumpsit upon the warranty of goods, the measure of damages is the difference between the value of the goods at the time of sale, if the warranty were true, and the actual value in point of fact."

In support of this doctrine, the author cites *Eggleston* v. *Macauley*, 1 McCord, 379, where the rule is thus stated: — "on breach of warranty, express or implied, in the sale of an article, the damages to be recovered must be rateable with the loss; and if a total loss, the whole sum paid, *with interest*, may be recovered back." He also cites *Armstrong* v. *Percy*, 5 Wend. 335, which was for a breach of an implied warranty in the title to a mare, and in which MARCY, J., states the rule of damages to be the price paid the defendant for the horse, *and interest* thereon, together with costs which the plaintiffs became liable to pay the true owner, in their suit to establish their title.

In *Neel* v. *Deens*, 1 Nott & McCord, 210, a similar rule was recognized by the Court, in an action for damages in the sale of a slave, which proved to be unsound.

In *Voorhes* v. *Earl*, 2 Hill, 288, which was assumpsit for

breach of warranty in the sale of sixty barrels of flour, COWEN, J., in delivering the opinion of the Court, remarked, "regarding this case as one of simple warranty without fraud, the measure of damages adopted at the trial, (which was the difference between the price paid, and that at which the article sold, at auction, *and interest* thereon,) was wrong. It should have been the difference between the value of the sixty barrels, at the time of the sale, considered as superfine flour, and the value of the inferior article sold."

In *Cary* v. *Gruman*, 4 Hill, 625, which was for a breach of warranty in the soundness of a horse, the rule was said to be, "by paying to the vendee such sum, as together with the cash value of the defective article, shall amount to what it would have been worth, if the defect had not existed."

It is now well settled, that the rule is the difference between the actual value, and the value that the article would have possessed, if it had conformed to the warranty. Sedgwick on Meas. of Dam. 290.

In the above cases, the question of interest does not appear to have been particularly considered.

But the question arises, whether interest, or its equivalent in damages, may be allowed in this class of cases, under any circumstances. Story, in his work on Contracts, § § 1029, 1030, says, "we now come to the second class of cases upon which interest is allowed, not as matter of strict right, and as a necessary incident to the original debt, but upon which it may be allowed by the jury *by way of damages*. Within this class are included cases of tort, or breach of contract, whereby special damage has resulted to the party claiming it. * * * * When the claim arises from tort, the form of action will not preclude the right to interest; and there is no difference in this respect, whether the action be assumpsit, or trespass, or trover. So also when there is a breach of contract, the same rule governs."

The general rule would seem to be, that it is not in conformity with legal principles, to allow interest in actions for unliquidated and contested claims, sounding in damages, but

it is within the discretion of a jury to give interest in such cases in the name of damages. *Still* v. *Hall*, 20 Wend. 51; *Goddard, Adm'r*, v. *Bulow*, 1 Nott & McCord, 45; *Gilpin* v. *Consequa*, Peters C. C. R. 88; *Willings* v. *Consequa*, ibid. 172; 1 Johnson, 315.

From the report of the case at bar, the jury appear to have been deprived of that *discretion*, by the instructions of the Judge. The result of such instructions may have been to increase the verdict by the amount of the interest upon the damages found against the defendant, from the date of the plaintiff's writ, to the time of trial. To that extent only could the defendant have suffered from the erroneous instruction. This sum, which may be accurately estimated, it is competent for the plaintiff to remit. If he shall elect so to do, and enter the same upon the record, he may have judgment for the balance; otherwise a new trial must be granted.

APPLETON, J., *hæsitante.*

See *Brannin* v. *Johnson*, 19 Maine, 361.

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51 367
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STATE OF MAINE *versus* JACKSON.

The Acts prescribing the limits of towns and *counties* are public Acts of which the Court are bound to take notice.

The offence in a criminal charge should appear to have been committed in the county named in the indictment.

But an indictment which alleges an offence to have been committed in a town named, and that it belonged to the county at the *finding* of the bill, without describing in what county it was *when* the offence was committed, is valid.

An offence committed in a town which is *afterwards* incorporated with other towns into a new county, on which no proceedings are pending, is cognizable by the Court sitting in such new county. Their jurisdiction extends over offences committed within the *territorial* limits of the county, whether *before* or *after* its incorporation.

An indictment in which two distinct times and places have been mentioned where the substantive offence has been committed, and reference is afterwards

made to time and place, by the words "then and there," is defective; but when one of the places previously mentioned has reference only to the *residence* of a person named therein, it is unexceptionable.

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

INDICTMENT, found against the respondent at Lewiston, in the county of Androscoggin, at the Aug. term, 1854. It was as follows: —

"The jurors for said State upon their oaths present, that Charles G. Jackson, of Winthrop, in the county of Kennebec, on the 8th day of January, in the year of our Lord 1854, at Poland, now in said county of Androscoggin, did commit the crime of adultery with one Rachel A. Cloudman, wife of Charles H. Cloudman, of Poland aforesaid, by then and there having carnal knowledge of the body of her, the said Rachel A. Cloudman, he, the said Charles G. Jackson, being then and there a married man, and having a lawful wife alive; the said Rachel A. Cloudman not being then and there the lawful wife of said Charles G. Jackson; and the said Rachel A. Cloudman being then and there a married woman, and having a lawful husband alive; and the said Chas. G. Jackson not being then and there the lawful husband of the said Rachel A. Cloudman, against the peace," &c.

Poland at the time the offence was charged belonged to the county of Cumberland. The new county of Androscoggin, composed of Poland and several other towns, was incorporated to take effect on March 31, 1854.

On trial the respondent was convicted, and his counsel moved in arrest of judgment for several causes, among which reliance was only placed upon the following: —

3. Because the Act of the Legislature creating the county of Androscoggin does not give this Court here jurisdiction of offences committed before the said Act took effect.

7. Because there is no averment in said indictment, that Poland, when the offence charged is alleged to have been committed, was then and there in the county of Androscoggin, or in any county in this State.

10. Because after two different places in different counties have been named in said indictment, and also two different times have been named in said indictment, all the averments material in said indictment as to the time and place are laid then and there, or with words denoting present time.

12. Because there is no averment, that said Charles G. Jackson had a lawful wife alive, or the said *particeps criminis* had a lawful husband alive when the offence is alleged to have been committed.

The motion was overruled.

*Morrill,* with whom was *Gerry,* in support of the exceptions, as to the first and second of the above reasons, cited Chit. Crim. Law, p. 196, note 1, (Perkins;) *State* v. *Jones,* 3 Halstead, 307; *Damon's case,* 6 Maine, 148; *U. S.* v. *Wood.* In support of the third, *State* v. *Roberts,* 26 Maine, 268; Chit. Crim. Law, p. 198; and in support of the fourth, *State* v. *Thurston,* 35 Maine, 205; *Moore* v. *Com.* 6 Met. 243; Chit. Crim. Law, before cited; Davis' Crim. Justice, p. 295; *State* v. *Hutchinson,* 36 Maine, 261.

*Abbott, Att'y Gen. contra.*

RICE, J. — The case is presented on motion in arrest of judgment, brought before us by exceptions. There are numerous causes assigned in the motion, why judgment should be arrested, only four of which, however, are relied upon in the argument.

The county of Androscoggin was incorporated March 18, 1854, — the Act to take effect on the 31st day of the same month.

The indictment was found at the August term of the Supreme Court, in that county, the same year. It is alleged in the indictment, that the offence was committed on the eighth day of January, A. D. 1854, at Poland, now in said county of Androscoggin.

The seventh cause assigned in the motion for arrest, but the first noticed in the argument is, "because there is no

averment in said indictment that Poland, where the offence charged is alleged to have been committed, was then in the county of Androscoggin, or any county in this State."

In *State* v. *Jones*, 3 Halstead, 307, cited and relied upon by defendant's counsel, the indictment charged, that John I. Jones, late of the township of Hardwick, in the county of Warren, on the 28th day of August, A. D. 1824, at the township of Mansfield, in the county aforesaid, and within the jurisdiction of this Court, feloniously did utter and publish as true, certain false, forged, and counterfeit acquittances," &c.

The Court at which the indictment was found, was held in June, 1825. The county of Warren was incorporated from a part of Sussex, Nov. 20, 1824.

The Court remarked in their opinion, "it is seen that at the time mentioned, there was no such place as that at which the offence is alleged to have been committed. There is a manifest repugnancy." Judgment was arrested.

The territory of the new county is described as being "all the lower part of the county of Sussex, northerly of a line beginning in the river Delaware at the mouth of Flat Brook, in the county of Walpeck, and running certain courses to other monuments." R. S., Laws of N. J., 1841, p. 172. It does not appear from the Act, whether the township of Mansfield is or is not included in the new county of Warren.

In *U. S.* v *Wood*, also cited by defendant's counsel, and referred to in Chitty's Cr. Law, 196, note, the defendant was charged as being accessory to the robbery of the United States Mail, and the offence was alleged to have been committed within the District of Pennsylvania. After the commencement of the session of the Court, but before the indictment was found, the State of Pennsylvania was divided by Act of Congress, into two Judicial Districts, the Eastern and Western. It did not appear in the indictment within which of the two districts the offence charged was committed. Judgment was therefore arrested. There was nothing in either of the above cases, either in the records or in the

statutes, by which it could be made certain whether the offences were committed within the territorial jurisdiction of the Courts in which the indictments were found, or otherwise. Judgment was, therefore, properly arrested. But *id certum est quod certum reddi potest.* In a criminal case the record should show that the offence was committed in the county charged in the indictment, but if it is shown to have been committed in a town which a public law recites to be in the county, this is sufficient, but if, since the passage of the law, the boundaries of the county have been changed, and the law changing the boundaries does not show whether the town is left within the old county, or is included in that part of the county which is taken off, the Court in such case cannot judicially know that the town is, or is not in the county. *Hilt* v. *State,* 9 Yerg. 357. The Acts prescribing the limits of counties and towns are public acts, of which Courts will judicially take notice. *Com.* v. *Springfield,* 7 Mass. 9.

The county of Androscoggin was incorporated by erecting certain existing towns, by their corporate names, into a new county. Poland is one of the towns named in the Act, and was taken from the county of Cumberland. When, therefore, the indictment charges the offence to have been committed in Poland, *now* in the county of Androscoggin, it becomes absolutely certain that the *locus in quo* is within the territorial limits of the county of Androscoggin; of which the Court will take judicial notice.

The next objection presented at the argument is, that there is no averment in the indictment, that the said Charles G. Jackson had a lawful wife alive, or the said *particeps criminis* had a lawful husband alive when the offence is alleged to have been committed.

This part of the indictment is in the precise words used in the indictment, *State* v. *Hutchinson,* 36 Maine, 261, which were, in that case, held to be sufficient, by this Court.

It is also objected that the averments as to time and place in the indictment are repugnant and uncertain.

When two distinct times and places have been mentioned, in, and at which, the substantive offence has been committed, and reference is afterwards made to time and place by the words "then and there," the allegation will be deemed defective, as it will be uncertain to *which* time and place the *then* and *there* refer. *Jane, (a slave,)* v. *State of Missouri*, 3 Missouri, 61.

There is but one time and one place when and where the *substantive offence* is alleged in this indictment, to have been committed, to wit, *at* Poland, on, &c. It describes one of the parties as being a resident *of* Winthrop and the other as being a resident *of* Poland. This is merely *descriptio personæ*, and has no reference either to the time when or place where the substantive offence was committed.

It is further objected that the offence is alleged to have been committed in the county of Androscoggin, before the same was established, if alleged to have been committed in any county in this State. As has already been remarked, the allegation in the indictment is, that the offence was committed in Poland, *now* in the county of Androscoggin. The charge substantially is, that the offence was committed in Poland which is within the territorial limits of the county of Androscoggin.

When a new county has been incorporated, and provision made for holding terms of the Supreme Court therein, such Court will take cognizance of all crimes and offences committed within the territorial limits of such new county, which are not then pending in, or returnable to other Courts, which fall within its general jurisdiction, whether such offences were committed before or after the Act of incorporation. Crimes are committed against the peace of the State and not against the peace of any particular county in the State. Territorial limits are assigned for the jurisdiction of particular Courts to facilitate the despatch of judicial business and for the safety and convenience of the citizens. No error or defect is perceived in the indictment or proceedings in this case. *The motion and exceptions are therefore overruled.*

FULLER *versus* FIELD *& als.*

No title to personal property can be acquired by the purchaser, at a sale on execution made subject to a prior attachment.

ON REPORT, SHEPLEY, C. J., presiding.

TROVER for a building.

After the evidence was introduced, the cause was submitted for the decision of the full Court upon the legal testimony, with authority to enter judgment by nonsuit or default, as the facts and law might authorize.

The building was personal property. The claim of plaintiff was by an attachment and sale on his execution at public auction. Defendants' title was through an attachment made subsequently to plaintiff's to secure a *lien* claim, and a sale thereof at auction.

By the return of the officer on the execution, it appeared that the sale to plaintiff was made subject to the attachment of defendants to secure their lien.

*Record,* for defendants.

*Ludden,* for plaintiff.

APPLETON, J. — This is an action of trover for a building erected under such circumstances as to be regarded as personal property.

The plaintiff derives title under a sale of the same on execution. The officer by whom the sale was made, returns that he sold it "subject to an attachment in favor of M. Ford and J. G. Field."

In the sale of personal property on execution, subject to the contingencies arising from its attachment in other suits, its price would be affected not merely by the value of the article sold at the time and place of sale, but by the chances whether the plaintiff in those suits to which the sale is subject, will obtain judgment, and whether, if judgments should be recovered, the executions issued thereon shall be seasonably placed in the hands of the attaching officer. The title of a purchaser in such case is liable to be defeated.

He would not therefore give the same price as if there was no such liability. He would regulate the price by his estimate of the uncertainties surrounding the title he might acquire. If the attachments in the suits to which the sale is made subject, should be perfected by judgment and sale on the executions issued thereon, he would gain nothing by his purchase. If for any cause those suits should fail, or the executions should not seasonably be placed in the hands of an officer, in case judgments were obtained, the purchaser will have paid less than if the sale had been subject to no such contingencies. The sale of personal property in this mode, and subject to these uncertainties, would be alike injurious to the rights and interests of debtors and creditors.

The sale of personal property on execution is regulated by statute. There is no provision of R. S., c. 117, under which the sale was made, which authorizes the sale of property on execution subject to the contingencies arising from other suits. The sale not being in accordance with law, the plaintiff has acquired no title.

*Plaintiff nonsuit.*

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COLLEN *versus* KELSEY.

By c. 117, § 3, of Acts of 1844, it is provided, that any married woman possessing property by virtue of that Act, may release to the husband the right of control of such property, and he may receive and dispose of the income thereof, so long as the same shall be appropriated for the mutual benefit of the parties.

For an injury to the property of the wife, although the control of it might be released to her husband under this provision, the action must be brought in the name of the wife.

ON EXCEPTIONS.

THIS was an action to recover damages suffered by the plaintiff in his mare for want of due care of her while performing a journey in the service of defendant, and was tried before RICE, J., under the general issue.

Evidence was introduced by defendant, tending to show, that the mare belonged to plaintiff's wife, and he requested the Judge to instruct the jury, that it was incumbent on the plaintiff to show, if the property was in the wife, that he had control of it in manner prescribed by c. 117, § 3, of the Acts of 1844, in order to recover in this action.

This request was declined, the Judge having already instructed the jury, that if the plaintiff had absolute control of the property and had it in his possession, exercising full control over it, then he might maintain the action, but if he was acting as agent for his wife or any other party, and made his contract with defendant as agent, then the action should have been brought in the name of the principal.

The verdict was for plaintiff.

*Morrill & Fessenden,* in support of the exceptions.

*Goddard, contra.*

APPLETON, J. — The object of statute 1844, c. 117, § 3, was to enable the husband to control the estates of the wife, with her consent, without which it is clear, that by its other provisions he would have no such right. This section provides, that "any married woman, possessing property by virtue of this Act, may release to the husband the *right of control of such property,* and he may *receive and dispose of the income thereof, so long as the same shall be appropriated for the mutual benefit of parties.*" It is apparent, that the title was to remain in the wife, and that when controlled by the husband its beneficial use was to be for "the mutual benefit of the parties." The object of the statute was to confer on the husband the management of the property within prescribed limits with the consent of the wife and under authority derived from her. The "control" was to remain only while the "income" was appropriated for the "mutual benefit of the parties." The right of action for any injury to the property over which the husband was exercising control, would have been in the wife equally after such release as before. It in no way affects the right of action. The

instruction, if given as requested, would have been erroneous and was properly refused.

No objections are urged against the instructions given. It is not therefore, necessary to examine them particularly, as their correctness is not made a matter of question.

*Exceptions overruled. —*
*Judgment on the verdict.*

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BROCK *& ux. versus* CHASE.

Of the evidence by which the existence of a town way may be established.

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

TRESPASS *quare clausum.*

The defendant pleaded the general issue, and justified his acts as a surveyor of the highways.

After the evidence was out, it was agreed that the cause might go before the full Court on report, they having authority to draw inferences as a jury might from the evidence and enter such judgment as the law and facts might warrant.

The whole case will be found in the opinion of the Court, which was drawn up by

RICE, J. — That the plaintiffs are owners in fee of the *locus in quo* is not controverted. Nor is it controverted that the defendant, in entering upon the land and performing the acts complained of, was acting in the capacity of a surveyor of highways, duly qualified. The only question in controversy is, whether there was a way across the plaintiffs' land upon which the town had a right to enter, for the purpose of making repairs. Such right the plaintiffs deny; and some seven or eight years before the alleged trespass they had closed up the ends of the way in dispute, by constructing permanent fences across the ends thereof. These

fences were removed by the defendant, so far as was necessary to go upon and repair the way.

To show the existence of such a way, the defendant introduced one William McKenney, who testified, among other things, "that when he was a boy, James Jordan, (who for many years owned the premises on which the plaintiffs now live,) came round with a paper, where we were at work on the Freeport road, to get people to sign, to get the town to discontinue the Chase road, and open the cross road, (the road now in dispute,) instead. Mr. Jordan opened the cross road and it was fenced out. Jordan built part of the fence upon the road. I did not live in the Chase neighborhood at the time Jordan opened the road. I then lived with my father. The road was worked upon and repaired by the district, and the fences remained upon the sides until they became old and rotten. The road was plowed on the sides, from one end to the other, on both sides. There were two stone culverts in it, built by the district. Think I might have been ten years old when Jordan carried round the paper; I am now fifty-six. I have had some conversation with Mr. Jordan in relation to the opening of the road, while he was owner of the land now in dispute. In 1825 the old man told me that the Chase road, east of the cross road, had been discontinued, and he had given this one in place of it. This was while we were working on the road; I was surveyor. He has told me the same thing at other times. Generally when we were at work upon the road, he would come out and talk with us about it."

*On cross-examination* this witness testified, "I should think Jordan went round with the paper referred to, prior to 1809. The road was fenced out on both sides. The road was given to the town in 1809. I am unable to tell how long after that it was fenced out. I lived in the vicinity till 1841, and then moved away, and was gone two years, when I came back and lived there ten years. I was surveyor in 1845. The remains of the old fence was then on the side of the road. There were bars across each end of the

road when I moved there in 1825. There are three families who live in there, who are mostly accommodated by this road.

"Jordan told me he gave the land for the road. I have seen a good many pass over this road. After I moved there, I told them that if they did not put gates up at the ends of the road, they should fence it out. The bars and gates were put up and kept up by Mr. Jordan and Mr. McKenney. They made no claim of right to fence up the road, but the people living in there consented that they should put bars across at the ends, to avoid fencing out the road. But when I went there, I told them if they did not put gates up instead of bars, they should fence the road, and they did so. Mr. Jordan told me that the bars were put up by permission.

Charles F. McKenney testified, "that he had known this road about forty years; have traveled over it; never saw any one at work on it. It was fenced on both sides. It had been ploughed and turnpiked up some; were two culverts across it. Should think the road was fenced out something like forty years ago, and I never knew any bars or gates at the ends of this road, until the fences had gone to decay.

Humphrey Vosmus testified, "that he was acquainted with the road and land about there. The road was fenced clear through from the county road. It was opened like any other road, and was an open road from eight to ten years. In 1846 and 1847 I was at work for Mr. McKenney. Mr. Webb came along there and said he was going to stop that road up. Mr. McKenney asked by what authority. He said he had been told by Col. Ingersoll that there was no road there."

The defendant also read to the jury, from the records of the town of Danville, the following extracts, containing the votes of said town relative to the road in dispute.

"Voted to discontinue the road from the northerly corner of James Jordan's land, southerly to the road leading from New Gloucester to Androscoggin river, and lay out

and locate a road south-west from the same corner of James Jordan's land to the county road leading through John Vosmus' land, towards Freeport, in its stead."

"The above vote was passed at a legal town meeting of the inhabitants of Pejepscot, now Danville, Nov. 9, 1809."

The following was a vote passed at a legal meeting of the inhabitants of said town, May 12, 1810.

"Voted to accept the report of a road laid out from James Jordan's northerly corner, south-west to the county road leading through John Vosmus' land towards Freeport."

It was admitted that the above extracts refer to the road in dispute.

There was evidence that this road had been assigned for many years to the several highway surveyors of one of the districts of said town, as a part of the road to be repaired by them, and that it had been so repaired under their direction. There was evidence that it had been left out of the assignment for one year by one of the selectmen, but was again restored, and has subsequently been included in the assignments of highways, as a part of the district to which it had previously been assigned.

There was much testimony introduced by both parties as to the manner in which this road had been fenced and used prior to the time it was first obstructed by a permanent fence near seven or eight years ago.

The records of the original laying out and location are informal and imperfect. It does not appear to have been a road upon which there had ever been any considerable amount of travel. But we think the evidence does show, that there was an original laying out on the part of the town, and a continual user by the public either as an open way, or encumbered only by movable bars or gates, which were placed across the ends thereof, not however under a claim of right, by the owners of the premises, now owned by plaintiff, but by the consent of those most interested in the road for a period of more than thirty years, and during

most of that time the town repairing the road from year to year. Those facts, together with the acts and admissions of Jordan, and the long acquiescence of the other proprietors, fully authorize the inference, that the road was originally legally laid out as a town way. At least, we think, after this long lapse of time, it is too late for the plaintiffs to controvert this fact. Whether the public have a right to an open way, unincumbered by gates or bars, it is not necessary now to decide. But the plaintiffs, by obstructing this way by permanent and immovable fences, were guilty of invasion of the public right. And the defendant, by removing these obstructions, in the manner he is proved to have done, committed no trespass upon the rights of the plaintiffs. According to the agreement of the parties a nonsuit must be entered.

*Record*, for defendant.

*Morrill & Fessenden*, for plaintiffs.

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DAVIS *versus* BRIGGS *& al.*

39 304
65 513
66 391

An *indorsee* of a note made by a firm to one of *its members* may maintain an action thereon against the makers.

When a partnership has been dissolved and *one* of the partners has assigned all his interest in the book debts and demands of the firm to the other, with power to collect them for his own benefit, *he* cannot afterwards exercise any control over such debts although one of them is against himself.

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

ASSUMPSIT, by the *indorsee*, against makers of a note made by Joseph D. Davis & Co., and payable to the order of Jos. D. Davis, one of the firm, on demand.

An account against Joseph D. Davis was filed in set-off.

The defence was, that the action was not maintainable, and that the note was not indorsed until it was overdue, and that the account in set-off should be allowed.

The firm of Davis & Co., consisting of Davis & Briggs, was dissolved in October, 1851, more than two years after

the note in suit was given, and in the agreement to dissolve, Davis assigned to Briggs all his interest in the books, debts, specialties and demands of every nature for and concerning the late co-partnership between them.

The books showed a large account against Joseph D. Davis, which was filed in set-off.

The plaintiff offered in evidence an agreement by Joseph D. Davis to be defaulted; in which was also a direction that the account in set-off should be withdrawn and no proof offered concerning it, as it was incorrect and filed without his consent.

There was other evidence in the case, and it was agreed to submit the case to the full Court with authority to draw inferences from the testimony as a jury might; and that if the action is maintainable and defendants are authorized to prove the account in set-off, the account is to be submitted to an auditor, and on his report the plaintiff to have judgment for the balance found due, (if any,) if nothing, or the action not maintainable, then the defendants to have judgment for costs.

The Court found that the note was in the hands of the original payee long after it was due, and that the amount filed in set-off should be allowed in payment.

*Morrill & Fessenden*, for defendants.

*J. Goodenow*, for plaintiff.

SHEPLEY, C. J. — This suit is upon a promissory note made by Joseph D. Davis & Co. for $2045,93, on May 10, 1849, payable to Joseph D. Davis or order, on demand, with interest, and by him indorsed. The firm of Joseph D. Davis & Co. was composed of Joseph D. Davis and John A. Briggs, as partners in trade. The note appears to have been justly due from the firm to Joseph D. Davis.

Although he could not have maintained an action against the firm upon it, an indorsee may, if the note be now justly due. *Thayer* v. *Buffum*, 11 Metc. 398.

The partnership between J. D. Davis and Briggs appears to have been dissolved on October 16, 1851, when Davis assigned to Briggs all his interest in the book debts and demands of the firm, with power to collect them for his own benefit. The attempt made by Davis, in June or July, 1854, to control one of those demands against himself, and to direct that it should not be allowed in set-off, can have no effect.

In an agreement made between the former partners, on March 22, 1852, there is a provision, "that the account against said Davis shall be set off against a certain note payable to him by J. D. Davis & Co., for about twenty-two hundred dollars." Although there would be due upon the note with interest at that time, more than that sum, there can be no doubt that it was the note referred to, for no other note appears to have been at any time made by the partnership payable to Davis, to which the description could have reference.

It is also apparent, that Davis at that time assumed to have control of the note, and to agree that it should be paid by the allowance of the account against himself.

He appears to have had possession of it on March 15, 1852, and to have caused a suit to be commenced upon it in the name of the plaintiff, which was not prosecuted.

Greene, who was a clerk for the firm from January 1 to July 1, 1849, and again from July 1, 1850, to September 1, 1851, testifies that he had charge of the safe belonging to the firm; that the note was kept in it, and that he thinks it was not taken from it, or delivered to any person, while he was in their employ.

The plaintiff offers no proof respecting the time of its indorsement to him, but relies upon the presumption of law. The note being payable on demand would be overdue long before Greene left the employment of the firm. The plaintiff, upon the testimony presented, must be considered as holding it subject to the same equitable defence as if it

were in the possession of the payee, and the account due from him to the firm should be allowed in payment.

An auditor is to be appointed, upon whose report judgment is to be entered.

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## MOORE *versus* HOLLAND.

39 307
46 317
53 214

Where the contents of a written contract which is lost is proved by parol, without any copy, its construction must be determined by the jury.

A contract in writing by the owner of a quantity of hay, with the tenant of a farm, that he may take and use the hay, the same to be and remain the property of the original owner, and the manure made therefrom to be and remain also his property as it is made, is a lawful and valid contract.

In the *manure* made under such a contract, the tenant has no property, and a sale of it by him to his landlord conveys no title.

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

TRESPASS, for a quantity of manure.

The writ contained two counts, one for breaking and entering the plaintiff's close, the other for carrying away his property.

It appeared that the plaintiff was the owner of a house and lot of land, which was occupied in 1844 and '45 by one Anderson, as his tenant. In the fall of 1844, Anderson agreed with the defendant for a mow of hay, to be paid in manure. The hay was to be defendant's until the manure was made from the hay; he was to have the manure for the hay. The hay was called six dollars, to be paid in manure, which was to be defendant's as it was made.

The agreement between Anderson and the defendant was in writing, but the loss of it was proved and the contents established by parol.

Plaintiff claimed title by bill of sale and delivery from Anderson, on April 25, 1845. The defendant took away from the plaintiff's premises two and a quarter cords of manure on May 2, 1845, and there was conflicting testimony

as to the fact whether Anderson at that time, was or not in possession.

The Judge instructed the jury, that if the defendant broke and entered the plaintiff's close without his consent, to carry away manure, after Anderson had vacated and given up possession of the premises to the plaintiff, this action was maintainable, even if the title to the manure was in the defendant at that time; and if they should find upon the testimony that the contract was that the hay procured by Anderson of the defendant, was to be and remain the property of the defendant; and that the manure made therefrom was to be and remain the property of the defendant as it was made, this would be a lawful contract, and Anderson would not acquire title to so much of the manure as was made from that hay, but would give to the defendant no right to the manure (if there was any) made from other hay, of which they were the judges; *that* if there was manure there not made from this hay, belonging to Anderson, he might lawfully sell it to plaintiff, and if he sold and delivered it as testified to, this would entitle the plaintiff to recover for so much of said manure as was not made from the hay purchased of the defendant.

A verdict was rendered for the defendant and the plaintiff excepted to the instructions.

*May*, for defendant.

*Gould*, for plaintiff.

RICE, J. — This is trespass for a quantity of manure taken and carried away by the defendant, and claimed by the plaintiff, by virtue of a bill of sale, and alleged delivery to him from one Anderson, who had occupied the premises, from which the manure was taken by the defendant, as tenant of the plaintiff. The defendant claimed title to the manure by virtue of a contract with Anderson, by which he supplied the hay from which the manure was made, under a stipulation that said hay was to remain his until it was used, and the manure made therefrom was to be his, as it was made.

This contract, which was reduced to writing, had been lost, and its contents were proved by the deposition of David B. Jones, who among other things, testified "that he heard an agreement between the defendant and Anderson, in regard to some manure, and hay, in the fall of 1844, in November. He (Anderson,) agreed with Holland for a mow of hay, to be paid for in manure. The hay was to be Holland's till the manure was made — that's about all — he was to have the manure for the hay."

This witness, in answer to other interrogatories, further stated, "there was a writing between them, that the hay should be Holland's till the manure was made from the hay. The hay was called six dollars, to be paid for in manure; the manure was to be Holland's as it was made."

The Judge instructed the jury "that if they should find upon the testimony that the contract was that the hay procured by Anderson of the defendant was to be and remain the property of the defendant, and that the manure made therefrom was to be and remain the property of the defendant as it was made, this would be a lawful contract, and Anderson would not acquire title to so much of the manure as was made from the hay, but it would give the defendant no right to manure, if there was any, made from other hay, of which they were the judges."

To this instruction the plaintiff, against whom the verdict was rendered, excepts, on the ground that the Judge erred in permitting the jury to determine from the evidence, the terms of the contract between the defendant and Anderson, contending that the contract having been reduced to writing, its construction (however its contents might be proved) was to be determined, as matter of law, by the Court. He also contends that by that contract the title to the hay passed to Anderson, as it was used, and that it was to be paid for in manure, the title to which could only pass from Anderson to the defendant, so as to affect the rights of subsequent purchasers, without notice, by a delivery to the defendant, and that, inasmuch as there had been no delivery to defendant

until after the sale and delivery to plaintiff, the title of the latter must prevail.

It is undoubtedly true, as a general rule, that instruments in writing are, when introduced as evidence, to be construed by the Court as matter of law. In such case, the facts appearing in the writing itself, there is nothing for the jury to find, and it only remains for the Court to apply the law. This rule, however, only applies when the instrument is before the Court, and when there is no dispute as to its contents; but does not apply when it becomes necessary to prove the contents of the instrument by parol. In that case the jury must find, as matter of fact, what were the contents of the missing instrument, from the evidence before them, and unless the instrument be proved by an exact copy, or in its precise terms, the Court cannot give a legal construction thereto but must, as in other cases of parol evidence, present the rules of law hypothetically, to be applied by the jury as they shall find the facts.

In the case at bar, the witness does not profess to give the precise words of the lost contract, and if he did so profess it would be a question of fact whether he did so. That question was properly submitted by the Court to the jury.

But it is contended that it was not competent for the parties to make a contract by which the defendant could acquire title to the manure, the product of his hay, without a formal delivery; that by converting hay into manure its character was so essentially changed as to destroy its identity, and consequently the continuity of ownership. To support this position, 2 Kent's Com. p. 363 and note, are cited. The authority there cited would apply in case the hay had been taken tortiously. But such is not the case here. The hay went into the possession of Anderson as matter of contract, and the only question presented was, whether by the terms of that contract Anderson became the purchaser of the hay, under an agreement to pay for it in manure, or whether he was simply the bailee, *locatio operis faciendi*, for the purpose of converting it into manure for the defen-

dant. If the former was the fact, if it were a sale, then the defendant could only acquire a valid title to the manure as against innocent purchasers, by a delivery; if the latter, if the hay was to be converted into manure by Anderson for the defendant, then, though the product was changed in form from the original article, the title to the property would not change, but remain in the original owner. *Collins* v. *Foster*, 3 T. R., 316; *Pierce* v. *Schenk*, 3 Hill, 28; *Smith* v. *Clark*, 21 Wend. 83; *Buffum* v. *Merry*, 3 Mason, 478; *Barker* v. *Roberts*, 8 Maine, 101. When the identical thing delivered is to be restored, though in an altered form, the contract is one of bailment, and the property is not changed. But when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor, to make the return, and the title to the property is changed, it is a sale. *Mallory* v. *Willis*, 4 Comst. 76.

The instructions of the Judge upon this point were carefully guarded, and are in strict conformity with established rules of law.

The objection, that the jury was misled by the instructions given in relation to the effect of a delivery of the manure to the plaintiff, is without foundation. Those actually given upon that point are manifestly correct. If the plaintiff had desired instructions as to the effect of leaving the manure upon his premises, the attention of the Judge should have been called to the matter officially.

There is no motion for setting aside the verdict as being against evidence. The correctness of the finding of the jury, upon matter of fact, is not therefore before the Court.

*Exceptions overruled and*
*judgment on the verdict.*

## COUNTY OF OXFORD.

39 312
70 507
39 312
92 97

### PROPRIETORS OF ROXBURY *versus* HUSTON.

No laches are imputable to a party who suffers a default in an action where a defence would be unavailing.

The tenant having entered into possession of the premises under one who disseized the true owner, is not liable to the latter in an action for use and occupation, though he may have promised by parol to pay the rent, unless an entry has been made to purge the disseizin.

No exceptions lie to the rulings of the presiding Judge in matters of law, relating to an action submitted to him for decision under § 12 of c. 246 of Acts of 1852, without an express reservation of that right in the agreement of the parties.

ASSUMPSIT to recover rent for a lot of land which the defendant occupied from March, 1845, to March, 1846.

In Feb. or March, 1845, the defendant wished to hire the premises of the agent of plaintiffs, who told him the rent was $20, per annum, and he promised to pay it, and afterwards used the premises, and it appeared that such was a reasonable price.

Other evidence was also introduced tending to show, that one Palmer, twenty-five years since, entered upon the land under a contract for a deed, and had by himself, and those occupying under him, held the same till the commencement of this suit; that he claimed to have paid for it, and held adversely; that he leased the same, and in 1843 the tenant entered into possession under him; that Palmer commenced an action for the rent sued for in this action, in which defendant was defaulted and paid the same; that he offered to pay plaintiffs if they would indemnify him, but no indemnity was given.

It appeared by the record, that plaintiffs had commenced a suit to recover the premises of one James Hunter at the same time this suit was commenced, who defended the same,

claiming title under said Palmer, and that the title was adjudged to be in plaintiffs.

There was no evidence of any entry on the part of plaintiffs, to purge the disseizin of Palmer.

The cause was taken from the jury and submitted to the decision of the presiding Judge, (APPLETON, J.,) who directed a nonsuit, which, according to the report, if erroneous and the plaintiffs have made out a case, is to be taken off and a default is to be entered.

*Walton*, for defendant, argued that the defendant was estopped to deny Palmer's title, and should be protected in paying his landlord's rent; that the promise to plaintiffs' agent was without consideration and void. Nor had the plaintiffs been delayed or prejudiced. 22 Maine, 395; *Byrne* v. *Beeson*, 1 Douglass, 179.

Before the tenant could make any valid agreement with another, he must surrender the possession he acquired from his landlord. 12 Maine, 478.

And that furthermore this action was not rightfully before the Court. It had been submitted to the decision of the presiding Judge at the trial, and his decision was final.

*Rawson*, for plaintiffs.

The opinion of the Court, TENNEY, J., taking no part in it, not being present at the hearing, was drawn up by

APPLETON, J. — The defendant entered into the possession and occupation of the premises, for which the plaintiffs claim rent, as a tenant to one Benjamin Palmer, who before such entry had disseized the plaintiffs. Having entered under Palmer, and as his tenant, he was estopped to contest his title. He would not be permitted as against his landlord to set up the title of the plaintiffs. *Doe* v. *Mills*, 2 Ad. & El. 17; *Sharpe* v. *Kelley*, 5 Den. 431. The defendant then being liable to Palmer, could not have resisted his suit for rent, and is guilty of no negligence in not attempting a defence, which must have been unavailing.

The plaintiffs being disseized by Palmer, could not main-

tain an action against him, as in such case there was no express promise to pay, and the law would not imply one. *Larrabee* v. *Lumbert*, 34 Maine, 79. Nor while the disseizin continued, would they be in any better condition to recover against the defendant.

It was held in *Meredith* v. *Gilpin*, 6 Price, 146, that to constitute a valid attornment, the consent, or at least the knowledge of the landlord must be shown. The tenant must first surrender the possession to his landlord, before he can make any valid agreement to become the tenant of another. *Moshier* v. *Reding*, 3 Fairf. 478. A contract by which a tenant is induced to desert his landlord, is corrupt and void, and the person to whom he has attorned cannot maintain an action upon it. And if an adverse claimant tampers with a tenant, and gets possession, either by his consent or a collusive recovery, he is estopped to deny the landlord's title. 1 Hilliard's Abr., c. 15, § 98. In *Cornish & al.* v. *Searell*, 8 B. & C. 471, the defendants had attorned to the plaintiffs, and had agreed to hold the premises for such time, and on such conditions as might subsequently be agreed upon; but as the defendant had not received the possession of the plaintiffs, and as the lease to which he was a party had not been surrendered, the agreement was held void for want of consideration, and the action not maintainable. The parol agreement in this case was without consideration, the defendant never having received the possession from the plaintiffs, they never having entered to purge the disseizin of Palmer, and the tenancy of the defendant under Palmer not having been terminated.

This action was submitted to the presiding Judge, under the provisions of the Act relating to the Supreme Judicial Court and its jurisdiction, approved April 9, 1852. By c. 246, § 12, it is provided, that "the Justice presiding at any term holden for jury trials shall hear and determine all causes whatsoever without the intervention of a jury, when both parties shall have so agreed and entered such agreement on the docket, and he shall direct what judgment shall

be entered up in all causes so by him decided." It will be perceived, that by § § 13 and 14, provisions are specially made for presenting to the consideration of the full Court, any questions of law which might arise, and when either party might desire their determination of the matter. In this section no such provision is found. The obvious intention of the Legislature, was to make the adjudication of the presiding Judge final and conclusive. This section confers on the presiding Judge the power to determine all causes, when both parties so agree and enter their agreement upon the docket, and that he shall direct what judgment shall be entered up. No exceptions are given in terms and the whole language of the Act shows none were intended. The design was to make his decision the end of all controversy, not that the losing party, after having agreed to submit to the decision of the Judge, and that he should direct what judgment should be entered up, should be permitted indefinitely to renew litigation. A statute with similar design has recently been enacted in England. The decision of the presiding Judge in all matters of law or fact, submitted to his determination under this section, is final.

By recurrence to the report of the commissioners, accompanying the Act of 1852, it will be perceived, that the object to be effected by the provision under consideration was in accordance with the construction above indicated.

The parties may agree that the presiding Judge shall hear the cause, and upon hearing decide the facts, reserving by express stipulation the right to except to his ruling as to any question of law which may arise. Such was the case in *Trustees* v. *Reed, ante*, p. 41, where the parties expressly reserved the right to except to the rulings of the presiding Judge, as to any questions of law which might arise.

The language used by the Court in that case was general, but it should be construed in connexion with the facts presented for determination. The point there to be decided was, whether the parties could by any stipulations reserve the right to except. They undoubtedly may do so; but in the

absence of such express stipulations, the reference under § 12, gives the Court full power to make a final decision of the matter submitted, to which there can be no exceptions.

*Plaintiff nonsuit.*

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WHITNEY *versus* SOUTH PARIS MANUFACTURING COMPANY.

39 316
48 138
72 171

Of the powers of an agent of an incorporated company.

An agent lawfully authorized to raise money and create liability on the part of an incorporated company, may also waive demand and notice on a note indorsed by such company, and this too *after* the note has been negotiated.

Such agent may waive demand and notice to procure delay of payment of the note and bind his principal, although in procuring delay he may *also* be the agent of the maker.

Nor will the fact that he agreed to pay more than the legal rate of interest for such delay, prevent a recovery against the company upon their indorsement of the amount legally due.

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

ASSUMPSIT, against the indorsers of a promissory note.

After the testimony was introduced, it was agreed, that the full Court should decide the cause upon the testimony introduced without objection, and upon such as was admissible, although objected to; to draw inferences as a jury might, and enter a nonsuit or default.

The facts proved appear in the opinion of the Court, which was drawn up by

SHEPLEY, C. J. — The plaintiff, as indorsee, has commenced this suit against the corporation as indorser of a promissory note for $1000, bearing date on March 8, 1849, made by Samuel T. Thomas, payable to the corporation or order, in nine months from date with interest. It appears to have been indorsed by William Deering, agent of South Paris Manufacturing Co., "accountable without notice or demand." The testimony proves, that the indorsement was made by Deering. In a letter written by him to Thomas, under date of Dec. 12, 1849, he says, "I arranged yester-

day with Esq. Whitney for an extension of the old note." It, however, appears from an entry made by him on a note book of the company, as well as from his testimony, that the waiver was in fact written on the back of the note, and an agreement made for an extension of the time for payment, on Dec. 10, 1849, being the day before the note became payable, with grace. There is no proof of any demand or notice. But the company will be liable by the waiver, if that was made by an agent having sufficient authority to make it. By the records of the corporation it appears, that Deering was chosen agent in May, 1848, and again in May, 1849. And he appears to have acted as such during those two years. On Nov. 7, 1836, the company voted, that an additional officer be chosen annually, to be styled Agent of the South Paris Manufacturing Co. The by-laws adopted on Feb. 26, 1836, were then amended so as to make it the duty of the agent "to purchase stock and make sales for the corporation, to hire and discharge help, and manage the concerns of the corporation, being subject at all times to the direction of the board of directors." Other powers were also conferred. The authority to manage the concerns of the corporation was sufficiently extensive to embrace all transactions necessary for the management of them in the usual manner. In his dealings with others, his powers would not be restricted by his being subjected to the direction of the board of directors, unless they interposed to limit them. There is no proof, that they did so. The usual course of transacting the financial affairs of the company appears to have been by the agent. He procuring loans of money from banks and individuals, on notes of the company made by him, on drafts drawn by him, and on notes and drafts payable to the company and indorsed by him. Notices on such paper, given to him, would bind the company, and he might waive the right to require notice and render the conditional liability absolute. This would come within the scope of his authority to create an absolute liability; it being but one of the forms of doing it. When notes be-

came payable and new loans or an extension of the time for paying those existing became necessary, he must have the power to meet the exigency or the credit of the company must be destroyed and his financial operations cease.

To procure delay of payment in case of necessity, of which he must be the judge, would seem to be clearly within the scope of this authority.

If this be so, it is still insisted, that he acted as the agent of the maker of the note and not of the company, when he made the agreement for an extension of time for payment, and when he made the waiver of demand and notice. He does appear to have acted as the agent of the maker at that time; but the maker could not, and he does not appear to have attempted to, confer upon him any authority to waive demand and notice. As early as the month of October preceding, the maker appears to have communicated his inability to make payment at the stipulated time. The agent therefore knew, that payment must be expected to be made by the company, or that he must assent to, or procure a delay for payment. If that could not be obtained without its becoming absolutely liable, it might be necessary to yield to it. In doing it, he would act as agent of the company, although he might at the same time be acting as the agent of the maker also to procure the delay. The company appears to have been under the necessity of conducting its business by means of loans of money, and its agent, according to the course of business, would be authorized to act for the company as well as for the maker, being authorized by him to procure the delay needful for both; and he appears to have so acted.

The fact, that he appears to have agreed to pay nine per cent. interest to obtain such delay, cannot absolve the company from the payment of what may be legally due, or prevent a recovery of that amount by the plaintiff.

The company by its agent being a party to the agreement for an extension of time, cannot thereby be discharged.

It is further insisted, that the plaintiff received this note

as collateral security for the payment of other notes, which have been paid by the company.

There is testimony from which such an inference might be drawn, while there is other testimony to prove, that an absolute title was conveyed by the indorsement. The burden of proof is upon the company to relieve itself by satisfactory proof from the obligation incurred by the indorsement, and this it has failed to do. *Defendants defaulted.*

*May*, for defendants.

*Whitman*, with whom was *Clifford*, for plaintiff.

## COUNTY OF FRANKLIN.

39 319
61 272
73 579

### BURNHAM *versus* ELLIS.

The *declarations* of an agent, while in the transaction of the business confided to his charge, are binding upon his principal.

But his *recital* of a *past transaction* of the business of his principal, is regarded as hearsay testimony and inadmissible.

Although at the time of such *recital*, his agency continued, the declaration cannot be received.

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

TRESPASS, *quare clausum fregit.*

The general issue was pleaded, and a brief statement filed, that the acts, (if any,) were done under a license from the plaintiff.

Under this branch of the defence, after some evidence had been introduced to show that one Daniel Burnham, a brother of plaintiff, had acted for many years as the agent of the plaintiff, in regard to the described close, and still continued to act, and that plaintiff had never been on to the

close, the defendant was permitted to prove, though objected to, that said Daniel Burnham stated to the witness, that defendant came to him and he gave the defendant leave to go on to the close and cut masts or timber.

The cutting, &c., was denied by the defendant.

The question as to the agency of Daniel Burnham, and whether he was or not the agent of the plaintiff, and authorized to act for him in the matter of the alleged license, was distinctly submitted by the presiding Judge to the jury upon the evidence.

The verdict was for defendant and the plaintiff excepted to the ruling as to the admission of the testimony.

*Linscott & J. S. Abbott,* for the exceptions.

*Whitcomb & H. Belcher, contra,* cited, 1 Greenl. Ev. § § 113 and 114; *Haven & al.* v. *Brown & al.* 7 Maine, 421; 24 Pick. 35; Story on Agency, § § 134 and 137.

APPLETON, J. — It was in evidence, that Daniel Burnham was the general agent of the plaintiffs, having the control and management of the township, upon which the trespass set forth in the declaration, is alleged to have been committed. The contracts of an agent within the limits of his authority, and his declarations while in the transaction of business confided to his charge, are as binding on his principal as if made by him.

In the case before us, the statements of the agent do not appear to have been made by him while in the exercise of his delegated authority. They relate to the past, and must be considered as a mere recital of what had been done. The principal is not to be injuriously affected by the declarations of one who may be his agent, if in making them he was neither acting nor claiming to act as such agent. To hold the principal as bound by them, would be to regard the agency as extending not merely to the powers directly given, but as conferring, by implication, the further power of binding the principal by any thing he might choose to say about his past transactions as agent. The assertion of a

fact, in a casual conversation, in no way connected with the business of the principal, though made by an agent, must be viewed in the same light as if made by any other individual. The principal may make such statements about his own affairs as he may deem expedient, because they are his own. But the declarations of an agent, not made in the transaction of the business of his principal, cannot be received as evidence against him. He is agent for no such purpose.

It does not appear, that the statements received were made under such circumstances as could either legally or equitably bind the plaintiff. The agent is a competent witness and either party can obtain his testimony. In such case, the rights of the parties will be guarded by the securities which are afforded by the sanctions of an oath and the searching interrogatories of cross-examination.

Upon principle, as well as by the uniform current of decisions, the testimony received must be regarded as hearsay and legally inadmissible. Story on Agency, § 134, &c.; 1 Greenl. Ev. § 113. *Exceptions sustained.* —

*New trial granted.*

## COUNTY OF CUMBERLAND.

† STATE OF MAINE *versus* BLAKE.

By the law of this State, rape consists in a man's ravishing and carnally knowing any female of the age of ten years or more, *by force*, and against her will.

An indictment for an intent to commit that crime, which contains no allegation of *force* or words of *equal* significance, is defective and will furnish no basis for a judgment upon it.

Thus, where the defendant is found guilty of an intent to commit a rape, but the indictment alleged the design was to be accomplished *violently*, instead of *by force*, judgment must be arrested.

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

INDICTMENT.

The allegations were, that the defendant "with force and arms and unlawfully, in and upon the body of one Sarah Jane Lowell, she, the said Sarah, being then and there between ten and eleven years of age, an assault did make; and her, the said Sarah Jane Lowell, did then and there beat, abuse, strike, wound and ill treat; with intent her, the said Sarah Jane Lowell, violently and against her will, then and there feloniously to ravish and carnally know, and other wrongs," &c.

The jury found the defendant guilty.

A motion was filed in arrest of judgment, in which several causes were assigned, but one only is it necessary to notice, which was, that the essential words "by force," were not found in the indictment.

This motion was denied and exceptions filed.

*Clifford*, in support of the exceptions, cited Arch. Crim. Plead. 52; *Smith* v. *State*, 33 Maine, 58; *U. S.* v. *Gording*, 12 Wheat. 460; 1 Chitty's Crim. Law, 280; 2 Hawk. P. C., c. 25, § 110; 2 East's P. C., 985, § 58; *U. S.* v. *Clark*, 1

Gal. 499; *People* v. *Allen*, 5 Denio, 76; Starkie's Crim. Plead., 225; *Com.* v. *Maxwell*, 2 Pick. 139; *Com.* v. *Tuck*, 20 Pick. 362.

*Abbott*, Attorney Gen., *contra*, cited Webster's Dictionary, word "violently," and contended it was synonymous with the statute word.

TENNEY, J. — The defendant is charged in the indictment, with having committed an assault upon Sarah J. Lowell, a female, between the ages of ten and eleven years, with intent her, the said Sarah J. Lowell, violently and against her will, then and there to ravish and carnally know, &c., contrary to the form of the statute, &c. One cause assigned for the arrest of the judgment, in the motion filed, is that the charge in the indictment is not in conformity to the § § 17 and 27 of c. 154, R. S., and fatally defective, by reason of the omission to allege in the indictment, that the intent of the defendant to ravish and carnally know was "by force."

By § 17, rape consists in a man's ravishing and carnally knowing any female of the age of ten years or more, by force and against her will, &c. To constitute the offence of an assault, with intent to commit a rape, under the 27th section, the rape intended by the person making the assault, if necessary by reason of resistance in the party assaulted, for the gratification of his lusts upon her person, must be the same. Or, as PATTERSON, J., in *Rex* v. *Lloyd*, 7 Car. & Payne, 318, instructed the jury, "In order to find the prisoner guilty of an assault, with intent to commit a rape, you must be satisfied, that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so, at all events, and notwithstanding any resistance on her part."

The indictment does not follow the language of the statute; but for the words "by force," is substituted the adverb "violently," which the Attorney General insists in argument is, in all respects, equivalent to the words omitted.

In looking into the most approved and accurate dictionaries of the English language, it is found that the definition of the word "force" is "strength, vigor, might, energy, power, violence, validity, armament, necessity." And that the signification of the term "violently," is "with violence, forcibly, vehemently." — Worcester. According to Webster "force" means "strength, active power, vigor, might, momentum, violence, virtue, efficacy, validity. "Violently," by the same author, signifies "with force," forcibly, vehemently."

It is very obvious, that by the substitution, in an indictment for a rape, or an assault with intent to commit a rape, many of the definitions of the word "force," for that term, would make the charge for such offences little less than absurd. And because the word "violently," may have a meaning somewhat similar, by some of the definitions, to the words "by force," it does not follow, that the indiscriminate use of one for the other, in an indictment like the one before us, would be at all proper.

The term "by force," when applied to the acts of a man, in illicit sexual intercourse with a female, it is believed, has a peculiar and technical meaning, which lexicographers have not always defined with precision. The definition nearest to its exact meaning, of the word "force," is "violence; power exerted against will or consent." — Webster. But it will be seen, that this signification is less restricted, than that obviously intended by the statute, which we are considering, although the true meaning in the statute may be embraced. One signification of the active verb "to force," is "to ravish, to violate by force, as a female," and conveys to the mind ideas, similar to those, which are imparted by the words "by force," which give to the acts of a person, the character essential, to constitute a rape. The adverb "violently," has a more general meaning ordinarily, and is not believed to be an appropriate word to be used in a charge for an offence of this kind, and is not understood to be common with experienced and accurate criminal pleaders, in indictments under this or the like statutes. If used by a man in applica-

tion to acts of sexual intercourse, without any of the accompanying language of this indictment, indicating compulsion, it would hardly, of necessity, import a crime against the person of the female, who was the subject of the acts; whereas, if the words "by force" were used, unaffected by the language denoting the assault, such as "against her will," and to "ravish and carnally know," it would be quite otherwise.

The acts necessary to constitute the crime of rape, must be done "by force," and these words, or something equally significant, in addition to the other language used in the statute, cannot be dispensed with, in an indictment founded thereon. We think it very clear that the word substituted in this case does not fulfill the demand of the statute.

*Judgment arrested,— defendant discharged.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

## MIDDLE DISTRICT,

## 1855.

39 326
52 534
54 396
58 253
60 398
65 30
75 160
78 295
78 296

PRESENT:

HON. ETHER SHEPLEY, LL. D., CHIEF JUSTICE.
HON. JOHN S. TENNEY, LL. D., } ASSOCIATE
HON. JOHN APPLETON, } JUSTICES.
HON. RICHARD D. RICE, }

## COUNTY OF SOMERSET.

### EMERY *versus* FOWLER.

A judgment in an action of trespass against the principal for the act of his servant, rendered upon a trial of the merits of the case, is a bar to a suit against the *servant* for the same act.

And where *such judgment* was rendered *after* the pleading of the general issue in the action against the *servant*, it is admissible under that plea.

*Parol* evidence may be received to show that the same matter was directly in issue in the two suits.

The testimony of a deceased witness is receivable, when the witness can state the substance of the *whole* testimony relating to the issue.

But when after rehearsing the testimony, the witness admits, that he cannot give the whole of it, the Judge should exclude its consideration from the jury.

Emery *v.* Fowler.

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

Trespass, *quare clausum*, against Charles A. Fowler. The general issue was pleaded.

This action was originally brought before a magistrate, and tried in 1850, and an appeal taken.

On the trial in the Supreme Court, after the plaintiff had offered evidence of the act of trespass of defendant in Aug. 1847, the latter offered to prove by the witnesses introduced, that the same act of trespass was testified to and relied upon by plaintiff in an action of trespass tried in 1853, in the county of Somerset, in his suit against *Nathan Fowler*, and in that suit it was testified, that the act of the defendant was done by the express direction of said Nathan.

This testimony was excluded.

In that action against Nathan Fowler, judgment was rendered in his favor, and this defendant, at the time of the act complained of, was his minor son.

The plaintiff also offered evidence of the testimony of a witness given before the justice, who had since deceased. The witness was allowed to testify and refresh his recollection from his minutes, against the objections of defendant, in case he could state the whole testimony of the deceased witness in his exact language, or in language substantially, as he gave it. The witness thought he could, and testified, but on cross-examination he said he could not give all his testimony and had not.

The defendant objected to this evidence, and the Judge left it to the jury to judge whether the witness had given the language of the deceased witness substantially, and his whole testimony or not, and that unless they believed he had, they would disregard it.

The jury returned a verdict for the plaintiff, and exceptions were filed by defendant to the rulings and instructions.

*Drummond*, with whom was *Evans*, in support of the exceptions.

1. The evidence excluded should have been received. 1 Greenl. Ev. § 522; *Calhoun* v. *Dunning*, 4 Dal. 120;

*Outram* v. *Morewood & ux.* 3 East, 350; *Kinnersley* v. *Orpe,* Doug. 517. The law looks to the real parties. *Rogers* v. *Hains,* 3 Greenl. 362; 1 Stark. Ev. § 60; 3 Wilson, 304; *Ferrer* v. *Arden,* Cro. Eliz. 667.

Where there has been no opportunity to plead an estoppel in bar, it may be given in evidence under the general issue. *Howard* v. *Mitchell,* 14 Mass. 241; *Adams* v. *Barnes,* 17 Mass. 365; *Sevey* v. *Chick,* 13 Maine, 141.

Parol evidence is admissible to prove whether the same subject matter was passed upon in the former suit. 1 Greenl. Ev. § 532; *Parker* v. *Thompson,* 3 Pick. 429; *Cist* v. *Zeigler,* 16 Ser. & Raw. 282; *Ward* v. *Jackson,* 8 Wend. 9; *Burt* v. *Sternberg,* 4 Cow. 559.

2. The admissibility of the testimony of the deceased witness should not have been left to the jury. It was a question for the Court, and was inadmissible. *Com.* v. *Richards,* 18 Pick. 434; *Warren* v. *Nichols,* 6 Met. 261; *Warren* v. *Walker,* 23 Maine, 453; *Wolf* v. *Wyeth,* 11 Ser. & Raw. 149.

*Abbott, contra.*

Shepley, C. J. — This was an action of trespass *quare clausum,* commenced and tried before a justice of the peace. The defendant having appealed, offered on trial in this Court to prove that the plaintiff, on trial of an action of the like kind between him and Nathan Fowler, introduced proof of the acts of this defendant, now relied upon as acts of trespass committed by him, and proof that they were committed by him as the servant of Nathan Fowler, who then admitted that this defendant was his minor son and servant. This testimony was excluded.

It is insisted that the testimony was admissible, although the parties named in the former and the present suit were not the same.

When a former judgment upon the same matter should be admitted in another suit between same parties, or between parties in interest not named in the record, such as

servants and agents of the parties named, has been discussed by the elementary writers on evidence. This case requires that a single point only should be considered; whether one who acts as the servant of another, in doing an act alleged to have been a trespass, is to be considered as so connected with his principal, who commanded the act to be done, that what will operate as a bar to the further prosecution of the principal, will operate as such for his servant. If the action were brought against the servant, he could be permitted to prove that he acted as the servant of another, who commanded the act and was justified in the commission of it, or who, if the act were unlawful, had made compensation for it, either before or after judgment; and his defence would be complete. It is not perceived, why he may not, upon the same principles, be permitted to prove that the plaintiff had commenced a suit against his principal for the same cause of action and proved the acts of his servant as material to the issue tried between them, and that a judgment upon the merits had been rendered against him. In such case the principal and servant would be one in interest and would be known to the plaintiff to be so. To permit a person to commence an action against the principal and to prove the acts alleged to be trespasses, to have been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule, that a judgment can only be admitted between the parties to the record or their privies, expands so far as to admit it, when the same question has been decided and judgment rendered between parties responsible for the acts of others. A familiar example is presented in suits against a sheriff or his deputy, which being determined upon the merits, against or in favor of one, will be conclusive upon the other.

In the case of *Ferris* v. *Arden*, Cro. Eliz. 667, an action

of trover appears to have been commenced by the plaintiffs, against Simon Wagnal and two other persons, for taking an ox, who justified the taking as servants of the defendant and obtained a judgment in their favor. That judgment was pleaded in bar by the defendant, with the necessary averments, to show the cause of action to be the same, and it was held to be a bar, and that the plaintiff should not have his action against the defendant, "although he be a stranger to the record, whereby the plaintiffs were barred, yet he is privy to the trespass, wherefore he may well plead it and take advantage thereof."

The case of *Kitchen* v. *Campbell*, 3 Wel. 304, was an action for money had and received. The defendant, being a creditor of Anderson, a bankrupt, had entered up a judgment against him by virtue of a warrant to confess judgment, and had caused the sheriff by virtue of an execution issued upon it, to levy on the goods of Anderson, after he had become a bankrupt. The plaintiffs, as assignees of Anderson, had brought an action of trover against the sheriff and the defendant, for the conversion of those goods, in which the defendants in that suit had obtained a verdict and judgment. The plaintiffs then brought their action against the defendant for money had and received, claiming the money received by him on sale of those goods. The former judgment was held to be a bar.

In the case of *Kennersley* v. *Orpe*, Doug. 517, a principal and his servants were regarded as so completely one in interest in actions of *tort*, that a judgment against one of them was admitted as evidence against another, the plaintiff in both being the same, on the ground that the principal was the party in interest, and the real defendant in both cases.

In the case of *Strutt* v. *Bovington*, 5 Esp. 56, the record of a suit by the same plaintiffs against Bovington alone, was admitted in a suit against him and two others, on the ground that the two other defendants justified as his servants, showing the actual parties in interest to be the same.

The case of *Shurman* v. *Wild*, 11 Ad. & El. 463, was trespass *quare clausum*. The defendants pleaded that they committed the acts alleged to be trespasses, as the servants of P. B. Barry, and delivered possession of the close to him; that the plaintiff entered and expelled Barry, who commenced a suit against him therefor, which with all other trespasses on the premises was compromised by the parties, upon certain terms set forth in the plea, which were accepted by the plaintiff in satisfaction. Judgment was entered for the defendants.

In the case of *Rogers* v. *Haines*, 3 Greenl. 362, it was decided that the record of a judgment in a suit, Thomas Clark against James Rogers, was admissible in a suit by James Rogers against Reuben Haines, who claimed to have had an equitable interest in the notes, which were the cause of action in the first suit.

In the case of *White* v. *Philbrick*, 5 Greenl. 147, it was decided that proof that the plaintiff had recovered a judgment in an action of trover against a judgment creditor for seizure of his goods on an execution against one Levi Barrett, was receivable to prevent a recovery by the plaintiff, against the officer who had seized them on the execution by direction of the creditor.

It will be perceived that under the term parties to an action, have been included not only the persons named and privies in law, but those persons whose rights have been legally represented by them. In this case, the defendant could legally represent the rights of Nathan Fowler, by proving that the acts alleged to be trespasses, were committed by him as his servant, and by his direction; and Nathan Fowler could in the former trial have legally represented the defendant by like proof. And the trial upon the merits in both suits, might take place upon the same testimony, presented by the same parties or those by whom they were legally represented.

It is not therefore perceived, that any valid objection existed to the admission of the testimony excluded, on ac-

count of the names of the parties in that and in the present suit.

It is insisted that the record of the former judgment could not have been legally received, under a plea of the general issue. That issue appears to have been formed at the trial before the justice of the peace, as early as August, 1850. The judgment, to procure which the testimony excluded was introduced, was not recovered till September, 1853. The former judgment might have been admitted under the general issue. 1 Greenl. Ev. § 531.

It is further insisted that the testimony was properly excluded, because the record of the former judgment was not introduced. It appears to have been offered by a cross-examination of witnesses introduced by the plaintiff, before the defendant could be called upon to present the record. It does not appear to have been excluded because the record had not been presented.

Parol testimony was receivable, to show that the same matter was directly put in issue in the former and in the present suit, and that the decision in the former was upon the merits. *Rogers* v. *Libby*, 35 Maine, 200.

If upon the testimony the jury should have been satisfied, that the same acts of alleged trespass had been directly put in issue, and that a decision upon them had been made in the former suit on trial of the merits, that decision exhibited by the record of the judgment, should have been held to be conclusive. 1 Greenl. Ev. § 531; *Marsh* v. *Pier*, 4 Rawle, 288.

The testimony of a deceased witness on a former trial, is admissible only when the witness can state the substance of his whole testimony. He should be able to state the whole of the ideas communicated to the jury by that testimony, so far as they related to the point in issue. The magistrate before whom the former testimony was given, appears to have been properly admitted, for he professed to be able so to state the whole testimony of the deceased witness. When he came to testify, he appears to have failed

to do so. The exceptions state, that he "said distinctly that he could not give all his testimony, and had not." This was sufficient to show, that the testimony of the deceased witness was not so presented as to make it legal testimony, and it should then on defendant's motion have been excluded. *Exceptions sustained, verdict set aside, and new trial granted.*

TENNEY, J., concurred in the result only.

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INHABITANTS OF CORNVILLE *versus* INHABITANTS OF BRIGHTON.

In a question as to the settlement of a pauper, *his declarations* are admissible in evidence, to illustrate any acts by him done tending to establish the issue.

Thus, when about going from the town where he was at work to the town where his former settlement was established, *his declarations* of his purpose in that journey are admissible.

And although the interrogatory framed to draw out his declarations may be general, and when standing alone appear to refer to *any departure* of the pauper, and therefore in itself inadmissible, yet, if it appears from the answer, and from the proceedings, to have had reference *only* to a journey to the town interested in the question, it furnishes no ground for exceptions.

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

ASSUMPSIT, for supplies furnished to Benjamin N. Berry, a pauper.

The pauper had a derivative settlement from his father in Brighton.

The defendants contended, that he subsequently gained a settlement in Cornville by five consecutive years of residence in that town, and that his home was with one Jos. Barker.

After the evidence of defendants was put in, the plaintiffs called Barker, and propounded to him this question: —

"At any time when Berry went away from your house what did he say?"

This inquiry was objected to, but the Judge allowed the plaintiffs' counsel to inquire what Berry said while in the act of going from witness' house, touching his intentions in going, as part of the *res gestæ*.

The answer was, that when Berry was going to Brighton he said he wished to go for a week or so; that he wished to attend to the land he bought of the witness.

The verdict was for plaintiffs. To this ruling the defendants excepted.

*Hutchinson & D. D. Stewart,* in support of the exceptions, contended that to render the declarations admissible, they must illustrate an act material to the issue. *Corinth* v. *Lincoln,* 34 Maine, 310; *Salem* v. *Lynn,* 13 Met. 544. The act cannot be proved by the declarations. It must be established by other evidence. And the act must be shown to be material to the issue. The purpose for which he returned to Brighton is uncertain, and it does not appear he was changing his residence.

*Leavitt & J. S. Abbott, contra.*

RICE, J. — It is admitted that the pauper whose settlement is controverted, had a derivative settlement in Brighton. The defence was, that by a residence in Cornville, during a period of five consecutive years, he had gained a settlement in that town, in his own right. The contested point at the trial, was whether he had resided in Cornville during that time, intending to make that place his home, or had simply been absent from Brighton, seeking temporary employment, *animo revertendi.*

The pauper, while in Cornville, had resided in the family of one Barker, who was called as a witness, and when upon the stand, the counsel for the plaintiffs put to him the following interrogatory; "At any time when Berry (the pauper) went away from your house, what did he say?"

This question was objected to by the counsel for the defendants; but the Court allowed the plaintiffs to inquire of the witness what Berry said, while in the act of going from witness' house, touching his intentions in going, as part of the *res gestæ.*

By this interrogatory, the declarations of the pauper were called for, at any time, when he was going from the house of

the witness, without reference to the place where he was going, or the purpose for which he was then about to depart. Standing alone, this question is altogether too general, and clearly inadmissible. In the examination of witnesses it frequently happens, that questions are put, which if separated from the general course of inquiry, then being pursued, would be inadmissible by reason of being too general, indefinite and uncertain, but which, taken in connection with the course of inquiry then being pursued, are thereby rendered both definite and pertinent. Interrogatories should be so framed as to call out from the witness, only such facts as are material and pertinent to the issue to be tried. To accomplish this object, much will depend upon the condition of things at the time the particular interrogatory is propounded, and to the antecedent course of inquiry. The law prescribes no particular formula to be used, but leaves the form to be governed by general principles as applied to particular cases. If there is sufficient, appearing in the case, to show that the attention of the witness was directed to matters which were pertinent and material, and the answer is confined to such matters, the interrogatory will not be deemed objectionable, although if taken alone, and unconnected with other inquiries, it would have been inadmissible.

In the case at bar we are satisfied, as well from the argument of counsel, as from the answer of the witness, that the interrogatory was understood to apply only to occasions when the pauper left the house of the witness to go to Brighton.

With this modification, it is contended that the question is still too general and uncertain; and that the declaration of the pauper can only be given in explanation of the act of going to Brighton, at a time when he was actually changing his residence, or moving, from one town to the other.

To make the declarations of a party who is competent to be a witness, admissible as "verbal acts," those declarations must accompany, and be explanatory of, some act which of

itself has a tendency to establish the issue to be determined. Declarations made at such times, and under such circumstances, become a part of the *res gestæ*, and as such are admissible. When a person changes his actual residence, or domicil, or is upon a journey, leaves home, or returns thither, or remains abroad, or secretes himself; or, in fine, does any other act, material to be understood; his declarations, made at the time of the transaction, and expressive of its character, motive, or object, are regarded as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof like any other material facts. 1 Greenl. Ev. § 108.

In *Gorham* v. *Canton*, 5 Maine, 266, it became important to determine where one Enoch Waite had his domicil. He appears to have been a man of migratory habits, who had lived in the family of Doct. Holland, in Canton. The plaintiffs were permitted to prove that Waite, when on one of his perigrinations and when in the town of Falmouth, declared he was going home, to Doct. Holland's. This evidence was objected to, but the full Court decided that it was properly admitted as part of the *res gestæ*. WESTON, C. J., in delivering the opinion of the Court, says, "had the pauper declared that he was going to consult Dr. Holland, as a physician; to adjust accounts between them; to procure the clothes he had left at his house, or for any special purpose, proof of such declarations would have been admissible. Such declarations show the intention with which the act was done."

In *Baring* v. *Calais*, 11 Maine, 463, the defendants offered to prove certain declarations of the pauper, while at Baring, touching his intentions as to residence. These declarations were excluded by the Judge who presided at the trial, and for that cause a new trial was granted by the full Court.

The rule of law is too well established on this subject to require illustration by the citation of authorities.

In the case at bar, the original home of the pauper was

in Brighton. The question to be decided was, had he abandoned that home? He is found, at different times, when out of that town, returning thither. It is suggested, and much insisted upon in the argument, that it is uncertain for what purpose he thus returned; that it might be on temporary business of his own, or on the business of his employer, and therefore the fact of his going to Brighton, while he was residing in Cornville, does not necessarily show that he was going to Brighton as his home. This is very true. But the act is entirely consistent with such intention and is evidence pertinent to prove that fact, and the only object of admitting the declarations is to illustrate the intention with which the act was done. If it thus appeared that the act had reference to his place of permanent residence, his home, it became material to the issue and was legitimate evidence for the plaintiffs; if not, then the whole transaction became immaterial or resulted in favor of the defendants.

The act itself being pertinent and proper to be proved, the force and effect to be given to it would depend upon the intent with which it was performed. As one legitimate mode of ascertaining that intention, resort is had to the declarations of the party, made at the time, and in explanation thereof. We think the answer of the witness was properly admitted. *Exceptions overruled.*

SHEPLEY, C. J., dissented.

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## STATE *versus* HANSON.

It is not enough to aver in an indictment for perjury, that the perjury was committed in a proceeding in a course of justice.

Where the perjury is predicated upon answers made by the respondent to certain interrogatories propounded to him on a writ of *scire facias*, unless the indictment alleges the entry or pendency of such writ in court, it will be invalid.

Designating the term of the Court at which the offence charged happened, is not a sufficient averment of the time required to be stated in the indictment.

INDICTMENT FOR PERJURY.

There was a general demurrer and joinder.

The substance of the indictment is recited in the opinion of the Court.

*Webster*, in support of the demurrer.

Every material fact which serves to constitute the offence charged should be alleged and set forth in the indictment with precision and certainty as to time and place. *State* v. *Thurston*, 35 Maine, 205; *State* v. *Baker*, 33 Maine, 52; 3 Bac. Abr. 106, Indictment, G, 4; *Reg.* v. *Pelham*, 8 A. & E., N. S. 959; 2 Hale's P. C. 178; Hawk. B. 2, c. 25, § 78; Hawk. B. 2, c. 23, § 88; 1 East's P. C. 346; 1 Chit. C. L. 219; *Rex* v. *Holland*, 5 T. R. 607.

It is not shown by the indictment that the oath was not extra-judicial. *Commonwealth* v. *White*, 8 Pick. 453; *State* v. *Furlong*, 26 Maine, 69; *King* v. *Aylett*, 1 T. R. 63; *King* v. *Dowlin*, 5 T. R. 311.

*D. D. Stewart*, County Att'y, for the State.

The allegations in the indictment show that the perjury was committed in a proceeding in a course of justice. That is sufficient, so far as it relates to the proceeding in which the perjury is alleged to have been committed. *Commonwealth* v. *Warden*, 11 Met. 407.

SHEPLEY, C. J. — This is an indictment for perjury, to which the defendant has demurred. It recites, that a judgment had been recovered by Oramandel D. Merrick against James Christie, jr., as principal, and James Christie, sen. and the defendant, as trustees; that an execution had been issued thereon, by virtue of which a demand had been made upon the defendant, for the goods of the principal in his possession. It alleges, that a writ of *scire facias* had been issued in favor of the plaintiff, in the first suit against the defendant, returnable to the District Court holden at Norridgewock, on the first Tuesday of May, 1851, which had been duly served upon the defendant, who had appeared at that Court and made oath that he had not any goods or

effects of the principal in his hands or possession, and that he made answers on oath to certain interrogatories then propounded to him by the plaintiff in that suit. It contains an averment that the Court had authority to administer the oath; and that the defendant was then and there required "to depose and answer the truth in a proceeding in a course of justice." It does not contain any allegation that the writ of *scire facias* had been entered or was pending in Court, or that the defendant pleaded or answered to that suit, or that his answers were made in that suit.

Perjury by the common law can only be committed in a judicial proceeding. As defined by statute, c. 158, § 1, the false oath may be made "to any material matter in any proceeding in any court of justice, or before any officer thereof, or before any tribunal or officer created by law; or in any proceeding, or in regard to any matter or thing, in or respecting which an oath or affirmation may be required or authorized by law." There must be some proceeding, matter or thing, to which the oath was taken; and by the common law the indictment must set it forth, so as to exhibit its character and the jurisdiction of it by the court or magistrate.

It was provided by statute, 23 George II., c. 11, that it should be sufficient to set forth in the indictment the substance of the offence, without setting forth at large the process or proceedings. No such statute exists here. In stating the substance, it has been required that there should be in the indictment a statement of the cause, process or proceeding as pending, or that the perjury was committed on trial in some civil or criminal proceeding. And so are the established forms. 2 Chitty's Cr. Law, 308; 2 Russell, 519; Wharton's Cr. Law, 754, 3d ed.; *King* v. *Aylett*, 1 T. R. 63; *King* v. *Dowlin*, 5 T. R. 311; *Lavey* v. *Regina*, 7 Eng. C. & Eq. 401; *Commonwealth* v. *Warden*, 11 Met. 406. The case last named is relied upon as deciding that it is sufficient to aver, that "the perjury was committed in a proceeding in a course of justice." The case does not

appear to authorize such a conclusion. The indictment in that case appears to have alleged, that the accused exhibited to the magistrate "an answer in writing of him, the said Gilbert Warden, to the bill of complaint of him, the said Alpheus Harding, then pending in the said Supreme Judicial Court, and made oath to it." The opinion states, that the allegations sufficiently charged, "that the defendant legally became a party to a proceeding in a court of justice."

It is said, that the indictment in this case was drawn in accordance with the precedent found in 2 Chitty's Crim. Law, 400. But that form contains an allegation, that the interrogatories were exhibited in a cause "then depending and at issue in the said court of chancery," and that the false oath was sworn in answer thereto, before a master in chancery authorized to administer it. There is in this indictment no averment, that the interrogatories were exhibited in any cause or proceeding pending or at issue, or on trial before the court.

In the case of the *People* v. *Phelps*, 5 Wend. 10, and *People* v. *Warner*, idem, 271, the false oath is alleged to have been sworn to a petition presented to the Recorder in a case of insolvency. An objection appears to have been made to the indictment, that it did not contain sufficient averments to show, that the Recorder had jurisdiction of the matter so as to be entitled to administer the oath. It being averred, that he had authority and that the oath was taken to a petition in insolvency, presented to him, the objection was overruled. There was in that State a statute provision similar to that of 23 Geo. II., c. 11. And yet those decisions do not appear to have met with entire approbation. *The People* v. *Tredway*, 3 Barb. 470.

This indictment appears to be defective in another respect. The day, month and year, when an offence was committed, must be alleged in an indictment, although it may not be necessary to prove it to have been committed on that day. Com. Dig. Indict., G, 2; 1 Chitty's Cr. Law, 217; Wharton's Cr. Law, 162–4; *United States* v. *LaCoste*, 2

Mason, 129; *United States* v. *Bowman*, 2 Wash. C. C. 328; *State* v. *Offutt*, 4 Blackf. 355; *Erwen* v. *The State*, 13 Missou. 306. The indictment alleges, that the defendant appeared before the Court, holden on the first Tuesday of May, 1851, and on oath declared, and that at the same term of the Court he answered on oath interrogatories in writing. These averments are in substance, that he appeared before the Court, during a certain term named, and there made the false answers; without stating any month or day of the month during that term, when those answers were made. *Demurrer allowed and Indictment quashed.*

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NASH *& als. versus* WHITNEY.

39 341
51 322
65 586

To maintain an action against an officer for a false return special damage sustained thereby must be shown.

If an officer, attaching real estate, files in the office of the register of deeds, a statement of the *ad damnum*, instead of the sum sued for, it is not a compliance with R. S., c. 114, § 32, and no *lien* is thereby created.

In his statement also must appear the *year* in which the term of the Court is holden, to which the writ is returnable.

ON FACTS AGREED.

This was an action on the case against an officer for a false return on a levy upon execution.

It appeared that the plaintiffs, in April, 1850, sued out a writ of attachment against one Bartlett and attached his real estate; that in May, 1851, they obtained judgment and execution against him; that they levied upon said real estate in proper form, and that the real estate was just enough to satisfy the levy; that in this writ there was but one count for $300, and the *ad damnum* was laid at $500; that the return filed by the officer in the registry of deeds states the sum sued for as $500, and that the term of the Court to which the writ is returnable is not stated; the term being "the first Tuesday of May next," with no date given.

It further appeared, that in March, 1850, one Norcross sued out a writ of attachment against the same Bartlett, and thereon attached all the real estate of said Bartlett in that county; that the said attachment, last named, was made prior to the attachment of Nash & als.; that in October, 1852, said Norcross obtained judgment and execution against said Bartlett; that thereafterwards he levied upon the real estate of said Bartlett; said real estate being the same previously levied upon by the plaintiffs in the present case; that the officer in his return upon the execution, in relation to said levy of said Norcross, alleged, that the appraisers of the real estate, taken upon said execution, were discreet and disinterested men; that Stedman Bartlett, one of these appraisers, was related to Frederick W. Bartlett, the execution debtor, by consanguinity in the sixth degree, according to the rules of the civil law.

On this statement of facts, the Court were to render such judgment as the law would authorize.

*Coburn & Wyman*, for plaintiffs.

1. The title to the Bartlett property vested in plaintiffs by their levy in 1851, subject to be divested by a legal levy by a prior attaching creditor.

2. The plaintiffs were divested of their title by the false return of the defendant's deputy. Stedman Bartlett, one of the appraisers, was not disinterested. R. S., c. 1, § 3; *McKeen* v. *Gammon*, 33 Maine, 187.

If the officer's return had been according to the fact, the second levy would have been void. *Williams* v. *Amory*, 14 Mass. 20; *Lobdel* v. *Sturdevant*, 4 Pick. 243; *Bradley* v. *Barrett*, 2 Cush. 417; *Pierce* v. *Strickland*, 26 Maine, 277; *Howard* v. *Turner*, 6 Maine, 106; *Russ* v. *Gilman*, 16 Maine, 209.

The officer's return is conclusive, as far as regards the validity of the levy. *Rollins* v. *Mooers*, 25 Maine, 192; *Whittaker* v. *Sumner*, 7 Pick. 551; *Bamford* v. *Melvin*, 7 Maine, 14; *Whittaker* v. *Sumner*, 9 Pick. 308; *McKeen* v. *Gammon*, 33 Maine, 187; *Bean* v. *Baker*, 17 Mass. 600;

*Lawrence* v. *Pond,* 17 Mass. 432; *Easterbrook* v. *Hapgood,* 10 Mass. 313.

3. The damage sustained by the plaintiffs is the amount of their levy with interest from date. *Fairfield* v. *Baldwin,* 12 Pick. 397; *Whittaker* v. *Sumner,* 9 Pick. 308; *Whittaker* v. *Sumner,* 7 Pick. 551.

*John S. Abbott,* for defendant.

RICE, J. — To maintain an action against an officer for a false return it is necessary to show, not only that the return complained of is untrue, in fact, but also, that the party seeking redress has been damaged thereby.

The plaintiffs attached the real estate of F. W. Bartlett, on the 14th of April, 1850, and within 30 days after the rendition of judgment in that action, by virtue of that attachment, levied their execution on said real estate.

Norcross & als. had also attached the real estate of the same Bartlett, on the 20th of March, 1850; this attachment being anterior to that of the plaintiffs. Norcross did not obtain judgment on his demand until after the plaintiffs had levied their execution against Bartlett. But when Norcross did obtain judgment he levied his execution upon the same land which had been before levied upon by the plaintiffs, and thereby, as the plaintiffs now affirm, by virtue of his prior attachment, acquired a title to the land thus levied upon. In this last levy, the deputy of the defendant returned that the appraisers were discreet and *disinterested* men, whereas the plaintiffs now assert, that one of them was not disinterested, being a second cousin to the execution debtor; and in that respect they contend that the return is false. The case finds that the officer had no knowledge of the existing relationship between the appraiser and the debtor, at the time of the levy.

Without determining, at this time, whether there was a sufficient waiver of any objection to the interest of the appraiser, by the parties to that levy, or whether without a waiver, the facts are such, as would render the officer liable

for a false return, we proceed to consider whether the plaintiffs, assuming the return to be false, have suffered damage by that act of the officer.

The original writ of the plaintiffs against Bartlett, contained one count only, for three hundred dollars, on an account annexed. The *ad damnum* in the writ was $500. The officer stated in his return to the register of deeds, that the sum sued for was five hundred dollars, and did not state the term of the Court to which the writ was returnable. Section 32 of c. 114, R. S., provides, that no attachment of real estate, on mesne process, shall be deemed and considered, as creating any lien on such estate, unless the officer making such attachment, within five days thereafter, shall file in the office of the register of deeds in the county or district, in which all or any part of said lands are situated, an attested copy of so much of the return, made by him on the writ, as relates to the attachment, together with the names of the parties, the sums sued for, the date of the writ, and the Court to which it is returnable.

The object of this statute, obviously was to afford information to the public of the condition of the title of such real estate as had been attached on mesne process, and to obviate the evils which had resulted from a system of private attachments.

Before the plaintiffs can claim damages for the loss of property upon which they claim a lien, they must show that they have themselves performed all those acts which the law requires to create and preserve such lien. The burden is therefore on them, when pursuing a statute remedy, to show that they have complied with all the requirements of the statute necessary to make that remedy effectual.

Now the statute requires, that the officer shall within five days after the attachment, return to the register of deeds the "sum sued for" in the writ. This he has failed to do, but instead thereof, returned the *ad damnum* in the writ. The officer was required to state in his return the Court to which his writ was returnable. This he has also failed to

do. The first requirement was necessary, to show the amount of the lien; the second to show whether the lien had been preserved.

Again, it does not appear, that at the time Norcross made his attachment, Bartlett had any title or interest in the estate upon which the execution was levied, nor that there has been any attempt to hold the land under that levy, since it was made.

For these reasons, we think the plaintiffs have failed to show that they have sustained any damage by reason of the Norcross levy, or any act of the officer in relation thereto.

*A nonsuit must be entered.*

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INHABITANTS OF ATHENS *versus* WARE *& als.*

39 345
49 431
73 284

A bond given to obtain release from an arrest made by the collector of taxes must run to the assessors of the town and not to the inhabitants.

Yet a bond running to the inhabitants of a town is good at common law.

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

DEBT upon a bond.

The defendant pleaded the general issue, and alleged by brief statement, that the bond was made under duress.

The defendant was arrested by the collector of taxes for the town of Athens, for non-payment of taxes. To obtain his release he gave the usual bond, running however, to the inhabitants of Athens. The bond contained *inter alia* "The condition of the above obligation is such that whereas the above bounden John Ware has this day been arrested by Leonard Bradbury, a collector of taxes, for the said town of Athens, by virtue of a tax warrant, signed by the assessors of said town, and committed to said Bradbury," &c.

The plaintiffs rested their case upon the bond. The case was taken from the jury and submitted to the whole Court, with the right to draw all legal inferences and render such judgment as the law should require.

*Hutchinson & Abbott*, for defendants, argued —

1. That it did not appear, that the officer had any right to arrest the body of principal defendant.

2. That a bond running to the inhabitants of a town is not a compliance with R. S., c. 148, § 50.

*D. D. Stewart*, for plaintiffs, insisted —

1. That the bond admitted the legality of the arrest, and therefore the defendants are estopped to deny it. *Cordis* v. *Sager*, 14 Maine, 475; *Kavanagh* v. *Saunders*, 8 Maine, 422; *Whitefield* v. *Longfellow*, 13 Maine, 146.

2. That at any rate the bond was good at common law. *Hoxie* v. *Weston*, 19 Maine, 322.

There was another case between the same parties on a similar bond executed at a different time. Both were argued together and decided by the same opinion, drawn up by

SHEPLEY, C. J. — The suit is upon a bond executed by the defendants, to procure the release of the principal from an arrest, made by the collector of that town for the year 1851.

It is contended, that the bond was obtained by duress. The proof of this rests upon the defendants. They fail to prove, that the arrest was not lawfully made. The bond recites, that Ware had "been arrested by Leonard Bradbury, a collector of taxes for the said town of Athens, by virtue of tax warrants signed by the assessors of the town of Athens and committed to the said Leonard Bradbury on the sixth day of October, 1851."

Another objection is, that the bond should have been made to the assessors and not to the town.

It is provided by statute c. 148, § 50, that "for all purposes of notice and other proceedings relating to the discharge from arrest or imprisonment of the person taxed, the assessors of the town, plantation, or parish, by whom such warrant was issued, shall be regarded as the creditors." One of the proceedings to procure a discharge is the giving of an approved bond.

That such should be the construction may be inferred from the language used in the Act of 1835, c. 195, § 14, that such person "shall stand in the same relation to the assessors of the city, town, parish, or plantation, as the debtor shall to the creditor in this Act, and the same proceedings may be had." On revision of the statutes, the provision, that he should stand in the same relation was omitted, while that relating to the proceedings appears to have been retained as sufficient for the purpose.

Although the bond was not made in conformity to the provisions of the statute, it is good at common law. *Hoxie* v. *Weston*, 19 Maine, 322.

The plaintiffs are entitled to judgment for the penal sum, and execution will issue for the amount of the taxes, with interest thereon from the time of the arrest, and for the officer's fees. *Defendants defaulted.*

For like reasons a like judgment will be entered in the other case argued with this.

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DRUMMOND *versus* HUMPHREYS *& al.*

If an agent, acting under the direction of his principal, cuts timber by mistake partly upon the wrong township, which his principal receives and disposes of, he can recover of his principal what he has been obliged to pay for damages in a suit for that trespass.

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

The writ was dated Oct. 25, 1850. It contained three counts upon an account annexed, for money paid and for money had and received.

It appeared from the evidence that in the winter of 1846 – 7, the defendants bought of W. H. McCrillis the stumpage upon No. 5 township, range 1, and employed the plaintiff to cut and haul the timber. One of the defendants, Merryman, was present all the time, and gave general directions as to the cutting, hauling and marking. By mistake, some of the timber was cut on township No. 4. This was

mixed with the rest, and came into the possession of the defendants.

Thereupon the plaintiff was afterwards sued by the proprietor of township No. 4, for trespass, and was obliged to pay a certain sum for damages.

To recover the money thus paid, this action is brought.

By agreement of parties a default was entered, with the understanding that if the action was not maintainable on the evidence introduced, the default should be taken off and a nonsuit entered, or the action stand for trial, at his election.

*Abbott*, for the defendants, insisted, —

1st. That the action, being assumpsit, cannot be maintained, unless against both of the defendants; and that no evidence appeared that Gen. Humphreys had any knowledge about the cutting on No. 4, at the time it took place, and hence could not be liable.

2d. That the plaintiff and defendants were co-trespassers, whether the trespass was committed intentionally or not; and the principle was well settled, that one co-trespasser cannot maintain an action for contribution against another.

3d. That McCrillis was the only one who received any benefit from the transaction, as he was paid for the stumpage, and he was the person alone liable.

*P. M. Foster*, for the plaintiff.

Drummond was sued for the trespass, and paid the damages. The property of the timber cut by mistake from township No. 4, was in him. This timber the defendants have taken and disposed of. Shall they not pay for it? *Ticonic Bank* v. *Smiley*, 27 Maine, 225.

RICE, J. — In the winter of 1846–7, the plaintiff, under a contract, cut and hauled timber for the defendants from township No. 5, range 1. In consequence of uncertainty as to the true location of the line, he extended his cutting beyond No. 5, and upon No. 4, of range 1. The timber thus cut on No. 4, was hauled by the plaintiff to the same

landing and commingled with the timber which he hauled for the defendants from No. 5. All the timber thus cut and hauled from both townships, was driven by the defendants, and by them manufactured.

For the value of so much thereof as was cut on No. 4, the proprietor of that township, Mr. Goodridge, has recovered of the plaintiff in an action of trespass. This action is brought to recover of the defendants the value of that timber for which the plaintiff has thus paid.

It would have been competent for Goodridge to have pursued the timber cut upon his land, without authority, and to have reclaimed the same; or it was competent for him to treat it as having been converted by Drummond, and to proceed against him for its value. He elected the latter method in which to enforce his rights, the consequence of which was, to vest the title to the timber in Drummond, the plaintiff.

That this timber, which has thus been paid for by the plaintiff, has gone into the hands of the defendants, and by them been appropriated to their use, does not seem to be controverted.

The defendants have submitted to a default, to be taken off if, upon the evidence reported, the action cannot be maintained.

It is contended, that the plaintiff is not entitled to recover, because it is not proved, that the defendants have received the money for the timber. The evidence is clear, that it was manufactured by them, and we think the legitimate inference is, that they have converted it into money, and therefore, that the plaintiff may well recover on the money counts. But he may also recover on the money counts by proof that the defendants have received either money or money's worth for the property taken. *Randall* v. *Rich*, 11 Mass. 494; *Payson* v. *Whitcomb*, 15 Pick. 212.

There surely is no reason, in equity and good conscience, why the plaintiff should not recover, and we think there is no technical rule of law which will defeat this action.

*The default must stand.*

SELECTMEN OF RIPLEY *& als., appellants from decree of County Commissioners.*

Those who are not parties to the record in an appeal from the County Commissioners to the Supreme Court, cannot take exceptions to the ruling of the Court.

Thus the County Commissioners are not parties in an appeal from their decision.

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

The selectmen of Ripley, and others, petitioned the County Commissioners of Somerset county, to discontinue a certain county road. The County Commissioners refused upon a hearing the prayer of the petitioners, and the petitioners appealed to the Supreme Judicial Court.

A committee was appointed by the Court, who reversed the decision and discontinued the road.

Exceptions were taken to the acceptance of this report by the County Commissioners and the inhabitants of St. Albans and Cambridge, who claimed to be parties interested in the location of that road.

It is not material to consider the nature of the exceptions. All the docket entries relating to this matter were made part of the case.

*D. D. Stewart,* in support of the exceptions, claimed that those persons or corporations interested adversely to the appellants have an undoubted right to object to any illegality or error in the proceedings under the statutes of 1847, c. 28. *Banks, app't from decision of Co. Com. of York and Cumberland,* 29 Maine, 288; *Jordan petitioner,* 32 Maine, 472.

*Abbott, contra,* insisted that the parties excepting were not parties to the suit and had no right to appear in it.

APPLETON, J. — It appears that the selectmen of Ripley and others, petitioned the County Commissioners of Somerset county for the discontinuance of a county road passing through the town of Ripley. Due notice was given to all

parties interested; a hearing was had upon this petition before the County Commissioners; the road in question was adjudged by them to be of common convenience and necessity, and the prayer of the petitioners was denied. From this decision an appeal was taken to this Court and entered. A committee was then appointed, who after a hearing before them reversed in whole the decision of the County Commissioners, and granted the prayer of the petitioners. The report of the Committee was presented and accepted by the presiding Judge, and to the acceptance of this report exceptions have been filed by counsel in behalf of the County Commissioners and the inhabitants of the several towns of St. Albans and Cambridge.

It is provided by "an Act granting appeals from the decisions of County Commissioners," approved August 9, 1847, c. 28, § 1, that "any person or corporation aggrieved by any decision of any Court of County Commissioners, on an application to lay out, alter or discontinue any highways, may appeal to the District Court held in the county where the location, alteration or discontinuance is prayed for, under the limitations and restrictions in this Act." By § 2, the parties, petitioners or respondents, may enter their appearance before the County Commissioners, and "*any party so entering an appearance*" may take an appeal from their decision, "which appeal may be prosecuted by any other person or corporation, being any such party of record upon the neglect of the party so appealing to prosecute the same," and "all persons and corporations claiming such appeal shall be held jointly and severally liable for all costs that may be adjudged against them." By § 5, provision is made for the adjudication of cost in certain cases. By the Act of 1852, c. 346, § 1, the whole jurisdiction of the late District Court is conferred upon this Court.

The inhabitants of St. Albans and of Cambridge did not litigate the subject matter of this petition, before the County Commissioners. They were neither "parties, petitioners or respondents" in that Court. They entered no appear-

ance. They neither appealed nor had a right to appeal from any decision the County Commissioners made or might have made. They made themselves in no event liable for costs. Their names are not upon the docket of this Court as parties. From aught that appears, any other town in the county might with equal propriety have contested the acceptance of this report, and are equally parties to the record. It would be an anomaly in judicial proceedings to permit mere strangers, not parties, either as petitioners or respondents, not privies in interest to any party, who have not entered their appearance, and who have not become amenable to the jurisdiction of the Court, to thrust themselves into the contests of others at their own will and pleasure. The inhabitants of St. Albans and of Cambridge, are in no condition to interfere with the disposition of this appeal, or to except to any decision or ruling of the Justice presiding.

The County Commissioners are public agents, whose duties are clearly set forth and defined by R. S., c. 99, § 3. This is an appeal from their decision. They were no parties to the petition when pending before them; they could not enter an appearance in their own court, or become before themselves either petitioners or respondents. In adjudicating upon the petition they acted judicially. When the appeal was taken the ultimate decision of the matter was withdrawn from their jurisdiction. It is no part of their duty to pursue appellants from their Court and to litigate in this with parties dissatisfied with and contesting the propriety of their adjudications, at the public charge, or to except to the decisions of any Justice of this Court in accepting a report of its committee by which their proceedings have been reversed. *Exceptions dismissed.*

STATE OF MAINE *versus* GRAY.

The time in which the offence of being a common seller under c. 211, of Acts of 1851, may be prosecuted by indictment, is limited to two years.

Evidence of the commission of such offence beyond the two years is inadmissible, and where a conviction is thus obtained, the respondent is entitled to a new trial.

A certified copy by the town clerk of the *appointment* of an agent to sell liquors under that Act, is not sufficient evidence of agency.

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

INDICTMENT, for being a common seller of spirituous liquors.

The indictment was found at Sept. term, 1853, and the attorney for the State interrogated the witnesses if they had seen any persons drinking intoxicating liquors at defendant's store between the 2d day of June, 1851, and the time of finding the indictment. This was objected to, but permitted.

The respondent offered certified copies by the town clerk, of his appointment as agent from the selectmen of Anson, where the offence was committed, which were rejected.

The respondent was convicted and excepted to the rulings.

*Foster*, in support of the exceptions.

*Abbott*, Att'y Gen., *contra*.

APPLETON, J. — This was an indictment against the defendant as a common seller of spirituous and intoxicating liquors.

By the Act approved June 2, 1851, c. 211, § 8, the penalty for being a common seller may be recovered by indictment or by an action of debt in the name of the city or town where the offence is committed. By R. S. c. 146, § 15, the time within which all actions and suits for a penalty or forfeiture on any penal statute may be commenced is limited to one year. By § 16, the prosecution by indictment is limited to "two years next after the offence was committed," and not afterwards. The exception in § 28, in case the defendant shall be out of the State, applies only "to any cause of action mentioned in this chapter," and not to indictments. The limitation as to the prosecution of crimes in

R. S., c. 167, § 15, does not apply, there being another limitation, to wit, that in R. S., c. 146, which is provided for this class of offences. It necessarily follows, that an indictment for being a common seller is barred by the lapse of two years.

Now evidence embracing time to which the statute of limitations would constitute a perfect bar, was received by the presiding Judge, notwithstanding the objections of the defendant's counsel. This was erroneous. The defendant could not legally be convicted on the proof of facts occurring more than two years previous to the finding of the indictment, as in such case the offence would be barred by the statute.

By c. 211, § 3, the agent is to receive "a certificate from the mayor and aldermen or selectmen by whom he has been appointed, authorizing him as the agent of such town or city, to sell intoxicating liquors for medicinal or mechanical purposes; but such certificate shall not be delivered to the person so appointed until he shall execute and deliver to said board a bond with two good and sufficient sureties," as is provided by the same section. The appointment might be made and entered of record, and yet the bond may not have been given. Or if the certificate has been given, the appointment may have been rescinded under the provisions of § 2. The certificate is not shown to have been delivered. If the defendant had received it, it was for him to produce the original or account for its non-production. He does not show that he has given the required bond, or that he has ever had the certificate, which is primarily the proper proof of his agency. The rejection of the evidence of copies of his appointment was in strict accordance with the law on this subject.

As evidence was offered to show the commission of the offence when by the statute it was barred, a new trial must be had. *Exceptions sustained. —*

*New trial granted.*

† LEDDEN, *Petitioner for Certiorari, versus* HANSON.

In the disclosure of a poor debtor before justices of the peace and quorum, no inquiries as to his property or his disposition of it, *prior* to the contraction of the debt on which he is disclosing, are pertinent or allowable; and for refusing such investigation *certiorari* to the justices will not lie.

Whether the facts stated by the debtor are true, and if so whether they are consistent with the oath prescribed by law for him to take, are matters entirely within the jurisdiction of the magistrates, and cannot be revised by this Court.

PETITION for the writ of *certiorari* to bring up the records of two justices of the peace and quorum.

The defendant was arrested on an execution of the plaintiff's and committed to jail. He then cited the plaintiff to attend at his disclosure.

At the time appointed he made a disclosure and was allowed to take the oath prescribed by law, and was discharged from imprisonment.

During the examination the petitioner's attorney propounded several questions to Hanson relating to his property, and his conveyance of it, and his intentions therein which he declined to answer, as they referred to matters which transpired before the debt to plaintiff was contracted. The creditor's attorney insisted upon an answer.

But the magistrates ruled, that the creditor should be restricted in his inquiries to the business transactions of the debtor made at the time and since the contraction of the debt upon which the debtor is imprisoned, and as to property owned by him at that time and since.

From some portion of the examination it had a tendency to show, that a fraud had been committed by the debtor in the transfer of his property, and that the grantee participated therein prior to plaintiff's debt.

The errors assigned in the petition appear in the opinion of the Court.

*Webster*, for defendant, cited *Hayward, Pet.*, 10 Pick. 358; *Gibbs, Pet.* v. *County Commissioners*, 19 Pick. 298; *Nightingale, Pet.*, 11 Pick. 168.

*Stewart*, for petitioner, cited *Little* v. *Cochrane*, 24 Maine, 509; *Pullen* v. *Hutchinson*, 25 Maine, 254; *Parkman* v. *Welch*, 19 Pick. 235; *Clark* v. *French*, 23 Maine, 238.

TENNEY, J. — The errors assigned in the petition are 1st, That in the disclosure and examination before the justices of the peace and quorum the creditor was restrained in his just rights in propounding interrogatories, under the statute, &c. 2. That the debtor was excused from answering interrogatories proposed, touching his ownership of property, prior to the time, when the debt, on which he was arrested, was contracted; — and 3, That upon the disclosure as made, he was improperly allowed to take the poor debtor's oath as prescribed in R. S., c. 148, § 28.

Several preliminary questions were presented by the respondents. One was, whether the Court have jurisdiction of the petition; and another was whether the magistrates, who administered the oath to the debtor are subject to the writ of *certiorari* to bring up their records, inasmuch as they are not required by statute to make records of their proceedings. These questions have been elaborately discussed by the respondent's counsel in argument, but we think it unnecessary to decide them, as we think there is no authority to grant the writ prayed for upon this petition, upon the hypothesis, that in a proper case, it may be granted to magistrates, who have examined a poor debtor, and permitted him to take the oath.

1. The assignment of the first error is very general, and is supposed to have been more specifically stated in those which follow.

2. The oath for poor debtors prescribed by the statutes of 1822, c. 219, § 15, of 1831, c. 520, § 4, of 1835, c. 195, § 10, and of 1836, c. 245, § 7, contains substantially the following, to wit, "That I have not since the commencement of this suit against me, or at any other time, directly or indirectly, sold, loaned, leased, or otherwise disposed of, or conveyed or entrusted, to any person or persons, whom-

soever, all or any part of the estate, real or personal, whereof I have been possessed, or been the lawful owner with any intent or design, to secure the same, or to receive, or to expect any profit, gift, remuneration, or advantage therefor personally, or that all or any of my family, heirs or friends, should receive or expect any profit, advantage or benefit therefrom, with an intent or design, that any of my creditors should be defrauded." In the R. S., c. 148, § 28, the form in reference to the disposition of his property is changed, so that he is required to state, "That I have not, since the commencement of this suit, or the time when the debt, or cause of action, or any part thereof, on which this suit was brought, was contracted by me, directly or indirectly sold, loaned, leased or otherwise disposed of, or conveyed or entrusted to any person," &c.

By § 20, of c. 148, the bond to be taken upon arrest or imprisonment, is conditioned, that the debtor will within six months thereafter, cite the creditor, &c., and submit himself to examination, and take the oath prescribed in the 28th section, &c. The justices of the peace and quorum, before whom he shall appear, according to the citation and the provisions of the statute, shall examine the debtor, under his oath, concerning his estate and effects, and the disposal thereof, and his ability to pay the debt for which he is committed, &c. By § 21, the creditor may propose to the debtor any interrogatories pertinent to the inquiry, which with the answers, if required by the creditor, shall be in writing, and the answers are to be sworn to, after being signed by the debtor. If, upon such examination, &c., the justices of the peace and quorum shall be satisfied, that the debtor's disclosure is true, and shall not discover any thing thereby inconsistent with his taking the oath, set forth in the next section, they may proceed to administer the same accordingly.

It is quite apparent from the foregoing citations from R. S., c. 148, that the examination required, is designed for the purpose of enabling the magistrates to determine,

whether the oath prescribed, can be permitted to be taken by the debtor; and also to secure to the creditor, by means of the arrest, imprisonment or bond, such a disclosure as will present the pecuniary condition of the debtor, and the history of the property, which he may have owned since the debt was contracted, and the disposal of the same so far as it may have been disposed of, and that of which he may still be the owner, and of which he may have the control. All that the debtor is required to do, is to satisfy the magistrates, that the disclosure he may make is true, and is not inconsistent with the form of oath prescribed, and he is entitled to the discharge of his body, and the condition of the bond is saved. The property, which he purchased, or owned, and the disposal of the same, before the origin of the debt, which was the cause of his arrest and imprisonment, whatever may have been his conduct, or intentions in reference thereto, is not made in any degree the test of his right to take the oath, and cannot be the subject of inquiry pertinent to the question before the justices of the peace and quorum.

It is true, if a person commits an actual fraud as against his creditors, in the disposal of his property, those becoming his creditors subsequently as well as those existing at the time, may take advantage of it, and the property, so fraudulently conveyed, may be made subject to their debts. But it appears, that the Legislature, in the Revised Statutes, did not intend to give magistrates, in proceedings, when there should be an attempt to take the poor debtor's oath before them, jurisdiction over such matters, so that they should possess the power to deprive a debtor of his liberty perpetually, (if he should be unable to pay,) on account of a fraud upon creditors, before he contracted the debt, on which he may make disclosure; or if he gave bond according to the statute to free himself from arrest or imprisonment, compel his sureties thereon to discharge the judgment and costs. The opinion of the Court, in the case of *Little* v. *Cochrane & al.*, 24 Maine, 509, treats the inquiry to be

made of the debtor in the disclosure as limited to transactions, which occurred at the time the debt was contracted and afterwards.

3. Whether the facts disclosed by the debtor in this case were true, and if so, whether they were consistent with the oath, were questions submitted by the statute entirely to the judgment of the magistrates, and their decision upon them cannot be revised by this Court. *Haywood, petitioner, &c.*, 10 Pick. 358.

*Writ denied, costs for the respondents.*

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† STATE OF MAINE *versus* NUTTING.

A motion to quash an indictment based upon proof to be produced, without its production, is unavailable.

If, during the trial, the attorney for the State obtains leave of the Court to enter a *nolle pros.* to a portion of the indictment, he may at the same trial, if the rights of the respondent are not prejudiced by his dismissal of any witnesses, by leave of the Court, have that entry withdrawn, and proceed upon the whole indictment.

To the answer of a witness responsive to a question put without objection, no exceptions can be taken.

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

INDICTMENT. It contained but one count charging the respondent with the crime of adultery with one A. M., a married woman. It also alleged the respondent to be her father, and that the parties were within the degrees of consanguinity, within which marriages by the law of this State, are incestuous and void.

Before pleading to the indictment a written motion in abatement was presented, because it was not signed by the foreman of the grand jury. (The one first chosen had resigned and another was appointed in his place, who had officiated at the finding of the indictment and signed the bill.)

To this motion a counter statement of the above facts was presented by the attorney for the county, and no evidence was offered in support of it by the respondent.

This motion was overruled.

The respondent also moved to quash the indictment, as there was only one count; and in it, (as he alleged,) were charged two offences, viz, adultery and incest.

The county attorney obtained leave of Court, against the objection of respondent, to enter a *nolle pros.* as to the substantive charge of adultery; and at the request of defendant's counsel, the following entry was made on the docket. — "*Nol. pros.* to all the charges of adultery against the defendant."

After this entry, and another motion of defendant, as to the insufficiency of the indictment, was overruled, the county attorney had leave to strike out the docket entry, against defendant's objections, and to proceed upon the indictment as returned by the grand jury; it appearing, that no witnesses had been discharged by the respondent.

In the course of the trial, one witness testified, that while she was at work at defendant's house, he and his daughter rode away one day in a chaise, and that afterwards, in referring to that time, he said something of an improper connexion between them; that he had his will of her; and on cross-examination she said this was spoken in a sporting, laughing way. When the direct examination was resumed, the witness, in answer to a question by the government, said the respondent had been drinking, but she thought he meant what he said.

The jury returned a verdict of guilty, and the respondent excepted to the rulings and instructions given, but the objections to the instructions were waived.

*J. H. Webster*, in support of the exceptions.

*D. D. Stewart*, County Att'y of Somerset, (the Att'y General having been of counsel for defendant,) *contra.*

APPLETON, J. — The defendant filed a motion to abate the indictment for causes therein set forth, and offered to substantiate the facts upon which the motion rested, by evidence derived from the records of this Court, and from the

testimony of witnesses. The case finds that no proof was offered to establish the facts alleged by the motion to exist. The motion was accordingly overruled, and it is difficult to perceive how the presiding Judge could have done otherwise than overrule it, since it was wholly unsustained by proof.

It seems that leave was granted the county attorney upon his motion, to enter a *nol. pros.* as to certain portions of the indictment, and the same was entered on the docket. Subsequently, during the progress of the trial, the attorney moved the Court that this entry on the docket should be stricken off, which the presiding Judge permitted to be done.

It is now insisted that as a *nol. pros.* had been entered as to part of the indictment, that the government was estopped thereby, and could not further proceed upon the indictment as originally found.

A *nol. pros.* is no bar to another indictment. According to the English authorities, it would seem that it does not even prevent the arrest and trial of the accused at a subsequent term, upon the indictment as to which it has been entered. Com. Dig., Indictment, K. "So the Attorney General may enter a *nolle prosequi.* But it does not discharge the crime." Salk. 21; Mod. Ca. 261. "And afterward there may be other process upon the same indictment." Per HOLT, C. J., Salk. 21; Mod. Ca. 261. "A *nol. pros.* in criminal proceedings," remarks NASH, J., in *State* v. *Thornton,* 13 Iredell, 257, "is nothing but a declaration on the part of the prosecuting officer that he will not at that time prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to leave the Court without entering into a recognizance to appear at any other time; but it does not operate as an acquittal, for he may afterwards be again indicted for the same offence, or fresh process may be issued against him upon the same indictment and he be tried upon it."

In the case at bar the motion, to the allowance of which exceptions are alleged, was made while the cause was on trial

and the prisoner was in custody. His witnesses had not been discharged. No rights had been impaired. He came prepared to meet the indictment as it had been originally found. He was tried on the indictment as thus found. In civil cases, if leave to enter a *nolle pros.* is improvidently granted, it may be set aside on motion. *Cate* v. *Pecker*, 6 N. H. 417. There seems no good reason why the motion of the attorney for the government should not have been granted, and in granting it the Court took especial care that the prisoner should not suffer therefrom in his defence.

It is not necessary to determine what would have been the result had the prisoner been discharged from custody, nor whether a new capias might have properly issued to bring him in at a subsequent term to be tried upon an indictment upon which a *nolle pros.* has been entered.

When the question proposed is improper, in seeking to obtain testimony which by the rules of law is inadmissible, objections should be seasonably taken thereto. It is not for counsel to wait till the answer is made, and if unfavorable, then to interpose objections and otherwise not to object. If the answer be given before time for an objection, or if the answer is not responsive to the question and is inadmissible, the proper course is to move to have the answer stricken out or that the jury be instructed to disregard it. Neither course was adopted here. If the answer, to which exceptions are taken, were to be regarded as not strictly in accordance with the law, it is responsive to a question put without objection.

The other grounds of exception are not relied upon by counsel, and are without foundation.

*Exceptions overruled and judgment on the verdict.*

PARLIN *& als. versus* WARE.

A title to land by levy cannot be sustained, by showing from the records that the judgment debtor had executed and acknowledged a *lease* of it, prior to the attachment, to another for life, and in the *lease* was a recital that the lessee had that day conveyed the same to the lessor by deed, against the tenant claiming by an absolute conveyance from the *lessee*, who is shown to have been the former owner.

From *such recital* no satisfactory evidence is furnished as to the real character of the conveyance to the judgment debtor.

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

WRIT OF ENTRY.

After the evidence was introduced it was agreed to submit the cause to the decision of the full Court upon such of the evidence as was admissible, the Court to draw inferences therefrom as a jury might properly do. The titles under which the parties claimed are fully stated in the opinion.

The demandant's title depending upon that of John Flanders, he introduced a lease of the premises, executed and recorded in June, 1829, from said John to Nathaniel Flanders for life.

In that lease was the following:—"That whereas the said Nathaniel hath by his deed of this date, conveyed unto the said John the farm situated in said Cornville whereon the said Nathaniel now lives, and whereas the aforesaid conveyance might subject the said Nathaniel to difficulty and inconvenience by depriving the said Nathaniel of the means of subsistence and a comfortable place of abode, now in consideration of the premises, the said John," &c. leased the same premises.

Evidence was also introduced that John occupied the same from the time the lease was made until after the levy, and that Nathaniel died in 1840.

The demandant also offered the deposition of Timothy Eastman, who among other matters testified as to the contents of the deed mentioned in the lease, he having drafted it, and that after it was delivered, thought it was given to

him to keep on some contingency, and that when he moved out of the State, in 1835, it was left among his papers.

That part of the deposition relating to the contents of the deed was objected to, and ruled out.

He also called Levi Johnson, who testified that Eastman's papers were left with him and that on searching them he was unable to find such a deed.

The deposition was offered after this testimony was given.

*Hutchinson*, for tenant, made some objections to the levy, but relied principally on the position that no legal proof had been introduced of any title in John Flanders; and that the loss of the deed to him had not been proved, and no parol evidence of its contents was admissible. *Kimball* v. *Morrell*, 4 Greenl. 368; *Emery* v. *Vinall*, 26 Maine, 295.

*Abbott*, for demandant, on this part of the case, contended that the deposition of Eastman should be admitted. It was taken under a commission; the witness was out of the jurisdiction and it was not objected to, excepting as to certain parts.

The copy of the lease was admissible under Rule 34 of this Court, and that recites the fact of the conveyance to John.

By this paper Nathaniel is estopped from denying that he had conveyed the premises.

The attachment and subsequent levy are tantamount to a deed from John Flanders, duly executed and recorded in July, 1836. All this was before any claim by defendant.

This lease, with other evidence, estops Nathaniel Flanders and his grantee, the tenant, who took his deed after the attachment, from contesting the fact recited in the lease, that Nathaniel had conveyed by deed to John, and from contesting the title of John and of these plaintiffs.

SHEPLEY, C. J. — The case is presented upon so much of the testimony, as may be legally admissible, with authority to make such inferences as a jury might.

The demandants' title arises out of the levy of an execu-

tion on the premises, on March 27, 1837, issued on a judgment recovered by Parlin and Moses Jewett against John Flanders. An attachment was made of the farm, on which John Flanders then lived, on July 25, 1836. A lease for life bearing date on June 1, 1829, and recorded in the registry of deeds, from John Flanders to Nathaniel Flanders, of the farm on which Nathaniel then lived, was introduced by a duly authenticated copy, which may be admissible under Rule 34 of this Court, as a deed operating to convey an estate for life. That lease contains a recital, that Nathaniel had on that day by his deed conveyed the same farm to John. This recital may be sufficient to prove the existence of such a deed, but it can afford no satisfactory proof of the character of that conveyance. It does not show, whether that deed was absolute or conditional — valid or invalid. The loss of that deed has not been proved, and no sufficient foundation has been laid for the admission of its contents. There is proof that John continued to occupy that farm, after he had made the lease to his father Nathaniel, until after the levy was made. Upon this proof rests the title of the demandants.

The tenant introduced a deed of conveyance of lot numbered 24, in Cornville, from Phineas Currier to Nathaniel Flanders, dated September 16, 1825. And a deed from the latter to himself of lot 24, in Cornville, being the farm whereon he then lived, made on November 22, 1836, and recorded on the day following. And a deed of release from John Flanders to himself, made on November 22, 1836, of lot 24, in Cornville, with other documents not deemed essential.

Objection is made to the title of the tenant, as derived from Nathaniel and John Flanders, "that there is not sufficient evidence in the case showing, or tending to show, that either of the deeds covers the land, or any part of the land, claimed in the case at bar."

The description of a tract of land in the levy, under which the demandants claim title, is of a piece of land lying in

Cornville, and bounded, "beginning at the south-east corner of lot numbered twenty-four, at the road, being the same lot on which the said Flanders now lives, thence north, on the east line of said lot 100 rods, to the north line of said lot, thence west, on the north line of said lot 160 rods, thence south, parallel with the east line 100 rods, to the south line of said lot to the road, thence east, on said road 160 rods, to the first mentioned bounds, containing one hundred acres." This appears to describe a tract of land 160 rods in length and 100 rods in breadth as part of lot 24. The description of the second tract has reference to "said lot" in all its lines except one, leaving no reasonable doubt, that the description is part of lot 24.

The land conveyed by Nathaniel Flanders to the tenant, is described as "a tract or parcel of land situated in Cornville aforesaid, being lot numbered twenty-four on the plan of Cornville." There is not, as the argument states, any reference in the levy to the plan of Cornville for the number of the lot. In the absence of all opposing testimony it is not a strained inference to make, that lot 24, in Cornville, and lot 24, on the plan of Cornville, is the same. The lot is however further identified by the lease introduced by the demandants and by testimony, as the lot on which the two Flanders lived.

It is further insisted, that the testimony does not prove, that Nathaniel Flanders owned the land, when he made a conveyance of it to the tenant, because the conveyance from Currier to him describes Nathaniel Flanders "of South Hampton, of the county of Rockingham and State of New Hampshire," and there is no testimony to prove that he removed to or lived upon lot 24, in Cornville. The proof authorizing an inference of identity is, that the lot conveyed to him and by him is the same; that he received a lease of it for life, describing it as the farm whereon he then lived. There is no proof of any other Nathaniel Flanders connected with those deeds.

It is not very desirable or useful to have such questions presented to the Court for decision.

The result is, that Nathaniel Flanders appears to have been the owner of the farm by a conveyance from Currier; to have made a deed of it to his son John, and then to have conveyed it to the tenant. There is no sufficient proof, that a legal title to the farm was conveyed by the deed from Nathaniel to John, and it was therefore apparently conveyed by Nathaniel to the tenant. *Demandants nonsuit.*

RICE, J., dissented.

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39 367
92 79

DUNN *versus* HUTCHINSON.

When a case has been submitted by agreement to the presiding Justice, to be heard and determined, no exceptions can be taken to his rulings.

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

This was an action of assumpsit for money had and received, and submitted to the Court by agreement.

The defendant objected to the rulings of the Court.

The nature of the exceptions is immaterial as the decision was placed on a different ground.

No arguments were offered on either side.

The opinion of the Court was drawn up by

GOODENOW, J. — This was an action of assumpsit, and submitted to the Court, by agreement, Dec. term, 1854, under the provision of the statute of 1852, c. 246, § 12. The Justice presiding ordered judgment for the plaintiff, for the sum of thirty dollars damages, and interest from the date of the writ.

The defendant claimed the money collected by him in set-off to charges on his books, and offered his books, together with his suppletory oath, showing the charges against R. M. Baker, the assignor of the demand to the plaintiff, to more than the amount of the money collected by him; being objected to, the Judge excluded said books.

To which rulings, decision and rejection of testimony the defendant excepted, and his exceptions were duly allowed.

Where a case has been submitted, as this was, to the Justice presiding, to be heard and determined by him, we do not understand that exceptions can properly be taken to his decision or proceedings. *Exceptions dismissed.*

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42 315
42 322
42 552
43 317
47 570
53 524

INHAB'TS OF STARKS *versus* INHAB'TS OF NEW SHARON.

The *annexation* of a small portion of the territory of one town to another adjoining, is not such a *division* as is contemplated by § 1, part 4, of c. 32, R. S.

And such annexation transfers the settlement of no persons, unless they have a settlement in the town from which the territory is taken, and *actually dwell on the territory* at the *time* of its separation. — APPLETON, J., dissenting.

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

ASSUMPSIT, for supplies furnished to Moses Pressy and his wife, and to one Rebecca Dyer, between March, 1852, and August, 1853.

The only question in issue was the legal settlement of the paupers.

After the evidence was out, the cause was taken from the jury and submitted to the full Court, with power to draw inferences as a jury might, and enter judgment by nonsuit or default according to the legal rights of the parties.

The Court found the legal settlement of the paupers to be in the town of Industry on March 19, 1852.

On that day the Legislature of the State set off a small part of the territory of Industry, "containing fifteen polls," and annexed it to the town of New Sharon.

On the territory so set off the paupers had in fact resided until they became chargeable to Industry, but did not reside there at the time of its annexation to New Sharon.

*O. L. Currier*, for defendants, cited *Groton* v. *Shirley*, 7 Mass. 156; *Great Barrington* v. *Lancaster*, 14 Mass. 253; *Fitchburg* v. *Westminster*, 1 Pick. 144; *Sutton* v.

*Dana*, 4 Pick. 117; *Hallowell* v. *Bowdoinham*, 1 Maine, 129; *New Portland* v. *Rumford*, 13 Maine, 299; *Smithfield* v. *Belgrade*, 19 Maine, 387; *St. George* v. *Deer Isle*, 3 Maine, 390.

*J. S. Abbott*, for plaintiffs, cited R. S. c. 32, § 1, art. 4; Private and Special Laws of 1852, c. 512, and c. 128 of Special Laws of 1853; *Smithfield* v. *Belgrade*, cited on the other side; *Belgrade* v. *Dearborn*, 21 Maine, 334.

SHEPLEY, C. J. — The paupers appear to have acquired a legal settlement in the town of Industry before a small part of it, containing "fifteen polls," was set off from that town "and annexed to the town of New Sharon," by the Act approved on March 19, 1852. They had resided in that part of Industry annexed to New Sharon, but did not reside there at the time of such annexation. They have no legal settlement in New Sharon, unless the annexation of that part of Industry to it, must be regarded as a division of the town of Industry.

A distinction between annexation and division has existed during our existence as a State. *Hallowell* v. *Bowdoinham*, 1 Greenl. 129. That decision was founded upon a construction of the statute of Massachusetts of the year 1793, c. 34, § 2, mode 10. That section was in substance reënacted in this State; and it constituted the sixth mode of acquiring a settlement under the Act of March 21, 1821, c. 122, § 2. This reënactment must have been made with a knowledge of the then recent decision. Its construction was again determined in accordance with the former one in the case of *New Portland* v. *Rumford*, 13 Maine, 299, decided in the year 1836.

On a revision of the statutes, in the year 1841, the section was again reënacted with a knowledge of the construction, which it had received for twenty years.

It is a well established rule in the construction of statutes, that upon their reënactment after a judicial construction well known, the Legislature is to be considered as hav-

ing adopted that construction by its reënactment without substantial change. Such construction rests therefore no longer upon an opinion of the judicial department. It has a legislative sanction; and judicial tribunals are deprived of any legitimate right to change the law by a new and different construction. This would be to declare, what the law should be, not what it is.

In the case of *Livermore* v. *Phillips*, 35 Maine, 184, the distinction between annexation and division was again recognized; while the remark made in *Hallowell* v. *Bowdoinham*, that a division of a town must produce two or more towns composed of the original territory, was questioned. Yet the case decided was received as authority. If any change of the law be desirable, it should be made by the Legislature. Its long acquiescence may be regarded as satisfactory proof, that no change is desirable.

The proposed change of construction rests upon an abstract proposition, that a town is divided, whether its parts, consequent upon such division, are more or less numerous, are larger or smaller, whether they constitute new towns or parts of new towns, or are annexed to existent corporations.

By the application of such a rule, if a single farm or a small strip of land, on which a person resided, were set off from one town to another to make a straight line between them, the town, from which it was set off, would be divided. This might be mathematically correct. And so the removal of particles from a diamond to polish it, might constitute a division of it; but it is not in such sense, that the word division appears to have been used in the statute.

*Plaintiffs nonsuit.*

Dissenting opinion by

APPLETON, J. — It has been determined by a long series of decisions, that the annexation of a part of one town to another is to be regarded, so far as it may affect the liability of the town to which such portion is annexed, to support

those actually dwelling and having their homes on the part thus set off, in the same light as the incorporation of a new town, and that the settlement of those, actually dwelling and having their homes in the territory annexed, is by the Act of annexation transferred to the town of which such territory becomes a part. *Groton* v. *Shirley*, 7 Mass. 136; *New Portland* v. *New Vineyard*, 16 Maine, 300; *New Portland* v. *Rumford*, 13 Maine, 299.

That annexation is to be regarded as operating like the incorporation of a new town is unquestionably correct. That the settlement of those actually dwelling and having their homes on the territory annexed is transferred therewith, is a proposition in entire conformity with the spirit of the pauper act and the intention of the Legislature.

It has however been decided, in *Hallowell* v. *Bowdoinham*, 1 Greenl. 129, and in some other cases, that annexation does not operate as a division of an old town, and that persons having their settlement in the town of which a portion is annexed and having their last residence in the part annexed, but absent therefrom at the time of such annexation, do not, as in case of a division, follow the territory divided and acquire a settlement in the newly formed town, but retain it in the old town from which a portion has been severed. The decision is based upon the idea that the "division" referred to in the fourth mode of gaining a settlement, as provided in R. S. c. 32, § 1, means, to use the language of MELLEN, C. J., in the case just referred to, only "such a division of a town as shall produce two or more towns composed of the same territory which formed the original town." This view will, we think, upon a careful examination of the statute, be found to be demonstrably erroneous.

Towns are referred to in the fourth mode of gaining a settlement as being, when incorporated, "composed of a *part* of *one* or *more* old incorporated towns." Under the decisions already referred to, annexation is deemed equivalent to such incorporation. In the eighth mode of acquiring a settlement, in the same section, towns are spoken of

as being formed from unincorporated places. These are the only modes of incorporation specified in R. S. c. 32.

A town is divided, whatever may be the disposition of the respective parts, which originally constituted its whole. It is divided, whether its parts, consequent upon such division, are more or less numerous; are larger or smaller; whether they constitute new towns or parts of new towns, or are annexed to existent corporations. Nothing in the language of the statute indicates that the word "division" should receive other than its usual and accustomed meaning, or that any such unwonted and forced limitation should be imposed upon the generality of its signification as to confine it to the formation of a new town or towns out of the original territory into which the old town had been divided. The usages of speech and the just principles of construction alike forbid such a conclusion.

It is doubtful, remarks SHEPLEY, C. J., in *Livermore* v. *Phillips*, 35 Maine, 184, whether the definition of the phrase used in the statute, "upon the division of any town," intimated in the case of *Hallowell* v. *Bowdoinham*, will prove to be entirely satisfactory. It is there said, that it "seems to have in view such a division of a town as shall produce two or more towns composed of the same territory, which formed the original town."

"Division" is the separation of any entire body into parts. It does not include the idea of preservation of any previous organization, form or shape. There is no indication, that the word was used in any unusual or technical sense. If a town should by Act of the Legislature be separated into two or more parts, and those parts should be incorporated, or without it, organized into plantations, the Act incorporating the town being repealed or annihilated, would the town be divided? If one part were incorporated into a plantation and the others were left without it, would there be no division? Would it be necessary that the two or more parts should either have any political organization of their respective parts even otherwise designated? If not, can it be in-

correct to speak of a town, as divided, when it has been separated into two parts, because one of them was left without organization and the other was united to another town? The reason of the Court in the case referred to must be regarded as decisive of the one at bar. If a town is to be regarded as divided, when it has been separated into two parts, one of which is left without organization and the other is united to another town, it is difficult to perceive why it is not equally divided, when its respective parts are annexed to other towns, or when of the parts into which a town is divided one part retains the old name and corporate organization and the other is united with some other town.

Now when a town is divided and two towns are incorporated out of its territory, or when, being divided, a new town is formed out of one of the parts into which it is divided and a part of some other incorporated town, it is obvious, that of those, who had a legal settlement in the town before its division, some may be resident within and others without the territorial limits of such town, and that provision should alike be made for the support of those for whom the town may be liable, whether they were resident therein or absent therefrom at the time of such division. It is equally clear, that in the incorporation of the new town "composed of a part of *one* or *more* old incorporated towns," or in the annexation of a part of one town to another, which has been deemed equivalent to incorporation, reference should be had to those having a settlement in the town which has been divided, whether they actually dwelt and had their "home within the bounds of such new town," or not, at the time of such annexation or incorporation.

In the first branch of the fourth mode of gaining a settlement, it is enacted that "upon the *division* of any town, every person having a legal settlement therein, but *absent at the time of such division and not having gained a legal settlement elsewhere,* shall have his legal settlement in that town wherein his last dwelling place shall happen to fall, upon such division." It will be perceived that no reference

whatsoever is made to the settlement of those who were actually dwelling and having their home at this time within the bounds of the divided town. So in the latter clause of the same mode it is provided, that "where any *new town* shall be incorporated, composed of a part of *one* or more *old* incorporated towns, every person legally settled in any town, of which such new town is *wholly* or partly so composed, or who has begun to acquire a settlement therein, and *who shall actually dwell and have his home, within the bounds of such new town,* at the time of its incorporation, shall have the same rights in such new town in relation to the settlement, whether incipient or absolute, as he would otherwise have had in the old town, where he dwelt." If these two clauses of the fourth mode of acquiring a settlement are to be construed separately and as having no interconnection, it will be seen that no reference is had to and no provision made for the settlement of those resident in a town at the time of its division. So, it will be perceived, in the case of incorporation there is an analogous omission to provide for those who, having their settlement in the town divided and their last residence in the limits of the new town, should happen to be resident elsewhere at the date of its incorporation.

But there can be no doubt but that the Legislature intended to make a provision for all having a settlement; as well for those resident in as for those absent from the town divided, at the time of its division; as well for those absent from as for those resident within the new town, at the date of its incorporation. The liabilities of the old and the new town, are determined upon the same principles. The last dwelling place of the individual absent, and the actual residence and home of the person resident, govern and control. This mode contemplates division and incorporation; absence from the town divided; residence in the town incorporated. The part, in case of division, is to be incorporated as a new town, or as part of a new town, and the statute makes no difference in either case. The provisions are double, looking

to both aspects of the case, and making provision for each. Incorporation presupposes division and is its natural and recognized sequence. Division and incorporation are necessarily connected together, in the progress of events and in the mind of the legislator, as part of the same act, and, regarded in this light, provision will have been made for all. In any other view, the work to be accomplished, will have been left half consummated.

If "upon the division of any town" "a new town should be incorporated, composed of a part of one" old incorporated town, this would be deemed a division in accordance with the doctrines advanced in *Hallowell* v. *Bowdoinham*, 1 Greenl. 129, and in such case all the provisions of the fourth mode of acquiring a settlement would have force and significancy. It would be a division and an incorporation; and under the first clause of this mode, those absent would have provision made for them, under the latter, those present and residing in the newly incorporated town would be cared for. But under section first, mode fourth, a town may "be incorporated, composed of a part of *one* or *more* old incorporated towns." Now is there to be a different rule when there is an incorporation of *a part* of an old town and where parts of old incorporated towns are created into a new corporation? If, upon a division, two towns become incorporated and a fragment is annexed to another town or erected into a new town composed of parts of other towns, is this to be deemed a division in reference to the towns formed out of the original limits of the old town, and not a division as to a portion annexed to or incorporated with another town or parts of other towns? Does the fact of a division or not a division depend upon this, whether the part severed from the old town is a new corporation or becomes part of a new corporation? Has the division taken place, when the part severed is made a new corporation, and not taken place if the same part should be annexed to an existent corporation? Neither equality of territorial parts nor of wealth, nor of population is made the test as to whether

a division has or has not taken place. According to the decision already referred to, if the portion severed become a new corporation, the town will be considered as having been divided; yet if a larger portion of the wealth, population and territory of the same town should be incorporated into a new town composed of that and part or parts of one or more towns, this will not constitute a division. So that the severance of any portion may constitute a division, while, if a larger portion be set off to another town, no division will have ensued. A construction leading to such results I do not think admissible.

The fourth mode of gaining a settlement is obviously contemplated by the Legislature as but *one* mode. That is to say, the division of a town and the incorporation or annexation of the parts severed upon division, are but parts of *one* and the *same* transaction. Now the construction given in *Hallowell* v. *Bowdoinham* makes the fourth mode to include two different and distinct modes of acquiring a settlement. In case of a division, where the two parts make distinct corporations, one rule is adopted, and when one of the parts consequent upon division is annexed to another town, another and different rule obtains. By that decision the latter clause is held to embrace equally incorporation or annexation, while the first clause in this mode is limited and restricted in its meaning, so as to include only the single case, where a new town is created out of the part severed from the old. It is difficult to believe such could ever have been the intention of the Legislature.

In *Groton* v. *Shirley*, 7 Mass. 156, and in the numerous cases which establish the doctrine that annexation is equivalent to incorporation, the paupers, whose settlement were in dispute, resided at the time of the division on the part severed from the old and annexed to the new town. They are all corroborative of the construction here adopted; for, by construing the statute as giving the same effect to annexation as to incorporation, they are impliedly authorities for the position that the division, which accompanies incorpora-

tion and annexation should have as broad a meaning and include all cases where a town is divided into parts, irrespective of what may be done with the parts consequent upon such division.

Before the separation no case had arisen, in which the meaning of the word division had received the consideration of the Court. It had been repeatedly held that annexation was to be regarded as equivalent to incorporation in its effect upon those resident upon the territory annexed, but what was to be regarded as a division or what was to be its effect upon those absent from the town divided, does not seem to have received their attention. Most of the decisions will be found to have been made upon the peculiar language of different Acts of incorporation. In none, were the peculiar provisions of the Act of 1793, which are substantially the same as those of the pauper Act of this State, examined in reference to the subject now under consideration.

The first case in which the meaning of the word "division" is limited to the single case, where a new town is incorporated, and is held not to refer to the case where annexation takes place, is *Hallowell* v. *Bowdoinham*, 1 Greenl. 129. In that case neither the language nor the just construction of the first clause of the fourth mode of gaining a settlement were considered by the Court. In the opinion, the case at bar was considered as "virtually settled by the case of *Groton* v. *Shirley*, 7 Mass. 156." But that case neither directly nor impliedly decides what should be considered as embraced within the meaning of the word "division," or what are to be the effects of a "division" upon the settlement of those absent at the time. The reasoning of the Court seems to be based upon the word "annexation," which is no where in the statute. The decision is professedly not upon an examination of the language of the statute, but "on the authority of the cases which have been adjudged as to the point in question." The Court seem to assume that di-

vision and annexation or incorporation, cannot coëxist, when from the nature of things, they always must.

In *Fitchburg* v. *Westminster*, 1 Pick. 144, the pauper was resident in Fitchburg at the time of the division and annexation, but not on the part annexed. Now the statute in the first clause refers to those absent from the town divided, which was not the case of the pauper whose settlement was in dispute. This too is made to rest upon *Groton* v. *Shirley*, and in this the construction of the first clause was not considered or discussed.

In *Sutton* v. *Dana*, 4 Pick. 117, it was held, that a pauper, whose settlement in a town was acquired in a part which was afterwards incorporated into a new town, but whose home at the time of the division was in the other part, did not gain a settlement in the new town. This in no respect conflicts with the views we have advanced.

In *Lexington* v. *Burlington*, 19 Pick. 426, it was decided that under stat. 1793, § 4, upon the division of a town, a person having a legal settlement *therein*, but being removed *therefrom* at the time of such division, acquired a settlement in that town in which his *last* dwelling place in the original town happened to fall upon such division. In that the town of Burlington was formed out of parts of different towns, and the construction given was entirely in accordance with the views we entertain.

In this State, the decision of *New Portland* v. *Rumford*, 13 Maine, 300, rests entirely upon the authority of *Hallowell* v. *Bowdoinham*. In *New Portland* v. *New Vineyard*, 16 Maine, 69, it was decided that when a part of one incorporated town is taken off and annexed to another the inhabitants living on the territory thus annexed, and having a settlement at the time in the town from which they are taken, acquire thereby a settlement in the town to which the annexation is made, and that if an inhabitant, *thus* acquiring a settlement, remove from the territory annexed into a different part of the town to which the annexation is made and there remains until after the Act is unconditionally repealed,

his settlement continues and is not transferred back by the repeal of the Act. The doctrine of the decision is in entire conformity with the provisions of the statute. The pauper was *not* on the territory transferred back and therefore not within the second clause of the fourth mode. He was not absent from the town, of which a division was thus made, and consequently his settlement was not affected by the first clause of the fourth mode. In *Smithfield* v. *Belgrade*, 19 Maine, 387, the Court held that the settlement of a pauper, which is in a *part* of a town which is *annexed* to another, though he be *removed* from such part before the annexation, is transfered to the new town by virtue of stat. 1821, c. 122, § 2, which provides that a person so circumstanced "shall have his legal settlement in that town wherein his *former* dwelling or home shall happen upon such division; thus directly overruling *Hallowell* v. *Bowdoinham*. The Court came to a similar result in *Belgrade* v. *Dearborn*, 21 Maine, 334. The case of *Mount Desert* v. *Seaville*, rests upon *Sutton* v. *Dana*, which, it has been shown, is in no respect in conflict with the views here expressed.

From this examination of adjudged cases, it will be perceived that the authorities are by no means concordant, and that the Court are at entire liberty to reëxamine the questions under consideration, and to adopt such a construction as will be most in consonance with the language and the obvious intention of the Legislature.

From the evidence as reported, it appears that Moses Pressy and wife commenced their residence in that part of Industry set off to the town of New Sharon, as early as 1824; that they there continued to reside till 1836; and that they never lived subsequently in any other part of Industry, except as paupers.

The liability of the defendant town depends on the construction of the first clause of the fourth mode, which provides, that "upon a division of any town, every person having a legal settlement *therein*, but being *absent* at the time of such division, and not having gained a settlement else-

where, shall have his legal settlement in that town, *wherein his last dwelling place shall happen to fall* upon such division." As Pressy and his wife were absent, when Industry was divided and a portion of it annexed to New Sharon, the rights of these parties must be settled accordingly as the fact where their *last dwelling place* was, shall be determined.

After Pressy and wife moved, in 1836, they were supported as paupers by the town of Industry. They lived a part of the time on a farm belonging to the town and were under the charge of the overseers of the poor and supported under their direction. The residue of the time of their residence in Industry they were hired out, to be kept, by the overseers. When living on the town farm or at Ring's, who was employed to provide for them, they were not upon the territory annexed to New Sharon. Had they, while being thus supported as paupers, a *dwelling place* within the meaning of the statute? If they had, the defendants are not liable for their support; if they had not, then, as their *last dwelling place,* before they became paupers, would be on the territory annexed, they would be liable.

The pauper, who receives aid from the town, while that condition of things exists, is deprived of the rights and privileges of citizenship. He cannot serve on the jury. He is not permitted to vote. He is eligible to no office. His control over his children ceases. They may be taken from him and bound to service. Where he shall reside is no longer a matter dependent upon his own will, but is determined for him by the action of the town or its constituted authorities. It may be in the poor house, if one there be. It may be where the person who has contracted to take charge of the poor may reside. The place where he may live is not one selected by himself, nor is his continuance there the result of his own volition.

The terms "his *dwelling place*" apply to a dwelling place which is *his,* so far that he has control over it and is master of it; not to a place provided for him. The dwelling place,

which is to control his settlement, is to be his and not that of another. So in the latter clause of the fourth mode, the equivalent expression "*actually dwell and have his home,*" does not apply to the condition of one who is receiving supplies or support as a pauper directly or indirectly. The last dwelling place of Pressy and wife in Industry, before they became paupers, was in the part annexed to New Sharon, and that town is liable for their support. *New Chester* v. *Bristol,* 3 N. H. 71; *Southbridge* v. *Charlton,* 15 Mass. 249; *Smithfield* v. *Belgrade,* 19 Maine, 387.

The evidence satisfactorily establishes the residence of Mrs. Dyer to have been for five consecutive years upon the territory annexed to the defendant town. Her settlement will be transferred with the territory upon which she dwelt to the town of New Sharon, and they must be adjudged liable for her support.

## COUNTY OF SAGADAHOC.

39 382
77 591
83 486

† ROGERS *& al. versus* HUMPHREY.

A sale and delivery of a quantity of boards sufficient to make a certain number of sugar box shooks, is legal and binding, although no survey was ever made.

Where a party seeks to recover payment for articles delivered under a special contract, which he has not fully performed, the damages suffered by reason of such breach may legally be deducted in the same suit.

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

ASSUMPSIT, upon a special contract, alleged to be in the possession of defendant, and which plaintiff was unable to obtain; also for wares and merchandize delivered. The contract appeared to be to furnish boards sufficient for 10,000 sugar box shooks.

Defendant pleaded the general issue and filed a brief statement, that he had paid all that was due, the amount being reduced by the non-performance of plaintiff's contract, and claimed to show the loss and damage thereby.

After the plaintiff's evidence was introduced, defendant offered to show in reduction of the damages to be recovered, the damage, loss and expense by him sustained in consequence of the non-fulfilment of the contract on the part of the plaintiff.

This testimony was excluded.

Defendant also objected to the recovery for the price of the boards, as they were never surveyed; but the Judge held, that it was not necessary; and a default was entered, to be taken off if either of the rulings was wrong.

*Barrows*, for defendant, cited *Hayward* v. *Leonard*, 7 Pick. 181; *Harrington* v. *Stratton*, 22 Pick. 510; *Folsom* v. *Muzzey*, 8 Greenl. 400; *Hammatt* v. *Emerson*, 27 Maine,

308; 1 Parsons on Con., 387; 2 Greenl. Ev. 124; 11 Met. 561; R. S., c. 66, § § 2, 17; *Wheeler* v. *Russell*, 17 Mass. 208.

*Gilbert*, for plaintiff.

APPLETON, J. — As the lumber, payment for which is sought to be recovered in this action, was never surveyed, it is insisted that the plaintiff's cannot maintain their suit. This branch of the defence rests upon the provisions of R. S., c. 66, § § 2 and 17. But we think the case is not within the spirit of the Act upon which the defendant relies. By the contract between the parties, the plaintiffs agreed to sell the defendant "boards sufficient to make ten thousand sugar box shooks, at their mills in Bath, for thirty cents for each and every box of the common size of sugar box shooks," &c. The contract, it will be perceived, was not for any definite quantity of boards, nor was the price dependent upon the contents as ascertained by a survey. The price could only be ascertained when the box shooks should have been manufactured. A survey would have been a mere idle ceremony and for no effective purpose whatever. Neither party had any interest in ascertaining the amount of such survey, as the result affected no one.

The contract under which the boards were delivered was not fully performed. The defendant claims to deduct from the amount, which would otherwise be due, the damages sustained by reason of the failure on the part of the plaintiff to perform his contract.

The early authorities in England and in this country are adverse to the allowance of the reduction claimed. The desire to avoid litigation, and to settle in one case mutual claims growing out of the same contract, has led to the allowance of claims for damage arising from fraud, failure of consideration or non-performance of the contract in reduction of damages. The defendant claims, that he has sustained damages from the failure on the part of the plaintiff to deliver boards sufficient to make the quantity of sugar box shooks specified in the contract. The evidence

offered to prove these facts was excluded, and erroneously excluded. *Reab* v. *McAllister*, 4 Wend. 483; S. C. 8 Wend. 109; *Still* v. *Hall*, 20 Wend. 51; *Blanchard* v. *Ely*, 21 Wend. 342. In *Butterman* v. *Pierce*, 3 Hill, 171, BRONSON, J., said, "where the demands of both parties spring out of the same contract or transaction the defendant may *recoup*, although the damages on both sides are unliquidated; but he can only *set off* when the demands of both parties are liquidated or capable of being ascertained by calculation." When the plaintiff renders services under a special contract, which he afterwards violates, and then brings an action to recover the value of his services, the defendant may set off any payments he has made on account of the services and the damages he has sustained by breach of the contract. "The plaintiff," remarks Mr. Justice GILCHRIST, in *Elliot* v. *Heath*, 14 N. H. 131, "is entitled to recover of the defendant the value of his services and he has no right to complain if, against that value, the defendant be permitted to set off payments he has made and the damages sustained. If they are equal to the value of the services the plaintiff should not recover any sum whatever. If, on the other hand, they fall short, the plaintiff should recover a sum equal to the difference between them and the value of his services." *Herbert* v. *Ford*, 29 Maine, 546; *VanBuren* v. *Diggs*, 11 How. 461; *Mixer* v. *Coburn*, 11 Met. 559.

*The default to be taken off and the cause to stand for trial.*

39 384
44 103
45 433
64 111
64 515
68 333
69 213

† PERRIN *versus* NOYES.

In an action by the indorsee of a promissory note, where it is proved that the note was fraudulently put into circulation, the burden of proof is upon the plaintiff to show, that he came by it fairly in the due course of business, unattended with circumstances justly calculated to awaken suspicion.

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

Perrin *v.* Noyes.

ASSUMPSIT, on a promissory note signed by defendant and indorsed by one Samuel L. Hazard.

The note came into plaintiff's hands duly indorsed before its maturity and passed through the hands of one Center, a broker in Boston.

There was evidence tending to show, that it was designed for collateral security for paper held by plaintiff against Hazard, which had been paid, and also that it was negotiated unconditionally for value.

If it was negotiated absolutely, it was contended from the evidence that Center had no such authority, and that it was a fraud upon defendant.

The instructions given were, that the note being read without objection, the burden of proof was upon defendant to show why he should not pay it, and if the jury believed the note was made and delivered to Center to be used as collateral security to the note of Hazard, and that he negotiated it for a different purpose unauthorized by the maker and indorser, the defence would not be complete, unless they were also satisfied from the evidence, that the plaintiff, when he took the note, knew that it was to be negotiated only as collateral to the note of Hazard.

Verdict for plaintiff, and defendant excepted.

*Gilbert*, in support of the exceptions, cited *Munroe* v. *Cooper*, 5 Pick. 412; *Aldrich* v. *Warren*, 16 Maine, 465.

*Bronson & Sewall, contra.*

TENNEY, J. — It is not disputed, that the note in suit was negotiated, and came into the hands of the plaintiff, before its maturity. But from the evidence reported, it was a point in controversy, whether it was left as collateral security for paper of Samuel L. Hazard, which he afterwards paid to the plaintiff, or whether it was negotiated absolutely, and not for a specific purpose. And if the transfer to the plaintiff was absolute, another question was, whether Center, the broker who made it, was authorized to transfer

the note in that manner, or did it in fraud of the defendant's rights.

The jury were instructed, "that the case having been made out by the note in evidence, the burden of proof was on the defendant, to show why he should not pay it; and if they believed the note was made and delivered to Center, to be used as collateral security of the note of Hazard, and that he negotiated it for a different purpose, unauthorized by the maker and indorser, the defence would not be complete, unless they were also satisfied from the evidence that the plaintiff, when he took the note, knew that it was to be negotiated only as collateral to the note of Hazard." Under these instructions, the defence would fail, upon satisfactory proof of fraud in the transfer of the note, and an entire want of consideration paid by the plaintiff for such transfer.

If fraud is practiced in the inception of a note, or the note is fraudulently put in circulation, the establishment of such facts will throw the burden of proof upon the plaintiff, to show that he came by the possession of the note fairly, in the due course of business, and without any knowledge of the fraud, and unattended with any circumstances, justly calculated to awaken suspicion. The cases cited for the defendant are decisive of this principle. The plaintiff was relieved of this burden of proof, and the instructions were less favorable to the defendant, than the law required.

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

39 386
67 290

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DUCETT *versus* CUNNINGHAM.

Where property is sold upon mesne process under § 52, c. 114, R. S., the payment of the proceeds, by the officer, to the attaching creditor's attorney before judgment is rendered, will protect him against any suit by the creditor for a failure to apply the same to the execution issued on such judgment. The payment to the attorney is payment to his principal.

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

Case against defendant, as sheriff, for the default of his deputy.

It appeared that Merrill & Sewall, attorneys at law, commenced several suits against one John McGee, and among them one in favor of the plaintiff, and caused his goods to be attached, which were sold on the writs in pursuance of § 52, c. 114, R. S.

The officer, before the entry of the actions, paid over the proceeds of the sale to Sewall, one of the attorneys.

Within thirty days after judgment was obtained in plaintiff's suit, Merrill delivered the execution to the officer, who made the attachment, being directed by plaintiff to get execution as soon as he could.

After the evidence was submitted, a default was entered, which was agreed to be taken off and the action to stand for trial, if upon the evidence the action cannot be maintained.

*Ingalls*, for defendant, cited *Jenney* v. *Delesdernier*, 20 Maine, 183; *Rice* v. *Wilkins*, 21 Maine, 558; *Farnham* v. *Gilman*, 24 Maine, 250.

*Gilbert*, for plaintiff.

Appleton, J. — The plaintiff and other creditors of one McGee having commenced various suits against him, on which attachments were made, entered into an agreement with him for the sale on mesne process, in pursuance of which and in accordance with R. S., c. 114, § 52, the goods so attached were sold. Before the actions were entered and judgments obtained in those suits, the proceeds are alleged to have been paid to the attorney of the plaintiff.

The plaintiff having obtained judgment, placed the execution in the hands of the officer by whom the attachment was made, and failing to receive upon demand the amount due, has commenced this action against the sheriff for the neglect of his deputy.

The question presented for consideration, is whether the

sheriff is exonerated from liability by payment of the proceeds of sale, before judgment is obtained, to the attorney of the plaintiff.

The general authority of an attorney in the management of a claim entrusted to his charge for collection, was very fully considered in the able and elaborate opinion of Mr. Justice SHEPLEY, in *Jenney* v. *Delesdernier*, 20 Maine, 183.

The common law confers liberal powers upon the attorney in the transaction of the business of his client, which is entrusted to his care and management. He may elect the remedy and all proceedings arising out of it connected therewith; he may commence the suit and direct what shall be attached; whether or not a receipt may be taken and whose receipt shall be regarded as sufficient and satisfactory. He may approve the receipt taken; he may receipt for the goods himself, and if so, there seems to exist no reason why he may not himself receipt for their proceeds. A payment made to him is binding on his principal. His discharge upon the execution is a protection to the officer from whom the money was received. If he may receive the money before the commencement and after the termination of the suit, he may equally well receive a payment during any intervening time. It is immaterial whether the money is received from the debtor or from the officer. It is just as valid a protection from further claim for the one as the other. He is the agent of his principal to receive money and give a discharge therefor. The principal in this case might have received the money in advance of the rendition of judgment, and he would have been thereby concluded. He is none the less concluded by the receipt of his accredited agent. If loss occurs, he should bear the insolvency of his attorney, rather than the officer who goes to him for instructions, and acts in accordance therewith. These views receive confirmation from the opinion of Mr. Justice STORY, in *Pierce* v. *Strickland*, 2 Story, 292.

Nor is this conclusion at variance or inconsistent with a just construction of R. S., c. 114, § 52, under which the

sale of the goods attached was made. By that section it is provided, that "the proceeds of the sales, after deducting necessary expenses, shall be held by such first attaching officer, or the sheriff, subject to the successive attachments, in like manner as if the sale had been on execution." The object of this section is to protect subsequent attaching creditors and to guard the interests of the debtor. It determines the order of the appropriation of the proceeds and the rights between creditors, but it does not bear upon the relation between the creditor and his attorney or between them and the officer. A payment made, as in the present case, is in no event to operate injuriously upon the debtor or upon other creditors. If it should eventually be determined to belong to the creditor to whose attorney the payment was made, the validity of the payment is a matter between the officer and plaintiff in the execution. If otherwise, it cannot operate to discharge the officer.

The conclusion to which we have arrived, is that a payment made to the attorney of the plaintiff during the progress of a suit and while it is under his charge and control, is equally binding upon the principal as if made to him.

It is not made certain whether Mr. Sewall was the attorney of the plaintiff when the payment was made. If that relation had ceased, and the fact was known to the officer, a payment could not *legally be made to him.* So if the payment was made to one of a firm to whom the business was intrusted, it may be a question whether such payment made to one in his individual capacity, would be conclusive upon the plaintiff.

According to the agreement of the parties the case must stand for trial.

† BRUCE *versus* MITCHELL.

39 390
63 542
77 83

A person in possession of lands cannot be ousted except by one having a better title.

Evidence that demandant's grantor had title to only a portion of the premises sought to be recovered, and included in his deed, is material, and will so far bar his recovery, although the tenant set up no title.

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

WRIT OF ENTRY.

The tenant pleaded the general issue, and claimed by possession of twenty years. He also claimed betterments.

The demandant derived his title to one half of the premises by deed from one Lemont and others, and to the other half by deed from C. & W. D. Crooker.

From the evidence it was claimed by tenant, that the Crookers attempted to convey more than their title authorized.

Several requests for instructions were refused, and some instructions given to which there were no objections. To the following the tenant excepted, a verdict being returned for demandant.

The jury were told, that inasmuch as the deed from the Crookers conveyed to plaintiff one undivided half of the demanded premises, it was immaterial, so far as concerned this case, whether they had acquired the title of all the heirs of James Thornton, (from whom their title came,) or not, unless the tenant proved title in himself or under adversary possession; that if he had no title or adversary possession, he could not controvert the title of demandant conveyed by Crookers' deed, and as there was no question raised as to the plaintiff's paper title to the other undivided half, and as the tenant exhibited no title by deed, they might consider the demandant as having the record title to the whole of the premises.

*Randall & Tallman*, in support of the exceptions.

*Porter*, with whom was *Smith, contra.*

APPLETON, J. — In real actions the demandant recovers on the strength of his own title and not on the weakness of that of the tenant. The premises in dispute were originally owned by one James Thornton, from whom the demandant claims to derive title. The demandant claims an undivided half thereof under a deed from W. D. &. C. Crooker. In the defence it was insisted, that the Crookers had conveyed by their deed a larger interest than they had acquired by their various conveyances from the heirs of Thornton.

In the absence of other evidence, a deed raises a presumption that the grantor had sufficient seizin to enable him to convey, and may be regarded as *prima facie* evidence of title in the grantee. *Ward* v. *Fuller*, 15 Pick. 185; *Blethen* v. *Dwinel*, 34 Maine, 133.

In the present case the Court instructed the jury, "that inasmuch as the deed from Charles & W. D. Crooker conveyed to the plaintiff one undivided half of the demanded premises, it was *immaterial, so far as regarded this case*, whether the Crookers had acquired the title of all the heirs of James Thornton or not, unless the tenant proved title in himself, or under adversary possession," &c. This instruction can hardly be regarded as correct. No reason is perceived why the demandant should recover land of the tenant to which he had no title. The deed to him is only material because it affords proof that he has such title. But if it appear that his grantor had no title, or only a title to a portion of the premises, such entire or partial deficiency of title cannot be regarded as immaterial. His deed is regarded as *prima facie* proof in the absence of other evidence. If from other evidence the *prima facie* title is rebutted, the demandant without title should not recover. The right of the tenant to controvert the title of the demandant does not depend upon his having an apparent title or adverse possession. Being in possession, even if without title, he is not to be ousted except by some one having a better title, and who has a right as against him to say that his possession is wrongful. In the absence of proof a *pri-*

*ma facie* title must always be regarded as sufficient to entitle a demandant to recover, but if such title should be disproved, its disproof cannot be regarded as immaterial. Any other doctrine would entitle a demandant without any title whatsoever, to recover against a tenant who had only the fact of possession upon which to rely.

*Exceptions sustained.*

*New trial granted.*

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39 392
86 101

† LUNT, *Appellant, versus* AUBENS, *Appellee.*

No person on strictly legal right can claim to be appointed as the guardian of another, but with the exception of certain legal disqualifications, the appointment is left to the discretion of the Judge of Probate.

But the statute authorizes an appeal from his decree by any one *aggrieved* thereby.

In the *appointment* of a guardian, the next of kin or heir presumptive of the ward may be *aggrieved* within the purview of the statute, and can lawfully take an appeal from such decree.

Whether the appointment made by the Judge of Probate was of a suitable person for the trust, is a fact to be determined by the presiding Judge in the appellate Court, on the evidence before him, and cannot be re-examined in the Court of law.

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

APPEAL from a decree of the Judge of Probate.

In the Probate Court, it appeared necessary that a guardian should be appointed for one Jane A. Lunt, who had living neither father nor mother, brother or sister.

Before that Court two petitioners applied for that trust. Humphrey Aubens, the husband of the half-sister of Jane, was one, and her paternal grandfather was the other. The former was appointed by the Judge of Probate; and the latter appealed. The reasons alleged for the appeal were:

First, that it was his legal right to be the guardian, and that the appellee was appointed in derogation of such right.

Second, that it was more suitable and proper that he should be appointed than the other.

There was evidence before the presiding Judge, that both petitioners were suitable persons for the trust, and evidence as to the conditions of the families of the parties, and intentions and wishes of the mother and father of the ward.

The appellee at the hearing denied the appellant's right to appeal, as he was not in the sense of the statute *aggrieved,* and contended, if the Judge held otherwise, it was not the legal right of the appellant to be the guardian; that it was more suitable that the appellee should have the custody of the child, and that it was in the discretion of the Judge of Probate to appoint such suitable person as he thought fit, and unless the Court were of opinion the appellee was not a *suitable person,* the decree could not be reversed.

The Judge held, that the appeal was well taken, and that it was more fit that the grandfather should be appointed guardian, and therefore *reversed the decree of the Judge of Probate.*

To which rulings and decree the appellee excepted.

*Gilbert,* in support of the exceptions.

*Barrows, contra.*

RICE, J. — At common law, the next of kin, who can by no possibility inherit the estate, is entitled to the guardianship in socage. 1 Black. Com. 460; Reeves' Domestic Rel. 311. In this the common law follows the institutions of Solon, who provided that no one should be another's guardian, who was to enjoy the estate after his death. Potter's Antiq. b. 1, c. 26.

It is a rule of the civil law that the nearest relations ought to be appointed guardians, if there is no reason to the contrary. Domat's Civil Law, by Cushing, ¶ 1285.

This rule of the civil law would seem to be approved by Chancellor KENT. 2 Kent's Com. 226, n.

The common law rule is based upon the policy of remov-

ing all temptation, on the part of the guardian to abuse his trust. The theory is, that if he can by no possibility inherit the estate, he will have no inducement, by foul practice, to jeopard the life of his ward. The advocates of the civil law rule condemn this policy, as the emanation of a barbarous age, and as placing too low an estimate upon human character. They, therefore, give their preference to the other rule, which placing more confidence in the natural sympathies of our race, selects those who are most nearly connected with the infant by ties of consanguinity, believing that such persons will feel a deeper interest in the welfare of those thus related to them, than can be expected from strangers, or those more remotely connected.

Neither of the above rules has been adopted in this State. Under our laws no class of persons can claim to be guardians, as matter of strict legal right. By c. 110, R. S., the appointment of guardians is entrusted to Judges of Probate as matter of discretion.

After minors arrive at the age of fourteen years, they may nominate their guardians, but if they neglect to nominate "suitable persons," or nominate those who will not accept the trust, the Judge of Probate may then nominate and appoint guardians in the same manner as if the minor was under the age of fourteen years. The same rule of discretion prevails when the appointment of guardians falls within the jurisdiction of Courts of Chancery. 2 Story's Eq. § 1338.

To any person aggrieved by any order, sentence or decree of a Judge of Probate, the statute, c. 105, § 25, gives the right of appeal to the Supreme Court of Probate, to be held within and for the same county. Such an appeal has been taken in this case. But it is contended that the appellant is not an "aggrieved person" within the meaning of the statute, and for that reason, as well as others, that the appeal was improperly allowed, and that the case should therefore be dismissed.

It is not every person who disapproves of, or is dissatis-

fied with, a judgment or decree of a Judge of Probate, who is "aggrieved" thereby, within the meaning of the law. In legal acceptation, a party is aggrieved by such decree only, when it operates on his property, or bears upon his interest directly. *Deering* v. *Adams*, 34, Maine, 41.

The ward, in this case, has living neither father nor mother, brother nor sister. Her grandfather, the appellant, is her next of kin and heir presumptive. The appellee married the half sister of the mother of the ward, and was appointed guardian by the Judge of Probate. With this appointment the appellant, who also petitioned to be appointed guardian, represents himself aggrieved, and for that cause claims this appeal.

In the case of *Penniman* v. *French*, 2 Mass. 140, the appellant claimed an appeal from a decree of the Judge of Probate, allowing the account of the guardian, as uncle and next friend of the ward. The Court remarked, that "Penniman claims the appeal as uncle and next friend of the *non compos*, and not as heir, next of kin, or creditor. He does not bring himself within the statute, nor does he show that he is aggrieved by the decree appealed from." The appeal was dismissed. If this appellant had been heir to the ward, the Court say, the decision would have been otherwise.

In *Boynton & als.* v. *Dyer*, 18 Pick. 1, which was an appeal from the Judge of Probate upon the account of the appellee, who was guardian of Ruth Boynton, a person *non compos*, and mother of the appellants, the Court decided that the appeal was properly taken. MORTON, J., in delivering the opinion of the Court, remarks, that "the appellants being presumptive heirs of the ward, are so interested in her estate that they have a right to claim an appeal from a decree affecting it. No other person, competent to make an appeal, has any interest in this question. The party *non compos*, is presumed to be incapable of doing it. The appellants are "persons aggrieved," within the meaning of the statute of 1817, c. 190, § 7."

In the case of *Deering & al.* v. *Adams*, cited above,

which was an appeal from a decree of the Judge of Probate appointing the appellee guardian, by the executors of the estate of the grandmother of the wards; the Court, in their opinion, by HOWARD, J., remark, "they were not therefore testamentary guardians of the children; and not being heirs, next of kin, or in any manner interested in the estate of Edward D. Preble, they can have no pecuniary interest either in their personal or representative characters, which is affected by the appointment of the respondent, and were not aggrieved by the decree of the Judge of Probate." Though this case does not expressly decide that had the appellants been next of kin and heirs presumptive of the wards, the appeal would have been sustained, yet such is the legitimate inference from the language used.

As a statutory explanation, bearing upon this question, reference may be had to § 33, c. 112, R. S., which provides, that "all those who are next of kin, and heirs apparent or presumptive of the ward, shall be considered as interested in the estate, and may appear, as such, and answer to the petition of any guardian or other person for the sale of his estate; and when personal notice is required to be given they shall be notified as such."

It is contended, that if persons next of kin and heirs apparent or presumptive may thus appear as parties, it is only when the property rights of the ward are the subject of adjudication, and by which their pecuniary interests may be directly affected.

The pecuniary interests of such persons may be as seriously affected by the appointment of an unsuitable person for guardian, as by the settlement of an erroneous account; and the interest of the ward is still more deeply affected, as the guardian not only has the care and management of his estate, but the tuition and custody of his person. The paramount object of the law, is the protection of the minor. To accomplish that object, it authorizes the interposition in his behalf of such persons as have interests in common with him and whose relations to him are such as to raise

the presumption of a feeling of natural affection for him and a desire to promote his welfare.

We are therefore of the opinion, that the appellant is within the purview of this statute, and that the appeal was properly taken and allowed. To adopt the construction contended for by the appellee, would seem to be, to determine that an appeal cannot be had in this class of cases by excluding all persons from the right to appeal.

In an appeal from a decree of the Judge of Probate the appellant is restricted to such matters as are specified in the reason for the appeal. *Mathes* v. *Bennet*, 1 Foster, (N. H.) 188; *Hatch* v. *Purcell*, Ib. 544; *Hughes* v. *Decker*, 38 Maine, 158.

It is further contended, that in case the appeal should be sustained, the decree of the Judge of Probate should be affirmed, because the evidence adduced before the Judge who tried the appeal, shows that the guardian appointed was a more suitable person for that trust, than the appellant.

The case comes before us on exceptions, under the provisions of statute of 1852, c. 246, § 13. All questions of fact, were finally settled by the Judge who tried the case. We can only determine whether the questions of law, decided by him, and presented by the exceptions, were correctly decided.

When there is no legal disqualification, to determine whether a person appointed as guardian is a suitable person to discharge that trust, is a question of fact, and not of law.

It may not be improper to remark, that appeals taken upon questions addressed solely to the discretion of the Judge of Probate, especially in cases of this kind, should not be encouraged; and that decrees of those Judges should only be reversed when it is made clearly to appear that an improper decision has been made and injustice been done.

Judges of Probate are selected not only with reference to their legal qualifications, but their sound discretion also, and they usually possess as great facilities, to say the least,

to enable them to determine correctly matters of discretion, of this kind, as can be presented to the Supreme Court.

Finding no errors in matter of law, as the case is presented, and not being authorized to reëxamine the questions of fact involved, and which have been so fully argued, nothing remains for us but to affirm the decree of the Judge who tried the appeal, and remand the case to the Judge of Probate for further proceedings in obedience to that decree. *Exceptions overruled. Decree of the Judge who tried the appeal affirmed. Case remanded to Judge of Probate for further proceedings.*

† SAMPSON *versus* CURTIS.

Payment for work done for another under a parol promise, that it should go in payment of a debt from which he had been discharged in bankruptcy, cannot be recovered, although no settlement has been made and the accounts of the parties remain unliquidated.

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

ASSUMPSIT on a note and account. The writ was dated March 1, 1854.

The pleadings were the general issue and a discharge in bankruptcy; and the record showed a discharge of the note and all that part of the account charged prior to May 28, 1842.

An account in set-off was filed for blacksmith work from time to time, but the most of it in 1846, and sustained by the book and suppletory oath of defendant.

A witness for plaintiff testified that some time in 1846, defendant expressly promised verbally to do the whole or a part of the work charged in set-off, in payment of the account and note sued and from which he had been discharged by proceedings in bankruptcy.

The plaintiff's counsel requested the Court to instruct the jury that it should be so appropriated.

But the Judge ruled that if defendant verbally promised

to do the work in payment or part payment of the note and account from which he had been discharged, and the work had been so done and received and appropriated, the defendant would be bound by such appropriation, but that so long as the accounts between the parties were unliquidated and unappropriated, and remained entirely unsettled, and merely matter of mutual charge, the defendant would not be legally bound by such verbal promise.

The verdict was for a balance in favor of defendant, and plaintiff excepted.

*Russell*, with whom was *Whitmore*, in support of the exceptions.

*Gilbert, contra.*

APPLETON, J. — A bankrupt, though discharged, is under a moral obligation to pay his debts, notwithstanding they may be barred by his certificate. This moral obligation has been deemed a sufficient consideration for a new promise after a discharge has been obtained. *Corliss* v. *Shepherd*, 28 Maine, 550; *Fleminge* v. *Hayne*, 1 Stark. 370.

There was evidence tending to show, that the defendant, though discharged in bankruptcy, promised to do a part or the whole of the work charged in the account in set-off, in payment of the demands in suit, and that the work was done in part payment of such indebtedness. The instruction given rests upon the idea, that a verbal promise to pay, would not have bound the party making it, and that unless there was an actual liquidation and settlement between the parties, the defendant would be relieved from his promise. Such is not the law. If the work was done by the defendant, under an agreement that it was to be in part payment of the plaintiff's demands, and the plaintiff so received it, the defendant would be bound by his agreement, notwithstanding the accounts may have remained unsettled and the promise was a verbal one. If the payment had been in money, the defendant could not by any subsequent dissent, reclaim the money, though it had been paid toward a claim

discharged in bankruptcy. A payment once made and received as such must remain. Whether it was in money or by labor is immaterial. In neither case can it be recalled and become the basis of a substantive claim on the part of the individual making it.

But if the jury should be satisfied, that the items of work and labor filed in set-off were done by the defendant and received by the plaintiff in part payment of the demands in suit, it would in no way affect the balance remaining unpaid. The right of the plaintiff to recover for such amount, would be barred by the provision of the Act of Aug. 3, 1848, c. 52, which requires the promise to pay a debt discharged by bankruptcy to be in writing.

*Exceptions sustained.*
*New trial granted.*

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† PAGE *& als., in review, versus* SWANTON *& al.*

If, between the owners of a vessel no other relations exist than that arising from such ownership, in an action against them for supplies, the unauthorized admission of one of the indebtment of all, is not competent evidence to charge the other owners.

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

ASSUMPSIT. This action was tried on a review granted on the petition of Samuel Page, at the Oct. term, 1851.

The parties to the original suit were J. B. Swanton & al. v. Samuel Page, Benjamin Bailey and Wm. Greenleaf.

At the Oct. term, 1853, the two latter original defendants were defaulted. Page pleaded the general issue.

The articles sued for were furnished for schooner "Willie Waugh" to fit her for sea, and were delivered thus:— $334,44, of the amount to Bailey, on the order of Page, directing it to be charged to him. June 2d and 21st, 1847, $99,99, of the sum, delivered to Greenleaf, Aug. 17, 1847,

and $19,08, delivered Greenleaf, April 18, 1848; at which time he paid $75.

There was evidence of payments made by both Page and Bayley to workmen on the schooner, and a bill of sale of one fourth of the same from Page to Greenleaf, June 14, 1847, and by copy of enrollment dated June 19 of same year, wherein Page made oath that he and Greenleaf were sole owners.

The original plaintiffs also offered in evidence a letter from Bayley to them, of Oct. 22, 1853, wherein he informed them, that the articles furnished on Page's order went into the schooner Willie Waugh, in which he and Page were jointly concerned at the time of the purchase.

This was received against defendants' objections.

Among the requests for instructions were the following by defendants in review:—

That if from the whole evidence the jury believe they all were owners, the admission of each is evidence against the whole.

But the Judge instructed them, *that* if the joint ownership and liability of all the defendants were first proved, then the acknowledgment of each concerning the joint indebtedness, would be competent evidence against the whole.

The jury returned a verdict against the plaintiff in review, and he filed exceptions to the ruling and instructions.

*Hubbard*, for plaintiff in review.

*Randall & Tallman*, for defendants.

RICE, J. — The Judge was requested to instruct the jury that if from the whole evidence, they believed they, (defendants,) were all owners, the admission of each is evidence against the whole.

Upon this request the Judge did instruct the jury that if the joint ownership and liability of all the defendants were first proved, then the acknowledgment of each concerning the joint indebtedness, would be competent evidence against the whole.

While ship owners may be in partnership as owners, their general relation is that of tenants in common, and their partnership relation, though probable, cannot be presumed from the fact of being part owners. They are not agents for each other, unless made such by authority conferred for the purpose, expressly or by implication. Their acts are not binding upon each other, without such special authority; nor can the unauthorized admissions of one implicate or bind the others. *McLellan* v. *Cox*, 36 Maine, 95.

In the case at bar there is not only no evidence of partnership, but the evidence shows that the defendants were not all owners at the time the original plaintiffs parted with the property sued for. The instructions were erroneous, and the verdict without evidence to support it.

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

TENNEY, J., was prevented by indisposition from hearing the case and took no part in the decision.

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COMMERCIAL BANK *versus* NEALLY *& Trustee.*

An administrator whose intestate gave a negotiable promissory note to defendant, is not chargeable for that cause, as his trustee, though the note may have been presented by the promisee for allowance against the estate.

If, when service of the writ is made upon an administrator as trustee of defendant, the latter was surety on sundry notes of the intestate, but had paid nothing, there is no indebtment of the estate, and the trustee process is unavailing.

Not even an attachment of defendant's property on suits against him as *such surety*, would constitute a debt either absolute or contingent against the estate.

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

ASSUMPSIT. William D. Sewall, as the administrator of Joseph Sewall, was summoned as the trustee of defendant, and on his disclosure was discharged by the presiding

Judge. Service of the writ on trustee was made April 24, 1852.

The defendant was surety or indorser for Joseph Sewall on sundry notes and drafts, and held a note against him for $2300, the consideration of which was such contingent liabilities.

The estate of Joseph being represented insolvent, commissioners were appointed to examine and allow the claims against it, and the defendant presented his claims as such surety, on April 5, 1852, none of which had been paid by him, and they were allowed as contingent claims, and a return of them made in May following. They also allowed him on contingent claims as indorser, where his property had been attached in suits then pending, and which were commenced before the death of Joseph, and subsequently satisfied by levy on Neally's real estate. They reported the note of $2300, as a contingent claim made before them.

The trustee disclosed an assignment of defendants' claims against said estate to one Thomas Eaton, made May 27, 1852, who became a party to these proceedings.

The disclosure was not made until April term, 1855.

It appeared that the Judge of Probate, at a court held before him March 5, 1855, had ordered the administrator to pay to defendant upon the contingent claims allowed to him, (certain of them having become absolute by payment,) the same amount allowed to other creditors, being twenty-five per cent.

*Barrows*, in support of the exceptions, contended that the 4th exception in § 63, c. 119, R. S., did not apply to trust funds in hands of an administrator. § 43, of same chapter.

When this writ was served there was an absolute claim, the amount only was contingent. There was also an actual damage prior to the service of the writ, which was recoverable. *Dwinell* v. *Stone*, 30 Maine, 384.

The $2300 note was a valid subsisting claim in Neally's hands against the estate, and the mere calling it contingent

by commissioners did not make it so. *Cushing* v. *Gore*, 15 Mass. 69; *Smith* v. *Crooker*, 21 Pick. 241; *Haseltine* v. *Guild*, 11 N. H. 390.

*Bronson*, for trustee.

SHEPLEY, C. J. — The administrator of Joseph Sewall appears to have been summoned as the trustee of Neally on April 24, 1852. At that time Neally appears to have held a note for $2300, signed by Joseph Sewall and others, the consideration of which was, that Neally had become surety on other paper for Sewall. It appears to have been a negotiable note.

The intestate, while alive, could not have been adjudged to be the trustee of Neally on account of having given that note. Statute, c. 119, § 63. It could not have been the intention to make an administrator liable in such a case as trustee, by the forty-third section, for he could be no more certain than his intestate could, that the note was due to the promisee.

When service of the writ was made upon the administrator, the estate of Joseph Sewall was not indebted to Neally by reason of the notes, on which he had become surety for Sewall; for at that time Neally had not paid any thing on account of them.

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The fact, that Neally's estate had then been attached on suits commenced upon them, did not create or constitute any debt either absolute or contingent due from the estate of Sewall to him. *Exceptions overruled.*

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ROUSE *versus* SOUTHARD.

In an action against a part owner of a vessel for repairs made from time to time, a portion of which was more than six years prior to the commencement of the suit, evidence that when that part of the account was presented to the defendant for payment, he denied any ownership in the vessel, is not a fraudulent concealment of the cause of action, so as to prevent the operation of the limitation bar.

Rouse *v.* Southard.

THIS was an action of ASSUMPSIT, on account annexed, tried on the general issue, and brief statement of the statute of limitations, before TENNEY, J.

The writ was dated September 2, 1853. The account commenced in July, 1844, and ended in April, 1850, and was for repairs on Schooner Resolution. There were no credits, and the work and materials were furnished on six months prices.

One witness stated that the items in the account prior to October 6, 1847, were presented to defendant and he denied any partnership in the schooner, but referred the witness to one Toothaker.

Evidence was introduced of the several items charged being furnished for the schooner, and that defendant was part owner.

The jury returned a verdict for nearly the entire account with interest, one half of which was claimed to have been barred by the statute.

The case was presented on motion to set the verdict aside.

*E. Abbott*, with whom was *Ingalls*, in support of the motion.

*Gilbert, contra.*

SHEPLEY, C. J. — This suit was commenced to recover compensation for materials furnished to repair the schooner Resolution. The general issue was pleaded with a brief statement, that the statute of limitations would be relied upon. The account appears to have commenced in July, 1844, and to have been closed in April, 1850. The writ bears date on Sept. 2, 1853. The testimony presented to the jury has been reported to sustain a motion to have the verdict set aside as one unauthorized by it. The amount of the account claimed with interest was $44,61. A verdict was found for the plaintiff for $43,47. The jury must have allowed the plaintiff to recover for several items of his account, which had become payable more than six years before the commencement of his suit. The testimony does

not exhibit any mutual accounts existing between the parties; or any payments or any new promise made by the defendant.

It is insisted, that the verdict may be sustained on the ground, that there was a fraudulent concealment. The only testimony relied upon in proof of it, is that a witness presented that part of the account, which had accrued before October 6, 1847, to defendant for payment and "he denied any partnership in the schooner, but referred witness to Samuel Toothaker," with testimony to prove, that the defendent was then a part owner.

The ownership of the vessel was a fact open to the investigation of all interested, and capable of proof without resorting to any admission of the defendant. A denial, that he was a part owner of the vessel, does not amount to a fraudulent concealment of the cause of action.

There being no testimony, upon which such a verdict could be properly found, the conclusion must be, that it was rendered through misapprehension, or by reason of some improper influence.

*Verdict set aside and new trial granted: —*

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58 237
58 274
62 442
39 406
101 442

Unless the plaintiff releases sufficient to reduce the verdict to the amount, which may be due for items of charge, payable within six years before the commencement of his suit, with interest on them after six months from the time of charge.

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† BOOBIER, *prochien ami, versus* BOOBIER.

A minor son allowed by his father to leave him and work for his own support, and make contracts for himself without interference, may acquire and hold property in his own right, and maintain actions at law respecting it, although he has never been emancipated.

One of the owners of chattels held by tenants in common, may maintain an action for the value of his property against any one who appropriates the *whole* to the exclusion of his possession in common.

Boobier *v.* Boobier.

A person who has no possession actual or constructive of property demanded of him by the owner, nor has previously wrongfully possessed or withheld it, cannot be made liable in an action of trover for refusal to deliver it, although he may have withstood the efforts of the owner to obtain possesson, or prevented him by force.

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

Trover. The general issue was pleaded, and the property alleged to be converted was denied to be in the plaintiff, or that there was any conversion by defendant.

The plaintiff is an infant, and evidence was produced tending to show emancipation by his father, who is still living, and that the property in question, was acquired by the joint exertion of plaintiff and his mother, without either aid or objection by the father; and also that plaintiff acquired it solely by his own efforts unmolested by his father.

Plaintiff, his mother and younger brother lived together in a part of defendant's house, the latter occupying the other part. A barn was also attached.

From the evidence reported, it appears, that the property sued for was a cow, hog, some farming tools and household furniture, but no schedule is found in the case.

The parties had some difficulty, when the plaintiff left the house hastily, without any change in the condition or possession of the property claimed, and soon after came with a cart and drayman, saying that he had come "to get his things." Defendant told him he had no things there. Plaintiff attempted to open the barn door, when the defendant forcibly resisted him, and after a personal encounter the plaintiff was induced to desist, being told by defendant that he might take any thing he had there.

The counsel for defendant requested the following instructions: —

1. If plaintiff left the cow and other property in the possession of his mother in the same manner and in the same place as they had been accustomed to be kept or used, the defendant could not be guilty of a conversion, unless he

assumed to hold possession of them against the lawful holder of them.

This was given with the addition, "unless the defendant in some way withstood the efforts of plaintiff to get the property."

2. If the mother had the joint right of possession with plaintiff, he could not rightfully claim exclusive possession, until the preëxisting arrangement for the joint possession had been terminated by some proper act of the parties, whether the property of the father or the son, or the son and his mother together.

3. If the mother and son had the joint right of possession by right of joint property, the action could not be maintained.

These requests were denied and these instructions given:

If they found that plaintiff's father had suffered him to go from him and work for his own support and make contracts for himself without interference, they might then infer an emancipation, which would enable the plaintiff, though a minor, to acquire and hold property in his own right, and against the rights of his father; — *that*, to recover, plaintiff must show that he owned the goods, and owning them there was a conversion by defendant; — *that*, to make a conversion, there must have been a demand and refusal to deliver, by one having the goods in possession, unless defendant had by force prevented plaintiff from getting possession, or in some way withstood his efforts to get them, and in that case it would be a conversion, whether defendant had possession or not.

Verdict for plaintiff.

*Gilbert*, in support of the exceptions.

*Clapp & Baker*, *contra*.

TENNEY, J. — A minor under the age of twenty-one years, may acquire and hold property in his own name, distinct from that of his father, at the time he may be legally subject to the control of the latter. This may be done when

the property is the fruit of the minor's earnings, if it be obtained by the consent of the father, that it shall be his. Complaint is made, that the instructions upon the right of the son, to hold property so acquired, were erroneous.

Instructions to the jury, when matter of exception in law, may properly be considered in connection with the evidence reported, bearing upon the point on which the instructions were given. In this case, under the instructions and the evidence, the jury must have found, that the father had suffered the plaintiff, his son, "to go from him, and work for his own support, and make contracts for himself without interference," and that the plaintiff was interested as the owner, in part at least, of the goods alleged to have been converted by the defendant. This was sufficient to enable the plaintiff to recover, other necessary facts existing, notwithstanding emancipation, as the term is generally understood, may not have been properly inferable, from the facts supposed in the instructions.

The requested instructions to the jury, which were not given, were properly withheld. If two persons are the owners of chattels as tenants in common, the entire appropriation of the whole by any one to the absolute exclusion of the other, is a conversion, and will entitle the party so deprived of possession in common, to maintain an action for the value of his property in damages. *Bryant* v. *Clifford*, 13 Met. 129.

The jury were instructed, "that to recover, the plaintiff must show, that he owned the goods, and there was a conversion by the defendant; that to make a conversion, there must be a demand, and a refusal to deliver, by one having the goods in possession, unless the defendant had by force prevented the plaintiff from getting possession, or in some way withstood his efforts to get them, and in that case, it would be a conversion, whether the defendant had possession or not." The proposition, that the use of force by one not having possession of goods, to prevent the true owner from obtaining them, amounts to a conversion of

those goods, is not sustained as sound in principle. The authorities cited by the defendant's counsel are decisive against its correctness.

In an action of trover, the plaintiff waives all claim to damages on account of a violation of his *possession*, and claims indemnity for the *loss* of the property itself and nothing further. And the property having become, by the conversion, that of the person who converted it, it follows, from the waiver, that the worth of the goods at the time of the tortious taking is *prima facie* the measure of damages. *Chamberlin* v. *Shaw*, 18 Pick. 278. If a defendant in an action of trover, has no possession actual or constructive, at the time, of a demand by the owner, and a refusal by him to deliver the property, and there has been no tortious taking or withholding of the same previously, he cannot restore the chattel, and he is absolved from liability, notwithstanding he may forcibly interpose obstacles, in order to prevent the owner from obtaining the possession sought. And it has been held, that when the plaintiff relies only upon a demand and a refusal, as evidence of conversion by the defendant, he must also show that the latter had the power to give up the goods. 2 Greenl. Ev. § 644; 3 Stark. Ev. 1497.

*Exceptions sustained.—New trial granted.*

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GIVEN *versus* GOULD.

In actions between the principal and his agent, *receipts* taken by the latter for the payment of money to third persons on account of his principal, are admissible in evidence to support an account in set-off for such disbursements, without *proof* of their actual payment.

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

ASSUMPSIT for money had and received.

The plaintiff by an agreement in writing, engaged defendant to cut ship timber, at a certain price per day, and agreed to pay the wages and board of the men he should employ, and the stumpage and hauling of the timber.

By the receipts of defendant he appeared to have received $370.

An account was filed in set-off of various items of payment for wages, board and services.

The defendant offered the receipts of the various persons to whom payments were alleged in his specifications to have been made, and a portion of such receipts were proved to have been paid by the signers. But the whole were admitted against the plaintiff's objections.

The jury found, that plaintiff was indebted to the defendant and the former excepted to the rulings.

*Merrill*, for plaintiff.

*Gilbert*, for defendant.

TENNEY, J. — The plaintiff agreed in writing with the defendant to cut ship timber for him; to pay for his services and board, and all necessary expenses; also all the wages of the men, and for their board, who should be employed in cutting the timber; the defendant to hire the men to the best advantage for the plaintiff.

In this action, which is for money had and received, the defendant filed an account in set-off, and among the specifications, are charges for money paid to men, and for their board, and evidence was introduced to prove these items by the defendant; he also offered receipts of the various persons, to whom payments were specified to have been made for labor and board of the men employed, which are understood by the exceptions to have been admitted against the objection of the plaintiff. Whether these receipts were admissible or not, is the only question presented in argument by the plaintiff.

The contract shows, that the defendant was the agent of the plaintiff, in the performance of the work which he undertook, and in the employment of the men, furnishing board, and in the payment of the expenses therefor. These payments were therefore made to the men in discharge of their claims against the plaintiff, as the principal, by the defend-

ant as his agent, and the receipts were taken as vouchers for the latter before this controversy.

It is said in a note to the case of *Hingham* v. *Ridgway*, 10 East, 109, in 2 Smith's Leading Cases, 183, on page 197, that there is a class of cases turning on this point, "that where one claims compensation for payments made on account of the defendant, for which the defendant was liable, *there* the acquittance of the person to whom the liability of defendant was, or such declaration by him as is equivalent thereto, is evidence to entitle the plaintiff to recover. The ground of the action is, that the plaintiff has discharged for the defendant a liability to which he was subject; the receipt or admission is not offered as *evidence* of any thing, but as a fact or act, in itself operating to discharge the defendant."

The case of *Sherman* v. *Crosby*, 11 Johns. 70, was where a receipt of payment of a judgment, recovered by a third person against the defendant, was held admissible in an action for the money so paid, by the party paying it, he having had authority to adjust the demand, and the receipt being a documentary fact in the adjustment, though the attorney who signed the receipt was not produced, nor proved to be dead.

It is said in Starkie's Ev. vol. 3, page 1276, "if a man by his receipt acknowledges, that he has received money from an agent on account of his principal, and thereby accredits the agent with the principal to that amount, such receipt is, it seems, conclusive as to the payment by the agent."

Receipts, &c., in making up the accounts of agents, executors and other trustees, seem to be admitted on the same ground. Smith's Leading Cases, and the note before cited; 1 Greenl. Ev. § 147, note (1;) *Thompson* v. *Stevens*, 2 Nott & McCord, 493; *Holladay* v. *Littlepage*, 2 Munf. 316; *Prather* v. *Johnson & al.*, 3 Har. & John. 487. The principle established by the authorities cited, seems to be applicable to the point in controversy, and does not conflict

with rules of evidence, and is not in any respect unreasonable. *Exceptions overruled.*

† CLIFFORD *& al. versus* KIMBALL *& al.*

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In a suit upon a bond, given under § 17, of c. 148, R. S., for a breach of its condition, and a default is submitted to, the damages are to be assessed by the Court, and not by the jury; and the amount is the *actual* damage sustained by such breach.

No allegation against the debtor of a fraudulent concealment of his property, whereby he would be prevented from taking the statute oath upon a disclosure, will entitle the obligee to a hearing in damages before the jury.

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

DEBT, on a bond given on arrest of the principal, under § 17, c. 68, R. S. Its conditions were not fulfilled. The defendants pleaded *nil debit*, and tendered an issue which was joined.

On the production of the original writ, officer's return, bond, judgment and execution, the defendants submitted to a default, and claimed a hearing in chancery.

The plaintiffs contended that the judgment debt was the measure of damages, and if any other basis was instituted, they had a right to go to the jury on that question, alleging such fraudulent transactions on the part of the debtor, and such a concealment of his property as would prevent him from having any benefit from a disclosure.

The Judge ruled that the question of damages was for the Court alone to determine.

Evidence of the condition of the debtor as to property was submitted and the Court ordered judgment for $1,00 damages, and full costs.

The plaintiffs excepted to the rulings.

*Gilbert*, in support of the exceptions, as to the measure of damages, cited *Richards* v. *Morse*, 36 Maine, 240; c. 85, § 2, of Acts of 1848.

As to the right to go to the jury. Const. of Maine, Art. 1, § 20.

*Randall, contra,* cited § 9, c. 31, of laws of 1842; *Hathaway* v. *Crosby,* 17 Maine, 448. That no exceptions lie. *Loud* v. *Pierce,* 25 Maine, 233; *Miller* v. *Goddard,* 34 Maine, 102.

TENNEY, J. — The bond was taken in pursuance of the provisions of R. S. c. 148, § 17. The defendants were defaulted, and damages were assessed upon a hearing in chancery by the Court, notwithstanding the plaintiffs claimed as damages, the sums appearing to be due, upon the execution, issued on the judgment obtained in the action, on which the arrest was made. The plaintiffs further contended, that if the damages were to be assessed upon any other basis, they were entitled to go to the jury, alleging such fraudulent transactions on the part of Kimball, as would forbid him to disclose, and that he had property concealed.

By authority of the case of *Burbank* v. *Berry,* 22 Maine, 483, which gives a construction to the Act of 1842, c. 31, § 9, the damages against the obligors in a bond, like the one before us, after a breach of the condition, are to be assessed by the Court, and not by the jury; and are those actually sustained by the obligee. This construction was affirmed in *Sargeant* v. *Pomeroy,* 33 Maine, 388; *Fales* v. *Dow,* 24 Maine, 211, and in *Call* v. *Barker,* 27 Maine, 97.

No statutory provision transfers the power of the Court to the jury in the assessment of damages, upon an allegation of fraud of the debtor, in the disposition of his property. And it is not perceived, that the constitution of this State, art. 1, § 20, gives to the creditor the right to be heard by the jury on the question of damages, as contended for by the plaintiff's counsel. The property, which it was insisted, that the principal obligor in the bond had fraudulently concealed, was not that of the obligee, nor had the latter acquired any right thereto, by attachment or otherwise, any farther, than by his relation to the former, of creditor. The right which the plaintiffs had to inquire into the transactions of the principal defendant in this suit, in relation to his pro-

perty, was under the statute, by which the Court has the power to fix the damages, upon principles of equity, upon bonds, "conditioned to be void or defeated, upon performance only of some act or duty," in which there have been breaches. The plaintiffs have chosen to resort to the remedy provided by the Legislative power, to obtain the payment of their debt, and they are not entitled to enlarge or to change it. 3 Story's Commentaries on the Const. U. S., 645. They are still creditors, for any unpaid balance, notwithstanding a part only of the original, may have been discharged; and all remedies, not already exhausted, are open to them.

The facts, on the question of damages, were properly submitted to the Court, and the conclusion to which it came was not a matter to which exceptions would lie.

*Exceptions overruled.*

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† DUNCAN *& als. versus* REED.

In case of the loss of a vessel, the captain is bound to dispose of the wreck to the best advantage of the owners, and his duties do not cease until the proceeds which may be saved are placed at their disposal.

While so employed in their interests, he is entitled to a reasonable compensation and necessary incidental expenses.

For expenses of board and medical services in his behalf the owners are liable.

Nor can they refuse the allowance of expenses which have been included in the general average, and of which they have received the benefit.

But for errors committed by the captain through his own fault only, the owners are not responsible to him.

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

ASSUMPSIT.

This action was brought by the owners of brig Mechanic against the master, to recover moneys alleged to have been detained in his hands belonging to them.

The brig sailed from Bath to New York, and from there was bound for Gatoon on the Chagres river, and was

stranded at its mouth. She was condemned and sold upon the beach.

The captain returned with the avails to New York.

The action was referred to an auditor who made an *alternative* report. If the plaintiffs' view of the case was correct, there was due from the captain $168. If the defendant's claims were allowed, the balance was in his favor. The claims of the latter were for physicians' bills at Chagres, and board after the loss of the vessel, his passage to New York, and a deficiency of the funds he brought to New York of $120, which he alleged was occasioned by his not being able to count it at Chagres on account of sickness.

The charge for passage home was allowed by the insurers.

The case was referred to the full Court to make up a legal judgment.

*Evans*, for defendant, contended that the report was inconclusive, and should be recommitted for further proceedings. *Merriam* v. *Merriam*, 6 Cush. 91.

That claim for medical services should have been allowed. *The George*, 1 Sum. 151. Also the passage home; it was allowed by the insurers. *The Dawn*, Davis' R. 1.

The proof was insufficient to charge defendant with receiving a larger sum at Chagres than he paid at New York. It was only the account of the merchant, and was inadmissible. The *onus* was on plaintiffs.

*Randall*, for plaintiffs.

Rice, J. — The facts reported in this case are very meager. It is presented upon the auditor's alternative report, without any statement of the evidence bearing upon the controverted items in the account. We are thus left to infer the facts from the general character of the business between the parties, and the nature of the items in controversy, rather than from any direct proofs in the case.

There are certain general principles applicable to cases similar to the one before us which will aid in solving, satisfactorily, most of the questions presented.

It seems that the brig Mechanic, of which the plaintiffs were owners, and the defendant master, on a voyage from New York to Chagres, was stranded at the latter port, and lost, before the delivery of her cargo, and that the wreck was sold, and the whole business closed up, at that place, December 11, 1850, and the proceeds of the property sold, brought by the master to New York, for the benefit of the owners.

While at Chagres, and on his passage to New York, the captain was sick and incurred, and paid, physicians' bills to the amount of fourteen dollars. The plaintiffs object to the allowance of those items.

The expenses of curing a sick seaman, in the course of a voyage, is a charge on the ship, by the maritime law; and in this charge are included not only medicine and medical advice, but nursing, diet and lodging, if the seaman be carried ashore. *Hamden* v. *Gordon & al.*, 2 Mason, 541.

The Act of Congress of 1790, c. 29, § 8, providing that there shall be kept on board of every ship or vessel of a certain specified tonnage, a chest of medicines, &c., does not apply to cases where seamen are removed on shore, and are deprived of the benefits secured by the Act. *Ibid.* The same rule has been held to apply in case of the sickness of the master, as of seamen. *The brig George*, 1 Sum. 151.

In this case, the ship having been stranded and lost, the master must of necessity, have subsisted on shore, and the legitimate inference is, that he could not avail himself of the benefits of the medicine chest.

The powers and duties of shipmasters, especially when in foreign ports, and in cases of disaster, either from the dangers of the sea, or public enemies, are very extensive. They are then the general agents of the owners, so far as respects acts necessary to the successful prosecution of their voyage. Their authority extends to the hypothecation of the ship, for necessary repairs, or in case of severe disaster and urgent necessity, to the sale of the ship itself. *Gordon* v.

*Mass. F. & M. Ins. Co.*, 2 Pick. 249; *Hall* v. *Frank. Ins. Co.*, 3 Pick. 466; *The Sarah Ann*, 3 Sum. 206.

He must faithfully discharge every duty incumbent upon him, and render a satisfactory account of all his transactions, that he should receive a stipulated sum as wages, and be secured in all his advances that do not exceed the value of the vessel, or the authority of the owner. Jacobsen's Sea Laws, by Frick, B. 2, c. 1, p. 87.

In case of capture, it is the imperative duty of the master to remain by the ship until a condemnation, and all hope of recovery is gone. He is intrusted with the authority and obligation to interpose a claim for the property, and to endeavor by all the means in his power, to make a just and successful defence. To abandon the ship to her fate, without asserting any claim, would be criminal neglect of duty, and subject him to heavy damages for a wanton sacrifice of the property. As the law compels him to remain by the ship, and attaches him in some sort to her fate, he is entitled to receive compensation for his services and incidental expenses, and this compensation is a charge to be borne, in the first instance, by the owner of the ship, and ultimately as a general average, by all parties in interest. *Wilson & ux.* v. *Dorr*, 3 Mass. 161.

The principles of the above rule are equally applicable in cases of loss by the dangers of the sea. The master must abide by the ship to the last, and save her if practicable, and if not, so dispose of the wreck as that the owners may realize the most that can be saved therefrom. His duty therefore, in case of disaster, does not close until the ship is in a place of safety, and the voyage ended, or in case of loss, until the proceeds which may be saved, are placed at the disposal of the owners.

But these duties carry with them corresponding rights, and among them is the right to reasonable compensation for services rendered, and incidental expenses incurred while thus in the service of the owners. These rights and duties

enter into, and form a part of every contract between master and owners.

In the case at bar, the services of the master do not seem to have terminated until he arrived in New York, and delivered the proceeds received from the sale of the wreck of the brig. To that point of time we think he was fairly entitled to remuneration for his necessary incidental expenses in the prosecution of the business of the owners, in the charge of their property. In these expenses the items charged for physicians' bills, board, and the amount paid for his passage are properly included. The owners surely are not in a position in equity and good conscience to resist the allowance of those items which have been included in the general average, and of which they have therefore received the benefit, as is the case of the charge for his passage to New York.

As to the charge for deficiency in the amount of money brought home by him, we do not perceive any authority for making these charges against the owners. As we understand the case, he himself presented the evidence of the amount he had received in Chagres, and if it did not hold out on a recount, it is his misfortune, or his fault; and for that deficiency he must look to the parties with whom he transacted the business. At all events he cannot properly charge the owners therewith until he presents some evidence that the loss was not occasioned by any fault on his part.

Correcting the account of the auditor according to the above principles, there will be found a balance due the plaintiffs of nineteen dollars and ninety-five cents, with interest thereon from the date of their writ, and for that sum they are to have judgment.

## COUNTY OF LINCOLN.

STEVENS *versus* BLEN.

An account in set-off must be of such a character, that the record will protect the party against an action relating to the same matter.

Thus, where the defendant took back a horse he had sold to plaintiff, on his saying, that he would do what was right about it, or would leave it to a third person, and plaintiff had in fact used and damaged the horse while thus owning it, in an action between them, such claim for *use and damage* is not a matter in *set-off*.

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

ASSUMPSIT, on a promissory note.

The following account in set-off was filed: —

To use of horse from Oct. 6, to Dec. 10, 1851, $12,00

To injury and damage to same, agreed to be paid, $15,00

It was objected by plaintiff, that such an account was unauthorized in way of set-off, but the Judge allowed proof in support of it.

The evidence tended to show that plaintiff bought a horse of defendant and used him some weeks, and so badly that he was worth $25 less than what he was to pay for him. He sent word to defendant that if he would take the horse back he would do what was right about it or leave it to John Chism. The horse was taken back.

Chism was never called on to arbitrate.

The presiding Judge instructed the jury that the signature of the note being admitted, the only question for them to decide was the amount of damage the defendant had sustained and plaintiff had agreed to pay; *that*, plaintiff having agreed to do what was right, they were to decide what was right.

The verdict was for defendant.

*Hubbard*, in support of the exceptions, relied upon § 27, c. 115, R. S.

*Gould, contra,* contended that the account in set-off was a demand founded upon a contract either express or implied, so as to bring it within § § 24, 27, of c. 115; although the account was in general terms, it was well understood, and cited *Jackson* v. *Holt,* 14 Pick. 151; *Richards* v. *Blood,* 17 Mass. 66; *Truesdell* v. *Wallace,* 4 Pick. 63.

Rice, J. — This is an action at law, and the rights of the parties must be determined upon legal principles. The defendant was sued on a note of hand, the execution of which does not seem to have been seriously controverted. He filed an account in set-off, consisting of two items, as follows: —

| | |
|---|---|
| 1851, Dec. 10, To use of horse from Oc. 6, 1851, to date, | $12,00 |
| To injury and damage to same, agreed to be paid, | 15,00 |

It appears from the evidence reported, that the plaintiff had purchased a horse of the defendant, and agreed to pay therefor $125. While the horse was in plaintiff's possession, after the purchase, he was both used and abused. After having had possession of the horse some time, the plaintiff induced the defendant to take him back, saying if he would do so, he would do what was right about it, or he would leave it to John Chism.

For the use of and damage to the horse, while in the plaintiff's possession, the defendant now claims to recover on his account in set-off. The plaintiff contests his right to recover for such charges, in this manner.

Chapter 115, § 27, R. S., provides that no demand shall be set off, unless it is founded upon a judgment or contract; but the contract may be either express or implied.

There is no proof of an express contract on the part of the plaintiff to pay defendant for the use of the horse nor for damage done to him. Nor will the law, under the circumstances, raise any such promise by implication. While the title and possession of the horse were in the plaintiff,

he alone had a right to his services, and if he misused him, it gave the defendant no right to recover damage therefor.

Though it would be equitable for the plaintiff to do what was right, in relation to the horse, he can only be compelled to do so, by a court of law, when the case is properly presented, in such form, that when once settled, the record will show what was determined, and protect the party from further litigation. A recovery by the defendant, for "use and damage" to the horse, would be no answer for the plaintiff in a suit by the defendant for the value of the horse, when sold, nor for the difference in value when sold and when taken back on resale. The instructions of the Court were too broad and gave the jury too much latitude in deciding the case.

*Exceptions sustained. — New trial granted.*

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WISE *& al. versus* NEAL.

In an action against the accepter by the *drawee* of a bill of exchange, *who* procured its acceptance, evidence, that the conditions upon which it was agreed to be accepted were not fulfilled, is admissible to show a want of consideration.

ON FACTS AGREED.

ASSUMPSIT.

The facts appear in the opinion of the Court, which was drawn up by

SHEPLEY, C. J. — This suit is upon two bills of exchange, drawn by James Neal in favor of the plaintiffs, and accepted by the defendant.

Testimony was offered by defendant to prove, that the plaintiffs inquired of him by telegraph if he would accept a draft on his son for furniture. To which he returned for answer, "yes, provided furniture is mine when paid for and leased;" and that the conditions named were never complied with.

An objection is made to the admission of such testimony, that it would vary the terms of a written contract by changing an absolute into a conditional one. For such a purpose it could not be received. The plaintiffs appear to have been the originators of the contracts; and the consideration of them may therefore be inquired into between these parties. A jury, upon the testimony offered, had it been admitted, might have been authorized to find, that the drawer had no funds in the hands of the defendant, and that the plaintiffs knew that he had not. That he proposed to purchase furniture of them, and that they were not willing to sell it to him, unless the defendant would accept bills to pay for it; that upon inquiry defendant did not consent to accept bills to pay for furniture to be sold to his son, but did consent to accept bills to pay for furniture to be sold to himself and leased to his son, and that these bills were accepted for such purpose and that the plaintiffs knew that they were.

This would exhibit the bills as accepted without any consideration received by the defendant, and without any thing parted with by plaintiffs with which the defendant was connected. The testimony might present the plaintiffs as parties to a transaction, by which the defendant was induced to accept bills for a purpose impliedly refused in a dispatch to themselves, when he supposed, that he was accepting them to pay for property sold to himself. To prove a want or a failure of consideration, the testimony offered is admissible.

*Action to stand for trial.*

*Neal, pro se.*

*Ingalls* and *Stinson*, for plaintiffs.

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## WHIPPLE *versus* WING.

Where the defendant is sued as a *lessee*, and he defends as *purchaser* of a patent, if the Court in their instructions to the jury *assume* the title to the patent to be in plaintiff, and that he has proved the erection of a machine in the defendant's shop and his use of it, and that the plaintiff is entitled to recover, unless the defendant, taking upon himself the burden of proof, shall show that he is not so entitled, exceptions may be sustained.

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

ASSUMPSIT, to recover for the use of a Norcross planing machine from October 1851, to June, 1852. A verdict was returned for plaintiff.

The defence made, the nature of the evidence and the instructions of the Court objected to, appear in the opinion of the Court, which was drawn up by

APPLETON, J. — This is an action of assumpsit in which the plaintiff seeks to recover "for the use of one Norcross planing machine, from Oct. 1851, to June 1852, at the rate of $100 per year."

It appears from the evidence that the plaintiff, being the assignee of the Norcross patent, had set up a machine in the defendant's shop, and that it had been used by him. The defendant claimed that he had purchased the machine for the use of which the suit was brought, and introduced evidence tending to prove that fact.

The Court instructed the jury that, "the plaintiff being the owner of the Norcross right, and having proved that he *set up a machine in the defendant's shop, and that it was used by him, had made out a case*, and the plaintiff was entitled to recover unless the defendant, taking upon himself the burden of proof, shows that the plaintiff is not entitled to recover." The fact that the plaintiff set up a machine in the defendant's shop, and that it was used by him, is equally consistent with the right to recover, as on a sale, or on a promise express or implied, to pay for the use of the machine. The question in dispute was whether the defendant had purchased the machine, or taken and used it on such

conditions or under such circumstances as to be liable for its hire. This was the issue which the jury were to determine. The fact upon which the instruction was predicated was consistent with the position taken by the plaintiff. It was none the less so with that of the defendant. But in this, as in all cases, the burthen of proof is on the plaintiff to establish at least a *prima facie* case. The instruction assumes every thing in dispute and submits nothing to the jury. From the facts stated, which are assumed to be true, the Judge draws the inference; and that is, that the plaintiff had made out a case; in other words, that there was no sale, but a use under such circumstances as entitled the plaintiff to compensation; that the defendant had used the machine in subservience to the title of the plaintiff and under an express or implied promise to pay for its use. But the inference from the facts proved, was equally, with the question whether they were proved, a matter for the jury. The question should have been submitted to their consideration, with alternative instructions, according to the different state of facts as alleged to exist on the one part or the other, with authority to the jury to draw such inferences as they might deem just, from such facts as they might find. *Linscott* v. *Trask*, 35 Maine, 150.

The plaintiff was the owner of the machine with an assignment of the Norcross patent. The machine could not lawfully be used without the consent of the patentee. If, then, the plaintiff, owning both the machine and the right to use it, should lease the machine, the right to use the machine must be regarded as included. A lease to the defendant of what he could not enjoy without the consent of the plaintiff, would confer no benefits upon him. The lease of a patented machine by the patentee, or his assignee, must be regarded as conveying, as against him, the right to use it without let or hindrance. The whole is given in the lease of the machine. What would be the effect on the rights of the lessee in case his lessor should convey by valid assignment, his rights to the use of the patent, within the limits in

which it was to be used, to a stranger, is a question which it is not material now to consider.

*Exceptions sustained. — New trial granted.*

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FREEMAN *versus* FREEMAN.

In an action of dower, if the plea *ne unques accouple* conclude by tendering an issue to the country, it is *bad* on demurrer.

But if the declaration be bad also, the judgment must be against the party committing the first fault in pleading.

Unless the declaration alleges a *seizin* of the husband of an *estate* of which by law his widow is dowable, it is defective and insufficient.

So it must show also, that the *demand* for dower was of the one then *seized* of the *freehold*, if within the State; otherwise of the tenant in *possession*.

WRIT OF DOWER. The claim was set up by reason of the seizin in the premises of John Freeman.

In the declaration was a description of the farm in which dower was demanded, "of which the said John, (her husband,) was seized during the coverture," but there was no allegation of the nature of the estate.

The declaration concluded thus, "being on the premises did then and there demand her said dower thereof. Yet the said Charles, (the defendant,) who then and there was and ever since has been and now is tenant in possession of the said premises, although one month," &c.

The respondent pleaded, that the demandant and said John Freeman never were accoupled together in lawful matrimony, and of this put himself on the country.

He also, by brief statement, alleged the marriage of demandant with one Henry Demuth, who obtained a divorce on a charge of adultery against her; and that John Freeman was never seized of the premises during the life of Demuth.

To the plea the demandant demurred.

*Seiders*, with whom was *Hubbard*, in support of the demurrer, denied that this plea was the general issue, and that

it was such a one as authorized a brief statement. Booth on Real Actions, 169.

It should have concluded with a verification. Chitty and Story on Pleading; Co. Lit. 126; Bacon's Abr. vol. 4, p. 55; 1 Burroughs, 317.

*Bulfinch, contra.*

SHEPLEY, C. J. — The case is presented on demurrer to the tenant's plea.

A defendant is allowed, by statute c. 115, § 18, to plead the general issue and to file a brief statement of special matter to be proved; or he may at his election "plead such matter specially after the general issue is pleaded."

The plea *ne unques accouple* is an appropriate one to a declaration in dower; but it should not conclude to the country. If an issue upon it were joined, there would be no certain facts put in issue for the jury to find. It should conclude with a verification. The demandant should in a replication set forth the time and place of the marriage, and by whom it was solemnized; thus presenting definite allegations of fact for the jury to find. 2 Saund. 44, note 4; Com. Dig. Pleader, 2 Y, 10. Such a bad conclusion is good cause for a demurrer. *Duppa* v. *Mayo*, 1 Saund. 283; Com. Dig. Pleader, E, 32. The plea is therefore bad.

But upon demurrer the whole record must be examined, and judgment must be against him, who made the first fault. If the declaration be bad, there must be judgment against the plaintiff, though the plea be also bad. Com. Dig. Pleader, M, 1.

Proof of all the facts alleged in the declaration would not establish the demandant's right to recover. The husband must appear to have been seized of an estate during the coverture in fee simple, fee tail general, or as heir in special tail. Lit. § 36; Co. Lit. 31, b; Com. Dig. Dower, A, 6, 7.

A widow is entitled to dower in those estates only, which her issue may inherit as heirs to her husband. 2 Saund. 45, note 5.

The declaration demands dower in an estate "of which the said John, [the husband,] was seized during the coverture." It does not allege, that he was seized in fee or of any estate, in which she would be entitled to dower. It might have been an estate for life, in which she could have no dower.

There is also another defect in the declaration. A demand for dower should be made of the person, "who is seized of the freehold at the time of making the demand, if he be in the State, otherwise of the tenant in possession." Stat. c. 144, § 2.

The declaration alleges, that a demand of dower was made on the premises, "being the same farm, on which the said Charles Freeman now lives," * * "and now is tenant in possession of the premises." It does not allege, that a demand was made of him. Nor that he was seized of the freehold. Nor that the person seized of the freehold was out of the State, so that a demand upon the tenant in possession would be good. *Judgment that the demandant take nothing by her writ.*

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WINSOR *versus* CLARK *& als.*

If other facts or matters are incorporated into the certificate of justices of the peace and quorum, under § 31, c. 148, R. S., than those required in that section, such foreign matter will be treated as surplusage. The certificate is evidence *only* of the facts required to be inserted therein.

When a disclosure of a poor debtor is made in writing, *parol* evidence of its contents is inadmissible, unless it be shown that the original or a duly certified copy is unattainable.

A witness who is employed by a creditor to appear at the time of the disclosure of his debtor, cannot be allowed to testify as to his *intentions* of bringing a suit upon the bond, formed at the time of the hearing.

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

DEBT, on a poor debtor's relief bond on execution.

The general issue was pleaded, and a brief statement filed of performance of one of the conditions of the bond.

After the plaintiff had introduced his judgment, execution and bond, the defendant produced a certificate of discharge of the principal defendant, signed by Samuel Kennedy and William Chism, two "disinterested justices of the peace and quorum."

This certificate, in addition to the form prescribed by c. 148, § 31, R. S., alleged, that said Kennedy was selected by the debtor and said Chism by the creditor's attorney, and both agreed to by the parties, they expressly waiving every objection to the residence of the justices and all other objections.

The certificate was objected to by plaintiff for not conforming to the statute, but was admitted subject to be impeached as to facts set forth therein and not required to be inserted in the statute form.

The plaintiff was permitted to show, against the objections of defendants, that Kennedy was a surety upon the bond in suit, and evidence was also introduced tending to prove that all objections to the magistrates were waived, and that no objections were waived excepting as to the residence.

The plaintiff proved that the disclosure of the debtor was in the hands of Kennedy, and that seasonable notice had been given to produce it; and he then was permitted to prove by parol the property disclosed, against the defendants' objections.

The counsel who brought the suit upon this bond, and who was present at the disclosure, testified as to what occurred at that hearing about the alleged "waiver," and said it was his intention to bring a suit on the bond if the debtor did not surrender himself to jail before it expired.

The evidence as to the "intentions" of the witness was objected to by defendant but admitted.

The instructions requested and refused, and the instructions given to the jury, are not required to be stated.

A verdict was returned for plaintiff for the amount of his demand, and exceptions taken to the rulings in the progress of the trial, to the refusals to instruct as requested, and to the instructions given; and the defendants also filed a motion to set aside the verdict as unsupported by the evidence.

*Lowell,* in support of the exceptions.

*Hubbard, contra.*

RICE, J.—By inserting in a poor debtor's certificate of discharge, matter not required by law to be inserted therein, such matter does not thereby become a part of the record and cannot be proved by a copy thereof. Though by inserting in such certificate facts or matters not required by law, the certificate will not thereby be invalidated, yet such irrelevant facts and matters will be treated as surplusage, and if it should become necessary to prove them upon trial they must be established in the same manner that they would have been, had they not appeared in the certificate.

The fact whether the parties to a poor debtor's disclosure, did or did not expressly waive all objections on account of the interest of one of the magistrates who heard the disclosure, is not proved by being included in the certificate of discharge to the debtor, such fact constituting no part of the certificate required by law.

Foreign, irrelevant and impertinent matter constitutes no part of a record by being improperly incorporated therein. The ruling upon this point was correct.

The disclosure of the debtor was taken by written interrogatories and answers. On the trial, in this case, the contents of that disclosure were proved by parol. But before the witness was permitted to testify as to the contents of the disclosure, the plaintiff had proved it to be in the possession of one of the defendants, and seasonable notice to his attorney to produce it on trial, which he refused to do.

The defendant objected to the introduction of this parol testimony, and we think it should have been excluded.

Section 26, c. 148, provides, when a disclosure is taken upon written interrogatories and answers, that the creditor may have a copy of the interrogatories and answers, certified by the justices, on paying therefor the same fees as for a deposition of the same length.

The law requiring the disclosure to be in writing if desired by the parties, and giving the creditor a right to a certified copy of that disclosure, such copy, in the absence of the original, is the legitimate evidence to prove the contents of the disclosure, and parol proof of the contents is not admissible until it is shown that neither the original, nor a copy duly certified is attainable. In this case there does not appear to have been any effort to procure such copy.

The plaintiff was also permitted to prove the "intentions," of Mr. Hubbard, his attorney, as to bringing a suit upon the bond, against the objections of the defendants. This testimony should have been excluded. Though standing alone it may not appear to have been material, yet when taken in connection with the question whether there was, or was not, an express waiver of all objections to one of the magistrates, on the ground of interest, a question which was of vital importance, it was calculated to have an influence on the minds of the jury. For these reasons a new trial must be had. There are other questions raised in the exceptions which it does not become material to examine.

*Exceptions sustained.*

*New trial granted.*

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CHAPMAN *versus* LOTHROP *& al.*

Where a bond has been settled and surrendered through mistake or fraud, it may be treated as a valid and subsisting instrument.

But when through negligence, inattention or ignorance, the plaintiff allows his bond to be discharged by his attorney, without claiming *a full performance* of its conditions, and after full knowledge of the mode in which the settlement of it was made, he acquiesces in it for a long time, he cannot afterwards treat the bond as subsisting and recover a further sum, although such claim was contemplated in its original provisions.

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

DEBT, on a bond executed by Lothrop as principal, and Glidden as surety, in Feb. 1848. The writ is dated Jan. 8, 1853.

The condition of said bond was in substance, that Lothrop and plaintiff, having been in company in building a bark, and in consideration of plaintiff's relinquishment of his interest in the vessel, Lothrop agreed to pay all their liabilities in consequence of building the vessel and save the plaintiff harmless from all expenses concerning it, and at a subsequent time pay him $300.

In June, 1849, the plaintiff commenced a suit on the bond which was settled Oct. 1851, by payment of the demand for which the bond was sued, amounting to $286,84, besides the costs. At that time the bond was given up to defendant's attorney, who surrendered it to his clients.

In Feb. 1852, the plaintiff paid about $50, on a demand of one N. T. Chapman against him and defendant Lothrop, for work done upon the bark, previously to the execution of the bond, the account having been sued.

It was in evidence, that this claim was not settled among the demands when the bond was surrendered.

It was agreed, that upon the testimony admissible, the Court might draw such inferences as a jury, and render judgment on default or nonsuit, or give such direction to the cause, as to the Court might seem most consistent with law and justice.

*Stinson*, with whom was *Ingalls*, for defendants.

1. The bond by its voluntary surrender by plaintiff, for the purpose of cancellation, became null and void. *Licey* v. *Licey*, Penn. R. 251.

2. All that was demanded was then paid. The understanding of both parties was, that it was discharged. *Steward* v. *Briggs & al.*, 9 Maine, 53.

3. The surety could have known nothing about the transactions between the plaintiff and Lothrop, and when on payment of the claims presented, and the giving up of the

bond, he had a right to suppose that his liabilities were at an end.

*Hubbard,* for plaintiff.

SHEPLEY, C. J. — This suit is upon a bond, not produced, made by defendants to the plaintiff, on Feb. 29, 1848, containing a condition providing in substance, that Lothrop should pay what he and the plaintiff were to pay for building a vessel, which they had built together; and should pay the plaintiff $300.

The plaintiff caused a suit to be commenced on that bond on June 11, 1849, which was prosecuted until October, 1851, when it was settled by the attorneys of the respective parties, by the surety paying $371,33, being the full amount of all claimed to be due for damages and costs; and the demands and bond were surrendered as satisfied. The attorney for the plaintiff, who made that settlement, testifies that he did not settle any other demands than those sued for in that action, having no knowledge or instructions beyond that suit. It does not appear that he exceeded his authority in making it. There is no proof that the plaintiff was not fully informed how it had been made, or that he was not fully satisfied with it, or that he has ever complained of it, or alleged that it was unauthorized or erroneous. The only evidence of it, now presented, is the commencement of this suit, on January 8, 1853. The presumption must be, that he received the money obtained by that settlement without making any objection to it.

When a bond or other contract has been settled and surrendered as satisfied by reason of mistake or fraud, it may be treated as a valid and subsisting instrument.

It does not in this case appear that any mistake was made in that settlement, or that it was procured by any fraud. The only error apparent, as the case is presented, was that through his own negligence, inattention, or ignorance, the plaintiff allowed a settlement to be made, and his bond to be discharged by his attorney, without claiming a full

performance of its condition. If the amount now claimed could have been recovered of Lothrop, the plaintiff might have allowed a judgment to be recovered against him and himself, and have procured the amount to be collected of him. After he had remained for so long a time apparently satisfied with that settlement, he should not be relieved from its effect, to enable him to recover a further sum from the surety, without more satisfactory proof of excess of authority, or of mistake, or fraud, than he has exhibited.

*Plaintiff nonsuit.*

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CALL *versus* LOTHROP *& als.*

Under the laws of this State a tender may be made after action brought and before entry with the same effect as before the commencement of the suit.

Where the principal and sureties on a poor debtor's bond are sued, but no *service* made, a tender of the amount of the joint liability, including the cost of the *writ*, will be sufficient, although the writ may have been sent away by the attorney for the purpose of having it served, if he has time to recall it before it is actually served.

In such suit where the tender covers the *joint liability*, no costs can be recovered by plaintiff, though he is entitled to a separate judgment against the principal for twenty per cent. interest on the amount due, beyond the amount tendered.

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

DEBT, on a poor debtor's relief bond.

The defendants had leave to plead double, and one of the pleas was a tender of the amount due and costs before entry of the action, which was brought into Court.

The facts are all stated in the opinion of the Court drawn up by

RICE, J. — This is a joint action against principal and surety, on a poor debtor's bond. The defence is a tender of the amount due after action brought, but before entry. The amount due, including debt and cost on the execution, officer's fees and interest, together with the writ in this action, was on the day of the tender, August 4, 1853, $64,97;

the amount tendered was $66,47. Before the tender was made the writ had been placed in the hands of one Geo. W. Philbrick, a deputy sheriff, in the county of Lincoln, for service, and two dollars deposited with him for his fees. The defendants at that time lived in Cumberland county. Philbrick testifies that he received the writ, July 30, 1853, and sent it to an officer in Portland soon after it came into his hands — probably right off. The writ was served on the defendants Sept. 6, 1853, and the fees taxed thereon are two dollars and sixty cents.

The plaintiff contends that the fees for serving this writ should be added to the sum due on the bond, which would thereby become larger than the amount tendered. There is no just ground for such claim. The service was not made for more than a month after the tender, affording ample time to recall the writ before service.

Section 39 of c. 148, R. S., provides that if the debtor fail to fufill the condition of any such bond, the same shall be forfeited, and judgment in any suit on such bond shall be rendered for the amount of the execution and costs, and fees of service, with interest on the same against all the obligors; and a special judgment shall also be rendered against the said principal debtor, for a further sum equal to the interest on the same at the rate of twenty per cent. by the year, after the breach of the bond.

It is contended that the tender, to constitute a good defence, should have been sufficient to cover the twenty per cent. for which the principal debtor is liable, in addition to the joint liability of all the obligors on the bond. This cannot be so. The twenty per cent. is in the nature of a penalty, and can be recovered only of the principal debtor. For this the other obligors are in no event liable.

By paying the money into Court the defendants acknowledge their liability to the action, and to the recovery by the plaintiff of so much as is paid in by them. *Burroughs* v. *Skinner*, 5 Burr. 2639; *Jones* v. *Hoar*, 5 Pick. 285; *Huntington* v. *American Bank*, 6 Pick. 340.

The tender in this case was joint, the action joint, the liability joint. The only question, which can, therefore, affect the defendants, jointly, would seem to be whether the tender was seasonably made and sufficient in amount.

If the plaintiff, after the money has been paid into Court, proceed in his action, it is at his peril. The sum paid in must be considered as stricken out of the declaration; it is, for so much a defence, and unless the plaintiff prove a sum to be due beyond what is paid, the verdict should be for the defendant. *Stevens* v. *Yorke*, 4 T. R., 1; 9 Greenl. 302, Rule 32. If, however, more appears to be due to the plaintiff, he is entitled to a verdict for the overplus and costs. Colby's Prac. 219.

By the common law a plea of tender is applicable to cases where the party pleading it has never been guilty of any breach of his contract. 2 Saund. Pl. 1443.

The tender must be made before the action was commenced, that is, before the issuing of the writ. Bro. Abr. Tender Pl. 9; Bac. Abr. Tender, D; 2 Saund. Pl. 1046.

A tender and refusal of principal and interest due on a bond, after the day mentioned in the condition, and before action brought, cannot be pleaded. *Underhill* v. *Mathews*, Bul. N. P. 171.

These rigid rules of the common law, as applicable to tender, have been modified in this State by statute provision. By the general Act of amendment to the R. S., approved April 16, 1841, p. 767, it is provided that any person, after the commencement of a suit against him, and before the entry thereof in Court, shall have the same right to tender payment of the amount due, to the plaintiff, or his attorney in the action, and legal costs to the time of such tender, and with the same effect, as before the commencement of the suit. The defendants have brought themselves within this provision of the statute, and their tender being sufficient to cover their joint liability, at the time it was made, they are entitled to judgment and their costs. The principal debtor having made no separate tender for his individual liability,

the plaintiff is entitled to a separate judgment against him, for a sum equal to twenty per cent., by the year, on the amount due, that is, on the amount of the execution, with fees of service, but without costs in this case.

*Hubbard*, for plaintiff.

*Ingalls*, for defendants.

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## TRASK *versus* FORD *& al.*

The *lessee* of real property when establishing title may use as evidence an *office copy* of the recorded title deed of his lessor.

One claiming by possession the prescriptive right to abut his mill-dam upon the opposite shore, must show such possession adverse and exclusive for twenty years prior to the commencement of the action.

Merely abutting one's mill-dam upon the opposite shore, without claim of right, may create an easement after its continuance for twenty years, but will not divest the owner of the shore of his title.

Such acts are assumed to be in *submission* to the title of the owner, unless they appear to be *adverse*.

When such dam is joined to the opposite shore by consent of the owner, its materials belong to the builder of the dam.

And while the dam remains, the owner of the opposite shore may so interfere with it as to enjoy his rights, but not to appropriate any of the materials to his individual use.

To maintain an action of trespass *quare clausum* against the owner of the opposite shore for intermeddling with his dam, the owner of the latter must show the prescriptive right by *adverse* occupation for twenty years.

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

TRESPASS, *quare clausum.*

This action was commenced on April 19, 1853. The writ contained counts for breaking, entering and carrying away a dam; also for breaking up plaintiff's dam and diverting the water from his mill; also for tearing up and carrying away his boards, planks and a chain.

After the evidence was out, it was agreed, that the Court, upon so much of it as was admissible, might draw such in-

ferences as a jury might, and render such judgment as the law required.

The titles of the parties are stated in the opinion of the Court.

The evidence showed, that the dam across Dyer's river had been built about forty years; when first built, a fulling mill was erected on the north side of the river, and about twenty years after a grist-mill was erected on the same side, which has been in operation ever since, and used by the plaintiff.

To the shore on the south side, upon which the dam abutted, the plaintiff had no record title. On that side was a waste way. The owner of the land and shore on that side leased the same with the privilege to defendants, and they erected a store and lathe mill, built a flume and joined it to the dam in the place of the waste way, and so altered it as to draw the water from the dam to drive their mill. None of the materials of the dam were used in or about the mill; the chain of plaintiff which was upon one of the pieces of the bulk head, was removed as it was necessary to move the post, but was left upon the dam. There was evidence tending to show, that prior to the date of the writ, there was no lack of water to drive the mills on both sides of the stream.

The plaintiff claimed his right to abut his dam on to the opposite shore by prescription.

*Lowell, Thacher & Foster*, for defendants.

1. Allowing the plaintiff had the exclusive right to the water power created by the dam, this action cannot be maintained, as he had suffered no injury when the writ was made. *Curtis* v. *Jackson*, 13 Mass. 507; *Rogers* v. *Bruce*, 17 Pick. 184; *Bonley* v. *Shaw*, 6 East, 208; 3 Kent's Com. 7th ed. p. 539.

2. But plaintiff is precluded from setting up any title by prescription, for his occupation was not adverse, but in submission to the title of defendant.

3. The office copy of the deed objected to was admissi-

ble. *Kimball* v. *Morrill,* 4 Maine, 368; *Emery* v. *Vinal,* 26 Maine, 295.

*Ingalls,* for plaintiff, in support of his prescriptive right as to his dam, cited *Bliss* v. *Rice,* 17 Pick. 23; *Melvin* v. *Whitney,* 10 Pick. 295; *Hill* v. *Crosby,* 2 Pick. 466; Angell on Water Courses, §§ 208, 217; 3 Stark. Ev. 1215; *Com.* v. *Low,* 3 Pick. 408; *Coolidge* v. *Leonard,* 8 Pick. 504.

He also contended, that the introduction of the deeds by defendants did not change plaintiff's rights.

The office copy of the deed objected to was not admissible, as the defendant justified under it.

The evidence showed an invasion of plaintiff's rights and in any event he was entitled to nominal damages.

Even if defendants were justified in removing the planks from the dam, they should have been restored to plaintiff, not put upon the premises of defendants.

TENNEY, J. — The plaintiff alleges in his writ, a breach of his close, therein described, by the defendants; the removal of his mill-dam, and the diversion of the water of the river from his mills, caused by the removal, and the taking away of boards, plank, and a chain from the dam. The writ also contains a count for taking away the boards, plank and chain, without the allegation of a breach of the close. The defendants, in a brief statement, justify the acts complained of under the authority of Thomas J. Trask, who it is alleged was the owner of the *locus in quo.*

The plaintiff claims a prescriptive right to maintain the dam across Dyer's river, upon the north shore of which he has mills, and to abut the same upon the south shore, opposite to his mills, and to use all the water raised by the dam. The defendants introduced evidence of title in said Trask, to the close described, and a lease thereof, and other land adjoining from him to them, dated Oct. 16, 1852, for the term of six years, with the right to erect mills upon the same, and to make use of the dam which the plaintiff claims the right

to abut to the south shore of the river, and to use the mills so to be erected till the right under the lease should be determined. A copy of a deed from Thomas Trask, jr., to Thomas J. Trask, was used in defence. It was objected to by the plaintiff on the ground that the defendants justified their acts under the grantor in that deed. By rule 34 of this Court, 1 Greenl. 422, in all actions touching the realty, office copies of deeds may be used in evidence, when the party offering such deeds is not a party thereto, or claims as heir, or justifies as servant of the grantee or his heirs. The defendants having entered the premises described in the writ, and done the acts complained of, at the time they held the lease of the land, cannot be regarded as servants of the grantee within the meaning of the rule, and they do not justify in their brief statement as such, and the copy of the deed was properly admitted.

On March 28, 1814, Jonathan Trask conveyed to the plaintiff twenty-five acres of land, including the gore where the plaintiff's mill stands; and on the 15th day of February, 1823, conveyed to the same one hundred and twenty acres, in one lot, and one hundred acres in another lot, including the gore before conveyed. On August 22, 1826, the plaintiff conveyed to Thomas Trask, jr., all right and title which he had in the one hundred and twenty acre, and the one hundred acre lots, including the gore with covenants of seizin and warranty. On Dec. 29, 1829, Thomas Trask, jr. conveyed to Thomas J. Trask the whole of the one hundred and twenty acre, and the one hundred acre lots, except the gore, but including the *locus in quo;* to wit, the lot on the south side of Dyer's river, upon which the south end of the dam claimed by plaintiff abuts. On April 20, 1841, Thomas Trask, jr., conveyed to the plaintiff the gore, including fulling and grist-mills.

The plaintiff claims no right in the land on the south shore of the river, excepting that acquired by the attachment of his dam thereto. Such right may be enjoyed and not constitute a possession of the land adverse to that of

the owner, which the law presumes, so that the latter is divested of his title after the lapse of twenty years. The abutting of the dam to the south shore would give to the owner of the mills after twenty years, nothing more than an easement. And this confers upon a person who has acquired it, no right to maintain an action of trespass for a breach of the close, against the one having title to the land. *Thompson & als.* v. *Androscoggin Bridge*, 5 Greenl. 62.

But the decision of the case is not put upon the ground that the plaintiff has an easement in the south shore, although that cannot give him a right to maintain an action of this kind for being disturbed in the enjoyment of it. We think it very clear that the plaintiff has no prescriptive right of any kind to the *locus in quo.* The title of the two lots of land called the one hundred and twenty, and the one hundred acre lots, which are on different sides of Dyer's river, and include the gore, which is on the north side of the river, and the place in question, which is on the south side, being in Thomas Trask, jr., under the plaintiff's deed to him, on Aug. 22, 1826, and so continuing till Dec. 29, 1829, the plaintiff could have no right whatever in any of this land by virtue of his former possession; and when Thomas J. Trask took his deed of the *locus in quo*, with other lands on Dec. 29, 1829, he acquired a perfect title thereto; and consequently when Thomas Trask, jr., conveyed to the plaintiff the gore and the mills thereon, it could not include the land on the south side of the river. The plaintiff therefore, on April 20, 1841, when he took his deed of the gore from Thomas Trask, jr., could have had no prescriptive right to the land to which the dam was joined on the south shore, whatever may have been the character of his possession.

The case furnishes no evidence, that Thomas Trask, jr., occupied, in any manner, the south shore after his conveyance to Thomas J. Trask, on Dec. 29, 1829, and the plaintiff could have acquired no possession from him, beyond that of the premises described in the deed which he received in 1841. He must therefore rely for his prescriptive right,

upon his own possession, adverse and exclusive, commencing as early as April 19, 1833, twenty years before the date of the writ. From the year 1826 to the year 1841, he had no title to the gore, the mills, or any other lands referred to in the case. If he occupied the mills, it was in submission to the right of Thomas Trask, jr., from whom he took his deed, at the time last named; and it cannot be assumed without evidence, that thus situated he claimed to hold the dam, which he did not own, abutted to the south shore, adversely to the owner thereof. It is unnecessary to discuss the nature of the possession of the plaintiff, in attaching the dam to the south side of the river, since his deed from Thomas Trask, jr., in 1841, of the gore, including the fulling and the grist mills, because it has not continued a sufficient length of time to give him any rights, even if it had been in all respects adverse. It is proper to remark, that from the evidence of witnesses introduced at the trial, which is uncontrolled, it is quite apparent, that the plaintiff has spoken of the southern shore in a manner entirely inconsistent with any right thereto, in himself, when a party to negotiations to become a purchaser of land on that side of the river. The conclusion is, that an action of trespass, for breaking and entering the close described in the writ, is not maintainable by the plaintiff.

In looking at the origin of the plaintiff's mills, and the dam, and the various conveyances of the same and other lands, disclosed by the case, it cannot be doubted, that up to a recent period at least, and perhaps to the time of the institution of this suit, the dam has been united to the southern shore by the consent of the owner thereof, either express or implied. But there is no evidence introduced and probably none exists, that such consent was given in writing. Consequently, it can be withdrawn at any time, and the owner of the dam might be entitled to take away the materials of which it is composed, without being subject to any thing beyond nominal damages. *Wells & al.* v. *Bannister & al.* 4 Mass. 514. The boards, plank and chain were

so situated as to be personal property. The plank and boards had been a part of the dam; and it does not appear from the evidence, that these were the property of the plaintiff, inasmuch as he had no interest in the mills, land or dam, after his conveyance to Thomas Trask, jr., till the deed from said Trask to him, of the gore and the mills. These premises in the deed would not necessarily comprehend the dam, from which the boards and plank were taken. The chain is shown to be the property of the plaintiff, but there is no evidence, that the defendants used either the boards, plank or chain, any further than they were entitled to do, in making the alterations, which they were authorized to make, by their removal, without appropriating them to their own use. *Plaintiff nonsuit.*

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## Cook *versus* Brown.

In an action for goods sold and delivered, when, to support his claim before the jury, the plaintiff is sworn and produces his book and reads the entries of the charges therein, and testifies that the articles were delivered to the defendant, and no objection is made to the evidence; the Court are not authorized to instruct them that the evidence is insufficient. The inferences from the testimony before them are for the jury.

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

Assumpsit. The charges claimed in this suit were principally such as make up a store account.

The plaintiff produced his day book, and the suppletory oath was administered to him. He read over the entries, and said he had delivered the several articles read over to the defendant. This was all the evidence.

The defendant's counsel requested the instruction, *that*, to recover on this kind of evidence, it is necessary for plaintiff to testify that the entries were made in his book at or about the time of the transactions, and that they are the original entries thereof, and if such testimony is not given by the plaintiff, his book account is not made out, not-

withstanding no questions are asked him on that subject on the cross-examination.

The Judge declined the request, and did instruct the jury that no objection to the introduction of the book containing the charges being interposed by defendant, such book was proper for their consideration.

The verdict was returned for plaintiff, and exceptions to the refusal and ruling were taken by defendant.

*Gould*, in support of the exceptions, cited *Cogswell* v. *Doliver*, 2 Mass. 217; Greenl. Ev. vol. 1, § 118; *Ives* v. *Niles*, 5 Watts, 324; Evans' Pothier, part 4, art. 2, § 4; *Leighton* v. *Monson*, 14 Maine, 208.

*Marble, contra.*

SHEPLEY, C. J. — If objection had been made to their admission, neither plaintiff's books nor his suppletory oath could, upon the facts stated, have been legally admitted in evidence. Testimony appears to have been introduced from the plaintiff without objection, that he had delivered the several articles charged on his book produced to the defendant. The book containing those charges was introduced as testimony, and the charges upon it were read without objection. This testimony the Court could not withdraw from the consideration of the jury. The law has not in this State prescribed the amount of testimony to be produced to entitle a party to recover for goods sold and delivered. It requires that he should produce sufficient testimony to satisfy a jury that they were sold and delivered to the person, from whom payment is claimed, or to another by his request.

The instruction requested was applicable rather to an exclusion of the testimony than to its effect. The Court might properly refuse to instruct the jury what inferences they must or must not draw from the testimony, or what amount of testimony the plaintiff should introduce to be entitled to their verdict. To allow the Court to instruct the jury what precise amount of testimony must be pro-

duced to prove an issue, would enable it to prevent the jury from having any efficient control of the facts of a case.

The remark alluded to in argument, contained in the opinion in the case of *Leighton* v. *Manson*, 14 Maine, 213, appears to have been made in a discussion of the circumstances, under which the books of a party could be admitted as testimony. *Exceptions overruled.*

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† HALL *versus* GLIDDEN.

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In an action on an account annexed, the *entries* of the services performed upon plaintiff's book, with his suppletory oath, *transcribed* from a slate, on which he was accustomed to make his charges from day to day, from *two* to *four* weeks after they were first made, are competent evidence for the consideration of the jury.

In *set-off* a charge for rent of real estate, where there is no contract as to the price, cannot be sustained.

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

ASSUMPSIT, on account annexed.

The plaintiff was a cordwainer, and the account mostly consisted of items pertaining to his trade.

To support his account, his *book* containing the charges, with his suppletory oath, was admitted against the objection of defendant.

It appeared, that he did but a small business; that his charges were first made upon a slate until it was full, and in from two to four weeks from the time they were so entered when the work was done, he transferred them to his book.

An account in set-off was duly filed, and among the items was one for rent where plaintiff's shop stood in Newcastle from June, 1847, to Oct. 1851, at ten dollars per year.

To evidence in support of this charge plaintiff objected, as it was not allowable in set-off, but the Court admitted it.

As to this charge there was much evidence, but none of any price to be paid by plaintiff, and it was disputed whether defendant owned the land where the shop stood.

The jury returned a verdict for plaintiff for sixteen cents. Both parties excepted to the rulings.

*Ingalls & Stinson,* for defendant.

*Hubbard,* for plaintiff.

APPLETON, J. — The verdict in this case was rendered by the jury for the sum of sixteen cents, as the balance in favor of the plaintiff over and above the amount filed in set-off, but both parties being dissatisfied with the result have taken exceptions to the instructions of the presiding Judge, in accordance with which the jury must be presumed to have acted in the discharge of their duty.

The plaintiff was introduced with his book and testified that the charges therein were first made on a slate, when the work was done; that he was accustomed to continue making them till it was full; that he then transferred them to his book, in from two to four weeks from their date; that he did but little business and had no occasion to transfer his charges oftener. To the introduction of the plaintiff's book with his suppletory oath, under such circumstances, exceptions were taken by the defendant.

In *Faxon* v. *Hollis,* 13 Mass. 428, it appeared that the plaintiff, who was a blacksmith, kept a slate in his shop, on which he set down all his charges, as they accrued, and was in the habit of transcribing the entries from the slate into his books, which he kept in the leger form. "The entries in the book," Mr. C. J. PARKER remarks, "may be considered original although transcribed from a slate, the slate containing merely memoranda, and not being intended to be permanent." It is true, it has been held in Pennsylvania, that when the entry has been copied from the slate as late as one or two weeks from that, the books with the suppletory oath of the plaintiff should not be received. But the true principle on the subject has been very clearly and accurately stated by Mr. Justice SARGEANT, in *Jones* v. *Long,* 3 Watts, 325. "The entry need not be made exactly at the time of the occurrence; it suffices if it be within a reason-

able time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which a knowledge of it was derived unimpaired. If done at or about the time, it is sufficient." In this case the source of knowledge was unimpaired, and there is no reason to believe the memory of the facts to have been forgotten when transcription was made. The entry on the slate was at the time the work was done, and from the nature of the case it could not be permanent. It had not been obliterated. It was transcribed by the party making it in the usual course of his business. The evidence we think was properly received, and the degree of credence to which under the circumstances disclosed it was entitled, was a matter peculiarly for the consideration of the jury.

The defendant filed in set-off a claim for rent. The plaintiff's counsel objected to the introduction of testimony to sustain the item for rent for land, as not being a proper item or cause of set-off, but the objection was overruled.

By the statute of 1821, c. 59, § 19, in certain cases the defendant was allowed to file his "account" in offset. But under the construction given to a similar statute in Massachusetts, it would seem that a charge for rent could not be filed in set-off. *Witter* v. *Witter*, 10 Mass. 223.

It is insisted that the law on this subject has been essentially changed by R. S., c. 115, § 27, by which it is enacted that "no demand shall be set off, unless it is founded upon a judgment or contract; but the contract may be either express or implied." Were this the only enactment bearing on the question there would be strong grounds for allowing rent to be filed in set-off, as the liability therefor may be established by express or implied contract.

But § 27 is most materially modified by the succeeding section, which is in these words: "No demand shall be set off, unless for the price of real or personal estate sold, or for money paid, money had and received, or for services done, or unless it be *for a sum liquidated*, or one that may be ascertained by calculation." The demands to be set off

must be upon judgments or contracts, and by § 28, the character of the demands, which may be set off, is clearly defined and determined. This does not enlarge, but on the contrary, restricts the preceding section, by enumerating the several matters to which alone section 27 can apply. An unliquidated claim for use and occupation is not included in the list. It cannot, upon any construction, be considered as embraced in the "price of real or personal estate sold, or for money paid, money had and received, or for services done." Neither can it be regarded as a demand "for a sum liquidated, or one that may be ascertained by calculation." Here was no sum liquidated, nor was there any contract from which, by any calculation, the amount due for rent could be ascertained. The very contract itself and all its terms, were involved in controversy and dispute. The true construction of the words "sum liquidated or one which may be ascertained by calculation," contained in R. S., is to limit them to such judgments or contracts only as that the amount of the defendant's demand can only be ascertained by the judgment or contract itself, or by mathematical calculations on the same. *Smith* v. *Eddy*, 1 R. I. 476. The language of our statute, it has been seen, is like that of the State of Rhode Island, and it should receive the same construction. The claim of rent was erroneously allowed in the set-off of the defendant as a subject to be proved before the jury.

*Plaintiff's exceptions sustained,*
*and a new trial granted.*

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54 561
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CLAPP *& al. versus* GLIDDEN *& als.*

*Lien* claims to be effectual against a purchaser must be perfected by attachment and judgment.

The mortgagee's title to personal property, in sixty days after the condition is broken, becomes absolute by operation of law.

In trover, the action may be defeated by showing, that plaintiff had no title at the commencement of his suit.

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

Trover, for a vessel called the "Kingsbury." This action was commenced in Jan. 1852. The demand was made the latter part of December previous.

The plaintiffs claimed title by a mortgage of the hull, made by Willard Clapp to them in Nov. 1848, and recorded in the town of Newcastle.

This mortgage was subject to a previous one for $200, to one Maddocks & Baker, for having signed as sureties for Willard Clapp, and was duly recorded.

Maddocks & Baker paid about $78, as sureties, which had never been cancelled; and in May, 1853, they assigned their mortgage to defendants for a valuable consideration.

Willard Clapp undertook to build this vessel, but was unable to complete her, and sold her in the spring of 1849, to John Glidden, one of defendants, he agreeing to pay all the lien claims. But no such claims were secured by attachment.

The evidence showed, that he had paid more of such claims than he agreed to pay for the vessel.

The vessel was in the possession of defendants, and they sent her to sea in July, 1849, and in the winter following sold her. On a voyage to California she was soon after lost.

When the evidence was out, it was agreed, that an auditor should report the amount of claims paid by defendant, called lien claims, and making his report a part of the case, the Court were authorized upon the evidence admissible to render a judgment according to law.

*Ingalls*, for defendants, cited *Sheldon* v. *Soper*, 14 Johns. 352; 3 Stark. Ev. 1503; *Kennedy* v. *Strong*, 14 Johns. 128; *Grubb* v. *Guilford*, 4 Watts, 24; Saund. Plead., 2, 1166; 2 Greenl. Ev. § 648.

*Hubbard*, for plaintiffs.

Shepley, C. J. — The action is trover for a vessel called the Kingsbury. During the year 1848, Willard Clapp undertook to build her, and soon became embarrassed and unable

to complete her or to pay the workmen, who had liens upon her. He appears to have sold her to John Glidden during the following winter or spring, who was to pay all the lien claims upon her; and who appears to have paid on account of them more than he had agreed to pay for the vessel. Those claims were never made perfect by any attachment or judgment; and the defendants are not by law entitled to interpose them to defeat any title, which the plaintiffs may have acquired.

In proof of their title the plaintiffs introduced a mortgage of the hull of the vessel, made to them by Willard Clapp, on Nov. 5, 1848, and recorded in the records of the town of Newcastle on Dec. 4, 1848. It was made subject to a prior mortgage "now on said vessel for about two hundred dollars," which appears to have been made by Willard Clapp to John Maddocks and John P. Baker, on October 28, 1848, and recorded in the records of the same town, on Nov. 2, 1848, to indemnify them for having signed as sureties for Willard Clapp a note for $200, bearing date on March 10, 1847, payable to Nathaniel Bryant in four months from date. From the testimony of Maddocks and Baker it appears, that on June 12, 1849, they paid upon that note about $78, which has never been repaid to them. Whatever title they had acquired to that vessel was transferred to the defendants on May 18, 1853.

Any title, which the plaintiffs, as mortgagees, or the defendants, as purchasers from Willard Clapp, had to that vessel, became extinguished, by operation of law, in sixty days after Maddocks and Baker had been compelled to pay part of the note of Bryant.

This suit was commenced on January 12, 1852, and it is insisted, that the defendants cannot be permitted to set up a title in themselves, acquired since that time, to defeat the action. Admitting this position to be correct, the question will remain, whether the plaintiffs, when their suit was commenced, had any legal title to the vessel; for if they had not, the action cannot be maintained.

The cases cited in argument for the defendants, establish the position, that the defendant in an action of trover may prove, that the title to the property claimed was, when the suit was commenced, in a third person, and thus defeat the action. If he could not, he might subsequently be compelled to pay for the same property again to such third person, he being a stranger to the first suit.

The extreme negligence exhibited by Maddocks and Baker, by the plaintiffs, and by the defendants, to secure and enforce their rights, until after the vessel was lost at sea, may not be productive of so great mischief as might have been anticipated. *Plaintiffs nonsuit.*

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93 537
93 540

† CLANCEY *versus* HOUDLETTE *& als.*

Where the proprietors of the Kennebec Purchase in their grants bounded their grantees at *high water*, their subsequent *vote* to extend such grants to *low water*, did not operate to enlarge their original grants.

In the grant of James I., of England, of all the territory of New England to the council of New Plymouth, was also included all the soils, grounds, creeks, seas, rivers, islands, waters and all and singular the commodities and jurisdictions both within the said tract of land lying upon the main, as also within the said islands and seas adjoining.

No surrender of the subject of that grant, or any part thereof, was afterwards made to the sovereign authority.

Under the colonial ordinance no title to the flats, beyond one hundred rods, could be acquired by virtue of owning the upland adjoining.

But the owners of flats beyond that distance, which are subject to the flux and re-flux of the tide, are liable to be disseized by an exclusive and adverse possession.

Such *disseizin* continued for twenty years divests the owner of his title.

A possession open, notorious and exclusive, such as the character of lands so situated will admit, showing a *disseizin* of the true owner, if less than twenty years, will authorize the disseizor to maintain an action of trespass against a mere wrongdoer.

Where upland is conveyed by deed and by a verbal agreement the possession of the flats adjoining is transmitted to the grantee, such possession if continued for twenty years will ripen into a perfect title, and if less than twenty years, a stranger to the title cannot intermeddle with the possession.

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

TRESPASS *quare clausum*. The general issue was pleaded.

After the evidence was out, it was agreed to submit the cause, upon so much of it as was admissible, to the decision of the full Court.

The *locus in quo* was the flats at the confluence and between the Kennebec and Eastern rivers. Over these flats the tide ebbs and flows leaving them bare at low water.

The acts complained of (entering, cutting and carrying away the grass,) were done on that part of it more than one hundred rods from the upland, and the value of the grass was admitted.

Plaintiff claimed title under mesne conveyances from the Proprietors of Kennebec Purchase, and also by possession.

The evidence tended to show, that the owners of the upland had for seventy-five years occupied and controlled these flats.

Plaintiff's title to the upland by deed was not in dispute.

He introduced the vote of the Proprietors of Kennebec Purchase, by which they attempted to enlarge their previous grant of the upland adjoining the premises, to low water mark.

The grants and deeds under which plaintiff claimed are referred to in the opinion of the Court.

*Hubbard*, for defendants, maintained, 1st. That the grants and deeds under which plaintiff claimed limited him to the upland.

2. That he could not claim by virtue of the colonial ordinance, as it was more than one hundred rods from the upland.

3. There was no such possession as the law recognized to gain rights.

4. But by the common law the title to the land between high and low water mark was in the king, and the rivers and their shores over which the tide ebbs and flows. *Com.* v. *Alger*, 7 Cush. 67.

King James the 1st, granted to the council of Plymouth

the territory of New England, (including the flats in controversy,) a portion of which, embracing these flats, was subsequently granted to the colony of New Plymouth, who in their grants never included any rivers and their appurtenances. The flats remain vested in the colony.

But the colony by their ordinance, which is held to operate as a grant, assigned them to the proprietors of the upland, but not to exceed one hundred rods. The State succeeding to the colony, and their rights and property, now holds the same beyond that distance.

5. As citizens of the State, defendants had equal rights with plaintiff to cut the grass beyond the one hundred rods.

*Ingalls & Stinson*, for plaintiff.

To lands thus situated, a good title can be acquired by deed or by possession.

1. By deed. A deed of the upland bounded on the water carries the title to the flats. *Lapish* v. *Bangor Bank*, 8 Maine, 85; *Storer* v. *Freeman*, 6 Mass. 435; *Parker* v. *Bates*, 13 Pick. 260; *Sparhawk* v. *Bullard*, 1 Met. 95; *Austin* v. *Center*, 1 Mass. 231; *Lufkin* v. *Haskell*, 3 Pick. 356: *Com.* v. *Alger*, 7 Cush. 63; *Thornton* v. *Foss*, 26 Maine, 402.

This right to the adjacent flats is not restricted to one hundred rods. It rests on usage, and not the ordinance of 1641, and in no case has this question of extent arisen.

The vote of the propriety of Nov. 11, 1761, extends the grant of lot 84, (the farm in controversy,) to the water, that is, to the water at all times, or low water. 8 Maine, 85.

2. By possession. A valid title to such lands may be acquired by possession, open, exclusive, claiming ownership.

The long continued possession in this case is evidence of a grant.

The plaintiff had possession whether he had title or not, and can maintain this action against defendants, who were wrongdoers, for the disturbance of his possession.

TENNEY, J.—It is admitted by the defendants, that they cut the grass as alleged in the writ; and by the plaintiff, that it was done at a place more than one hundred rods from the upland. It appears from the evidence, that the grounds on which the alleged trespass was committed, were on a point of land extending between Kennebec and Eastern river, to their junction with each other, and where the tide ebbs and flows; that the land is covered at high and is bare at low water at ordinary states of the tides.

The plaintiff claims to maintain his title to the land under deeds of conveyance of the premises; and also by possession. He introduced a deed to himself from his father, David Clancey, dated Oct. 1, 1839, which describes a parcel of land, as follows:—a certain parcel of land situate upon the neck of land between Kennebec and Eastern rivers, and is the southerly part of said neck, and beginning upon the west side of Eastern river at the south line of Capt. Converse Lilley's land, at a rail fence, thence running by said Lilley's land west thirty degrees north across the neck aforesaid to Kennebec river, thence bounded westerly by Kennebec river, running down said river to the southerly point of said neck, and thence bounded easterly by Eastern river from said point, up Eastern river to the bounds first mentioned. The title of the plaintiff's grantor was by a deed from Charles Call, who had all the rights of Philip Call, jr., at the time of the decease of said Philip, dated May 9, 1799, containing a description similar to that in the deed to the plaintiff. Philip Call, jr., held under a grant from the Proprietors of Kennebec Purchase, dated May 8, 1760, describing a parcel of land as follows:—"Beginning on Kennebec river at a marked tree on said river, on the southwesterly corner of Philip Call, sen'r., his land, from thence to run east thirty degrees south one hundred and seventy-six poles, to Eastern river, which line runs on the southerly line of Philip Call, sen'r, his land, thence to run southerly and southwesterly down said Eastern river, on the water's edge, to the southerly point of the neck of land between the Kennebec and the

said Eastern river, at high water, thence to run northerly up Kennebec river to the first mentioned bounds."

It is very apparent that the grant to Philip Call, jr., did not cover the land in dispute, it being entirely below high water.

The vote of the Proprietors of Kennebec Purchase, passed Nov. 11, 1761, if admissible in evidence, can have no effect to enlarge the boundaries of the land conveyed to Philip Call, jr.

If no title to the flats was acquired under the grant to Philip Call, jr., the rights of the plaintiff thereto must be founded upon a disseizin of the Proprietors, made by him or some one under whom he claims.

When the description of land conveyed in the grant of the Proprietors of Kennebec Purchase to Philip Call, jr., is compared with those in the deeds to David Clancey from Charles Call, and to the plaintiff from David Clancey, it will be perceived that the words "high water," in the former, are omitted in the latter. But when the whole is examined, it is at least doubtful whether it was the intention of the parties in the two last named deeds to vary the boundaries of the land as acquired under the Proprietor's grant. And from the view which we have taken of the second ground, in which the plaintiff attempts to maintain this action, it does not become important, that a construction should be given to the language of the description of the land in the deeds to the plaintiff and that to his grantor.

Had the plaintiff such rights, acquired by possession, as will enable him to maintain this action against the defendants, who claim no right to the land by possession or otherwise?

By the letters patent to the council of New Plymouth, dated Nov. 3, in the 18th year of the reign of James I., of England, he granted the territory described, "together also with all the pine lands, soils, grounds, creeks, inlets, havens, ports, seas, rivers, islands, waters, fishings, mines, minerals, precious stones, quarries, and all and singular the commodi-

ties and jurisdictions, both within the said tract of land lying upon the main, as also within the said islands, and seas adjoining." By this grant, the king was divested of his title in the premises, so that the principle, that he is supposed always to be in possession, and no disseizin can be effected, did no longer apply to these lands; but they were liable to disseizin, so far as they were susceptible of an adverse and exclusive possession.

No surrender of the subject of the grant, or any part thereof, was made to the sovereign authority, after the delivery of the letters patent to the council of New Plymouth, so that the power to disseize the owner of the land was taken away.

The lands in controversy could not have been held by the plaintiff under the colonial ordinance of 1641, which is a part of the common law of this State, being more than one hundred rods from the plaintiff's upland adjoining; but they were of a character to be held by such exclusive and adverse possession, that the owner thereof could be disseized. Such lands have always been subjects of conveyance by deed, like uplands, though they have not been attended by all the incidents belonging to the latter, such as carrying the right to adjoining flats, destitute of grass, under the colonial ordinance, without being embraced in the description. "A riparian proprietor with shore flats adjoining may convey his upland without his flats, or his flats without his upland." *Barker* v. *Bates & al.* 13 Pick. 255; *Adams* v. *Frothingham*, 3 Mass. 360. The conveyance of salt marsh or thatch banks for salt hay by metes and bounds is as common as the conveyance of any other lands. *Lufkin* v. *Haskell*, 3 Pick. 356. The fact, that they are covered with water at every tide, does not take away the power of a person to disseize the proprietor of them. The possession may not be so perfect in all respects, and at all times, as of higher lands, but this does not preclude an exclusive and adverse occupation; the causes which will prevent the actual use of the land, when the water is upon

them, by the one, who is in possession when they are bare, will exclude another from obtaining the possession during the same time. Rights in, and perfect titles to such property, have been obtained by disseizin. *Sparhawk* v. *Bullard*, 1 Met. 95; *Thornton* v. *Foss*, 26 Maine, 402.

In looking into the evidence in the case, it appears, that for more than seventy-five years, the flats on which the acts complained of in the plaintiff's writ are admitted to have been done, have been mowed and depastured, by the successive occupants and owners of the upland described in the grant from the proprietors of Kennebec Purchase to Philip Call, jr. And when the upland has been conveyed, the possession taken by the purchasers under such deeds of the upland, has been simultaneously taken of the flats. This possession, by the evidence, has been open, notorious and exclusive, and comporting with the usual management and improvement of a farm by its owner, so far as such management and improvement could take place upon land of the like character. Evidence was introduced by the defendants, that the cattle of others living in the same vicinity were permitted to go upon this land for pasturage; but it appeared further, that this was only when such cattle strayed from adjoining lands without the agency of their owners, who did not at the time claim the right to thus occupy the flats, but conceded the right of the owner of the plaintiff's upland to the exclusive use thereof.

From the facts in the case, it may be well inferred, if the flats were not embraced in the several conveyances of the upland, under which the plaintiff claims after the grant to Philip Call, jr., that by a verbal agreement, the possession of the flats was transmitted from the grantors to the grantees, which would create a perfect title, if continued for the term of twenty years. But if this were not the case, the evidence is plenary, that the plaintiff has held them in such a manner from the time of the conveyance of his father, David Clancey, to him, as to constitute a disseizin, and authorize the maintenance of an action for the acts admitted,

as an invasion of his rights, although the time during which such possession has been in the plaintiff has been less than twenty years. The defendants being strangers to the title, cannot invoke it in their defence, in an action of trespass.

According to the agreement of the parties, the defendants must be defaulted, and damage for the sum of seven dollars and fifty cents.

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† BRYANT, *complainant, versus* GLIDDEN *& al.*

In the trial of a complaint for flowing lands by means of a mill-dam, after the commissioners have been appointed and reported the damages, such commissioners cannot be interrogated whether they exercised great care in their proceedings, and in arriving at their conclusion. The jury are to judge whether the commissioners were inattentive to their duty by their own standard.

Of the duties of commissioners appointed under a complaint for flowing lands.

Of the evidence required to set aside a verdict impeaching such commissioners' report.

Where such report is impeached by the verdict, merely showing that the verdict is erroneous, is not sufficient cause to set it aside, but it must appear that the jury acted under improper influences, or were affected by some bias, or misconceived some of the essential facts of the case.

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

COMPLAINT, for flowing land by means of a mill-dam.

This case was before the Court, 36 Maine, 36, and the nature of it is therein fully stated.

At the trial, the counsel for respondents contended, that in order to impeach the report of the commissioners, the jury must be satisfied that from the evidence adduced before the commissioners by the parties, and by their view of the premises, they were influenced by bias or prejudice, or were inattentive or negligent of their duties in the premises.

The defendants propounded to the chairman of the commissioners, who was a witness, the question — "whether or not they exercised great care in the discharge of their duty in examining the premises, hearing the parties and arriving at their final decision and making their report," which being

objected to by the complainants, was rejected by the Court, but he was permitted to state what they did in the discharge of their duty.

The Court instructed the jury that the report of the commissioners was conclusive, unless impeached by the complainant, to do which the burden of proof was on him to satisfy the jury, that the commissioners in the discharge of their duty, committed an error of such an extraordinary character or grossness as to imply that it was occasioned by some partiality, bias, prejudice, inattention to, or unfaithfulfulness in the discharge of that duty, and that if such error implied the mildest of these terms, such as "inattention to," it was a sufficient impeachment to authorize them to correct or set aside the report.

The jury returned the following verdict:—

The jury find that the flowing of the complainant's land described in his complaint, did occasion damage to the same, and for three years next before the institution of said complaint they assess damages for the complainant in the sum of one hundred and twenty-nine dollars and sixteen cents.

The jury further find that the yearly damages sustained by the complainant by the flowing of his said lands since the institution of said complaint, is twenty-seven dollars and eighteen cents.

The jury further find that it is necessary, that the respondents should hereafter be allowed to flow the round or upper meadow, (so called,) and the lower meadow, (so called,) both embraced in the land described in said complaint, up to the upper margin thereof, which separates the same from the adjoining upland at all times, except as follows: That said round or upper meadow separated from said lower meadow by a line drawn along the northern margin of the canal, (so called,) near the great bluff, ought not to be flowed, and the respondents are prohibited from flowing the same from the tenth day of May to the first day of Sept. in each year.

And the said lower meadow from said margin of said canal,

to a line crossing the opening at the foot of said lower meadow, running parallel with the road near the same, ought not to be flowed, and the respondents are prohibited from flowing the same from the first day of July to the first day of September in each year. And that no future damages will be done to said lands by the flowing of the same as above provided for and regulated.

A motion was filed to set this verdict aside as being against law, evidence and the weight of evidence, and because by it justice had not been done between the parties, but great injustice had been done to the respondents.

Upon this motion the argument of the respondents was confined to the report of the commissioners.

A great number of witnesses was examined, but the nature and bearing of the testimony appear in the opinion of the Court.

*Tallman,* with whom was *Ingalls,* in support of the exceptions and motion.

*Gould,* for the complainant.

TENNEY, J. — Inquiry was made by the counsel for the respondents of one of the commissioners "whether or not, they exercised great care, in the discharge of their duty, in examining the premises, hearing the parties, and arriving at their final decision and making their report." Objection being made, the answer to the question was not allowed by the Court to be received.

It is now insisted, that the question was proper, as attention and care is a fact, independent of any outward appearances, circumstances or acts, being an operation of the mind merely. It was the purpose of the complainant to show, that the commissioners committed an error of such a character, or grossness, as to imply that it was occasioned, at least, by inattention to the discharge of their duty. This error was not attempted to be proved in any other manner, than by the acts of the commissioners, and the result to which they came upon the facts adduced. In the perform-

ance of the service undertaken by the commissioners, what they might have regarded as great mental attention to the transactions taking place touching the business before them, independent of their own action, or the conclusions to which they might come, could be of no importance to the parties. Evidence of a design to do all, which they believed the law required of them, in the discharge of their duty, would not, under the law as settled in this case, protect their report from impeachment, if the jury should be satisfied, that the things which they intended to do, fell far short of the duty, which the law required them to perform, and that their errors were so gross, that in the judgment of the jury it implied inattention to the discharge of that duty. On the principle contended for, the most palpable blunders, which were highly injurious to a party, might be overcome in effect, by the testimony of the one, who committed them, that he was very attentive to all the transactions and intended to do all, which duty demanded of him.

But the argument of counsel is not properly applicable to the question put, and ruled by the Court to be inadmissible. The question was not, whether it was the intention of the commissioner to bestow a great care, but whether such care was not *exercised.*

The complainant attempted to place before the jury the state of things presented to the commissioners when they were upon the ground, and thereby to prove that the results to which they arrived, as shown by the report, were so palpably erroneous, that at least inattention to the discharge of their duty was imputable to them. This was the issue before the jury, to be determined by their conclusions alone, upon the facts in evidence. The conclusions of others from those facts, could have had no legitimate influence, and were inadmissible. The jury were to form their own standard, by which to determine inattention in the commissioners to the discharge of their duty, and by which also they were to measure the degree of care, which should have been exercised by them. Whether the commissioners exercised the

degree of care, which they would treat as great, was not that which could have properly any effect upon the minds of the jury, and the answer to the question proposed was inadmissible.

The respondents rely upon the motion to set aside the verdict for the various reasons assigned therein.

The instructions to the jury being legally correct, we must assume that they were observed till the contrary is clearly manifest. Wherein instructions have been violated has not been shown.

The jury which tried the cause on the original issues before the appointment of commissioners, found that the dam complained of did flow higher than did the former dam, under which the respondents claimed a prescriptive right to flow. The commissioners were bound to keep this fact in view; and notwithstanding the greater light, which may have been thrown upon that question, as well as those which they were called upon to settle, even if it were sufficient to satisfy them of the error of the jury, they were bound to treat that verdict as conclusive upon them, while in the performance of their duty. They found no damage, and if the evidence convinced them, that none had been sustained, they were warranted in so finding. For damages did not necessarily follow the proof of simply a higher flowing. The increased height might be so small, or such was the character and quality of the land, that the additional elevation of the water would cause no damage.

The complainant undertook to impeach the report of the commissioners, by showing such conduct, or remissness in them, in some respects, as would imply the existence of that, which would render the report invalid. To do this, numerous witnesses were introduced, who were examined and cross-examined with great minuteness, and at much length, to show the condition of the old dam, the old mills and other objects, which existed about them and about the pond at the same time, as compared with the new dam, the new mills and fixtures, believed to have a bearing upon the question

at issue. The state of the water in the pond, which is of great extent, at different seasons of the year, and at different places when the old dam was in existence, and also the state of the water, at the same seasons of the year and in the same places, since the erection of the new dam, was attempted to be shown by the complainant. The respondents, on the other hand, introduced evidence upon these several points, by many witnesses, whose testimony was supposed to tend to a different result from that presented on the other side.

A question may have arisen also from the proof, whether the increased height of the water flowed by the new dam over that flowed by the old one, which by some of the testimony appeared to have been very considerable, was occasioned by a higher dam, or by a superior capacity to hold the water, without leakage, or by a greater perfection of the machinery in the mills, which required less water for its operation, and thus from one or both of these causes, the water was retained in the pond and on the adjacent meadows and uplands, a longer period of time in each year.

From all the evidence reported, which is exceedingly voluminous, and in many respects contradictory, the questions in dispute before the commissioners were, as before the jury, many and various. The case as a whole was one of unusual complexity, involving philosophical principles, in connection with disputed facts.

It is not understood to be insisted in argument, that the commissioners were influenced by positive sinister purposes. Their known character and standing in society is such, that perhaps nothing short of clear and overwhelming evidence, would lead the mind to such a conclusion. But they are to be judged by the same law and the same rules, which are applied to every individual, and by them they must stand or fall.

In a case like this, some facts may have so far escaped the notice of the commissioners, and may have been deemed so important by the jury, that in their judgment, the report

could not well consist therewith; and hence the want of this attention, may have been deemed of so extraordinary a character, as to imply such an omission, and disregard of duty as to be a successful impeachment of the report under the instructions given.

We do not by any means intend to suggest, that the commissioners did fall into such errors, for such is not the question before us. The case taken together, is one in which the Court might well doubt, on an examination of all the evidence spread out before it, whether therefrom it could come to a conclusion, which would with absolute certainty comport with perfect justice. The jury have found at least inattention in the commissioners, in the performance of the service undertaken by them; for such was the issue. Before the verdict can be disturbed under this motion, it must satisfactorily appear from the evidence reported, that the jury were under improper influences, guided by prejudice, or affected by some bias, unwarranted by the evidence, or that they in some essential particular, misconceived the facts. And the question now before the Court is, whether the jury conducted thus improperly in finding the commissioners guilty of neglect in the discharge of their duty. This is an important question, and should not be answered in the affirmative, excepting from the evidence which produces conviction in the mind, not simply that the verdict was erroneous, but the direct fruit of those feelings and views which disqualified them to sit as jurors in the case. Such is not the character of the evidence reported, in the estimation of the Court. *Exceptions and motion overruled.*

*Judgment on the verdict.*

APPLETON, J., concurred in the result.

39 465
54 437
70 448
80 465

† CALL *versus* MITCHELL.

Actions before a justice of the peace, may be *once* continued for a term not exceeding *thirty days*, by another justice, on account of his absence at the time fixed for trial. A second continuance for the same cause, or a trial therein by *another justice*, after thirty days from the return day, is illegal, and a judgment rendered thereafter is invalid.

Jurisdiction of magistrates cannot be conferred by assent of parties. It is merely a statute regulation.

Although the trial of an action before a magistrate is a nullity for want of jurisdiction, and on appeal the action is dismissed, the prevailing party is still entitled to his costs.

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

This was an appeal from the judgment of a justice of the peace. The writ was returnable before one Bailey on Feb. 21, 1853.

On the return day, the justice being necessarily absent, the action was continued by Cyrus Cotter, Esq., another justice of the same county, to March 19, following.

When the time of adjournment had expired, Bailey being still necessarily absent, Cotter entered the action to be tried before himself, and continued the same to April 9, 1853, when the parties appeared, the general issue was pleaded and joined, a trial had, and judgment rendered for the defendant. The plaintiff appealed and entered into recognizance with sureties to prosecute his appeal.

The defendant filed a written motion to dismiss the action for want of jurisdiction of the justice to try the action, and render the judgment appealed from.

That motion was granted, and the Judge also ruled that defendant was entitled to costs.

*Hubbard*, in support of the exceptions, relied upon a waiver by the defendant, by pleading the general issue; and that here was subsequent assent, by which jurisdiction was restored. 1 Cow. 245; 7 Wend. 202.

*Ingalls* and *Stinson*, *contra*, that the justice had no jurisdiction, cited *Spencer* v. *Perry*, 17 Maine, 413; as to costs, *Turner* v. *Putnam*, 31 Maine, 557; *Cary* v. *Daniels*, 5

Met. 236; *Jordan* v. *Dennis*, 7 Met. 590; *Hunt* v. *Inhabitants of Hanover*, 8 Met. 343.

TENNEY, J. — This action was brought, to be tried by Elias Bailey, a justice of the peace, on Feb. 21, 1853. On the return day of the writ, the justice was necessarily absent, and Cyrus Cotter, another justice of the peace for the same county, continued the action to March 19, 1853, at which time justice Bailey was again necessarily absent, and justice Cotter being otherwise engaged, continued the action to April 9, 1853. On the day last named the parties appeared, and the general issue was pleaded and joined, and upon a hearing, judgment was rendered for the defendant that he was not guilty and for his costs; from which an appeal was taken by the plaintiff, and brought into this Court.

If a justice of the peace, by reason of sickness or any unforeseen cause, is unable to attend at the time and place by him appointed for holding a court, any other justice in the county, &c., may continue such cause once, not exceeding thirty days, &c., and in case the disability of the justice, to whom the writ was returnable, is not removed at the expiration of the time of adjournment, such action may be entered before, and tried by any justice of the peace of the same county at the time and place to which it was adjourned. R. S., c. 116, § 14.

The justice who tried the cause, had twice continued it, and the hearing was more than thirty days after the return day of the writ. The justice had no jurisdiction when he entered the action, and heard the parties. *Spencer* v. *Perry*, 17 Maine, 413.

It is however insisted by the plaintiff, that the defendant having pleaded the general issue, and upon a hearing having obtained a judgment in his favor, has waived all defects and irregularities in the proceedings. R. S., c. 116, § 30, has provided, that in all cases, except those mentioned in the first section, the defendant shall plead the general issue, and need not file any brief statement. By doing what the stat-

ute required, the defendant has lost none of his rights. But an express waiver of all objection to the jurisdiction of the justice, or consent that he should exercise it, does not confer jurisdiction, when none existed by law. *Williams* v. *Burrill*, 23 Maine, 144.

After the appeal was entered in this Court, it was proper for the defendant to appear and present his rights and have them protected, notwithstanding the trial was a nullity. Without the irregularities being brought to the attention of the Court, the defendant might be defaulted, and judgment be entered against him. The authorities referred to by him, are decisive upon this question. The dismissal of the action was a termination of proceedings thereon. The defendant was the prevailing party, and is entitled to his costs in this Court. *Exceptions overruled. Judgment in favor of the defendant, for costs.*

39 467
46 442

† ERSKINE *versus* DECKER.

A purchaser of real estate, for a full consideration, of one who has the recorded title, without any knowledge that it was held under a fraudulent conveyance, will be protected in his title against the creditors of the fraudulent grantor.

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

WRIT OF ENTRY.

The demandant's title originated in a levy upon the premises as the property of Nathaniel Leighton.

The tenant claimed title, and it appeared that Nathaniel Leighton conveyed the premises to Abiel Erskine in Oct. 1849, which deed was acknowledged and recorded on Dec. 19, 1849.

That on the same day Erskine conveyed the same to Sarah A. Leighton, wife of Nathaniel, which was then recorded; and on Oct. 26, 1850, Sarah A. and her husband conveyed the premises to tenant, who paid $800 therefor, and the latter deed was also recorded on Nov. 5, 1850.

It was contended by demandant that the deed from Nathaniel Leighton to Erskine was fraudulent, and in consequence the other deeds conveyed no title.

(The report did not show when the levy was made, but it is supposed to have been made after the tenant had purchased.)

It was agreed that if in the opinion of the Court this action can be maintained on proof that the deed from Leighton to Erskine was fraudulent and void, the cause is to stand for trial; otherwise a nonsuit to be entered.

*Hubbard,* for the tenant.

*Ingalls,* for demandant.

TENNEY, J. — The demandant claims to hold a title to the land in question under a levy of an execution against Nathaniel Leighton in favor of James Erskine, which had been assigned to him previous to the extent upon the premises; and by a deed from James Erskine to himself.

The tenant holds under a deed from Sarah A. Leighton and Nathaniel Leighton, given to him on Oct. 26, 1850, recorded Nov. 5, 1850. Sarah A. Leighton had a conveyance of the same from Abiel Erskine, by deed dated Dec. 19, 1849, and recorded the same day. Abiel Erskine took a deed from Nathaniel Leighton on Oct. 6, 1849, recorded Dec. 19, 1849. The deed last mentioned was resisted, as fraudulent, and it was contended that the other deeds conveyed no title.

The evidence adduced was reported; and by the agreement of parties, upon that evidence, unless the demandant can maintain his action by showing merely, that the deed from Nathaniel Leighton to Abiel Erskine is fraudulent and void, he is to become nonsuit. His right to recover is not to depend upon the question whether the tenant had notice of such fraud, if it existed, or of the circumstances under which that deed was given. Nothing is presented in the evidence, tending in the slightest degree to prove, that he had any knowledge whatever of the facts touching that conveyance. When he took his deed, there is no suggestion

that he did not pay a full consideration therefor; and the prior deeds of the land from Nathaniel Leighton to Abiel Erskine, and of the latter to Sarah A. Leighton, were duly recorded. And the tenant, being an innocent purchaser, for consideration, is entitled to hold the premises according to the settled doctrine of the law. *Goodale, adm'r,* v. *Nichols,* and *Sutton* v. *Lord,* reported in 1 Dane's Abr. 631, as having been decided in the county of Essex, the former in 1793, and the latter in 1808. The same principle is recognized in *Somes* v. *Brewer,* 2 Pick. 184, and in *Rowley* v. *Bigelow,* 12 Pick. 307; also in *Neal* v. *Williams,* 18 Maine, 391, and numerous other authorities.

*Plaintiff nonsuit.*

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39 469
67 246

† BEALS, *complainant, versus* FURBISH.

The accusation and examination of the complainant under c. 131, R. S., may be made *before* as well as *after* the birth of the child; and are not required to contain allegations of an accusation in time of her travail, or of constancy therein.

Nor is it necessary to state the *precise time* when the child was begotten. If charged as having transpired between the first and fifteenth of the month recited, it is sufficient.

That the complainant may be a competent witness, she must accuse the respondent at the time of her travail and remain constant in such accusation.

This requirement at the time of her travail is satisfied, if her accusation is made during the *interval* of her pains.

If, in her *declaration,* she allege the child was begotten on or about a certain day, it is a compliance with the statute. The *certainty* in criminal matters is not required in these proceedings.

After a verdict against the respondent in a bastardy process, it is no ground for a new trial, that the jury found the child was begotten at a later time than that charged in the complaint and declaration.

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

COMPLAINT under c. 131, R. S., relating to bastard children and their maintenance.

The accusation was made April 21, 1854, and the child was born on the 12th of the same month. In this accusa-

tion her pregnancy is alleged to have commenced from the first to the middle of July, 1853.

Her declaration in Court fixes the time she was made pregnant, on or about the 12th day of July, 1853.

When the cause came on for trial, a motion was made to quash the proceedings because the complaint did not allege any accusation of respondent during the time of her travail, or that she remained constant in that accusation, and time and place were not alleged with sufficient certainty.

This motion was overruled and respondent required to plead.

Evidence was offered by complainant that during her travail she accused the defendant of being the father of her child, and had been constant in such accusation, and evidence was introduced by defendant tending to contradict it; but it appeared that in the *intervals* of her pains she did accuse the respondent.

The complainant was permitted to testify.

Evidence was produced by respondent tending to prove that he was absent from the place where the child was alleged to be begotten and that part of the State from July 2d to July 19th, of 1853.

The respondent requested the instruction that the time and place being required to be stated in the accusation and declaration, are material averments, which she is required to prove, and is not at liberty to disprove, and to charge and prove an offence at another time and place; but the Court instructed the jury that *time* in this process was immaterial, and that if they were satisfied from all the evidence in the case, that the respondent was the father of the child, they would find for the complainant, though it should appear that the child was not begotten between the 1st and 15th of July, 1853.

The jury were required, if they found for complainant, to find whether the child was begotten between July 1st and 15th, of 1853.

A general verdict for complainant was returned, and they

answered the interrogatory that the child was not begotten between the 1st and 15th of July, but probably after.

Exceptions were filed by the respondent, and a motion to set the verdict aside as being against law and the weight of evidence.

*Lowell, Thacher & Foster,* in support of the exceptions.

The *time* was not stated in the complaint as required in c. 131, § 1, R. S. The complainant ought not to have been admitted as a witness, as she did not accuse the respondent "during or at the time of her travail." c. 131, § § 7, 8, R. S., and c. 1, § 1, clause 1. Webster's Dict. "Travail." *Blake* v. *Junkins,* 35 Maine, 433; *Maxwell* v. *Hardy,* 8 Pick. 560, and 21 Pick. 132.

But if admitted she should have been confined to testify to the matters alleged in her accusation. The time stated was material, and she should not have been allowed to contradict or vary it. R. S. c. 131, § § 1, 7; *Foster* v. *Beaty,* 1 Maine, 304; *Rice* v. *Chapman,* 10 Met. 6.

*Gould, contra.*

APPLETON, J. — It is urged that the proceedings before the magistrate taking the accusation and examination of the complainant, should have been quashed, because it is not alleged therein that she accused the respondent of being the father of her bastard child, at the time of her travail, and that she has continued constant in her accusation.

By R. S., c. 131, § 1, the accusation and examination of the complainant may be made before the birth of the child, which "if born alive may be a bastard." By § 8, the accusation of the complainant at the time of the travail, that the person accused is the father of the child of which she is about to be delivered, and constancy in such accusation are required to render her a competent witness. These facts are not, by § 1, to be inserted in the preliminary proceedings. From the nature of the case, it must be so, because the process before the magistrate may be had, and the accused required to give his bond before the birth of the child.

It is next objected that the time and place when and where the complainant's child was begotten were not stated in said complaint and warrant, with reasonable and sufficient certainty.

The allegation is, "that she was between the *first and fifteenth days of July*, 1853, made pregnant with a child, and which was a male child, born alive, on the twelfth day of April, A. D. 1854." The statute, § 1, only requires that the justice "shall take her accusation and examination on oath respecting the person accused, *and the time and place, as correctly as either can be described, when and where the child was begotten*, and all such other circumstances as he may deem useful in the discovery of the truth."

No complaint is made that the place is not described with sufficient certainty. The objection taken relates only to the allegation as to time. In *Tillson* v. *Bowley*, 8 Greenl. 163, in the examination before the magistrate, it appeared that the complainant had charged the respondent with being the father of a child with which she was then pregnant, which she alleged was begotten on or about the 11th of April, without saying in what year. The complaint bore date Nov. 7, 1829. WESTON, J., says, "it is impossible to mistake what April was intended," and the Court sustained the proceedings. In *Marston* v. *Jenness*, 12 N. H. 144, an objection similar to the one in the case before us was taken, in reference to which GILCHRIST, J., remarks, "we have already held, that a complaint under this Act was not a complaint for an offence, in *Marston* v. *Jenness*, 11 N. H. 156, and it follows that the strictness usually required in criminal proceedings is not requisite here." *Robie* v. *McNuce*, 7 Verm. 419, a complaint was held to be a civil process and amendable, and that the certainty as to time required in criminal proceedings was not necessary. "We consider the verdict," says WILLIAMS, C. J., "has cured any defects if there were any in the proceedings, even as the complaint was before the amendment."

The complainant was properly admitted. Her accusation

of the father was made "at the travail," after the pains of labor had commenced, and before the birth of the child, and she is none the less competent because it was made in a temporary interval of comparative freedom from pain. Indeed it is not easy to perceive at what other time it could have been made.

In the declaration filed in pursuance of § 7, the allegation is that the child was begotten on or about the 12th day of July, 1853. This section requires that the declaration should state the time and place, when and where the child was begotten, "with as much precision as the case will admit." The certainty in criminal proceedings is not necessary. The declaration is sufficient within the statute.

The jury rendered a general verdict of guilty, and upon inquiry by the Judge, answered verbally that "the child was not begotten between the 1st and 15th days of July, 1853, but probably after." This in no way changes the verdict or detracts from its effect. The gist of the matter before the jury was, whether the child of which the complainant had been delivered, was begotten by the defendant, and not on what particular day it was begotten. He was equally liable whether it was on the 12th or the 16th of July, as by the verdict it might have been. As to the main fact in the case, the jury found no difficulty. As to the time they could hardly be expected to be more accurate than the mother, and it would be a novel course of procedure to grant a new trial because the jury could not on their oaths say on what particular day conception took place.

The verdict rests on the testimony of the complainant. The attention of the jury was clearly and forcibly directed to all the circumstances tending in any measure to diminish the force and effect of her statements. The degree of credit to be given to her as a witness was a matter for them to determine. From the evidence as reported, there is nothing indicating any such error on their part as to the facts, as according to well settled principles would require or justify our interposition. *Exceptions and motion overruled.*

† GOWDY *versus* FARROW.

An offer in writing in an action pending in Court, made by the defendant's attorney in these words, "and now on this third day of the term the defendant, by his attorney, comes and offers to be defaulted for the sum of seventy dollars damages in said action;" is a compliance with § 22 of c.115, R. S.

And an offer so made, unaccepted, cannot be used as evidence for any purpose in the trial of the action.

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

ASSUMPSIT, to recover $87,50, for work on a school-house, which defendant had contracted to build. The writ was dated soon after the work was performed.

At the first term an offer "to be defaulted for the sum of seventy dollars, damages in said action," was filed.

On the trial, a witness for defendant testified to declarations of plaintiff, while performing the labor, that he was to have one half his pay when the house was completed and accepted, and the other in one year after.

To contradict that witness the plaintiff offered to read the offer to be defaulted, which was denied by the Court.

The verdict for plaintiff being only for $46,92, the plaintiff excepted to the ruling.

*Hubbard*, in support of the exceptions, denied that this was a statute offer, and so was not exempted from being used as evidence.

*Gould, contra.*

TENNEY, J. — In c. 115, of R. S., which treats of proceedings in civil actions in Court, § 22, it is provided, that in any action founded on judgment or contract, "the defendant may offer and consent in writing to be defaulted, and that judgment may be entered against him for a specified sum in damages." This provision was undoubtedly intended to furnish an opportunity to a defendant, in order to put a stop to litigation, and consequent costs, to admit his liability for a certain amount, when the other party claimed in his suit a greater sum in damages; and thereby present an inducement to the latter to accept the offer, and release

himself from the exposure to further litigation and the recovery of costs by the defendant, in consequence of a verdict for a sum no greater than that offered. It does not appear to have been designed to afford any greater advantages to the plaintiff under such a judgment than those to which he would be entitled by a judgment entered upon a verdict in his favor.

To prevent any further dispute between the parties after an offer to be defaulted, should be made and accepted, it would be proper in many cases at least, that the amount of the defendant's indebtedness should be fixed. A default would not necessarily do this, in actions on contracts, where the damages were not liquidated. A hearing might be required after the default by the Court or the jury. In all cases, where the defendant should not deny his liability to some extent, but the controversy should be wholly as to the amount, a simple offer to be defaulted would be, if accepted, a withdrawal of his appearance, and allow the hearing of the plaintiff on the question of damages, when such question should arise, to be *ex parte*, which would probably not be expected to be so favorable to him, as it would be, if he could be fully heard, or his offer of the amount should be satisfactory to the other side. The statute was intended to be broad enough to embrace all actions where an offer could be made; and it was necessary therefore, to carry out the designs of its authors, that all further defence to an action, and also all questions of damages should be determined by the offer, if it should be accepted. Hence the propriety, that the sum, for which judgment might be entered, should be specified. When the offer to be defaulted, and the sum in damages named is accepted, the plaintiff is immediately as much entitled to judgment, as he would be if the offer were in the identical language of the statute.

The offer in writing of the defendant in this case "to be defaulted for the sum of seventy dollars damages in said action," is equivalent to an offer to be defaulted, and that judgment may be entered against him for that sum; and

comes within the description of an offer, which cannot be used as evidence before the jury in the trial of the action, in the statutes of 1847, c. 31, § 2.

*Exceptions overruled.*

## COUNTY OF KENNEBEC.

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j100 339

*In the matter of* JOHN HERSOM, *on writ of Habeas Corpus.*

The Act incorporating the city of Augusta, provided for the establishment of a municipal court consisting of one judge, who should have concurrent jurisdiction with justices of the peace in all matters civil and criminal within the county of Kennebec.

Justices of the peace can exercise jurisdiction over no offences not given by some statute. It is never to be presumed.

By c. 170, R. S. they are authorized to punish by fine, not exceeding ten dollars, persons convicted of certain offences, and to try all offences within their jurisdiction, and to sentence those convicted according to law, but under that Act have no authority to imprison.

By c. 167, § 14, it is provided that "all fines and forfeitures given or limited by law in whole or in part, to the use of the State, may be recovered by indictment in the district court when no other mode is *expressly* provided."

The punishment for a violation of § 2, c. 166, of the laws of 1855, being by a fine of *twenty dollars*, and *imprisonment* of the offender, puts the offence out of the jurisdiction of a justice of the peace, without some *express* provision to that effect. No such provision is found in that Act.

And a conviction under that section, of a violation of its provisions, before the judge of the municipal court of Augusta, and sentence thereon, are illegal and void.

THE petitioner represented to the Court that he was illegally imprisoned in the jail at Augusta, and prayed for a writ of *habeas corpus*.

By a copy of the mittimus annexed to the petition, it appeared that a complaint had been made under oath against

him for an illegal sale of intoxicating liquors, before the judge of the municipal court for the city of Augusta, under § 2, of c. 166, of the Acts of 1855, on which complaint he was convicted before the judge of that court, and sentenced to pay a fine of twenty dollars and costs of prosecution, and to be imprisoned in the jail at Augusta for thirty days.

Under this sentence the petitioner was now in prison.

The writ was granted and made returnable before the full Court on June 25, 1855, and notice ordered to the State's Attorney for the county of Kennebec.

On the return of the writ, the case was fully argued by *Vose*, County Attorney, against the discharge of the prisoner, and by

*Lancaster*, for the petitioner.

The prisoner was remanded to await the advisement and determination of the Court. On June 28, the opinion of the Court, (TENNEY, J., on account of indisposition not being present at the hearing, and taking no part in the decision,) was drawn up and delivered by

SHEPLEY, C. J. — From the return made by the prison keeper to the writ of *habeas corpus*, it appears, that the prisoner was committed to prison on June 9, 1855, by virtue of a mittimus issued by the judge of the municipal court for the city of Augusta, reciting, that the prisoner had been tried and found guilty by him, of having on the fifteenth day of May, 1855, sold one quart of brandy to George W. Doe, contrary to the form of the statute; and had been tried by him and sentenced to pay a fine of twenty dollars and costs of prosecution, taxed at five dollars and sixty-one cents, and to be imprisoned in the county jail for the term of thirty days, and stand committed till said order be complied with.

By the eleventh section of the Act incorporating the city of Augusta, approved on July 23, 1849, it is provided, that there shall be established a municipal court to consist of one judge, "who shall have concurrent jurisdiction with justices of the peace in all matters civil and criminal within the

county of Kennebec;" and jurisdiction in all cases of simple larceny where the property shall not exceed in value the sum of twenty dollars. His general jurisdiction of offences, other than larceny, is to be ascertained from the jurisdiction which justices of the peace have; and they, by the R. S. c. 170, are authorized to punish by fine "not exceeding ten dollars" persons convicted of certain enumerated offences; and to try all offences within their jurisdiction and to sentence those convicted according to law. They are not authorized thereby to impose a fine exceeding ten dollars, or to imprison, for any time whatever. By particular provisions in other statutes they are authorized as in cases of larceny to punish by a fine not exceeding twenty dollars, and by imprisonment not exceeding six months. But their general jurisdiction is not thereby enlarged. No statute has been cited or noticed, giving to them a general jurisdiction of offences with power to impose a fine to the amount of twenty dollars, or to imprison a person for any time. Such a jurisdiction, if it exists, must be derived from some statute specially conferring it.

By the Act for the suppression of drinking-houses and tippling shops, approved on June 2, 1851, provision was made by the fifth section, that "any forfeiture or penalty arising under the above section may be recovered by an action of debt, or by complaint before any justice of the peace or judge of any municipal or police court, in the county where the offence was committed." By the section referred to, as above, the sale of intoxicating liquors was prohibited. Here the jurisdiction was specially conferred; but by the Act approved on March 16, 1855, that Act and the Act approved on March 31, 1853, were repealed, saving all processes then pending, and leaving them in force for the punishment of all offences committed under them. Justices of the peace cannot, therefore, have any jurisdiction by virtue of the Acts of 1851 and 1853, of any such offence committed since the first day of May, 1855, when the Act of 1855 took effect. If they have jurisdiction to punish

for offences committed since that time by the sale of intoxicating liquors in violation of the provisions of the second section of the Act of 1855, it must be derived from some provision contained in that Act. No such jurisdiction is conferred, or attempted to be conferred, by the second section, which prohibits the sale.

There is a provision contained in the nineteenth section, that "any penalties or forfeitures, the recovery of which is not otherwise provided for in this Act, may be recovered by complaint or indictment in any Court proper to try the same." This does not determine what Court is proper to try the same, but leaves it to be ascertained from existing laws. No provision has been found in any section of the Act of 1855, expressly conferring upon justices of the peace, or municipal or police judges, any jurisdiction of the offence of which the prisoner was found to be guilty.

By the eighth section of the Act they have jurisdiction to try and punish persons found to be guilty of certain offences therein named; but this does not include offences against the provisions of the second section. It is insisted that jurisdiction is conferred upon them, by implication, from provisions contained in several of the sections.

Provision is made in the twentieth section for an appeal from the decisions of such judge or justice of the peace, and for recognizances to be by them taken in cases, which might arise out of violations of the provisions of the second section.

Provision is also made for appeals from their decisions, by the twenty-ninth section, by language appropriate to authorize them in cases arising under the eighth section over which they have jurisdiction. Being suited to authorize appeals in such cases, no inference can be drawn that appeals from decisions made under the second section were intended.

By the thirty-first section, provision is made that "whenever in this Act fine and imprisonment are the punishment provided for the offence charged, it shall be the duty of the justice or court to sentence the convict to both fine and imprisonment." This language is applicable to offences arising

under the 8th section, and no inference can be drawn that it authorized punishment to be inflicted for offences against the second section.

By the thirty-second section, forms of process to be used are prescribed, and it is declared that they "shall be deemed sufficient in law, for all the cases arising under this Act, to which they purport to be adapted." Among these forms is one for a complaint to be made to a justice of the peace, that the person accused, at a certain time and place, "did sell a quantity of intoxicating liquors" contrary to the form of the statute. There is also a form for a warrant to be issued by a justice of the peace on such a complaint and a form for a recognizance to be taken by him in case of an appeal from his decision, finding the accused guilty of such an offence.

Neither of these forms contains any allegation or recital of a forfeiture of twenty dollars, or that the accused is liable to be imprisoned for thirty days. Such allegations or recitals are not necessary to their legal validity, and the omission of them is only noticed to show that no words are used in the forms conferring a jurisdiction to punish by imposing a fine of twenty dollars, or an imprisonment of thirty days. They cannot therefore inflict such a punishment by virtue of these forms. And a court cannot exercise jurisdiction over an offence when it cannot inflict the punishment prescribed for it by statute. *Com.* v. *Curtis,* Thatcher's Crim. Cases, 202.

By the words "shall be deemed sufficient in law for all cases arising under this Act to which they purport to be adapted," no more is meant, than, that they shall be deemed legal and sufficient *forms* to be used in such cases. The mere enactment of correct and legal forms to be used for the prosecution and punishment of an offence, cannot confer jurisdiction upon a court or magistrate. If so, and the words "one of the justices of the peace" were stricken out of the complaint, and the words judge of probate, or county commissioner, were inserted, then a judge of probate

or county commissioner would have jurisdiction, without any other provision of law conferring such jurisdiction upon them. The same remark would be applicable to the provision authorizing appeals to be made from the decisions of justices of the peace. A provision authorizing an appeal from the decision of a court in criminal cases, cannot give the tribunal from which the appeal is allowed to be made, jurisdiction in all such cases.

It is an established rule of law that the jurisdiction of an inferior court, or magistrate, is never to be presumed. It must be clearly exhibited.

The enactments in the various sections of the Act of 1855 do clearly show, that they were made upon the assumption or supposition, that municipal and police judges and justices of the peace had jurisdiction. If from such enactments, then, jurisdiction might be conferred by implication; then it might be, if it were capable of proof, that the provision contained in the Act of 1851, expressly conferring such jurisdiction, had been originally inserted in the Act of 1855, and had been upon deliberate consideration, stricken out for the very purpose of depriving them of such jurisdiction. It is said that the intention of the Legislature to confer such a jurisdiction is clearly ascertainable from the provisions of the Act, and that such intention should be made effectual. The intention of a legislative body is by the law regarded as a rule for a court to determine what construction the language which the Legislature has used should receive. But no rule of construction is known, or admitted, by which a clearly perceived defect, or omission in legislation to accomplish an important purpose in criminal law, has been, or can be supplied by inferring it from language used for another purpose not suited nor intended to supply that defect.

If the intention of the Legislature could be used legally for the purpose of making the law what they supposed it was, and intended it should be, instead of a rule of construction to ascertain from the language used what enactments it had really made, this difficulty would remain, that no person

can conclude, or believe that the Legislature intended, by the mere enactment of the forms, to give jurisdiction. The intention to give jurisdiction by the forms does not therefore exist. If forms alone are relied upon, the form of complaint for a single sale is not a form addressed to a municipal or police judge, and no provision is made that such form for a complaint shall be so varied as to make it applicable to such a judge.

Even in the construction of wills, in which the intention of the testator is to be preëminently the guide of the court, that intention cannot, however clearly discoverable, be made effectual, if there be found in the will no language used by which the object can be accomplished.

In the case of *Pickering* v. *Langdon*, 22 Maine, 413, the opinion states, "but the court is not authorized to supply omissions by adding words even for such a purpose. The intention is one thing; and the execution of that intention by the testatrix, another. She must execute her intentions by the use of some language to give tothe Court the power to execute them to make them effectual."

If the Court were to supply a clear defect of legislation to give magistrates a criminal jurisdiction, it would exhibit an act of judicial legislation forbidden by the constitution.

The case of *Commonwealth* v. *Leach*, 1 Mass. 59, referred to by the Attorney for the State in this county as one, in which the jurisdiction of the former court of general sessions in a criminal case was implied, does not authorize such a conclusion.

The Court held, that jurisdiction had been conferred upon justices of the peace by the adoption, in that State, of the statutes of Edward III., expressly conferring such jurisdiction.

The construction of the law respecting the punishment of offences for selling intoxicating liquors, in violation of the second section of the Act of 1855, appears to be this. The Legislature has, by enactments, provided for suitable forms to be used by justices of the peace for the punishment of

such offences, and has provided for appeals from their decisions upon the supposition, that they had jurisdiction. That supposition is ascertained to be wholly unsupported and without foundation. To hold that those magistrates have thereby acquired jurisdiction, would be to make the erroneous supposition of a legislative body the foundation, and the only foundation, upon which a jurisdiction could rest empowering such magistrates to imprison the persons of the citizens. The introduction of such a principle into the administration of criminal law, cannot be admitted.

The rule of law respecting the criminal jurisdiction of courts, is thus stated by Espinasse on Penal Statutes: "with respect however to statutes giving jurisdiction, a difference must be observed as to the superior and inferior courts. The courts above may have jurisdiction by implication, as in the cases of penal statutes, mentioned; such as *Rex* v. *Mallard*, ante fol. 9, prohibiting any matter of public concern under a penalty, but without appropriating it, and which is a debt due to the crown, and recoverable in the court of exchequer. That might be sued for in the courts above, though they are not named; *but no inferior court or jurisdiction can have cognizance of any penalty recoverable under a penal statute, by implication.* They *must be expressly mentioned* in the statutes themselves, and *cognizance given to them in express terms.*"

This language was adopted and sanctioned by the Court in the case of *Bowers* v. *Green*, 1 Scam. 42, in which the opinion states, "jurisdiction not having been *given expressly* to justices of the peace, we are of opinion that the justice in this case had no jurisdiction." Whether the doctrine as stated by Espinasse, that superior courts have jurisdiction by implication, can be applicable to courts existing under our institutions, it is not now necessary to determine.

All doubt, if any exists, on this subject, may be removed by presenting the provision contained in statute c. 167, § 14, which is in these words: "all fines and forfeitures given or limited by law in whole or in part, to the use of

the State, may be recovered by indictment in the district court when no other mode is *expressly* provided."

By the twenty-seventh section of the Act of 1855, it is provided, that "all fines, penalties, and costs, and all sums paid on recognizances as in this Act provided, shall be paid into the county treasuries of the respective counties for the use of the State."

When therefore no other mode of recovery is *expressly* provided, such fines and penalties were to be recovered by indictment in the district court. The whole jurisdiction of that court, was by the Act of 1852 transferred to this Court, in which such fines and penalties are now recoverable by indictments; and for violation of the provisions of the second section of the Act of 1855, offenders may, on proper complaint, be brought before municipal or police Judges, or justices of the peace having jurisdiction, and may be by them bound over to answer for such offences in this Court.

*Petitioner discharged from imprisonment.*

APPLETON, J., remarked that he was not then prepared to concur.

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LAWTON *versus* BRUCE.

To secure the exemption of a homestead from attachment and levy for the debts of the owner, it is essential that a certificate, as indicated in § 4, of c. 207, of Acts of 1850, should be filed with the register of deeds, in the county where the land is situated.

Unless it clearly appears from the certificate, that exemption is claimed from the debts mentioned in § 1, of that chapter, it will only be effectual against such as accrue after its record.

But to be effectual against the debts provided against in § 1, it must appear, that the debtor was at the time of the contraction of such debt, the *owner* and *continued* to be such owner at the time of filing the certificate of the land to be exempted.

He cannot by such certificate effectuate an exemption from debts which originated *prior* to the time he acquired *title* to his land, although *after* Jan. 1st, 1850.

ON FACTS AGREED.

EJECTMENT.

The demandant's title rests upon the recorded levy of an execution. The tenant claims title by virtue of c. 207, of the Acts of 1850.

Demandant recovered his judgment on August 23, 1851, and had the same levied on June 29, 1852. The lot of land, with the buildings, did not exceed in value five hundred dollars.

A portion of the debt on which judgment was rendered accrued after Jan. 1850.

The land in controversy being tenant's homestead, was first conveyed to him by a recorded deed on April 17, 1849; and on August 11, 1851, he conveyed the same to William W. Bruce.

William, afterwards, on May 6, 1852, conveyed the same back to the tenant; and on the 8th day of the same May, he caused his certificate, claiming the same as his homestead exemption, to be recorded.

If the Court shall determine that the action is maintainable, the tenant is to be defaulted; otherwise a nonsuit to be entered with costs for the prevailing party.

*F. Allen*, for tenant.

1. Section 1, of c. 207, is absolute and unconditional; the lot shall be exempt from levy for all debts contracted *after* Jan. 1, 1850. The debt here was so contracted.

2. The 4th § of this Act is in the *alternative*. The head of a family *may* file a certificate; it is not imperative; not necessary in order to protect the homestead. It is only for the sake of convenience, only *prima facie* evidence of certain facts.

3. A creditor may show it to be untrue. It is a legislative mode of legalizing evidence which would not otherwise be so. The debtor is under no necessity of filing such certificate, it only facilitates his proof; his homestead is protected without it.

*North & Fales*, for demandant, maintained 1st, that a certificate of record was necessary in all cases before an ex-

emption can exist; that the very language of § 4 clearly demands it.

2. That if this view is in conflict with § 1, the answer was, that this section must yield to § 4. The last must stand. 6 Mod. R. 267; Co. Litt. 111 and 115.

3. But if both sections are to be reconciled, it may be done by applying them to two classes of cases; § 1, to those who owned and were in actual possession of a homestead at the time the Act took effect; § 4, to those who acquired a homestead after the Act took effect. This view will be strengthened by considering the Act of 1849, which was repealed by the Act of 1850.

The Act of 1849, exempted the *real estate* of a resident citizen to the amount of $500, from any debt contracted after Jan. 1, 1850; the Act of 1850, § 1, continued and confined the exemption to strictly a homestead, changing the general exemption of *real estate* to that only of a certain description.

By § 4, provision was made for those, who had not acquired a homestead at that time, but should afterwards, and might wish to have it exempted from debts, contracted after the certificate should be recorded.

Notice seems to have been intended in any event by the Legislature.

4. If either construction should prevail, the tenant had no case, for under the first no record was made, until the debt was contracted and judgment rendered; and under the second he did not acquire the lot until May, 1852, and made his record thereafter.

APPLETON, J. — On Aug. 14, 1849, an Act, c. 135, "to exempt homesteads from attachment and levy or sale on execution," was passed, which by its terms was "to take effect from and after the last day of December next." By this Act, real estate to the value of five hundred dollars was protected from seizure and sale, or levy on execution against its owner.

The Act of 1849 was repealed the following year by stat. c. 207, by the first section of which lands and buildings not exceeding five hundred dollars in value were exempted from "seizure or levy upon any execution issued on a judgment recovered for any debt contracted jointly or severally, after the first day of January in the year of our Lord one thousand eight hundred and fifty," which was the day when the Act repealed was to have taken effect. The design of this section, though varying from the law of the preceding year, which had exempted the real estate of the debtor claiming the benefit of that Act from levy or sale on execution "on any debt contracted after the passage" of the Act, was apparently intended to preserve and continue the rights acquired by the first statute and which but for this provision might have been lost.

It is provided, by c. 207, § 4, that the head of any family or any householder, wishing to avail himself of the benefits of *this* Act, may file a certificate, by him signed, declaring such wish and describing the property, with the register of deeds in the county where the same is situated; and upon receiving the fees now allowed for recording deeds, such register shall record the same in a book kept by him for that purpose; and so much of the property in said certificate described as does not exceed the value aforesaid, shall be forever exempt from seizure or levy on any execution issued on any judgment recovered for any *debt contracted jointly or severally by the person signing said certificate, after the date of the recording thereof;*" and the record in said register's office, shall be *prima facie* evidence that the certificate, purporting to be there recorded, was made, signed and filed, as appears upon such record, and "*upon being recorded as aforesaid,* the property as described *in the first section of this Act shall be exempted within the provisions thereof.*" By this section it is apparent that all wishing to avail themselves of the provisions of this Act must file their certificates, and that unless this be done, they cannot claim the exemptions thereby allowed. The statute provides for

two classes of exemptions; by § 1, from debts contracted after Jan. 1850, and by that in § 4, from debts accruing after the date of the recording of the certificate. But the record in each case is required for the protection of the public. The certificate should express clearly the exemption claimed, so that the public may be advised of the class of demands from which the estate is to be protected. If the debtor claims under § 1, "the property *as described* in the first section of this Act shall be exempted within the provisions thereof," otherwise, the date of the recording of the certificate is the limit of indebtedness to which the estate is exposed.

In this case, the defendant owned the land in dispute on the 1st of Jan. 1850, and would have been within the provisions of § 1, had he retained his title and filed his certificate. But on the 11th of Aug. 1851, he conveyed the land to William W. Bruce, and by that conveyance, it at once became liable to attachment, for the right of exemption conferred by the statute is not transferable. The defendant, upon the conveyance of the estate, became divested by his own act, of all right to assert any of the privileges conferred by statute.

On May 6, 1852, the defendant again acquired title by a conveyance from William W. Bruce, and on the next day made his certificate, as required by statute, which was recorded on May 8. His rights, consequently, originated under the last conveyance, and are limited by its date. But the debt upon which the judgment was rendered, and on which the execution issued upon which the plaintiff's levy was made, accrued prior to the date of the deed under which the defendant now claims. He cannot, therefore, claim exemption under § 4, as the judgment was recovered on a debt contracted prior to the recording of his certificate.

By the agreement of parties, as the defence is not established, a default must be entered. *Defendant defaulted.*

TENNEY, J., took no part in the opinion, not being present at the argument.

FRANKLIN BANK *versus* BYRAM.

For payments made by their cashier on *checks overdrawn*, the bank may maintain an action against the drawer.

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

ASSUMPSIT.

The writ contained one count for money had and received, and another for money paid, laid out and expended.

A specification of plaintiffs' claims described them as for money paid out on defendant's checks, and they were presented.

After the evidence was introduced, it was agreed to submit the cause to the full Court upon the testimony, with power to draw inferences as a jury might, and if the action is maintainable, an auditor to be appointed to audit the accounts between the parties, whose report shall be final, and judgment to be entered thereon; but if otherwise, a nonsuit to be entered.

The Court found that the cashier had permitted the defendant to overdraw.

*Evans*, for defendant.

No action can be maintained by a bank against the drawer of a check, which it has paid. A check is no evidence of indebtedness to the bank. A check only shows that the party drawing had money in his hands. Story on Prom. Notes, § § 487, 488, 489.

It is always supposed to be drawn upon a previous deposit of funds. 2 Story's R. 519.

Payment of a check by a bank is an admission of having funds of the drawer. It is drawn, not upon credit, but on one's own money. It is a breach of trust to pay it without funds. It is also a breach of law, and neither can be presumed, nor allowed to be proved. Banking Law of the State. "*Ex turpi causa non oritur actio.*" *Lancaster Bank* v. *Woodward*, 18 Penn., cited in Am. Dig. 1853, p. 90, § § 50, 52.

*Usage* to pay such checks, is not admissible. Same case cited.

It is sometimes said, that checks are bills of exchange to all intents. As between drawer and holder, they may resemble each other in several particulars; as between drawer and drawee no resemblance. Story on Prom. Notes, § 489, note 5, § 498, note 2.

The distinction is pointed out in *Woodruff* v. *Merchants' Bank*, 2 Hill, 673; Story, § 490, note 1; *Smith* v. *Poor*, 37 Maine, 462.

*Paine*, for plaintiffs.

APPLETON, J. — The evidence tends satisfactorily to show that the defendant has in his hands the funds of the Franklin Bank, which its cashier permitted him to overdraw.

It is insisted that such overdrawing is a loan, and as such within the prohibition of R. S., c. 77, § 19, which forbids any bank to make any discounts without at least two responsible names as principals, sureties or indorsers, and that no action can be maintained for any funds of the bank which may be proved to be in the defendant's hands or to have been paid on his check. But this cannot be regarded as correct. It is no part of the duty of the cashier to make discounts. The loans of the bank are to be effected through the agency of its directors. No loan is shown to have been made by the bank; no discount by its directors within any meaning which can be properly given to either the word loan or discount. This case is not therefore within the provisions of § 19.

The declaration contains the money counts, on which the plaintiff seeks to recover what is equitably due. If the cashier, without authority, misappropriates the funds of the bank; if he violates his trust; if he pay away money wrongfully and that money can be traced into the hands of one conusant of his breach of trust and participant in his wrongdoings, it is difficult to perceive why redress should be denied the bank. In this view, it is immaterial whether it is

paid out on a check or not. If the drawer of the check has no funds, the cashier is under no greater obligation to pay than if it were a mere verbal request. The overdrawing and the payment of the check overdrawn are both wrongful acts. If in such case the money of a bank has been misappropriated by its cashier, without the knowledge or consent of its officers, there is neither law nor equity in permitting the recipient to retain what he has received without right. The plaintiff may consequently recover the amount shown to have been overdrawn.

The authorities cited by the learned counsel for the defendant upon examination fail to sustain the position upon which the defence rests. In *Hacker* v. *Anderson*, 21 Wend. 372, it was held that an action cannot be maintained on a bank check, against the drawer, until after notice of presentment and non-payment, and that a check is in effect and form a bill of exchange. As between the immediate parties to a bill, the consideration may be inquired into, and it may be shown that nothing was due when the acceptance was given, or that it was in whole or in part an accommodation. So as between the parties the acceptance of a bill is presumptive evidence of funds in the hands of the acceptor. *Kendall* v. *Galvin*, 15 Maine, 131. "A check of itself," says WOODWARD, J., in *Lancaster Bank* v. *Woodward*, 6 Harris, 357, "is not evidence of a debt or loan of money. The presumption is that it was given in payment of a debt and that cash was given for it at the time." In that case no such question was raised as is here presented. "It was attempted to prove a custom to pay overdrafts of solvent dealers with banks, but it failed, and if it had not failed such a custom should be abolished. *Malus usus abolendus est.*" But it is not intimated in that or in any case, that if an overdraft has been paid by the cashier, that it cannot be recovered back by the bank from the individual thus overdrawing. The defence is alike without foundation in law and in morals.

According to the agreement of the parties, as the ac-

tion is maintainable, an auditor is to be appointed, whose report is to be final, and judgment to be entered thereon.

TENNEY, J., being unable to be present at the argument, took no part in this decision.

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## YOUNG *versus* WESTON *& al.*

A memorandum and promise in writing by the makers of a note to pay it *in any time within six years* from the date of the writing, is in law, a promise to pay on demand.

To such a promise the limitation bar begins to run from its date.

And such new promise, though *attested by a witness*, is not a promissory note, but is subject to the limitation bar after six years.

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

ASSUMPSIT, upon the following promissory note: — "Jan. 22, 1836, value received, we promise to pay our own order at the Franklin Bank, Gardiner, seven hundred fifty dollars eighty one-hundredths in sixty days and grace.

"Benj. & Nathan Weston."

The note was indorsed by the makers. Partial payments were indorsed upon the note in July, 1838, and May, 1842. This suit was commenced Nov. 9, 1849.

The general issue and statute of limitations were pleaded.

The signature and partnership of defendants were admitted.

Plaintiff read in evidence, though objected to, a writing signed by the defendants, by their said partnership name, and witnessed by H. Stevens, who had since deceased, dated at Gardiner, Jan. 21st, 1842, as follows: "We hereby promise and agree to pay in any time within six years from this date, a note held by the Franklin Bank for seven hundred and fifty dollars eighty one-hundredths and interest on the same, dated Jan. 22d, 1836."

The Court were authorized on the evidence admissible to draw inferences as a jury might and render judgment by nonsuit or default.

*J. S. Abbott*, for defendants.

1. The note being without a witness, and without any payments made upon it within six years before the commencement of this suit, is barred by c. 146, § 1.

2. The memorandum is subject to the same limitation. It is in no way connected with or attached to the note; but is separate and distinct.

3. But if it attaches to the note, it cannot be construed to give the note life for more than six years from the date of the memorandum. It did not suspend or defer the collection of the note for a single day.

4. No action could be maintained upon the memorandum alone. It is without any consideration of itself.

*H. W. Paine*, for plaintiff.

1. The Court, sitting as a jury, may well infer that the note referred to in the writing is the note in suit, the amount, the date, year, month, and day, place payable, all leave no doubt of it.

2. The writing was therefore a renewal of the note and passed with it to the indorser.

3. The promise was to pay at any time, *at the election of the signers*, within six years, and therefore, no cause of action existed till the expiration of that time, otherwise no effect can be given to the words "within six years."

4. The attestation of the writing was such as avoids the statute bar. *Com. Ins. Co.* v. *Whitney*, 1 Met. 21; *Warren Academy* v. *Starrett*, 15 Maine, 443.

APPLETON, J. — This action is brought upon a note of the defendants for $750,81, dated Jan. 22, 1836, payable to their own order in sixty days from date and by them indorsed. The writ is dated Nov. 9, 1849. The statute of limitations is relied upon as a defence.

To avoid the bar of the statute thus interposed to prevent his recovery, the plaintiff introduces the following memorandum signed by the defendants: —

"We hereby promise and agree to pay *in any time with-*

*in six years from this date,* a note held by the Franklin Bank for seven hundred and fifty dollars, eighty-one hundredths, and interest on the same, dated Jan. 22, 1836.

"Gardiner, Jan. 21, 1842.

"Benj. & Nathan Weston."

"Attest, H. Stevens."

On May 23, 1842, the interest on the note to July 12, 1842, amounting to $174,02, and the further sum of $424,98, were received and indorsed upon the note.

It was held in *Little* v. *Blunt,* 9 Pick. 488, that "a new promise is regarded as a new cause of action, upon which the statute operates in the same manner and for the same period of time as it did before in the original cause of action." When a note or bill is payable on demand, the statute of limitations runs from the date of the instrument, and not from the time of demand, because the right of action accrues immediately upon giving the note. On a note payable with interest on demand, the statute of limitations begins to run from the date of the note. "The debt," remarks Mr. Baron PARK, in *Norton* v. *Ellam,* 2 Mees. & Wels. 461, "which constitutes the cause of action arises instantly on the loan. When money is lent simply, it is not denied that the statute begins to run from the time of lending. Then is there any difference when it is payable with interest? It is quite clear, that a promissory note, payable on demand, is a present debt, and is payable without any demand, and the statute begins to run from the date of it, then the stipulation for compensation, in the shape of interest, makes no difference, except that thereby the debt is continually increasing *de die in diem.*"

Where a promissory note is payable "on demand with interest after six months," it is due presently. *Rice* v. *West,* 2 Fairf. 323. A promissory note payable on demand, but not to draw interest during the life of the promisor, will support an action upon it immediately after it is given; consequently, the statute of limitations commences running from its date, and not from the decease of the promisor.

*Newman* v. *Kettelle,* 13 Pick. 418. There is no difference between a note payable "*when demanded*" and one payable *on demand.* In both cases the statute of limitations begins to run from the date of the note. *Kingsbury* v. *Butler,* 4 Verm. 458. So too with a receipt for borrowed money, whereby the borrower agrees to pay "whenever called upon to do so." *Waters* v. *Earl of Thanet,* 2 Q. B. 757.

The promise in this case, is to pay "*in any time within six years* from this date." The defendants were bound to be ready at any and all times. It is therefore to be regarded as a promise to pay on demand, and a suit might have been commenced immediately.

But however that may be, the note seems to have been presented and partially paid on May 23, 1842, from which time a period of more than six years has elapsed.

The statute of limitations will defeat the plaintiff's claim to recover, unless he can bring himself within the provisions of R. S., c. 146, § 7, by which an exception is created in favor of "a promissory note which is signed in the presence of an attesting witness." But the memorandum of Jan. 21, 1842, does not purport to be, and is not a promissory note. It is merely a separate promise referring, probably, to the note in suit, and is neither within the spirit nor letter of this section. In *Gray* v. *Bowden,* 23 Pick. 282, it was held, that an indorsement on a promissory note acknowledging it to be due, signed by the maker and attested by a witness, is not an attested promissory note within the meaning of the R. S., c. 129, § § 4, 7, of Massachusetts, which is similar to the statute of this State, upon the same subject, to which reference has been had. The new, as well as the original promise, are alike subject to the statute bar of six years. The action cannot be maintained.

*Paintiff nonsuit.*

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## VINING *versus* GILBRETH.

In the sale of personal property, *delivery* is essential to its validity, as against the creditors of the vendor.

But where the article sold is ponderous, a *symbolical* or *constructive* delivery will be sufficient.

Thus, the sale of a shop will be effectual against creditors, by the delivery of its *key*, and that too at a place distant from the shop sold.

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

TRESPASS for taking and converting a shoemaker's shop situated in Mount Vernon.

The defence was, that defendant, as deputy sheriff, attached the shop as the property of one Jonathan Vining, on a demand of *his* creditor.

The plaintiff, being in Massachusetts and a clerk in a store, claimed title from Jonathan by a bill of sale, made Sept. 2, 1850, at Hallowell, where the key was delivered to him, and he paid $50 down and gave up a note he had against him for about the same amount. He kept the key about an hour, and then gave it back to Jonathan.

Jonathan Vining built the shop in 1850, in Vienna, and in Feb. 1851, hired a piece of land in Mount Vernon and moved it there, and continued to occupy it to the time of the attachment, and from time to time offered to sell the same. He did not disclose the sale to plaintiff. The presiding Justice ruled, that the delivery of the key of said shop was a sufficient delivery of the shop to the plaintiff, if made for that purpose at the time, and so understood by the parties.

The verdict was for plaintiff and defendant excepted to the ruling.

*Kempton*, for defendant.

The doctrine of symbolical or constructive delivery has never received particular favor from courts, and is only allowed when the thing sold does not admit of actual delivery. 2 Kent's Com. 500.

There are some few cases when the delivery of the key

has symbolized the transfer of goods deposited in a warehouse, and the wines deposited in a cellar, but none where the house and cellar have been thus held delivered.

Here the parties were not present at the place where the shop was, nor in the same town; the plaintiff does not appear to have ever seen the property. In such case the delivery of the key and the continuance of the vendor in possession, can give no rights against his creditor. *Cobb* v. *Haskell,* 14 Maine, 303; *Shumway* v. *Rutter,* 8 Pick. 443.

Between the vendor and vendee no objection could be made to this delivery; with them the *intentions* and *understandings* of the contracting parties must govern.

As between a creditor and the vendor some other rule than the *intentions* and *purposes* of the parties to the contract, must be established. The doctrine of the instruction disposes with the formalities of sale and the elements of contracts.

*Paine,* for plaintiff. The jury have found the sale *bona fide;* in such cases slight evidence of delivery is sufficient. *Shumway* v. *Rutter,* 8 Pick. 443.

Here was the sale of a shop and incapable of manual delivery; passing over the evidence of the property is enough. *Rice* v. *Austin,* 17 Mass. 197; *Jewett* v. *Warren,* 12 Mass. 300; *Boynton* v. *Veazie,* 24 Maine, 286.

A symbolical delivery, showing the purchaser's right to take possession and the right of control, is all that is required. *Ludwig* v. *Fuller,* 17 Maine, 162.

APPLETON, J. — It is well settled that a shop built upon the land of another, with his consent, remains the personal property of the builder.

In the sale of personal property, the delivery of the thing sold is necessary as against every one but the vendee. As to him the title passes without delivery. The delivery may be actual or symbolical. Where the goods are so situated as to admit of no delivery, the sale will be valid

without it. *Ricker* v. *Cross,* 5 N. H. 571. Where the articles sold are ponderous, a symbolical or constructive delivery will be equivalent in its effect to an actual one. So when goods sold are in a warehouse, the delivery of the key has been deemed sufficient. The delivery of wine in a cellar is held to be made by a delivery of the keys of the cellar. The title to a ship at sea may pass by a delivery of the bill of sale. In this case the shop was unsusceptible of manual tradition from its bulk. The delivery of the key was as complete a delivery as the subject matter reasonably admitted, and if in good faith, is sufficient to pass the title. 2 Kent's Com. 393; *Ludwig* v. *Fuller,* 17 Maine, 162.

The good faith of the sale is fully affirmed by the finding of the jury. *Exceptions overruled.*

*Judgment on the verdict.*

TENNEY, J., did not sit.

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PETTENGILL *versus* PATTERSON, *Executor.*

Suits against executors must be commenced within four years from the time they give their bond and notice of their appointment, except in certain cases specified in the statute.

Where a creditor, having a claim against an estate which is not due until the four years have expired, unless *within that period,* it has been filed in the probate office, he can have no remedy against the executor.

And where the obligee in a bond given by the testator has recovered judgment for its penalty and execution for such sum as was due, against the executor, within the *four years* from the time he accepted his trust, *scire facias* will not lie *after* the four years have elapsed, to obtain execution for subsequent instalments.

ON FACTS AGREED.

SCIRE FACIAS.

The defendant was executor of the last will and testament of Foxwell F. Pettengill, and was qualified to act on Dec. 27, 1847.

His testator, with four other children, had given a bond in

$2000 to the father, Howard Pettengill, and Annie his wife, conditioned to furnish support to his wife, during her life.

Howard Pettengill died before the execution of the bond, but in his will he charged his lands with its performance.

At the October term of this Court in Kennebec county, 1851, the plaintiff recovered judgment against defendant as such executor, for the penalty of the bond, and execution was directed to issue for eleven instalments of $22 each, and costs.

That execution was paid in Nov. 1851, and Oct. 1852.

The present suit, the plaintiff still living, was commenced Feb. 4, 1854.

If the suit is maintainable, a default is to be entered and the amount of judgment to be made up by the Court; otherwise a nonsuit to be entered with costs for the prevailing party.

*Vose*, for defendant, contended that this action was barred by the statute of limitation. R. S., c. 146 § 29, and c. 120, § 23; *McLellan* v. *Lunt*, 14 Maine, 254.

If the plaintiff had a demand not due against the estate, the statute provides the way to obtain it. c. 120 § 25. If she has neglected that course, the law has cut her off from this.

*Lancaster*, for plaintiff, replied that this was not an original but judicial writ, and was a mere continuation of the original action, and the statute would no more apply to this than to that. But that was in season. *Morton* v. *Morton*, 4 Cush. 518.

APPLETON, J. — By R. S., c. 146, § 29, no action can be maintained against an executor or administrator after the expiration of four years from the date of his appointment, and notice thereof, except in the cases mentioned in R. S., c. 120, "where the provisions are distinctly stated." In *McLellan* v. *Lunt*, 14 Maine, 254, it was held that a writ of *scire facias*, as well as an action of debt, commenced more than four years after the appointment of an executor or administrator, though founded upon a judgment recov-

ered within four years, was barred by the statute of 1821, c. 52, § 26. This action is consequently barred, unless saved by the provision of R. S., c. 120.

By R. S., c. 120, § 23, the same limitation as to actions against executors and administrators, is enacted as in c. 146, § 29, subject only to the exception of "cases after mentioned." By § 24, provision is made for the case where assets have been received after the expiration of the period of four years.

The only section which is applicable is the twenty-fifth, by which it is provided when the demand of any creditor, "founded on any covenant, contract or agreement, shall not accrue within four years," that "the claimant may file such demand in the pobate office within said term; and the Judge of Probate shall *direct* the executor or administrator to *retain* in his hands assets, if there are sufficient, *unless* the heirs to such estate, or the devisees thereof, shall *give bond*, with sufficient surety or sureties, in the opinion of the Judge of Probate, to such executor or administrator to respond to the same." When the security above referred to is given, the executor or administrator is not allowed to retain in his hands the assets of the estate for the purpose of meeting the demands referred to in § 25, but the remedy of the creditor is upon the bond. If no bond is given, then by § 27, the claim is to be brought against the executor or administrator.

It was obviously the intention of the Legislature, that four years should be a perfect bar to all actions, except in the cases specifically mentioned. The plaintiff does not bring herself within any of the statutory exceptions. Her claim was contingent and uncertain, depending upon the duration of her life. No demand was ever filed in the probate office. More than seven years have elapsed since the defendant assumed his trust as executor. If no demand is filed in accordance with § 25, the executor has no right to retain the assets of the estate. That right exists only when the demand is filed, and the heirs or devisees refuse to give the

required bond, and upon such refusal the Judge of Probate shall direct him to retain such assets as may be sufficient to satisfy the demand filed. The defendant, if in no fault, should not be held, unless he has retained assets to meet the present claim. That he could not do without the direction of the Judge of Probate. The plaintiff cannot complain that assets have not been retained, inasmuch as she has never filed in the probate office the demand which she now seeks to enforce.

In *Morton* v. *Morton*, 4 Cush. 518, no question as to the effect of the statute of limitations arose. *Scire facias* is undoubtedly the proper remedy to revive a judgment, but when barred by lapse of time, it cannot be maintained. Such is the condition of the present plaintiff. Her right to maintain the present suit is barred by statute.

*Plaintiff nonsuit.*

TENNEY, J., did not sit in this case.

39 501
57 410

TRAFTON *versus* GARDINER.

The authority of an officer to arrest the body of the defendant, in an action of trespass, rests upon the want of property to be attached.

An attachment of property *and* an arrest of the body are unauthorized by the same writ.

But when a return of an attachment has been made upon the writ, the officer cannot justify a subsequent arrest of defendant, by showing that he did not own the property attached, or that it was ineffectual.

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

This action was trespass for false imprisonment. With the general issue the defendant filed a brief statement, justifying the acts complained of as done in discharge of his official duties, as deputy sheriff.

The defendant had a writ in trespass against the plaintiff & al. in his hands for service, having upon it directions to attach real estate. On this writ he made the following return: —

"Kennebec ss. June 5, at 6 o'clock, P. M., 1852. I have attached all the right, title and interest that the defendants have in and unto all real estate in the county of Kennebec, and within five days filed in the office of the register of deeds for Kennebec county, a true and attested copy of this attachment, together with the date of the writ, the name of the parties, the sum sued for and the court to which the writ was returnable, and afterwards, by order of E. A. Chadwick, plaintiff's attorney, on the 12th day of October, 1852, I arrested the bodies of the defendants, and them conveyed to the county jail in Augusta and delivered them to the keeper thereof, together with a copy of this precept."

In that suit judgment was obtained and execution satisfied by a levy upon real estate attached on the writ, but it appeared that the *plaintiff* had none within the county that could be attached.

It appeared that the arrest and imprisonment of plaintiff were made in pursuance of the verbal instruction of the attorney of plaintiff in that suit.

Defendant requested the instruction that the officer was authorized by the writ to arrest the body of plaintiff and to commit him to prison, if he failed to furnish a bond for his release.

The Court declined so to instruct the jury; but did instruct them that after making the attachment, as appears by his return on the writ, the officer had no authority by virtue of said writ to arrest the body of plaintiff or commit him to prison.

The verdict was for plaintiff.

*Bradbury & Morrill,* for defendant.

1. In his precept, the officer was commanded to attach property or hold to bail. He had not executed his writ by attachment of property, and the writ had not performed its office. 25 Maine, 110, and cases there cited.

2. The officer does not, in his return, affirm that he had *actually* attached property. It is rather a statement of

what he had done, upon the supposition that plaintiff had property.

*Clay*, for plaintiff. The writ did not authorize the officer to take *both* property and the body, and when he had taken *one*, it afforded him *no authority* to take the other. The same writ cannot be used both as a capias and writ of attachment.

The return is evidence of the attachment, and that before the arrest. Having selected the mode of service, he cannot afterwards take another. *Brinly* v. *Allen*, 3 Mass. 561; *Almy* v. *Walcott*, 13 Mass. 73; *Miller* v. *Miller*, 25 Maine, 110; *Miller* v. *Scherder*, 2 Conn. 262.

SHEPLEY, C. J. — The right of a creditor to attach the property or to arrest the body of his debtor, rests upon the provisions of our statutes.

It does not appear to have been the intention to permit a creditor to take the property of a debtor from his possession, or to create a lien upon it, and at the same time to arrest his body. Hence the frame of the writ is such, that an attachment and an arrest are not commanded or authorized at the same time. This was the condition of the law, while this State composed a part of the Commonwealth of Massachusetts. *Almy* v. *Walcott*, 13 Mass. 73.

In this case the defendant, as a deputy of the sheriff, made his return on a writ in favor of William C. Watson against the plaintiff and William Trafton, that he had on June 5, 1852, attached all the right, title and interest of the defendants in all real estate in the county, and that he had within five days filed with the register of deeds a regular notice of it. On October 12, 1852, he also returned on the same writ that he had arrested the bodies of the defendants and committed them to prison.

The plaintiff did not prove to have had any real estate in the county liable to be attached. But the authority of the officer to arrest the body was not made to depend upon the fact, that the property attached was owned by the debtor,

or upon the fact that the attachment should prove to be effectual, but upon the want of property to be attached. And that want cannot be alleged to exist, when an attachment of property has been returned upon the writ.

*Exceptions overruled.*

TENNEY, J., was not present at the hearing and took no part in the opinion.

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BOWKER *versus* PORTER *& als.*

The jurisdiction of justices of the peace and quorum in hearing a poor debtor's disclosure must appear from the record of their proceedings.

Thus, a certificate by such justices that a poor debtor made a disclosure and they administered to him the oath required, on a day named, and that *such hearing* before them was in pursuance of a *previous adjournment* without certifying any time from which such adjournment was had, is invalid.

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

This is an action of debt, on a poor debtor's relief bond.

The defence was that he took the oath prescribed by law within the six months mentioned in the bond.

By the records the creditor was cited to hear the disclosure on the 17th June, 1852. The disclosure was on 22d of same June.

The counsel for the creditor testified that he appeared when and where the plaintiff was cited, and that the debtor did not appear on that day.

James O'Donnell and J. Pierce, jr., were the magistrates before whom the disclosure was taken.

The copy of the record, certified by Justice O'Donnell alone, stated that on the *eighteenth* day of June, 1852, the debtor presented the citation, in due form and duly served and returned, and that the debtor was then and there ready and willing to make a full disclosure, and the creditor neglecting to appear and select a justice, he (O'Donnell) adjourned the hearing for twenty-four hours, when Josiah Pierce, jr., a justice of the peace and quorum, was returned

on said citation by the officer and he accordingly appeared and acted in concert with the said justice.

The other copy of record was under the hands and seals of said O'Donnell and Peirce as justices of the peace and quorum, and stated the examination of the debtor and that they administered the oath to him required.

A portion of the record was as follows: — "Cumberland ss. On the twenty-second day of June, A. D. 1852, *pursuant to previous adjournment*," *&c.*

On so much of the testimony as was admissible, the Court were authorized to determine the rights of the parties by nonsuit or default; if by default, the defendants to be heard in damages.

*Bradbury & Morrill*, for defendants.

The justices' certificate is conclusive as to notice, and evidence to contradict it is inadmissible. *Baker* v. *Holmes*, 27 Maine, 153.

The certificate and record of justices show that all the statute requirements have been complied with and cannot be contradicted by evidence *aliunde*. *Clement* v. *Wyman*, 31 Maine, 52.

*S. Lancaster* and *A. Gile*, for plaintiff.

Nothing is to be presumed in favor of the jurisdiction of these justices. *State* v. *Hartwell*, 35 Maine, 129; *Libby* v. *Main*, 2 Fairf. 344; *Granite Bank* v. *Treat*, 18 Maine, 340.

There is no evidence, that the *two* justices acted at all until the 22d of June, and then *they* had no jurisdiction; the record shows none.

The parol evidence is admissible to show want of jurisdiction and also to show *fraud* which vitiates proceedings of courts of justice. 2 Starkie on Ev. 587.

APPLETON, J. — That the authority of inferior magistrates to act, must appear from the record of their proceedings, and that nothing is to be presumed in favor of their jurisdiction, are familiar and well settled principles of law.

From the record before us, bearing date June 18, 1852, it appears that the debtor appeared on that day to disclose, and "the creditor having neglected to appear, by himself or attorney, to select a justice of the peace and quorum to hear said Porter's disclosure, the undersigned, a justice of the peace and quorum, residing in Portland, in the county of Cumberland, appointed by said debtor, adjourned the hearing of said disclosure for the space of twenty-four hours, when Josiah Pierce, jr., a justice of the peace and quorum, was returned on said citation by an officer, to wit: R. A. Bird, deputy sheriff, to attend in behalf of said Bowker, and hear said disclosure; and he accordingly did appear and acted in concert with the undersigned." This is signed by the magistrate chosen by the debtor. What the magistrate thus appointed did in concert with the one selected by the debtor is not disclosed, nor is any adjournment stated to have been made by them jointly or severally.

From the certificate of the magistrates, it seems that they met and heard the disclosure of the debtor on the 22d of June, but, from aught that appears, they might as well have met on any other day. There is no day from which the adjournment was had to the day of the disclosure. No authority for the magistrates to meet on that day is shown, and without proof of such authority, they could have had no jurisdiction. The disclosure consequently can afford no defence.

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69 175
78 323

*Defendants defaulted. — To be heard in damages.*

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HUBBARD *versus* AND. & KEN. RAILROAD CO.

In claiming damages of defendants for the bad condition in which they left the passage-way from the highway to his tavern stand, the plaintiff cannot show that the carriages of travelers were upset by reason of defendants' omission.

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

TRESPASS *quare clausum.*

The defendants' railroad passed in the vicinity of the plaintiff's premises; and the latter proved that the defendants had dug down and widened the wrought part of the highway, between their location on the west, and his tavern house on the east, and had thereby rendered difficult the access from the highway to his house.

There was some evidence tending to show a breach of plaintiff's close.

The plaintiff also proved, that on two occasions the carriages of travelers had been upset in attempting to pass from the highway to his tavern house.

This evidence was objected to, but admitted by the Court.

A verdict was returned for plaintiff.

*J. H. Drummond* and *H. W. Paine*, for defendants.

The evidence objected to should not have been admitted.

1. It had no tendency to prove the condition of the passage-way.

2. The defendants could not have anticipated and could not have prepared to meet such evidence. 1 Greenl. Ev. § 52.

3. The introduction of such proof must lead to a multitude of issues. 1 Greenl. Ev. § 448.

*Bradbury*, for plaintiff, contended, that the evidence was admissible as showing the condition of the passage-way left by defendants, and also as bearing upon the question of damages.

APPLETON, J. — The condition of the road, as left by the defendants, was a matter for the consideration of the jury. That condition was to be ascertained from the testimony of witnesses. If the fact, that one or more persons had been upset in driving over the road in question, were to be regarded as admissible in evidence, then it would necessarily be proper to receive testimony to show that the accidents which may have occurred, were the results of carelessness or negligence on the part of those sustaining the injuries of which complaint is made. It would be equally

proper to show the number of carriages which may have safely passed over. But if proof of this description should be received, then the opposing party would obviously have the right of showing, that in all of those instances extraordinary care had been used, for the purpose of rebutting the inference which might otherwise arise, that the road was safe and convenient. As many distinct issues might thus be raised as there were instances of carriages passing over the road. The attention of the jury would be thus diverted from the questions really in dispute and directed to what is entirely collateral. Neither can such evidence be regarded as necessary. The width of the road, the smoothness of its surface, its elevations and depressions, the obstructions remaining thereon and their size and position, are all susceptible of exact admeasurement, and from these facts as disclosed with more or less of accuracy, it will be for the jury to determine how far and to what extent the condition of the road may have been the cause of injury to the party complaining. The evidence of carriages having been upset in attempting to pass from the highway to the plaintiff's tavern, was improperly received and a new trial must be granted. *Collins* v. *Dorchester*, 6 Cush. 396; *Aldrich* v. *Pelham*, 1 Gray, 510. *Exceptions sustained.*

*New trial granted.*

TENNEY, J., was unable to be present at the hearing and took no part in the opinion.

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64 465

† HUTCHINSON *versus* CHASE.

One sole seized of a parcel of land with mill privileges attached, has no power to convey, with such land, the *right of flowing* lands above, held by him in *common* with another.

But where a mill-dam, owned by tenants in common, flows their common lands above, a release by one to the other of the mill sites and all the privileges and appurtenances thereto belonging, will authorize the grantee to continue the flowing of the lands above, and to transmit that right to *his* grantees without being liable to the payment of damages.

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

COMPLAINT, for flowing land by means of respondent's dam.

The proceedings were commenced under c. 126, R. S.

The complainant appeared to be the sole owner of lot No. three, alleged to be damaged by means of the dam.

Respondent claimed the right to flow the same by sundry conveyances, through which he claimed the rights originally granted by the Commonwealth of Massachusetts to Edmund Bridge, Robert Page and Brown Emerson.

In the grant to these persons were included the land where the mills and dam are located and the land flowed.

Bridge released his interest in the grant to Page and Emerson, and Page afterwards released to Emerson, his interest in that part of the grant embracing the respondent's mill sites.

Afterwards Emerson, in 1790, conveyed to one Chase Elkins all the mill privileges on Hale's brook to Jennings' meadows, and one acre of land with each mill privilege, to be laid out so as best to accommodate the privilege on the eastern side of the brook, the said Elkins to have all said Emerson's right of building a dam or dams on that part of said brook mentioned, and also of building a dam and flowing Hale's brook, pond or ponds, containing about twelve acres.

The defendant appeared to have succeeded to all the rights of Elkins.

The presiding Judge instructed the jury, that it appearing, from the record titles produced, that at the date of the deed from Emerson to Elkins, in 1790, he was the owner of the land and privileges deeded to Elkins, and if satisfied that he was the owner with said Page, as tenant in common in said lot No. 3, then Emerson might convey the right to flow said lot No. 3, without paying damage.

The verdict was for respondent.

*Bradbury & Morrill*, in support of the exceptions, maintained that Emerson, who was sole proprietor of the mill

privilege, could not convey the right to flow lot No. 3, which was owned by the proprietors, and was in possession of a third party, without paying damages, and cited *Stevens* v. *Morse*, 5 Greenl. 25.

*Bean*, with whom was *Paine*, *contra*, sustained the instructions.

No action could have been maintained against Elkins for the flowage; not by Page alone, because tenants in common must all join for injury to the common property; Page's remedy was by partition. Co. Lit. 198.

He could not support an action at common law. *Gilman* v. *Mellen*, 12 Pick. 120; *May* v. *Parker*, 12 Pick. 34. Nor could he under the mill Act. *Tucker* v. *Campbell*, 36 Maine, 346.

Such action would not lie by Emerson and Page, for Emerson had by his deed released his claim for damages.

In this case the complainant derives title either from Emerson and Page or by disseizin; if in the former mode, he can have no greater right than they had; if in the latter mode he could not disseize of a right to flow which is incorporeal.

RICE, J. — By the provisions of § 5, c. 126, R. S., any person sustaining damages in his lands, by their being overflowed by a mill-dam, may obtain compensation for the injury, by complaint to the District Court in the county where the lands so flowed shall be situated, or any part of the same.

Section 9 of same chapter authorizes the owner or occupant of such mill to appear and plead in bar of such complaint, that the complainant has no right, title or estate in the lands alleged to be flowed; or that he has a right to maintain such dam and flow the lands for an agreed price or without compensation; or any other matter which may show that the complainant cannot maintain the suit.

The complainant's land alleged to be flowed is situated

on Hale's brook upper pond; and the defendant's dam is located on Hale's brook, below the lower pond.

A grant of land, the exterior bounds of which included the several parcels now claimed by the complainant and defendant, was made by the Commonwealth of Massachusetts to Edmund Bridge, Robert Page and Brown Emerson, July 2d, 1785. Bridge released his interest in the above grant to Page and Emerson, January 10th, 1787.

Nov. 17, 1789, Page conveyed to Emerson that part of the land granted by the Commonwealth, on which the dam of the defendant, of which complaint is made, now stands.

Sept. 18, 1790, Emerson conveyed to Chase Elkins certain lands and privileges, from "Lower Hale's brook pond to Jennings' meadow." This deed, after describing the land conveyed, continues, "as the said Elkins is to have all the said Emerson's right of building a dam or dams on that part of said brook, above described, and also of building a dam and flowing Hale's brook pond and ponds; said tract of land contains about twelve acres."

So far as appears from the title deeds, Emerson, at the date of the above deed, was sole seized of the mill privilege now owned by defendant, and seized as tenant in common with Page, of one half the land now alleged to be flowed. There is no evidence that the flowed land has been divided, and the tenancy in common thus sundered.

It does not seem to be contested, that the title which Elkins acquired to the privileges and all his rights to flow, unless lost by adverse possession, have passed, by sundry mesne conveyances, to the defendant.

The earliest deed put into the case by the complainant, under which he claims title to the premises alleged to be flowed, bears date Nov. 22, 1823. His sole seizin of the land was not controverted, subject however, as the defendant contends, to his right to flow, in common with the complainant.

The defendant contends that in 1790, Emerson being sole seized of the mill privileges below the lower pond, and at

the same time as tenant in common with Page of one half of the land flowed, would have the right, by his dam, to flow the land owned in common by himself and Page, and that this assumed right of Emerson's could be conveyed by him, and was conveyed to Elkins, under whom the defendant now holds.

The possession and seizin of one tenant in common, is the possession and seizin of the other, because such possession is not adverse to the right of his companion, but in support of their common title. And although one tenant in common takes the whole profits, yet this does not divest the possession of his companion. Greenl. Cruise, Tit. xx, Tenancy in common, § 14.

It is upon this general rule of law, as applicable to this class of tenancies, that the defendant relies, in his argument, to show that Emerson might lawfully flow the land owned in common by himself and Page, and also that the grantees of Emerson were entitled to the same rights.

The rule, though general in its terms, is subject to many qualifications. One tenant in common is not remediless in case his co-tenant shall assume absolute dominion over the common property. The right of each extends to all and every part of the common estate. Absolute exclusion of one tenant from any part, is a violation of his rights, for which the law will afford an appropriate remedy.

"If two tenants in common be of a folding, and the one of them disturb the other to erect hurdles, he shall have an action of trespass *quare vi et armis* for this disturbance." 1 Coke, 200, b, [d.]

"If two several owners of houses have a river in common between them, if one of them corrupt the river the other shall have an action upon his case." *Ibid.* [e.]

One tenant in common is not authorized to exclude another from the possession of land owned in common, or to destroy a chattel, or to sell the whole of it. If one tenant in common of land oust his co-tenant, the latter may maintain ejectment. 3 Wils. 118; *Brackett* v. *Norcross*, 1 Maine,

89. If he destroys personal property owned in common, trover lies. 1 Coke on Litt. 200, a. So if he sell the entire property. *Farr* v. *Smith*, 9 Wend. 338.

The general rule seems to be well settled that one tenant in common cannot, as against his co-tenant, convey any part of the common property by metes and bounds, or even an undivided portion of such part. *Bartlett* v. *Harlow*, 12 Mass. 348; *Peabody* v. *Minot*, 24 Pick. 329; *Griswold* v. *Johnson*, 5 Con. 366; *Smith* v. *Benson*, 9 Vt. The reason is obvious. His title is to an undivided share of the whole, and he is not authorized to carve out his own part, nor to convey in such a manner, as to compel his co-tenants to take their shares in several distinct parcels, such as he may please. *Great Falls Co.* v. *Worcester*, 15 N. H. 412. Even though his deed may bind him by way of estoppel; as against the co-tenants, such deed is inoperative and void. 4 Kent's Com. 368.

Though tenants in common are, in legal contemplation, all seized of each and every part of the estate, still they are not permitted to do acts which are prejudicial to their co-tenants.

Thus, if two tenants in common be of a wardship of the bodie, and one doth ravish the ward, and one tenant in common release to the ravisher, this shall go in benefit of the other tenant in common, and he shall recover the whole, and this release shall not be any bar to him. And as if two tenants in common be of an advowson, and they bring a *quare impedit*, and the one doth release, yet the other shall sue forth and recover the whole presentment. 1 Cok. Inst. 197, b.

As one tenant in common cannot convey the entire estate, or the whole of any portion thereof, or give a valid release for injuries done thereto; so too, and for the same reasons, he cannot subject the common property to particular servitudes, by which the rights of his co-tenants will be affected. These servitudes, or easements, must be created by the owner, and one tenant in common cannot establish them, upon

the common property, without the consent of his co-tenant. 3 Kent's Com. 436; 2 Hilliard's Abr. 118.

Such also is the rule of the civil law. He who has the property of an estate, only in common with others, without any division of the several shares, cannot subject any part of it to a service without the consent of all his co-partners; and any one of them may hinder it, until the estate being divided into shares, every one may impose a service on his own share if he think fit. And likewise he who possesses in common and undivided, a portion of the land or "tenement to which the service is so due, cannot by himself, free the land or tenement which owes the service; but the service remains for the portions of others. For these services are for every part of the land or tenement to which they are due, and every one of the proprietors has an interest in the service for his own portion." Domat's Civil Law, Cushing's ed. ¶ 1035.

This principle has been applied to the class of cases now under consideration, and it has been decided that one tenant in common has no right, by means of a close erected on other land of which he is sole seized, to flow the land owned in common, without the consent of his co-tenants. It is a wrong to his co-tenants, of the same character, and which allows of similar remedies, as if they had been sole seized. *Odiorne* v. *Lyford*, 9 N. H. 502; *Great Falls Co.* v. *Worcester*, 15 N. H. 412.

The case of *Tucker* v. *Campbell & al.*, 36 Maine, 346, has been cited to show, that in a complaint for flowing land owned by tenants in common, by means of a mill-dam, all the co-tenants must join. At the trial, it was evidently supposed that the same principles were involved in this case that were settled by this Court in that. Such however is not the fact. In the case at bar there is no suggestion that the complainant is tenant in common of the *land* flowed. Of that, he is sole seized. We have already seen that he is not, as was supposed, tenant in common of the right to flow. Therefore the legal objection to the maintenance of the pro-

cess, supposed in the argument, does not exist. But were it otherwise, the difficulties presented in *Tucker* v. *Campbell,* would not exist in this case. If the defendant is owner of one undivided half of the right to flow, the complainant is the owner of the other half, and therefore on that hypothesis, represents all the interest now existing in the land, adverse to the defendant. A judgment therefore which should settle the conflicting right to flow between these parties, would just as effectually close litigation, as though the complainant was sole seized, because there is no other party in existence to join with him, or who could maintain a like complaint against the defendant. There could, therefore, by no possibility, be multifarious and conflicting judgments in this case, as was supposed in the case cited. At most, it could only affect the question of damages.

To flow the land owned in common, by one tenant in common, operates as an absolute exclusion of the co-tenant, *pro tanto,* from the beneficial use of the common estate, for which he would have been entitled to a remedy at common law. In all cases, where applicable, the proceeding by complaint has been substituted by the Legislature of this State, for an action at common law. No practical difficulties being perceived in the way of maintaining this process, we think it cannot be defeated by technical objections.

As the case may be again presented to a jury, it may not be improper to make a suggestion in relation to the deed from Page to Emerson, under which the defendant holds. That deed conveys one undivided half of the land upon which the defendant's dam is now located, with all the "privileges and appurtenances thereunto belonging." Whether there was then, upon the land conveyed, a mill privilege and dam, by which the land now owned by complainant was flowed, the evidence does not disclose. If such was the case, then the whole right to flow would seem to have been in Emerson at the time he conveyed to Elkins, and to have passed by that deed to Elkins, and through him to the defendant.

As the case appears by the report, we are satisfied it was presented to the jury under an erroneous view of the law, and that a new trial should be had.

*Exceptions sustained.* —

*Verdict set aside and new trial granted.*

TENNEY, J., being unable to attend at the argument of the cause, took no part in the decision.

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† GREELY *versus* CURRIER.

By § 10, c. 130, R. S., it is provided that *before* serving a writ of replevin the officer is required to take from the plaintiff, or some one in his behalf, a bond to the defendant with sufficient *sureties*, in double the value of the goods replevied.

Such bond with only *one* surety is fatally defective, if objected to by a plea in abatement, or by motion *seasonably* filed.

When proceedings in replevin are quashed for such defect, the plaintiff cannot contest, by the introduction of testimony, the right of defendant to a return of the property.

By the *illegality* of the proceeding, it is "made to appear" to the Court, on motion, that the property should be returned.

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

REPLEVIN.

The bond given by the plaintiff had only one surety.

On the second day of the term to which the writ was returnable; the defendant filed a written motion, that for that cause, the writ might abate; and on the ninth day of the same term, he filed a motion for a return of the property replevied and for an order accordingly.

The plaintiff contended as to the first motion, that the want of an additonal surety did not render the process fatally defective, and offered to pay the costs awarded and furnish the additional surety.

But the Court ruled, that they had no power to allow the same against the consent of the adverse party, and ordered the writ and proceedings to be quashed.

As to the second motion, the plaintiff objected that it was not filed in season, and that it should be made to appear that defendant was entitled to a return, and offered testimony that he owned the property.

But the Court ruled that the motion was seasonable, that as the case was presented the ownership appeared to be in defendant and declined to hear the testimony, and ordered a return of the property.

To all which plaintiff excepted.

*B. A. G. Fuller,* supported the positions taken at the hearing, and cited 20 Maine, 96; 18 Wend. 521; 19 Wend. 632; *Hicks* v. *Hull,* 11 B. Munroe, 53; *Bloomer* v. *Craig,* 6 Dane, 310; *Hodsdon* v. *Morse,* 5 Mass. 314; *Simonds* v. *Parker,* 1 Met. 508; 2 Met. 492; c. 130, § 11, R. S.

*North,* for the defendant.

RICE, J. — By provision of § 10, c. 130, R. S., an officer, before serving a writ of replevin is required to take from the plaintiff, or some one in his behalf, a bond to the defendant, with sufficient sureties, in double the value of the goods replevied, conditioned, &c., to be returned with the writ. This bond is provided for the security of the defendant, the taking of which is a condition precedent which must be complied with before a legal service of the writ can be made. It, however, being a provision for the defendant's benefit, may be waived by him. Or if he choose he may take advantage of defects in the bond by plea in abatement or on motion. *Johnson* v. *Richards,* 2 Fairf. 49; *Simonds* v. *Parker,* 1 Met. 508. A defect apparent on the record may be taken advantage of as well by motion as by plea in abatement. *Chamberlain* v. *Lake,* 36 Maine, 388. But such motion must be made within the time prescribed for filing pleas in abatement. *Nickerson* v. *Nickerson,* 36 Maine, 417. The motion in this case was made on the second day of the return term and was therefore in season.

In the case of *Smith & al.* v. *Fuller & al.* 18 Wend. 521, and *Hawley* v. *Bates,* 19 Wend. 432, cited by counsel

for plaintiff, the Court held, that a defect appearing upon the face of the bond could be taken advantage of on motion, if seasonably filed. Bonds in those cases, with one surety, when the statute required *sureties,* were held defective by the Court, but the plaintiffs were permitted to file new bonds within thirty days on payment of costs. This permission was granted under authority of § 31, p. 527, vol. 2, R. S., of New York. No such authority is conferred by our statutes.

The case of *Hicks* v. *Hull,* 11 B. Munroe, 53, in which the Court intimate, that in certain contingencies a new replevin bond would be ordered, is founded upon statute provisions similar to those existing in New York.

Section 11, c. 130, R. S., provides, that if it shall appear upon the nonsuit of the plaintiff, or upon a trial or otherwise, that the defendant is entitled to a return of the goods he shall have judgment therefor accordingly.

How shall it be "made to appear?" Clearly not by the production of testimony, when the plaintiff is out of Court. That would authorize a party to try a question of fact before the Court, without a writ and without a bond, which the defendant has a right to have tried by a jury, after a sufficient bond has been filed and legal service made of the writ. It did appear from this fact, that the property had been taken without legal authority, and that the defendant was entitled to a return. This want of authority being apparent on the record, and being properly and seasonably brought before the Court and insisted upon, was conclusive as well upon the Court as the plaintiff. The admission of the testimony offered would have been wholly unauthorized. *Exceptions overruled, and*

*Judgment affirmed.*

TENNEY, J., was not present at the hearing and took no part in the opinion.

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## † FULLER *versus* TABOR.

A dwellinghouse erected on the land of another, with the previous knowledge and consent of the owner of the land, remains the *personal* property of the builder.

And if so erected without such knowledge and consent of the owner of the land, his *subsequent* assent that it may remain, will make it equally personal property.

Of the evidence of a conversion in an action of trover.

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

TROVER for a wooden building.

The plaintiff introduced evidence tending to show that he sold to Moses B. Brown a shop for a certain sum which was to remain his until paid for. Brown moved it on to a piece of land and fitted it into a dwellinghouse and underpinned it, and lived there until he died. His widow occupied the same when this action was commenced. There was no evidence that it was ever paid for.

It appeared that Brown moved it upon land of one Hoxie without his knowledge or consent. After finding the house there, Hoxie notified him the land was his, but Brown said he bought it of Reed, and afterwards agreed with Hoxie to buy the land of him and pay three dollars for it, but died without doing so.

It also appeared, that the defendant had a deed of quitclaim of the land where the house stood, from Brown; and that plaintiff demanded the shop and house of defendant, who said he had bought it of Brown and got a deed of it, and should keep it; that Fuller could have a watch for it, but would not take it. About one hundred dollars worth of labor and materials had been added by Brown.

There was other evidence tending to show, that defendant had never in fact exercised any *actual* control over the house.

The presiding Judge instructed the jury, that if the building was put on Hoxie's land by Brown without his knowledge or consent, but when Hoxie was informed that the house was thus put upon his land he consented that it

might remain, it would be personal property and this form of action might be maintained; *that* the agreement by Hoxie to sell to Brown would not of itself be sufficient evidence of such consent by Hoxie; but that they might determine from the position of the parties, the circumstances of the case, together with the agreement testified to by Hoxie, whether he did give such consent.

The defendant requested instructions, "that taking a quitclaim deed of the building without taking possession of the land or house, or exercising any acts of control over it, *but leaving it in the possession of Brown,* was not a conversion, though there may have been a demand by plaintiff and a refusal by defendant to deliver, and that asserting a claim to the building, merely, *without having the possession,* is not an act of control over the property."

Which instructions were refused; but the Court instructed the jury that to entitle the plaintiff to recover, he must prove a conversion of the building by the defendant, as alleged in his writ; that conversion consisted in the exercise of dominion and control over property, inconsistent with, and in defiance of the rights of the true owner or party having the right of possession. That taking a quitclaim deed of the land and building and putting it on record would not, of itself, constitute a conversion; but they would look at all the evidence in the case, as well the taking and recording of the deed as the other acts and declarations of the defendant, and from the whole evidence determine whether he had, as matter of fact, converted the property to his own use.

The verdict was for plaintiff, and defendant excepted.

A motion was also filed to set aside the verdict as against the evidence in the case.

*H. W. Paine* and *A. Libby*, for defendant.

The house when placed on Hoxie's land and underpinned, without his consent, became real property. His consent that it might remain there, if afterwards given, was consistent with his right in it and would not make it personal property.

The request should have been complied with. *Fernald* v. *Chase*, 37 Maine, 289, and cases there cited; *Mattawam Co.* v. *Bentley & al.*, 13 Barb. S. C. 641; *Rand* v. *Sargent*, 23 Maine, 326.

*Bradbury & Morrill*, for plaintiff.

RICE, J. — The evidence in this case tended to show that the house in controversy had been placed upon the land of one Hoxie, without his knowledge or consent, by Brown, under whom the defendant claims title.

Hoxie, who was a witness, testified, "I did not know the house was there till some time after it was put there; can't say how long; the house was underpinned; I gave no consent for it to be put there. As soon as I saw it, I notified Brown that the land was mine. He said he bought it of Reed. I told him Reed owned only the eight rod strip east of it. Brown agreed to buy the land of me, and I agreed to sell it to him for three dollars; but he died without completing the trade."

The Court were requested to instruct the jury, "that if the building sued for had been attached to the land of Hoxie, or any other person, other than Brown, by being underpinned, without the consent of the owner of the land, prior to the alleged conversion, and remained so attached at the commencement of this suit, then this action cannot be maintained."

This instruction was given. But the Judge further instructed the jury, that if the building was put upon Hoxie's land by Brown, without his knowledge or consent, but when Hoxie was informed that the house was thus put upon his land, he consented that it might remain, it would be personal property, and this form of action might be maintained.

It is a rule, that things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment, having been fixed to the realty, or used with it, and continuing to be so used, become parts of

the land, *accessione et destinatione,* and pass with it by deed of conveyance. 1 Greenl. Cruise, 46.

But an exception to this rule is admitted, when the parties previous to the annexation of things to the freehold have mutually agreed, that they shall not become parts of the realty, but shall remain the property of the person annexing them, or may be removed by him. *Ibid.*

There can be no doubt that one may own a building standing on the land of another, with his consent, and may dispose of it, and it will be liable to attachment, the owner of the land interposing no claim. *Ashmun* v. *Williams & al.* 8 Pick. 402.

The subsequent assent and ratification of Hoxie, with a full knowledge of all the facts, was equivalent to a prior agreement, and relates back to the time the house was put upon his land.

It would be absurd to hold that a man is *compelled* to become the owner of a house, against his will, simply because his neighbor, acting under a misapprehension as to the title, had placed it upon his land without his knowledge and consent. Yet such would be the result of the doctrine contended for by the defendant. The instruction was obviously right.

The instruction upon the point in relation to conversion is in strict accordance with well established legal principles, and we think the evidence reported authorized the finding of the jury. *Exceptions and motion overruled.*

*Judgment on the verdict.*

TENNEY, J., did not sit in this case.

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† AUGUSTA MUTUAL FIRE INS. CO. *versus* FRENCH.

A mutual insurance company, to maintain an action for an *assessment,* upon a premium note, must show that it was *legally* made.

Thus, where such company being regularly organized, were authorized by a Legislative Act, as to all applications to them *afterwards* made, to take them

under their *former* organization, *until* the property to be insured in each class should amount to fifty thousand dollars, *when* the risks thus taken might be classified; and the company after such Act received an application and issued a policy in one of the classifications and made an assessment upon the premium note; *it was held*, that without showing that the risks in *each* class equalled the sum required by the Act, the assessment was unauthorized and no action for it could be maintained.

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

Assumpsit.

The writ contained two counts. One was upon a note given by defendant for $225, dated Dec. 12, 1849, purporting to be for value received in policy No. 3180, and to be paid at such times, and by such instalments as the plaintiffs should from time to time determine, pursuant to the Act of incorporation and by-laws of the company.

The other count was for an assessment made Jan. 1, 1853.

Plaintiffs were incorporated in Feb. 1845, and soon after organized. In July, 1849, the Legislature, by an additional Act, authorized the plaintiffs to make a *classification* of risks and the second section provided: —

"That all applications to said company for insurance hereafter made, may be taken by said company under their present Act of incorporation until the property to be insured in each class shall amount to $50,000, when the risks thus taken may be classed and policies issued. The applications made under this section shall contain a provision for transferring the risk from the general company to a classified risk when the property to be insured in the several classes shall amount to the sum aforesaid."

The records of the corporation did not show any vote accepting the Act of 1849, or any vote of the directors, ordering a classification of the risks.

From the register it appeard that defendant's risk was taken Dec. 12, 1849, — that the policy was No. 3180, and was in the third class.

The secretary testified, and the register exhibited showed, that plaintiffs commenced taking risks in the classes Sept.

1st, 1849; that they classified the old risks and the new risks taken in the classes after Sept. 1st, 1849, on the first day of Jan. 1850, into three classes; and on that day ordered an assessment on all the risks of the company to that time, which assessments included the risks taken in the various classes to that date. The amount of risks taken and registered in the various classes to Jan. 1, 1850, and in force at that time, was, class 1st, $42,000; class 2d, $100,000; class 3d, $83,945. The risks in all the classes on Jan. 1st, 1850, were over $1,000,000, and the old and new risks classified on that day, were over $60,000.

It appeared that defendant's assessment of Jan. 1st, 1850, was $4,50, and had been paid. The *first* assessment on the *third class* was made by order of the directors, Jan. 1, 1851, of which defendant's assessment was $19,12, which he had paid.

The last assessment in such class was made Jan. 1st, 1853, under which to defendant's policy was assessed $52, payment of which was refused, and is the subject matter of this suit.

The Court were authorized to draw the same inferences from the facts that a jury might, and render judgment according to law.

*Bradbury*, for defendant, maintained that the assessment was illegal. It is made upon a part of the general company, when it should have been made upon the whole, thus materially increasing the defendant's liability.

At the time of defendant's insurance, the Act of 1849 had not been accepted by the company, nor has it ever been since.

But no classification was authorized, even if it had been accepted, until the property in each class amounted to $50,000. In 1850, one of the classes fell short of that sum, and there is no evidence that it has ever reached it since. The attempt to make the classification was of no avail.

The note could only be assessed according to the Act of

incorporation and by-laws of the company, which does not appear to have been done.

*North*, for plaintiffs, argued that the acceptance of the Act of 1849 may be presumed from the exercise of the corporate powers granted. *Penobscot Boom* v. *Lawson*, 16 Maine, 230, and cases there cited. A long time had elapsed since its exercise; it had been recognized at the annual meetings of the corporation; assessments had been made under it and paid by defendant, and if such questions were open to him, under the general issue, the length of time since the exercise of this power ought to put it at rest; that the acts of defendant show a ratification of the doings of the company, to which he cannot now object.

APPLETON, J. — In case of a loss the assessment must depend upon the number and amount of the policies which are to contribute. When a loss has occurred, it is a most material question to determine whether the assessment shall be made upon all or only on a portion of the policies, which may have been issued.

The right of the plaintiffs to maintain this action depends upon the validity of the assessments, which they seek to recover. If there has been no valid assessment, it is obvious that the present action is not maintainable.

By the original charter of the plaintiffs, the assessments, in case of loss were to be made upon all the policies issued. By the special Act, approved July 31, 1849, c. 250, authority is given to distribute the risks taken into three classes.

The burthen is upon the plaintiffs to show the validity of their assessments. Assuming what is denied and the determination of which is not necessary for the decision of this case, that the plaintiffs have by their acts accepted the change made in their charter by the Act of 1849, still no authority is perceived by which the present assessment can be regarded as valid.

By § 2, of the Act of 1849, it is enacted that "all applications to said company for insurance, hereafter made, may be

taken by said company under their present Act of incorporation *until* the property to be insured in each class shall amount to fifty thousand dollars; *when* the risks thus taken may be classified, and the policies issued; the applications made under this section shall contain a provision for transferring the risk from the general company to a classified risk, *when* the property to be insured in the several classes shall amount to the fund aforesaid."

It does not appear that the plaintiffs have ever had or now have the amount of fifty thousand dollars insured in their first class. On Jan. 1, 1850, the amount of risks taken and in force, which according to the classification made would fall under the first class, amounted to $42,000. By the second section the division into classes could not then have been legally made. It does not appear that there has ever been a time in which there was a sufficient amount insured to constitute the first class. There could be no valid assessment upon the basis of a classification, before the classification itself could legally take place. The existence of the facts, which should precede a legal distribution of risks into classes, is not shown. Until their existence is established, the corporation could not classify their risks, nor make their assessments upon the basis of a division into classes. *Plaintiff nonsuit.*

TENNEY, J., did not sit in this case.

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† ELLIS *versus* ELLIS.

An assignment of partition fences, by fence viewers, under § 5 of c. 29, R. S., to be binding, must be recorded in the town clerk's office of the town where the land is situated.

Without *such record* a neglect by one of the co-terminous proprietors to build the part assigned to him, will not render him liable to an action for double the expense of building it, by the other.

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

Ellis *v.* Ellis.

This was a suit to recover double the expense of building a partition fence assigned to defendant.

The parties were owners of adjacent lands in Belgrade, and having disagreed as to their respective rights therein, the plaintiff proved an application to two fence viewers of that town to assign to each his share of the partition fence.

The plaintiff also introduced the assignment of the partition fence, and proof of the notices required by the statute. He also produced proof that the part assigned to defendant was built by himself after the expiration of the time fixed by the fence viewers for building the same.

The certificate of the fence viewers of their adjudication of the sufficiency of the fence so built by plaintiffs, of its value and their fees, was read, and proof was given of a demand of payment of the value and charges more than one month prior to the suit.

There was no proof that the assignment had been recorded by either party in the town clerk's office in Belgrade.

The plaintiff rested his case upon the testimony, and the Court inclining to the opinion that the action could not be maintained, it was agreed to have it reported for the decision of the full Court; and if, on the evidence, the action is maintainable, the cause to stand for trial, otherwise a nonsuit to be entered.

*Vose, North & Fales,* for defendant.

*Bradbury & Morrill,* for plaintiff.

RICE, J. — This action is founded on § 5, c. 29, R. S. This section provides that when the occupants or owners of adjacent lands cannot agree respecting their rights in partition fences, and their obligations to maintain the same, on application of either party to two or more fence viewers of the town, where the lands lie, said fence viewers after reasonable notice to each party, may in writing, under their hands, assign to each party his share thereof, and limit the time within which each party shall build or repair his part of the fence, not exceeding six days, as is provided in the

third section of this chapter. Such assignment and all other assignments of proprietors of partition fences, provided for in this chapter, being recorded in the town clerk's office, shall be binding upon the parties, and all who may afterwards occupy the lands.

Where there is no prescriptive agreement, or statute assignment, no tenant is bound to fence against an adjoining close; but in such case, there being no fence, each owner is bound, at his peril, to keep his cattle on his own close. *Little* v. *Lothrop*, 5 Maine, 356.

When a statute gives a new right, and prescribes the remedy, that remedy, to be available, must be strictly pursued.

The right to compel an adjoining proprietor or occupant to build and maintain a portion of the partition fence, or to pay for such portion, if built by a co-terminous proprietor, is derived from the statute. Before such right can be enforced, all the requirements of the statute must be complied with. To make the assignments of proprietors of partition fences, provided for in c. 29, binding, they must be recorded in the town clerk's office. This was not done by either of the parties in this case, and for that reason the action cannot be maintained. *Plaintiff nonsuit.*

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† TOTMAN *& al. versus* SAWYER *& als. and Trustee.*

Where the trustee claims to hold the property of defendants in his hands by virtue of an assignment for the benefit of their creditors, and an issue is made up with him as to its validity on account of its being fraudulent, a deposition duly taken, on *notice* given to the *trustee*, is admissible.

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

This was an action of assumpsit on a promissory note. James A. Thompson, the trustee, disclosed an assignment made to him by the defendants in due form of law, for the benefit of all their creditors.

At the Nov. term 1855, the plaintiffs having caused the

creditors who had become parties to the assignment, to be cited into Court, they alleged that it was made in fraud of creditors and void.

On this point an issue was made between the plaintiffs, and the trustee as assignee, and submitted to the jury.

(The papers furnish no evidence whether the creditors appeared or not.)

In support of the issue the plaintiffs introduced the deposition of Orison Burrill, which was objected to for want of notice to the *creditors*, but it was admitted.

Objection was also made to a portion of the deposition showing that defendants bought lumber at a certain time of plaintiffs and gave their note, and wanted an extension when it fell due, which was refused, and that Sawyer promised to get security, &c., but it was admitted.

A verdict was returned for the plaintiffs and exceptions were taken to the rulings.

*Bradbury & Morrill,* for trustee.

*Vose,* for plaintiffs.

RICE, J. — Thompson, the trustee, was also the assignee of the defendants. The plaintiffs alleged that the assignment to Thompson was fraudulent and void as to creditors. On this point the issue was made up between the plaintiffs and Thompson as assignee. To protect the interests of those creditors of the defendants, who have become parties to the assignment they had been summoned into Court. Whether they appeared or not, the case does not find. They did not become parties to the record and if they participated in the defence it was under Thompson with whom the issue was made up, and by whom they were represented. Notice to him was therefore sufficient.

In the admission of those portions of the deposition which have been copied with the case no error is perceived.

*Exceptions overruled.*

*Judgment on the verdict.*

TENNEY, J., did not sit in this case.

## † CROWELL *versus* WHITTIER.

*Constables* and all other town officers can only be chosen by a major vote of the votes cast at the annual town meeting.

And to constitute an election to such offices, it is essential that the person claiming to be chosen, should be presented distinctly before the meeting.

Thus, the vote of the town that whoever should make the lowest bid for collecting the taxes, should be the *constable*, will not authorize the person making such bid to perform the duties of that office.

ON FACTS AGREED.

TRESPASS for false imprisonment.

Defendant arrested the plaintiff at the several times alleged in the writ upon warrants duly issued, and after the trial received him into his custody until the sentence was performed.

The defendant lived in the town of Rome and claimed to exercise the powers of an officer, as constable of that town.

His authority to act as such was derived from a vote passed at the annual meeting of said town, as follows:—

"Voted, that the collector's and constable's berth go to the lowest bidder. Thomas Whittier bid off the collector's and constable's berth at two cents and two mills on a dollar for collecting."

The defendant, before assuming to act as constable, gave the bond required by law.

If the defendant had authority to act as constable and arrest the plaintiff, a nonsuit to be entered; otherwise a default to be entered, and the defendant heard in damages.

*Bradbury & Morrill*, for defendant, contended, that the requirements of the statutes regarding the mode of choosing constables were complied with. It was voted that the person who should collect the taxes for the smallest compensation, should be the constable. Defendant made the lowest bid, and was therefore by a major vote of the inhabitants declared elected.

This record does not amount to a sale of the office, but only to a vote to unite in one person the offices of collector and constable.

*Drummond,* for plaintiff.

1. The town must determine beforehand by vote in what manner constables and some other officers shall be elected, or any election other than by ballot is void. Without this determination constables can be elected not otherwise than by ballot.

In this case no such vote was passed, unless by the vote read in evidence. If they did so determine, then they did not elect even if the method proposed was legal.

2. The record shows a sale of the office, which is void and no election. Chitty on Con. 672, and notes and authorities cited. Such office cannot be the subject of a sale. 5 N. H. 196; 6 N. H. 183.

It is contrary to sound policy. 2 N. H. 517.

TENNEY, J. — The Revised Statutes, c. 5, § 9, provide, that at the annual town meeting to be held in the month of March or April, the qualified voters in each town shall choose by a major vote, constables, collectors of taxes and other town officers; and by § 10, certain of the town officers shall be chosen by ballot, and all others may be chosen by ballot, or other method agreed on by a vote of the town.

It appears by the records of the town of Rome, that at the annual meeting of that town in March, 1853, it was "voted, that the collector's and constable's berths go to the lowest bidder. Thomas Whittier bid off the collector's and constable's berth at two cents and two mills for collecting." What method the town agreed on, by their vote to choose those officers, who were not required to be chosen by ballot, does not appear. But upon the adoption of any mode, the choice of the officers must be by giving to each respectively a majority of all the votes cast. It was necessary to constitute an election, that the person claiming to be chosen, should at the time he was voted for be presented distinctly to the mind of each elector, who voted, so that he should know for whom he voted. The general vote of the town, that whoever should make the lowest bid for col-

lecting the taxes should be the constable, cannot be regarded as the choice of such person for that office, by a major vote. Upon the passage of this general vote, no one is chosen. And it is difficult to perceive, how that vote and the bid only of an individual afterwards made, without further action of the town can in any sense be a choice of that person, within the meaning of the statute.

Other objections to the validity of the choice of the defendant as constable have been presented, the consideration of which is not important for the decision of the case.

As the defence is upon the ground, that the defendant was legally the constable of the town of Rome, and this not appearing by the evidence, it necessarily fails.

*Defendant defaulted.*

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† FRANKLIN BANK *versus* STEVENS *& al.*

Whether entries made by order of Court upon its docket as to the disposition of actions, such as "to become nonsuit," "to be defaulted," "to abide, &c.," shall be stricken off, is within the discretion of the Court, and to such orders no exceptions lie.

In contracts of suretyship good faith is required.

If, in such contract there is any misrepresentation or concealment as to any *material* part of the transaction to induce the surety to become a party, it is void.

But to be *material* it must be some fact or circumstance immediately affecting the liability of the surety, and bearing directly upon the particular transaction to which the suretyship attaches.

Thus, in regard to the bond given by a cashier, in which was a condition that he should account for the money and property which had come into his hands as such cashier, *prior* as well as subsequent to the date of the bond, the knowledge of the agents of the bank, that the books of the bank had been badly kept; that bonds had not been given in previous years; that the Bank Commissioners had omitted to perform their duties; that the directors had been negligent, and the concealment of these facts from the sureties, is not material to the risk assumed, and will not shield them from responsibility; but a knowledge by such agents of the bank, that at the time of taking such bond, the cashier was a defaulter, and a concealment thereof from the sureties, would avoid the bond.

Nor can a surety on such bond interpose as a defence against paying for the defaults of the cashier, that the name of *another surety* upon the same bond was obtained by fraud, unless the signature of the latter was a condition by which to obtain that of the former.

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

This was an action of debt upon a bond purporting to be dated Oct. 1, 1847, and to be signed by Hiram Stevens as principal, and the defendants and one James N. Cooper, since deceased, as sureties.

Proof that the bond was lost was introduced, and a copy duly authenticated was used on the trial. The defendants pleaded "*non est factum.*" An issue was joined thereon.

On the back of the bond was this indorsement, "approved and accepted by vote of directors, Oct. 11, 1847. J. Otis, Pres."

The condition was in these words, "that whereas the above named Hiram Stevens has been appointed cashier of the said Franklin Bank, now if the said Hiram Stevens shall during his continuance in office of cashier aforesaid, truly and faithfully perform and discharge his duties of cashier aforesaid, and shall when he vacates his office aforesaid, a true account make, and all the notes, drafts, moneys and all and every property of every name and nature shall truly and faithfully render and deliver to the directors of said bank, and shall account for all notes, drafts and moneys, drafts, notes and property heretofore intrusted to his hands and possession as cashier of said bank, since he has held the said office of cashier of said bank, then this obligation," &c.

Evidence was introduced of an acceptance of the bond by a majority of the directors.

The defendants contended that the bond was not obligatory upon them, because it was obtained by fraud, and by the suppression and concealment of material facts and circumstances affecting their liability, known to the plaintiffs or their authorized agents, and not known to the defend-

ants, and they produced evidence tending to show that for two or three years prior to the date of this bond, Stevens being cashier, no bonds for the performance of his duties had been taken, and that this was known to the president and some of the directors, before the execution of this bond; that for several years preceding, great irregularity and neglect in doing the business and keeping the books of the bank, had prevailed; that no weekly trial balance or exhibit of the condition of the bank had been kept subsequent to 1842; that notice of this was given to some of the directors; that the bank commissioners had been unable to obtain access to the bank after 1842; that the semi-annual returns made to the governor and council as required by law, were made by the directors without any examination or verification of the truth of them; and, as has since been ascertained, were false at the time.

At a previous term of the Court, auditors had been appointed to ascertain the amount of deficiency in the bank, and the time it occurred, by whose report it appeared that the cashier was a defaulter to the amount of $5822,71, and that the whole of it occurred between Jan. 1st, 1844, and Oct. 1st, 1847.

Proof was offered by defendants tending to show that it was known to the president and some of the directors, before the bond was taken, that there existed a deficiency in the cashier's accounts; and by plaintiffs tending to show that the condition of the books was such, and had been three or four years prior to the date of the bond, that it was difficult to ascertain without laborious investigation, what the condition of the bank was, whether the cashier was a defaulter or not.

The defendants contended, that if the signature of said Cooper to the bond was obtained by fraud and concealment, that it was thereby invalid as against the other sureties, and proposed to give evidence that it was so obtained, but the Judge excluded this testimony.

The defendants offered testimony tending to prove, that

some of the directors by whom the bond was taken, had been guilty of negligence and misconduct in overdrawing their accounts, prior to 1847, and during the period within which the defalcation reported by the directors occurred; and contended that this was a material circumstance which should have been communicated to the sureties.

The presiding Judge instructed the jury, among other instructions not stated, that even if the authorized agents of the bank did know, at the time the bond was taken, that bonds for preceding years had not been taken, or could not be found, they were not bound to communicate it to the sureties, and that the omission of it would be no fraud, and would not render the bond invalid, unless they also knew that there was a deficiency or defalcation on the part of the cashier; and that the jury would not be authorized to find that the bond was obtained by fraud for that cause.

He further instructed the jury, that if the bond was obtained from Cooper by fraud, so that it was inoperative against him, it would not, for that reason, be invalid against the defendants, unless there was evidence that the signatures of the defendants were to be made on condition that Cooper signed it.

The Judge further instructed the jury, that the condition of the bond did not extend to the keeping of the books of the bank, or the cashier's neglect or misconduct in that respect, at any time prior to its date, and that the directors and agents of the bank were not bound to communicate what information they might have on that subject, and that the omission to do it was no fraud on their part.

And he also instructed the jury, that the misconduct of the directors prior to the date of the bond, though it might render them responsible to the stockholders, furnished no defence in this suit, unless it brought home to them knowledge of an existing deficiency on the part of the cashier.

A verdict was returned for plaintiffs, and to these rulings and instructions the defendants excepted.

At a prior term of the Court, another action against Cooper, executor of a deceased surety in this bond, was pending with this in the Court. At a term when the action against Cooper was continued on report of the Judge, an entry was made on the docket that this action should abide the action against Cooper. Subsequently there was a trial in that action, and a verdict and exceptions taken, and the plaintiffs moved to strike out the entry "to abide" under this action. The Judge granted the motion against defendants' objections, and exceptions were taken to that order.

*Evans*, in support of the exceptions, maintained that the docket entry ought not to have been stricken out, and cited *Burgess* v. *Lane*, 3 Greenl. 165; *Smith* v. *Wadleigh*, 17 Maine, 353; *Hatch* v. *Dennis*, 10 Maine, 244; *Billington* v. *Sprague*, 22 Maine, 34; *Coburn* v. *Whiteley*, 8 Met. 272; *Witherell* v. *Ocean Ins. Co.*, 24 Pick. 68.

The defendants ought not to have been required to plead until the exceptions were disposed of. c. 236, § 8 of Acts of 1852.

But the instructions given were objectionable on two grounds.

1. They decided as matter of law, what should have been submitted to the jury as matter of fact.

2. They were erroneous in themselves.

1. What was or was not material to be known to defendants, was a question for the jury. The true test of materiality is, would the sureties have entered into the contract if they had been apprised of all the circumstances of the case? And this is of necessity a question for the jury.

Questions of concealment, and the effects of it, arise oftener in cases of insurance, than elsewhere, and authorities may be found there. *Burrett* v. *Saratoga Ins. Co.*, 5 Hill. 192; *Grant* v. *Howard Ins. Co.*, 5 Hill, 15; *Howard* v. *N. E. Ins. Co.*, 2 Mason, 222.

The instructions were too stringent, calling for actual knowledge of defalcation.

2. The instructions were erroneous. The facts, if communicated, might have had, and doubtless would have had great influence upon the minds of the sureties.

3. The exclusion of the testimony, that the signature of Cooper was obtained by fraud, and the instruction on that head were erroneous. The bond was joint, not several. Whenever, by the act of the obligee, one, in a joint obligation is discharged, all are discharged. In legal contemplation the bond was executed by all at the same time. There was no occasion and no opportunity for conditional stipulations.

*Paine, contra.*

RICE, J. — This case is presented on two bills of exceptions. The first bill was filed and allowed at the August Term of the Court, in 1854. The complaint in this bill is, that the words "to abide," which had been entered upon the docket, under this action, at some preceding term, were, on motion of the plaintiffs, stricken off by order of the presiding Judge.

Entries made upon court dockets by consent of parties, under the direction of the Court, merely to facilitate business, are subject to the direction of the Court. They are designed to relieve parties from unnecessary inconvenience and costs, and to promote the despatch of public business. Of this character are the entries "to become nonsuit," "to be defaulted," "to continue," "to await," "to abide," and the like. Such entries will always be observed by the Court, and ordinarily enforced according to their terms. But when it becomes manifest to the Court that they have been made under a misapprehension of facts, or, when by a change of circumstances the rights of parties would be sacrificed by a rigid enforcement of such orders, and justice thereby defeated, the Court may properly discharge or modify them. Such entries are under the control of the Court, to be determined as matter of discretion, upon the peculiar circumstances of each case. To the exercise of that discretion

exceptions do not lie. These exceptions must therefore be dismissed.

As to the second bill of exceptions; the defence was placed upon the ground that the bond was void, because it was obtained from the defendants by fraud, and by the suppression and concealment of material facts and circumstances affecting their liability, known to the plaintiffs, or their authorized officers and agents, and not known to the defendants.

There was evidence tending to prove that there had been great irregularity in keeping the books of the bank, by the cashier; that for two or three years before the bond in suit was executed, in which Hiram Stevens was cashier, no bonds for the faithful performance of his duties had been taken; that during the years in which the cashier was subsequently found to have been a defaulter to the bank, some of the directors had been guilty of negligence and misconduct in overdrawing their accounts, and that other irregularities existed in conducting the business of the bank.

The Judge instructed the jury that even if the authorized agents of the bank did know at the time the bond was taken, that bonds for preceding years had not been taken, or could not be found, they were not bound to communicate it to the sureties and that the omission of it would be no fraud, would not render the bond invalid, unless they also knew there was a deficiency or defalcation on the part of the cashier, and that the jury would not be authorized to find the bond obtained by fraud for that cause; that the condition of the bond did not extend to the keeping of the books of the bank, or the cashier's neglect or omission in that respect, at any time prior to its date, and that the directors and agents of the bank were not bound to communicate what information they might have on that subject, and that the omission to do it was no fraud on their part; and that the misconduct of the directors prior to the date of the bond, though it might render them liable to the stockholders, furnished no defence in this suit, unless it brought home to

them knowledge of an existing deficiency on the part of the cashier.

In contracts of suretyship good faith is to be observed. If there be any misrepresentation or concealment in relation to any material part of the transaction, to induce the surety to enter into the obligation, the contract will be void. Thus, if a principal, knowing that he had been cheated by an agent, should apply for security for the good conduct of the agent, and conceal such fact, and any one in ignorance thereof should become surety for the agent, it would be void. *Maltby's case*, 1 Dow. Parl. Cases, 294.

In the case of *Jackson* v. *Duchaire*, 3 T. R., 552, where a widow in straitened circumstances, took a house upon terms that she was to take the furniture of the preceding tenant, at a valuation, provided she could raise the money within a given time, and a third party came forward upon the understanding that the price to be paid by her for the furniture had been settled at £70, and became responsible for the payment of that amount, but it afterwards appeared that there had been a secret understanding between the widow and the parties, that the real price was to be £100, and that the widow had given two promissory notes to secure the payment of the additional £30, the existence of which, as well as the underhand agreement, had been kept back from the third party; it was held that the transaction was a gross fraud upon the latter, and that the plaintiff could not recover for that reason.

In the case of *Pidlock* v. *Bishop*, 5 D. & R. 509, and in *Stone* v. *Compton*, 5 Bing. N. C. 142, the same principle was fully recognized.

It is more difficult to determine what will constitute a material part of a transaction, in relation to which misrepresentation or concealment will be deemed fraudulent. It is apparent that to be thus material, it must be some fact or circumstance immediately affecting the liability of the surety, and bearing directly upon the particular transaction to which the suretyship attaches. There are many facts

and circumstances which may indirectly affect the liability of the surety, such as the skill, or want of it; the industry, or indolence; the care, or negligence; the wealth or poverty of the party for whose faithfulness or responsibility a surety is sought, to which this rule will not apply. Such facts and circumstances are too remote to constitute elements to be deemed material in transactions of this kind, unless they are made such by particular inquiry and distinct representation. The effects which result from such personal qualities are matters for which the surety ordinarily assumes the responsibility.

It is the province of the Court to determine the competency of testimony, and the jury to determine its weight.

The bond in suit contains this provision, in addition to those ordinarily incorporated in cashiers' bonds; "and shall account for all notes, drafts and moneys, drafts, notes and property heretofore intrusted to his hands and possession as cashier of said bank, since he has held the said office of cashier of said bank." This provision does not render the sureties liable for the unskillful or negligent manner in which the books of the bank had been kept, nor for the negligence of the directors, nor the acts of the bank commissioners. It simply stipulates that the cashier shall account for the property of the bank, which had before that time been intrusted to his hands. Whether the property or any portion of it had been lost by the cashier, and if so, whether the officers of the bank had knowledge of that fact, were material facts, which had a direct bearing upon the liability of the sureties. Upon this point the instructions are distinct and accurate.

So too as to the existence of former bonds. The existence or non-existence of such bonds can have no effect upon the defendants' liability. If such bonds were in existence, the sureties in this could not compel the bank to resort to them. They did not stipulate to become liable in case former bonds were found insufficient. But they undertook absolutely that the cashier should account for the funds in

his hands. The terms of the contract clearly indicate the character and extent of the liability.

The jury were also instructed that if the bond was obtained from Cooper (a co-surety) by fraud, so that it was inoperative against him, it would not for that reason be invalid against the defendants, unless there was evidence that the signatures of the defendants were to be made on condition that Cooper had or should sign. It is contended that this intimation is erroneous.

In the case of *Keyser* v. *Keene*, 17 Penn. State R., (5 Harris,) 327, a bond had been prepared for six persons to sign, and contained a declaration that the obligee had become surety for another, on the agreement of the six to indemnify him, but the bond was executed by five only. Held that the bond being delivered, was obligatory on those by whom it was executed.

In the case of *Martin* v. *Stribbling*, 1 Spears, (S. C. R.,) 23, it was held that it is no discharge of a surety that he expected a third person would also sign as surety, and that such third person would receive from the principal certain books and papers as an indemnity for the suretyship, unless it is shown that the surety stipulated that the paper should not have effect until one or both those things were done; or that the signature of the surety was obtained by means of fraudulent representations, that such third person would sign the notes, and that the principal would place in his hands his books and papers, to be by him collected and applied in payment of the debt.

There was no evidence that the execution of the bond by the defendants in any way depended upon the fact that Cooper should also sign, or that any representations were made to them in relation to the fact, whether Cooper would or would not sign.

Many cases illustrating the law of insurance were cited at the argument, by counsel for the defendants. Though the two classes of cases may be in some respects analagous, yet they are not sufficiently so to render the *dicta* of Judges, or

the rules adopted by courts in one class, authority in the other. No error is perceived in the instructions given, or other proceedings at the trial.

*Exceptions overruled, and judgment for the amount reported by the auditors.*

TENNEY, J., was unable to attend at the hearing, and took no part in the opinion.

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39 542
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† FRANKLIN BANK *versus* COOPER, *Executor.*

No action can be maintained against the surety upon a bond given by the cashier of a bank, which purports to secure the bank against *previous delinquencies* of the cashier, if the agents of the bank had knowledge of such default, and it was unknown to the surety, and they *neglected* to inform him, having a reasonable opportunity to do so, before the execution of the bond.

Where the surety in such action claims exemption from any responsibility on account of a *fraudulent concealment* of facts affecting the risk by the agents of the bank, which concealment may be proved by facts and circumstances, no one of which of itself would be sufficient, but when combined with and explained by other evidence might satisfy the jury of its existence, although it should appear in the evidence: —

1st, That the surety did not *call for information*, nor *see* the officers of the bank after he was called upon to sign, and before the delivery of the bond, and the agent of the bank had not *avoided* giving the information.

2d, That the agent had only *omitted* to seek after the surety and *volunteer* unsolicited explanations.

3d, That knowing the defendant was to be the surety, and afterwards receiving his bond, *without seeing him*, when he was near at hand and could readily have been found; the proof of these facts will not authorize the Court to say to the jury that they overthrow the defence, *as a rule of law.*

A request for certain instructions which cannot be given with legal propriety may be refused, and no exceptions lie because not given in a modified form.

That a party has not been guilty of a fraudulent concealment of facts from another, cannot be assumed *as a rule of law* because the parties had no communication together *verbally* or in *writing.* Other modes of communication are common.

A request for instructions which assumes a ground of defence to the suit which is not taken, may properly be refused.

Thus, a request for an instruction, that defendant is not permitted to avoid his liability by proof that he did not understand the import of the bond,

unless he was induced by plaintiffs or their agents to suppose it was different from what it really was, may be refused, when the defence is, not that he did not know the import of the bond, but that facts material to the risk were concealed from him.

Declarations of the officers of a bank when made to a party transacting business with them in their official capacity, are admissible in evidence.

But declarations made by the president of a bank, when not acting in his official capacity, respecting its *past transactions*, are not admissible.

Whether a surety on an executor's bond can be discharged, so as to make him a competent witness for the executor, without notice given by the probate court; *quere*.

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

DEBT, upon a cashier's bond. The defendant's testator was one of the sureties.

The instrument being lost, its contents were proved by a copy. It was dated Oct. 1, 1847, and with the usual conditions in such bonds, contained the following,—*and shall account for all notes, drafts and moneys, drafts, notes and property heretofore intrusted to his hands and possession, as cashier of said bank, since he has held the said office.*

Evidence was produced of the loss of the funds of the bank to a large amount, but prior to the date of the bond.

The bank charter expired Oct. 1st, 1849, but by special Act of June 9, 1849, was authorized to continue its corporate capacity to Oct. 1, 1851, for the purpose of collecting its debts, and the corporation was authorized to choose three trustees, with power to prosecute and defend in the name of the bank any suits at law or equity.

The Act was accepted Oct. 22, 1849, and John Otis, Stephen Young, and Joseph Eaton were chosen trustees by whom this action was prosecuted. Otis was president of the bank in 1847, and continued such to its close and had been one of the directors for many years. Eaton had been one of the directors for some years, up to 1847, and the defendant's testator had likewise held the same office several years prior to the acceptance of the bond.

The defence was, that facts material to the risk were known to the president and directors of the bank, which

were not known to the testator; which were not communicated to him, but were concealed from him, and that the bond was obtained by fraud.

Much evidence was introduced tending to prove and also to disprove that the president and directors had knowledge before the bond was executed, that the cashier was a defaulter.

There was evidence tending to show that the books of the bank were badly kept; that different firms had largely overdrawn; that the bonds for two or three years previous to the one in suit were not found; that the cashier was called upon to give this one because the others could not be found, and that he said he would give one to cover the past, and named the testator as surety.

Hiram Stevens, the cashier, was dead.

The defendant offered Charles Cooper, (testator's son,) as a witness, who was objected to, as he was a surety on defendant's probate bond, but on the production of a copy of a petition to the Judge of Probate, and proceedings thereon, discharging the witness from his liability on the bond, and also a release from witness to himself, and a release from the executor to him, the Court allowed him to testify. By him were also proved certain conversations with Otis, which were objected to by plaintiffs but admitted.

One conversation testified to was in Washington, in 1850, when the witness said that he charged him with fraud and corruption; that he told Otis that his father sent for Stevens, (the cashier,) while he lay sick, and he heard him, Stevens, tell him that he did not know the clause was in the bond when he signed it; that Stevens said the bond that was intended to be given was accepted; that Otis took it before it was signed; that the next day Otis came down and handed him another bond which he supposed was the same one which had been agreed to, and asked him to run over and get father and his brothers to sign it, and he would wait for him. He told him of his father's astonishment and suspicion at the

retrospective clause, and that it was the basest fraud, and the witness did not recollect that Otis made any reply.

Another conversation testified to by this witness was in the spring of 1848, at the Franklin Bank, when he went to settle his father's account. At that time witness had not seen the bond; asked Otis the condition of the bank and he said all would come out right, provided the overdrafts should be made good. If the overdrafts of W. & H. Stevens could be secured the defalcation would be made up; he said my father was on the bond, and if he would indorse this paper it would save all trouble upon the bond, and his object was to induce me to get my father to indorse it. I reminded him that my father would not be liable on the bond as it was given after the defalcation; he said father was a friend to Stevens, but made no other remark.

The next conversation testified to by this witness, was in July or August, 1849. "I met Otis in the street; there had a talk about bond and reference; called on him for a copy; told him I had found a retrospective clause, and that I was astonished at it; charged him with obtaining the bond by fraud; told him my father said he did not know there was such a clause in the bond when he signed it, and it was a fraud on him; asked him how he could reconcile it to his conscience to trap him into signing the bond; said he did not think he had done my father wrong; he had been on the bond in previous years, and they had neglected to take bonds three or four years, and father would have undoubtedly signed them if asked; he expressed some doubt about the validity of the bond; said father's estate would never be troubled; it was an offence in Stevens, and they could send him to the state prison at any time."

Eaton and Young were called as witnesses by plaintiffs, who testified that the defalcation of the cashier, or any deficiency in the bank, was unknown to them or to the directors so far as they knew, until after this bond was given.

The evidence introduced bearing directly or remotely upon the grounds taken in defence was voluminous, and will

readily be apprehended by the instructions given and requested at the trial.

The jury were instructed that if at the time the bond was executed the cashier was a defaulter to the bank, and that fact was known to the president and directors of the bank, and by them concealed from defendant's testator, such concealment would be a fraud upon him, and would vitiate the bond; or, if the cashier was a defaulter at that time, and that fact was unknown to the defendant's testator, but was known to the president and directors of the bank, and they neglected to apprise him of that fact, they having a reasonable opportunity to do so before he executed the bond, such neglect would be a fraud upon the testator, and would vitiate the bond so far as he was concerned.

*That* if they were satisfied that defendant's testator was a man of business, and well able to read the bond signed by him, it is a legal presumption that he knew and understood all the provisions therein contained; *that* James N. Cooper, (the testator,) being a director of the bank, it was his duty to know the condition of the books of the bank; *that* as a director he had the opportunity to know, and the law presumes he did know their condition, and that having sworn in their semi-annual returns to the Secretary of State, as to the state of the books, the law presumes he had such knowledge; *that* it must be a knowledge of an actual deficiency, of facts material to the risk, and not the mere irregularity or want of posting up or keeping the books, the concealment of which would constitute a fraud — it must be *knowledge,* not *conjectural fears; that* the inquiry was not what witnesses understood or represented Otis to say; but the fact, did the directors know of the defalcation.

The plaintiffs' counsel requested the following instructions, viz: —

(The 1st and 2d are omitted as they were not relied upon.)

3d. If the jury believe that John Otis, president of the bank, had no communication with said James, verbally or in writing, touching his signing said bond before his signing

the same, there is no ground for any presumption that said James N. Cooper was deceived or imposed upon by said Otis in obtaining his signature.

4th. If the jury believe the testimony of Joseph Eaton and Stephen Young, that the fact of the defalcation of said cashier, or the deficiency of the assets of said bank was unknown to them, or to the directors of said bank, or any of them, until long after the signing of said bond, defendant, in that case, can make no legal defence to plaintiffs' recovering upon the same, although a defalcation or deficiency then actually existed.

5th. There is no evidence in this case, proving or tending to prove that the president, or any of the directors knew of a defalcation, or of a deficiency of the assets of said bank, prior to the execution of said bond of the first of October, 1847.

6th. That as Mr. Cooper did not call on Mr. Otis for information, nor see him after it was proposed by the cashier to procure his, (Cooper's,) signature to the bond until he did sign it, and as there is not evidence of Otis having avoided giving any information he had, there was not such opportunity for communicating information as that the want of doing it would constitute a fraud on said Cooper.

7th. That if the jury believe the testimony of Mr. Young, that the cashier, Stevens, proposed to procure, and knew the bond he was expected to procure, was to cover past years, Mr. Otis had a right to presume, that Stevens would not conceal its character from his sureties; and his, (Stevens') concealment, if such were the fact, would not be a fraud on the part of plaintiffs.

8th. The omission to seek after and volunteer unsolicited explanations, under the circumstances, (if such they are found to be,) is not such fraudulent concealment as to vitiate the bond.

9th. Unless Cooper, when he executed the bond, was induced by the misconduct of the plaintiffs or their agent, to suppose the bond was different from what it really was, he

is not permitted to avoid his liability by proof, that he did not understand the import of the bond.

The Judge refused to give any of these requested instructions. A verdict was returned for defendant.

The plaintiffs filed exceptions to the rulings, the instructions and the refusals to instruct.

*J. W. Bradbury* and *H. W. Paine*, in support of the exceptions, argued 1st, that Charles Cooper was not a *competent* witness. When he was discharged it was done in probate court without notice. *Chase* v. *Hathaway*, 18 Mass. 222; *Breed* v. *Pratt*, 18 Pick. 115. Such a proceeding destroyed the right of appeal provided for in c. 105, § 25, R. S.

2. That the testimony as to conversations with Otis was improperly received. Otis was then but a director, and it does not appear he was employed about the business of the bank. He was doing no act. It was at most but a conversation between the witness and director about a past transaction. *Polley* v. *Ocean Ins. Co.* 14 Maine, 141; *Hartford Bank* v. *Hart*, 3 Day, 491; *McGill* v. *Ransford*, 4 S. & R. 317.

3. The conversation in July, 1849, was not admissible. Otis was not trustee till the fall of 1849. Otis was then in the street, and there is no pretence he was doing any act in his official capacity. This testimony was calculated to prejudice the jury.

4. The third request should have been complied with. The jury were to inquire whether there was a concealment, or if there may have been an omission to state facts proper to be known as to the first breach, they should have been told there could be no concealment, if the parties did not come directly or indirectly together, and there was not the slightest evidence they ever did.

The counsel further argued that the 6th, 8th and 9th requests should have been complied with.

*Evans, contra.* Cooper was a competent witness, having been discharged from the executor's bond, and mutual re-

leases between him and the executor having been given. The statute requires no notice to be given. *Dunham* v. *Branch*, 5 Cush. 560; *Ford* v. *Ford*, 17 Pick. 418; *Bryant* v. *Turner*, 13 Mass. 391. When wanted as a witness surety may be discharged. c. 113, § 20, R. S.

2. The testimony was admissible. The trustees were appointed before the Act, which afterwards ratified rather than gave them their authority. The directors supposed themselves possessed of the required power, and the trustees performed the same duties before and since said act.

3. The requested instructions were properly withheld. The first three, with the fifth and sixth, called upon the Court to decide as matters of law, what was plainly for the jury as matter of fact. 1 Greenl. Ev. § § 44, 48 inclusive.

The fourth was substantially given in chief. It forms no ground of exceptions that the instructions are not given in any precise form, provided those proper for the case are given in any form. *Walcot* v. *Keith*, 2 Foster, N. H. 196.

The seventh was properly refused. The character of the bond was not the turning point in the case. The eighth assumes a ground of defence not taken by defendant, and as to the ninth, the defence was not put upon the ground that defendant's testator did not understand the import of the bond.

If the result of the whole charge is correct, though there may be errors in some particulars, there is no ground for a new trial. *Gibson* v. *Stevens*, 7 N. H. 352; *Lyman* v. *Redman*, 23 Maine, 289; *Brown* v. *Osgood*, 25 Maine, 525.

*Paine*, in reply. Although the statute does not require notice to discharge the surety, yet the common law does, according to the authorities cited.

The vote appointing trustees was not until Oct. 1849; the conversation testified to was prior to that time. But I deny they were trustees in any sense to authorize their declaration to be given in evidence, until made such by the Act of 1849. They were appointed by the directors as a commit-

tee, but that vote had no effect to vest in them the property of the bank, as was done by the Act.

TENNEY, J. — When this case went to the jury it was upon a bond given by the cashier of the bank, and the defendant's testator as one of his sureties. Among other duties required of the cashier, in the condition of the bond, was, "and shall account for all notes, drafts and moneys, drafts, notes and property, heretofore intrusted to his hands and possession as cashier of said bank, since he has held said office."

The defence to the action was, that the bond was obtained by fraud. That facts material to the risk were known to the president and directors of the bank, which were not known to the defendant's testator, and which were not communicated to him, but were concealed from him. And evidence was introduced for the purpose of establishing these propositions.

The jury were instructed, that if at the time the bond was given, the cashier was a defaulter, and that fact was unknown to the defendant's testator, but was known to the president and directors of the bank, and they neglected to apprise him of that fact, they having a reasonable opportunity to do so, before he executed the bond, such a neglect would be a fraud upon the testator and would vitiate the bond, so far as he was concerned."

These instructions are well supported by this case as reported in 36 Maine, 179, and no question is made thereon. But exceptions are taken to omissions to give certain instructions, requested by the plaintiffs, some of which are not relied upon; and also to the admission of certain testimony objected to by them.

The requests, numbered six, seven and eight for instructions, were, that fraudulent concealment would be negatived, by the finding of certain other facts, stated in the requests. The fraud alleged, was of that character, which might be shown by facts and circumstances, no one of which was

suited to prove it without further evidence, but altogether might clearly satisfy the jury of its existence, when little of it was *positive* and *directly* bearing upon the issue. What influence the facts assumed in the requests might have upon the question of fraudulent concealment, was beyond the power of the Court to state to the jury, as a rule of law.

It was properly submitted to the jury to determine what would constitute a reasonable opportunity for the president and directors of the bank to give the defendant's testator information of the cashier's defaults. It would have been clearly erroneous in the Judge to have instructed the jury, that there was no fraudulent concealment, because Cooper did not call on Otis for information, nor see him, after it was proposed by the cashier to obtain his signature, even if Otis had not avoided giving the information. If the president and directors had just ascertained with much labor and research, that the cashier was a defaulter, and Cooper was ignorant thereof, and they had reason to suppose, that he was thus ignorant, no known principle of law, would confine the reasonable opportunity, to that which would be afforded by a call by Cooper for information, upon the president and directors, or to a meeting with them after the cashier had proposed to them to obtain him as a surety.

Neither is it a settled principle of law, that the president and directors of the bank, would be relieved from the imputation of fraudulent concealment, after obtaining the knowledge, that the cashier was a defaulter, which knowledge they had, under such circumstances, that they had no reason to believe the defendant's testator was possessed of merely by the omission to seek after and volunteer unsolicited explanations.

One element in this species of fraud is, that the party charged therewith, has full knowledge of facts, which cause the transaction to be a departue from such, as are expected to occur in the usual course of business of that description, subjecting the other party, only to the ordinary risks attending it; and the latter is not supposed to be under even

a reasonable apprehension of that, of which the other has this perfect information.

Under the circumstances relied upon in defence of this action, if the president and directors were informed by the cashier, that he designed to obtain the name of Cooper upon this bond, and they received it afterwards from the cashier without seeing him, when he was near and could readily be found, the omission to give him the information, that the principal in the bond was a defaulter, so important for him, cannot be treated as an honest transaction, when silence would be a fraudulent concealment, if he executed the bond in their presence. Such distinctions have no basis, and cannot be upheld.

The third requested instruction was, that "if the jury believe that John Otis, president of the bank, had no communication with said James Cooper, verbally or in writing, touching his signing said bond, before signing the same, there is no ground for any presumption that said Cooper was deceived or imposed upon by said Otis, in obtaining his signature."

It is contended, that as to the first branch of this requested instruction, the jury should have been told that there could be no concealment, if the parties did not directly or indirectly come together; and it is said, there was not the slightest evidence that they ever did.

It is well settled, that if an instruction cannot be given entire with legal propriety, no exception can be taken, because not given in a modified form. If no communication, either verbal or written, had taken place between Otis and Cooper, very important communications may have taken place between them in other modes. And it seems to have been relied upon, that this negotiation between the president and directors and the defendant's testator was through the cashier. At any rate, evidence is introduced, by which it appears that the president was charged with having had an agency in obtaining the signature of Cooper to the bond before its execution by Charles Cooper, and he is repre-

sented as having made no reply to the charge. It was for the jury to judge of the effect of this evidence. This instruction was properly withheld.

The ninth requested instruction was, that "unless Cooper, when he executed the bond, was induced by the misconduct of the plaintiffs or their agent to suppose the bond was different from what it really was, he is not permitted to avoid his liability, by proof that he did not understand the import of the bond."

The jury were instructed, that if the defendant's testator was a man of business, and well able to read the bond which he signed, the law presumed that he knew and understood all the provisions therein contained. And the defence was not that the testator was imposed upon, in signing a bond containing a provision that he knew not of, but as the case finds, that facts material to his risk, unknown to him, but known to the president and directors, were concealed from him.

Again, there was no attempt made, at the trial, to show that Cooper was ignorant of the existence of the retrospective clause in the bond, when he signed it, as an independent fact, and no suggestion made, that such fact could be a defence, if proved. But every thing in the case upon this point is, that Charles Cooper charged the president, after the death of his father, with fraud and corruption; told him his father sent for the cashier, while he lay sick; and that he heard the cashier tell his father, that he did not know the clause was in the bond when he signed it; that the cashier said, that the bond that was intended to be given, was accepted; that the president took it before it was signed; and that the next day he came down and handed him another bond, which he supposed was the same one which had been agreed to, and asked him to run over, and get his father and brother to sign it, and he would wait for him; that he told him of his father's astonishment and surprise at the retrospective clause, and that it was the basest fraud. To this the witness stated, he recollected no reply

from Mr. Otis. In this evidence, the charge was, that there had been a gross fraud in obtaining the signature of the defendant's testator; that charge, and the one, that the testator was ignorant of the retrospective clause, were inseparably connected; if one is to be inferred to be true, from the silence of the party addressed, equally so must the other. There is no foundation, therefore, for the instruction, in the evidence, if the defendant had relied upon the want of knowledge simply, that the retrospective clause was in the bond.

The evidence of the interview between Charles Cooper and the officers of the bank, early in the spring of 1848, which was objected to, appertained to the business of the testator with the bank, and the conversation, which took place, might with propriety be regarded as acts, which were admissible, inasmuch as Charles Cooper went there for the purpose of settling his father's account.

A conversation is also represented by Charles Cooper as having taken place between him and the president of the bank, in the street in Hallowell, in a month or two after the death of the testator, which was on June 17, 1849. They had a talk about the bond and reference; called on Otis for a copy; told him he had found there was a retrospective clause, and that he was astonished at it; charged him with obtaining the bond by fraud; told him his father did not know there was such a clause in the bond when he signed it, and it was a fraud on him; asked him how he could reconcile it to his conscience to trap him into signing the bond. He said he did not think he had done his father wrong; he had been on the bond in previous years, and they had neglected to take bonds three or four years, and his father would, undoubtedly, have signed them if asked; he expressed some doubt about the validity of the bond; said father's estate would never be troubled. This evidence was objected to, but admitted.

At the time of this conversation, the Act of June 9, 1849, authorizing the choice of three trustees, to close up the

affairs of the bank, had not been accepted. The vote of acceptance was on Oct. 22, 1849, when Otis, Eaton and Young were chosen trustees. The declarations or admissions of a director of a bank, respecting its past transactions are inadmissible as testimony. *Polleys* v. *Ocean Ins. Co.*, 2 Shepley, 141.

Was the conversation between the president of the bank and Charles Cooper, in the summer of 1849, respecting past transactions? Part of it was certainly of this character. It is true, the witness called for a copy of the bond, but the call being in the street, several miles from the bank, it is not to be understood, that it was made under the expectation of obtaining it at that time. No attempt was made to adjust the difficulty, but all had reference to what had been done before. The president spoke of having neglected to take bonds of the cashier before, and that the testator would have signed such, had they been presented. These admissions of Otis had a tendency to show a concealment of the fact, that the cashier was a defaulter, and we think they were inadmissible, from Otis as president.

Whether Charles Cooper was a competent witness or not, on account of having been a surety on the defendant's bond as executor and discharged by the Judge of Probate, without having given notice to those interested, is a question which it is not important to decide, inasmuch as upon another ground the case must be sent to another trial; and under the law as it now stands, a surety upon a bond is a competent witness for the principal therein without a discharge. *Exceptions sustained.*

† TOZIER *versus* SCHOOL DISTRICT NO. 2 IN VIENNA.

It is no valid objection to the legality of a school district tax laid for removing and repairing a school-house, that the house is taken from the limits of another district; that in removing it is pulled down, and that in repairing it is left in a different shape and size from what it formerly was.

Where by the records, the school district officers appear to have been qualified by a magistrate, the presumption is, in the absence of all testimony, that they were made by the proper recording officer.

When by the vote of a district the selectmen are requested to locate their school-house, their acts under such vote are recommendatory only.

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

ASSUMPSIT, to recover back money paid to discharge two taxes assessed on plaintiff's property by school district No. 2.

In 1848 the limits of the school districts in Vienna were changed, by which change the school-house of former district No. 2, was included in the limits of district No. 1.

A meeting of district No. 2, was called by the selectmen for the following among other purposes, "to see if the district will vote to remove and repair the old school-house and if so, fix upon some place to set said house," and another article, "to see what sum of money they would raise for that purpose."

One article in the warrant was to choose a clerk, and James Sanborn was chosen.

The only evidence of his being sworn was a record upon the district book of records that such was the fact, and signed by a justice of the peace.

At that meeting $125 were raised under the article in the warrant; and at a subsequent meeting a vote was passed to raise $30 to finish the school-house, and $6 to purchase a stove.

At one of the meetings, by a vote of the district, the selectmen were requested to fix upon the place on which the school-house was to be erected, and they did so, and it was erected on the spot by them designated.

It appeared that the old school-house was pulled down,

and the materials removed to the place where the new one was erected, which was neither so high, long nor wide as the old one.

Assessments were made upon the certificates of the sums to be raised by the clerk of the district, and a warrant issued.

The collector seized personal property of the plaintiff to collect the first tax, and advertised it for sale, and the plaintiff then paid the tax, saying the tax was illegal, and he paid the second tax without such seizure.

The money had been paid to the district.

The Court were authorized to enter the proper judgment.

*Currier*, for defendants.

1. The money was raised in both cases for lawful purposes; the taxes legally assessed and duly applied to the objects for which it was raised.

2. Both assessments were voluntarily paid, and therefore cannot be recovered back.

*Kempton*, for plaintiff, argued —

1. That if the money was raised for an ostensible lawful purpose, it was not in fact, but the district designed to commit a trespass; it was to remove this house which they did not own. And in fact the purpose was unlawful.

2. That the money was never expended for the purposes for which it was pretended to be raised. The district did not contemplate building a school-house; the vote was to remove and repair. *Green* v. *Bailey*, 3 Fairf. 254. The work on the school-house does not come under the head of *repairs*. *Webster's Dict.*, word *repair*.

3. The evidence of the qualification of the officer was not legal. R. S., c. 5, § 15.

4. The selectmen unlawfully interfered to locate the school-house; they can only act where there is a disagreement of the district; here was none.

5. The plaintiff paid under protest that the tax was illegal.

Tozier *v.* School District No 2 in Vienna.

RICE, J. — School Districts are authorized by law to raise money for the purpose of erecting, repairing, purchasing, and removing school-houses. R. S., c. 17, § 8. It does not appear in what manner the district, in this case, claimed title to the old school-house. The first assessment of which the plaintiff complains, was made for the purpose of removing the school-house and repairing the same. The law does not prescribe the place where a school-house may be purchased, nor the manner in which it may be removed or repaired.

Justices of the peace are authorized to administer to clerks of school districts the oath of office, and when a certificate of such oath is found extended upon the records of the district, in the absence of other proof, it is presumed to have been placed upon record by the proper recording officer, in conformity with his duty.

The selectmen in the location of the school-house, do not appear to have acted under authority conferred upon them by the statute, in case of a disagreement on the part of the district, but in harmony with the whole district, by its invitation, and under a vote thereof which seems to have been passed without dissent. Their acts under such circumstances were merely recommendatory, not compulsory.

The second tax appears to have been paid without objection.

No such substantial deviations from the requirements of the statute have been indicated as would relieve the plaintiff from his obligation to pay this tax, or as will entitle him to recover back the money paid, even had it been paid under protest and by duress. *Plaintiff nonsuit.*

TENNEY, J., did not sit.

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† FELLOWS *versus* SCHOOL DISTRICT NO. 8, IN FAYETTE.

Of duress, *per minas*, and by imprisonment.

The payment of a tax, which may conscientiously be retained, with a full knowledge of all the facts, *after* one has been arrested for its non-payment, and *discharged* on his *promise* to pay it, is voluntary, and cannot be recovered back, notwithstanding informalities in its assessment.

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

ASSUMPSIT, to recover back the sum paid on a school district tax in 1852, for building a school-house.

After the evidence was introduced, the cause was agreed to be submitted to the decision of the full Court upon so much of the testimony as was admissible, and such judgment to be entered as the rights of the parties may require.

Much evidence was given as to the proceedings of the district and the town, but from the view of the case taken by the Court, that part of it becomes immaterial.

The collector of the tax testified, that a tax came into his hands against the inhabitants of school district No, 8; that he collected of the plaintiff on said tax $6,69, that plaintiff protested against the payment of said tax, that he arrested him and carried him to Augusta, (the place of the jail,) and brought him back; that at Augusta the plaintiff promised and agreed, that if he would release him from said arrest he would pay over the $6,69, and the costs of the arrest; that the sum paid was the tax assessed on plaintiff's personal estate and poll; that he thereupon released him from said arrest, and that he afterwards paid him the tax and cost. The arrest was made the last of November, 1852, and it was paid about one week after the arrest, and in pursuance of the agreement by which he was discharged.

*Kempton*, for defendants, argued at length all the points raised in the case, as to the illegal proceedings, which it becomes unnecessary to notice.

He also argued, that in any event the action was not maintainable on two grounds:—

1st. The money was paid voluntarily and with a full

knowledge of all the facts in the case. Money thus paid cannot be recovered back. *Norton* v. *Marden*, 15 Maine, 45.

He paid the money one week after the arrest, not because he was threatened with arrest or because his property was liable to seizure and sacrifice, but simply because he had promised to pay. The warrant had then lost its vitality. It is of no consequence what had previously transpired between the collector and plaintiff, their agreements and promises amount to nothing, so far as the real and actual fact of payment is concerned. If the payment was the result of choice, a free act of the will, without compulsion or duress either of the mind or body, then the money was paid voluntarily and with a knowledge of all the facts.

2. The defendants have received none of the plaintiff's money. The collector released the plaintiff upon his own responsibility, and at his peril. That act done fixed his liability, and he thereby assumed the indebtedness of the plaintiff. He was holden for it, whether plaintiff paid it or not. When plaintiff paid it, he paid it for the exclusive benefit of the collector. The town had a right of action against the collector, immediately on the discharge of plaintiff; so that the money paid by plaintiff was *not* the district's.

3. The equities are on the side of defendants; there is no complaint that a house was not needed; that plaintiff was assessed for property he did not own, or that his proportion was too large. The law and the best interests of the rising generation require districts to build schoolhouses. This district has never had one before, although the town has had a corporate existence of fifty years. Stronger reasons than have been presented in this case, should be shown, before the proceedings of the district are broken up.

*E. O. Bean*, for plaintiff, maintained that many errors in the proceedings were apparent which rendered the tax invalid. As for the payment of the tax, he insisted it was

done under protest and if the tax was illegal, he could recover it back, and cited *Smith* v. *Inhabitants of Readfield*, 27 Maine, 145; *Preston* v. *Boston*, 12 Pick. 7.

RICE, J. — The defendant claims to recover the amount of a tax paid to the collector of the town of Fayette, for the benefit of the defendants, which he alleges was illegally assessed upon him, and which he was compelled to pay by duress, and which was paid under protest.

By duress, in its more extended sense, is meant that degree of severity, either threatened or impending, or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness. The common law has divided it into two classes, namely, duress *per minas*, and duress of imprisonment. Duress *per minas* is restricted to the fear of loss of life, or of mayhem, or loss of limb; or in other words of remediless harm to the person. 2 Greenl. Ev. § 301.

The plea of duress of imprisonment is supported by any evidence that the party was unlawfully restrained of his liberty until he would execute the instrument. *Ibid*, § 302. To constitute duress of imprisonment, the imprisonment must be unlawful. 1 Salk. 68.

One peremptorily called upon to pay an illegal tax, by virtue of a warrant issued to a collector of taxes, may give notice that he pays it by duress, and not voluntarily, and it would seem, under such circumstances, may recover it back again. *Preston* v. *Boston*, 12 Pick. 7.

But where money is claimed as rightfully due, and is paid voluntarily, and with a full knowledge of all the facts in the case, it cannot be recovered back if the party to whom it has been paid may conscientiously retain it. *Brisbane* v. *Dacres*, 5 Taunt. 144; *Smith* v. *Readfield*, 27 Maine, 145. Nor can money paid under a mistake of law be reclaimed. *Norton* v. *Marden*, 15 Maine, 45.

A tax had been assessed against the plaintiff by the assessors of Fayette, for the benefit of the inhabitants of

School District No. 8, in that town. Tax bills in which this tax was included, accompanied by a warrant for their collection, had been committed to the collector of taxes for Fayette. The plaintiff had been called upon by the collector, and payment of the tax against him demanded; he protested against paying; was arrested by the collector and carried to Augusta, when he agreed that he would pay the tax, and was thereupon discharged from his arrest by the collector. About a week after this transaction, without any further interposition, or claim on the part of the collector, so far as the case finds, the plaintiff paid the tax, and costs of arrest and conveyance to Augusta and back. Was that a voluntary payment, with a knowledge of all the facts, or was it a payment under protest, and by duress?

At common law, as it was understood before and during the reign of Elizabeth, a voluntary escape of a prisoner, in execution, completely and forever discharged him from the debt, so that neither the plaintiff nor sheriff could retake him for the same demand. Bra. Tit. Escape, Pl. 12 and 45; *Linacre* v. *Rhodes*' case, Leon. R. 96; *Lansing* v. *Fleet*, 2 Johnson's Cases, 3.

Since that time this law has been modified, or differently understood, and a voluntary escape of a debtor in execution, will not deprive the creditor of the right of procuring the rearrest of the debtor on a *new* process, or if he voluntarily return, of considering him in custody under the old; but so far as the sheriff is concerned, he cannot rearrest the debtor on the old process. By the first arrest the writ has been obeyed, and has performed its proper function; and after a voluntary discharge, the sheriff cannot arrest a second time on the same precept. If he does so, he is liable to an action for false imprisonment. *Atkinson* v. *Jameson*, 5 D. & E. 25; *Sheriff of Essex's case*, Hob. 202; Vin. Ab. Escape, p. 17; *Thompson* v. *Lockwood*, 15 John. 256; *Lansing* v. *Fleet*, 2 Johns. Cases, 3; *Com.* v. *Drew*, 4 Mass. 391; *Brown* v. *Getchell*, 11 Mass. 11.

That the collector, after the arrest, permitted the plaintiff

voluntarily to escape, is too plain to require argument. After that escape the power of the collector, under his warrant, to reärrest the plaintiff was extinguished. Nor indeed is there any evidence that he again sought to enforce his warrant by another arrest, or even threatened to do so. If it be said that the tax was paid under the agreement to pay, by means of which the plaintiff procured his discharge from arrest, and that that agreement was extorted by duress, the answer is, if, as the plaintiff contends, the arrest was illegal, then the agreement was without legal consideration, and void. If it be further said that the plaintiff supposed or apprehended that he should be again arrested if he did not pay, and made the payment under the misapprehension of his legal rights, the answer is, that such a misapprehension would be a mistake of law, and not of fact.

Upon the whole, the payment of which the plaintiff now complains, must be deemed to have been made voluntarily, and with a knowledge of all the facts. The action seems to be grounded wholly on supposed technical defects in the proceedings on the part of the town and the school district. The money has been appropriated for a highly meritorious object, and there is no suggestion of oppression, improvidence or waste, on the part of the authorities of the town or district. In such a case we think the money may well be consistently retained, even though there may have been technical informalities in assessing the tax. In the view however, which we have taken of the case, it does not become necessary to examine the proceedings of the town or district; we therefore express no opinion upon that part of the case which refers to the legality of the tax.

*Plaintiff nonsuit.*

TENNEY, J. — having been unable to be present at the hearing, took no part in the decision.

† SPAULDING *versus* GOODSPEAD.

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A judgment in a writ of entry for the premises, and possession under it against the person apparently holding title, though he may have conveyed it by an *unrecorded deed*, but unknown to the levying creditor, is evidence of title against which *such grantee* can interpose no defence.

Nor can the claimants under such *grantee* set up any title *anterior* to the *judgment*, and which, if pleaded, might have defeated it.

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

WRIT OF ENTRY.

After the evidence was introduced the case was taken from the jury, and upon so much of the evidence as was admissible the Court were authorized to draw the inferences a jury might, and render judgment according to law.

The titles of the parties are fully stated in the opinion of the Court, which was drawn up by

TENNEY, J. — The demandant's title is under the levy of an execution in his favor against Charles O'Conner, upon the demanded premises, made on Sept. 17, 1849, and in season to preserve the attachment upon the original writ, which was made on Sept. 7, 1848. In support of this title, is introduced a judgment in a real action in favor of the demandant, against Edmund Fuller, instituted on Nov. 15, 1849, of which Fuller had notice the same day by a personal service of the writ upon him; and the writ of possession issued upon that judgment, with the return of an officer thereon, that he had delivered seizin and possession of the premises demanded to the demandant, on Oct. 17, 1851.

The tenant claims under a deed from Charles O'Conner, dated August 31, 1848, which was recorded on the day next succeeding, to Daniel Gifford, who gave a deed to Jonathan H. Fuller, on May 12, 1849, which was recorded Nov. 1, 1850. Jonathan H. Fuller made and delivered his deed of the premises to Edmund Fuller, dated Nov. 13, 1849, which was put upon record Nov. 1, 1850, and the latter deeded to Robert Elliot on Nov. 15, 1849, and the deed was recorded on Oct. 26, 1852.

The tenant also introduced the levy of an execution in favor of Jonathan H. Fuller, against Charles O'Conner, dated January 10, 1849, and within thirty days after the rendition of judgment, on which the execution issued, the premises having been attached on Sept. 5, 1848.

The suit of the demandant against Edmund Fuller, was commenced on the same day of the date of the deed from Fuller to Elliot. The case however discloses no evidence that the demandant had actual notice of this deed, sooner than the same was recorded. And as against the demandant, the grantee acquired no rights thereby, until after the former had been put into possession of the premises, by the officer who executed the writ of possession; and at that time he was concluded, by that judgment and subsequent proceedings. R. S., c. 91, § § 1 and 26.

Those persons claiming under Edmund Fuller, derived all the rights which they acquired subsequently to the recovery of the demandant against him, and can stand in no better position than he did. *Winslow* v. *Grindal*, 2 Greenl. 64.

The tenant can derive no benefit under the levy of Jonathan H. Fuller's execution against Charles O'Conner, even if the levy was sufficient to pass the debtor's interest in the land at the time of the attachment, which may be very doubtful. The deed of Jonathan H. Fuller to Edmund Fuller was given before the institution of the suit of the demandant against the latter, and after the completion of the levy of Jonathan H. Fuller's execution. The rights acquired under this levy were in Edmund Fuller, so that he could have defended the demandant's suit thereby, if he had chosen to do so. But since the recovery, this levy cannot prevail against the demandant's title.

*Tenant defaulted.*

*Bradbury & Morrill*, for the tenant.

*Libbey*, for demandant.

† BROWN *versus* CLOUGH, *Executor.*

A bond, in which the condition is that if within one year upon request and payment of a certain sum, the obligor shall make and execute a valid deed of a piece of land, is forfeited, by a refusal to convey on such request and payment at *any time* within the year.

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

DEBT, on a bond.

The defendant's testator on Dec. 22, 1851, gave to plaintiff a bond for the conveyance of a parcel of land on payment of $100.

A part of the condition was in these words: —

"The condition of the above obligation is such, that if within one year from this date, upon the request of said Brown, &c., and the payment of the sum of one hundred dollars, the said Nathaniel and his heirs, executors, administrators, shall make and deliver to him, his heirs or assigns, a good and valid deed in fee" of the premises described, &c.

Soon after this bond was executed the obligor died, and defendant was appointed his executor.

In June, 1852, the assignee of this bond petitioned the Judge of Probate that he would empower the defendant to make the deed referred to, which was accordingly done.

In July, 1852, the $100 was tendered to the defendant and the deed requested by the obligee for the benefit of the assignee of the bond.

The defendant refused to receive the money and give the deed.

This suit was commenced in August, 1852.

The Court were authorized to render judgment by nonsuit or default, according to the legal rights of the parties.

*Paine*, for defendant, maintained that the obligor had the entire year to give the deed and save the forfeiture; that it was when a party voluntarily disables himself to perform, there was a breach within the time, and cited *Heard* v. *Bowers*, 23 Pick. 455.

*L. M. Morrill* and *W. B. Snell*, for plaintiff.

1. The rights of the obligee depended upon some acts. To secure those rights he must perform those acts within the year.

"Upon" such performance of those acts, he is, within a reasonable time, to have his deed.

2. The obligor is bound to make the deed "upon" payment and demand, if within the year.

Time was important only to the obligee; to the obligor it was not; the sooner he could get his pay, the better. The contract is for the sale of land, giving time to purchase for payment. No facts are in the case to show that time was material or important to the obligor.

3. The year was not claimed as the ground of refusal to convey.

RICE, J. — The case presents a single point only, and that is, whether the obligor in the bond was entitled to one year within which to execute his deed, or the obligee was entitled to that time within which to make payment and request a deed. The language in the condition in the bond, bearing upon that point, is as follows: — "That if within one year from this date, upon request of the said William G. Brown, or his heirs, executors or administrators, and the payment of one hundred dollars, &c., the said Nathaniel Blair, &c., shall make and deliver to the said Brown, &c., a good and valid deed," &c. This language, standing alone, is not wholly free from ambiguity. The intention of the parties must govern, if not inconsistent with rules of law. Those intentions may be ascertained by reference to the whole instrument, to the situation of the parties, and to their contemporaneous acts in relation to the subject matter.

The transaction was between buyer and seller of land. Was time desired by the seller to enable him to execute his deed of the premises; or by the purchaser to enable him to make the stipulated payment? The ordinary course of business between parties thus situated would indicate the latter. The acts of the parties also indicate, that they understood

that the deed was to be executed upon request, (within the year,) and payment of the price stipulated. An application of the technical rules of construction between grantor and grantee, in cases of doubt, favors the position of the plaintiff.

In view of the whole case, we are of opinion, that the word "upon," as used in the condition of the bond is equivalent in meaning to the words "at the time of." This construction would require the obligor to execute his deed within a reasonable time after request made and money paid or tendered, if done within a year. This he has neglected and refused to do, and thereby occasioned a breach of the bond.

According to agreement a default must be entered, the defendant to be heard in damages by the Court.

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HOPKINS *versus* FOWLER.

Instructions, though true as abstract propositions, which have no foundation in the evidence in the case, but which *may* have had a tendency to mislead the jury, cannot be sustained.

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

ASSUMPSIT.

The parties were co-sureties on a note wherein Lewis Hopkins was principal. The note was paid by plaintiff. At the time the note was given, Lewis was carrying on a tannery in the neighborhood of the defendant, and about sixteen miles from the residence of plaintiff.

Lewis Hopkins was a witness for plaintiff to show for whom the note was discounted. He also testified, that after the note was paid, defendant requested him to get the note and bring it to him, so that he could know it was out of the bank; and he asked plaintiff to let him take it, and show it to defendant, that he might know it was taken up, and that after calling upon him two or three times, the plain-

tiff let him take it, requiring it to be returned to him, and he showed it to defendant, who cut his name out of it.

He also testified that about the time the note was given, he had a lot of five or six hundred hides, which plaintiff procured for him in Boston, and was holden for them; the witness was to have the profits of tanning, and he expected to realize enough to pay the note; it was the understanding the tanning should go in that way, but before they were done leather was down, and nothing came from it.

There was some evidence tending to show that Lewis secured the defendant for becoming his surety, and that the property was given up when he showed to him the note.

No evidence was produced that plaintiff knew that Lewis had given any security to defendant.

The Court instructed the jury that if plaintiff permitted Lewis to take the note, with the intention or expectation that he should exhibit it to Fowler, as evidence that he (Lewis) had paid it, and if Lewis did so exhibit the note, and was thereby enabled to induce Fowler to surrender his security, then the plaintiff is not entitled to recover, even if he did not receive pay from the leather; and that if plaintiff, knowing that Fowler had the property of Lewis in his hands, and that he believed the note to have been paid by Lewis, intentionally neglected to inform Fowler that he had paid the note, till such property had all gone back into the hands of Lewis, and he had become insolvent, then he is not entitled to recover.

A verdict was returned for defendant.

The plaintiff excepted to the instructions, and also submitted a motion to set aside the verdict as being returned against the evidence in the cause.

*Heath*, for plaintiff.

*H. W. Paine* and *A. Libbey*, for defendant.

CUTTING, J. — On a careful examination of "all the testimony presented to the jury," we are unable to perceive, that the plaintiff had any knowledge of the existence of any

mortgage or security from Lewis Hopkins to the defendant to indemnify him against his liability as a co-surety on the note; or that the plaintiff "intentionally neglected to inform the defendant that he had paid the note." From the evidence, it does not appear, that the plaintiff was under any legal obligation to give such information, for he could not have anticipated any loss to the defendant from his neglect to do so. It seems, that the defendant was led into an error (if any there was,) by his conversations with Lewis Hopkins, for which the plaintiff was not legally responsible, they having been made without his knowledge. If the defendant saw fit to rely on such declarations, without ascertaining their truth from the plaintiff, and in consequence thereof surrendered his security, it only shows a misplaced confidence in the person whom he had aided, and for which the plaintiff was in no way accountable. The possession of the note by Lewis Fowler, at the time it was exhibited to the defendant, is accounted for without impeaching the motives of the plaintiff. Consequently the instructions of the presiding Judge, although perhaps true as abstract propositions, were erroneous when applied to the evidence in this case. They must have been called forth upon an assumption of some testimony to warrant them, and if the assumption was erroneous, the instructions became a superstructure without a foundation, and might have had some tendency to mislead the jury.

On the other hand, if the instructions were correct, the verdict is clearly against evidence, and should be set aside on the motion. On the whole we are inclined to sustain both the exceptions and motion.

*Verdict set aside.*
*New trial granted.*

TENNEY and APPLETON, J. J., concurred.

SHEPLEY, C. J., did not concur.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

## EASTERN DISTRICT,

## 1855.

39 571
39 594
45 533
48 455
68 251
78 168

PRESENT:

HON. ETHER SHEPLEY, LL. D., CHIEF JUSTICE.
HON. JOHN S. TENNEY, LL. D., } ASSOCIATE
HON. JOHN APPLETON, } JUSTICES.
HON. RICHARD D. RICE, }

## COUNTY OF PENOBSCOT.

### OLDTOWN & LINCOLN RAILROAD CO. *versus* VEAZIE.

Where the Act of incorporation requires the company's capital stock to consist of not less than a given number of shares, assessments made upon subscriptions to such stock *before* the required number is taken, are illegal, and no action can be maintained to recover them.

A subscription for a certain portion of such capital stock, on condition that a *proposition* made by the subscriber shall be accepted, which was in fact but the *basis* of a contract, but when drawn up in form was repudiated by the subscriber as being variant from the proposition, is invalid, although *the proposition* may have been accepted by the corporation.

The plea of the *general issue* to an action by a corporation admits only their power to sue and be sued. It does not admit that such plaintiff has performed conditions by which contracts made with it have become binding.

Oldtown & Lincoln Railroad Co. *v.* Veazie.

The alteration of the charter of a corporation, requiring less amount of capital stock, whereby the amount required is subscribed for, cannot make *previous subscribers* to its stock liable as *shareholders*, who were not such before the alteration.

Thus, where the defendant subscribed for 1,000 shares in the capital stock of the plaintiff corporation, *when* the charter required 11,000 shares to be the minimum, and somewhat less than 10,000 were in fact agreed to be taken and paid for, and the company was organized, the subscriptions accepted and assessments made upon them; and afterwards an alteration in the charter was made by the Legislature and accepted by the corporation reducing the minimum of the capital stock required to 8,000 shares; in an action to recover such assessments on defendant's shares, made *before* and *after* such alteration of the charter; *it was held* —

1st. That the minimum number of shares of capital stock required by the charter at the time the subscription was made, was a condition precedent to be fulfilled by the corporation before the subscription was liable to assessment.

2d. That the alteration and acceptance of the charter requiring only 8,000 shares for the minimum of the capital stock, and although an amount exceeding that number was taken, would not authorize the corporation to assess a subscription made under the original charter.

3d. Nor will the defendant be estopped to set up the original conditions of his subscription, although he may have exhibited himself as a shareholder and officer in the corporation, and had contributed towards payment of the expenses of the corporation. The requirements of the charter cannot be waived.

4th. That corporators by any acts or declarations cannot relieve the corporation from its obligation to possess the capital stock required by its charter.

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

Assumpsit, to recover assessments and interest on defendant's subscription for one thousand shares of the capital stock in the Oldtown & Lincoln Railroad Company. The writ bore date of Dec. 9, 1854, and the cause was presented under the general issue.

In evidence was offered a charter, granted by the Legislature, on March 8, 1852, by which the defendant and others were made a body corporate by name of the Oldtown & Lincoln Railroad Company, for the purpose therein named.

By the second section of the charter, it was provided that the capital stock of said corporation should consist of not less than eleven thousand, nor more than fifteen thousand shares.

On September 8, 1852, after notice had been given as

required, the charter was accepted, and defendant and eight others were chosen as directors.

At this meeting the following vote was passed: "whereas the corporators of this charter have heretofore directed subscriptions to the capital stock of said corporation, according to which a subscription has been obtained of shares exceeding the minimum number named in said charter, and whereas a large majority of said stock is represented at this meeting, and a majority of the persons subscribing are now present; therefore it is voted that said subscriptions be accepted and made valid between said subscribers and this corporation, and that they be admitted as the stockholders, at this meeting."

A code of by-laws was also accepted, and article 9th provided that the capital stock should be divided into shares of twenty dollars each, subject at any and all times to the assessments as ordered by the board of directors.

The second section of the charter was amended in Sept. 1853, so that the capital stock should consist of not less than eight thousand shares, nor more than twenty-five thousand shares, the par value being thereby fixed at $20 each, which was accepted by the directors on Oct. 1, 1853.

A paper signed by defendant, under date of August 13, 1853, for one thousand shares, $20,000, of the following tenor, was in evidence.

"Oldtown & Lincoln Railroad Company. *Subscription.*— Whereas, it is proposed to build an up river railroad, so called, and an Act of incorporation has been obtained from the Legislature of Maine, entitled 'An Act to incorporate the Oldtown & Lincoln Railroad Company.'

"We the subscribers severally agree to take the number of shares of the capital stock in said corporation which are affixed to our respective names, and to pay to the treasurer of said company, when they have one, or to whoever may be entitled to receive the same, all such legal assessments on each of said shares, not exceeding twenty dollars on each share, as shall be made by the future government of said

corporation after the same has been organized according to said Act."

The subscription books to the capital stock were put in, on which were subscriptions against persons who were responsible for 9476 shares only, excepting an additional subscription for 6000 shares, made by defendant on Sept. 17, 1853, which was denied to be valid by the plaintiffs.

According to the records, defendant was a director from the organization of the company to August 7, 1854, and president until July 8, 1854, when he was removed by the directors.

On August 16, 1853, defendant submitted to the directors the following proposition, which was accepted; and they voted "that ——— committee be appointed to close the contract for the same."

"Build railroad from a point in Milford to a point in Lincoln, each point to be selected by D. A. Sanborn, engineer appointed by the directors; the road to be constructed under the direction of said engineer, according to the plans and specifications to be furnished by him, and when finished, to compare favorably in point of grades, curves and workmanship, with the best roads in New England; meaning to embrace every thing appertaining to the construction of said road, and operating the same, except the land damages and fencing, and the furniture thereof.

"Said road to be completed by the 1st day of December, 1854, ready for the furniture.

"Price, $12,000 per mile, and any addition above $4,400 per mile that the rails may cost.

"Payment, the present stock subscription, and balance in stock of said road, with the privilege of using mortgage bonds of the road to buy the rails, said mortgages to be provided for at maturity by me."

The contract afterwards drawn up for defendant to sign, was objected to as not in conformity with his proposition and was never signed.

The defendant, on Sept. 17, 1853, before the meeting of

the directors on that day, sent in a paper, which, after setting forth the proposition he had made to build the road, and the acceptance thereof by the directors, concluded as follows:—"And inasmuch as the subscription books have not been all returned and it cannot be ascertained precisely how much of the stock of said road remains not subscribed for by others, I hereby agree to take and subscribe for six thousand shares more or less, intending to embrace all the rest and residue of the fifteen thousand shares authorized by the Act of incorporation not subscribed for by others. Price of shares limited to twenty dollars."

He also filed with them a protest against any action of theirs tending to impair his rights as subscriber to 6000 shares more or less of the capital stock, he claiming the right to subscribe therefor as he had done.

On that day the directors voted to petition the Legislature for the amendment of their charter as above.

At a meeting called to choose directors, in August, 1854, the defendant claimed to represent the above 6000 shares, and threw his vote accordingly which was rejected, and afterwards two antagonistic boards of directors were chosen.

In December of the same year, this action was commenced.

There was evidence introduced as to money expended in and about the road, and payments of money by defendant, and the records of the directors as to the several assessments, amounting to $20 per share, on the 1000 shares, the last subscription of defendants never having been assessed.

There was much other evidence not bearing upon the points on which the decision turned.

It was agreed, that if upon the testimony the defendant was legally holden to pay the assessments sued for, or any part of them, a default should be entered for such sum as the Court might think proper, otherwise the case to stand for trial.

*A. W. Paine*, with whom was *W. P. Fessenden*, for defendant, objected to the maintenance of this action:—

1. Because the required amount of subscriptions to the capital stock had never been obtained, and no assessment could therefore be legally binding. *Salem Mill-dam Co.* v. *Ropes*, 6 Pick. 23; *Central Turnpike Cor.* v. *Valentine*, 10 Pick. 142; *W. & N. Railroad Co.* v. *Hinds*, 8 Cush. 110; *Ken. & P. Railroad Co.* v. *Jarvis*, 34 Maine, 360.

2. The additional Act of Sept. 27, 1853, having been passed after the subscription was signed, could not affect that subscription nor give an effect to it which it did not otherwise have. *U. L. & C. Co.* v. *Towne*, 1 N. H. 44; *H. & N. H. Railroad Co.* v. *Cammell*, 5 Hill, 383; *Mid. Turnpike Co.* v. *Lock*, 8 Mass. 268; *same* v. *Walker*, 10 Mass. 390; Angell on Cor. 483, § 10.

3. That no waiver could be made or was in fact made by defendant, which had or could have an effect to give validity to the Act of the Legislature which was otherwise unconstitutional or invalid.

4. The additional Act was never legally accepted by the company until after ten assessments were made, the directors having no power to do such an act as to accept of the amendment.

5. The contract and subscription for 6000 shares were valid and binding, and being so, the contract made with Fairbanks & Morgan was illegal, as were also the assessments made to meet its calls. The assessments were made upon a wrong basis by excluding these shares. The votes by defendant for said shares were legally cast and another board of directors was elected than those who acted in making the last ten assessments.

The case was further argued by defendant's counsel as to the illegality of the several assessments.

*J. A. Peters*, for plaintiffs.

SHEPLEY, C. J. — The corporation was created by an Act approved on March 8, 1852, with a capital stock to "consist of not less than eleven thousand nor more than fifteen

thousand shares." The charter was accepted on September 8, 1852, when the corporation was organized and a vote, containing a recital that "a subscription has been obtained of shares exceeding the minimum number named in said charter," was passed, "that said subscriptions be accepted and made valid between said subscribers and this corporation." This recital of the amount then subscribed is ascertained to have been incorrect. The capital stock required has not been obtained.

The report of the case states "the subscription on said books was of persons who were responsible for 9476 shares, and amounts in all to $189,520, besides 6000 shares additional which said defendant hereinafter introduces." The subscription for the 9476 shares appears to have been made under date of August 13, 1852, in these words;—"We the subscribers severally agree to take the number of shares of the capital stock in said corporation which are affixed to our respective names and to pay to the treasurer of said company, when they have one, or to whoever may be entitled to receive the same, all such legal assessments on each of said shares, not exceeding $20 on each share, as shall be made by the future goverment of said corporation after the same has been organized according to said Act."

The agreement is to take the number of shares of the capital stock, and that must have had reference to the capital stock required by the charter. The engagement was to take such a part of that capital. The shares to be assessed were the shares of that capital. The agreement to pay "all such legal assessments on each of said shares," was to pay them on shares of that capital. There must therefore have been such a capital stock obtained before the subscriptions could be binding or any legal assessments could be made. The subscription having been made before the corporation was organized, was necessarily as well as in terms subject to a condition, that the party to accept it should have a legal existence, and should obtain the capital required by its charter and referred to in the subscription, by which it became

a part of it. That condition, required both by the charter and the contract, has never been performed by the corporation, which has never been in a situation to make a legal assessment on such shares or to enforce payment of the subscriptions, unless the additional subscription of the defendant for six thousand shares can be regarded as binding.

The defendant, on September 17, 1853, after reciting a proposal made by him to build the road, and an acceptance of it by the directors on August 16, 1853, subscribed "for six thousand shares, more or less, intending to embrace all the rest and residue of the fifteen thousand shares authorized by the Act of incorporation, not subscribed for by others." This subscription was predicated upon the completion of the contract proposed. If that was not so accepted by the corporation, so as to become a valid contract between the parties, it is not contended that this subscription was binding. The corporation does not allege that the deficiency of capital stock was supplied by it. It denies both the acceptance of the proposed contract, and the validity of the subscription for those shares; while the defendant insists that his proposal was accepted, that the contract for building the road was completed, and that he is entitled to those shares.

Upon examination of the defendant's proposal, it appears to have been so general in its terms, that it could not well be regarded as more than a basis for a contract to be properly drawn and executed, prescribing the manner in which the road should be constructed and the work performed. It appears to have been so regarded by the directors, who in their vote, containing the alleged acceptance of it as a complete contract, "accept the proposition now made by Samuel Veazie to build the railroad from Milford to Lincoln, and that ——— committee be appointed to close the contract for the same." It is accepted only as a proposition, to form the basis of a contract to be closed thereafter. The defendant appears also to have so regarded it at that time. The committee caused a contract to be drawn and

submitted to the defendant for his signature, which he alleged was not drawn according to his proposal, and he therefore refused to sign it, and not because the contract had been already completed. Another unsuccessful attempt appears to have been made to have a contract drawn and signed. The defendant, on September 17, 1853, submitted to the directors a written statement, claiming that his proposal had been accepted and become a binding contract; and in it he assigned as his reason for refusing to sign the contract as presented by the committee, that it was "widely variant from his proposition, and for this reason he objected, and still objects to signing the same." The directors thereupon resolved, "that the vote of the directors accepting said proposal of said Veazie, is hereby reconsidered and made nugatory; and the said Veazie is thereby to consider his agreement to subscribe for the deficiency of said stock, as null and void." These proceedings present only an ineffectual attempt to make a contract for building the road, the basis for one having been agreed upon, and the parties having disagreed, when they attempted to complete a contract containing the details of the work and the manner in which it was to be performed. The foundation upon which the subscription for those shares rested having fallen, the subscription falls with it. The rights of neither party can be affected by those ineffectual attempts to make a valid subscription and contract.

The difficulty before noticed in the way of a recovery by the corporation will remain, unless it can be otherwise overcome. This has been attempted in different modes.

It is insisted that the general issue having been pleaded, that is an admission of the existence of the corporation with the capacities required by the charter.

A plea of the general issue does, in our practice, admit the existence of the corporation with a capacity to sue and be sued. It cannot be an admission of more than this. There is nothing in the plea authorizing it. The decided cases do not. The plea contains no language, from which

an inference can be drawn, that the corporation has performed the duties required of it in other respects. Or that it has performed its part of a condition, by which a conditional contract made with it has become binding.

It is also alleged, that the corporation has been relieved from the performance of that condition by the Act approved on September 27, 1853, c. 193, and that the defendant's subscription thereby became binding.

By that Act the charter was so amended, that the capital stock might consist of not less than eight thousand nor more than twenty-five thousand shares. The Act was accepted by the stockholders on August 7, 1854. The corporation might accept a modification of its charter, by which its rights and obligations were varied and new duties imposed. And the rights and duties of its corporators might thereby be increased or diminished. But those could not thereby be made shareholders in its capital, who were not such before. Nor could any contract made between the corporation and one of its corporators be thereby altered or affected. When that Act was accepted, the defendant and others by their subscriptions had never become shareholders in its capital stock; they had only agreed to become such upon condition, that the least sum required for its capital should be subscribed. That condition not having been performed, when the additional Act was passed and accepted, they were not then shareholders, and could not thereby be made such. The Legislature did not attempt to make them such. It might as well have attempted to alter a contract made between the corporation and one of its members respecting the construction of the road, as respecting a contract to pay a part of its capital. If the corporation, being a party to a contract with one of its corporators, might by the assistance of the Legislature absolve itself from the performance of any part of the contract, it might from the whole, and require payment of the money subscribed, without allowing the subscriber to derive any benefit from it.

It is the charter only and the rights and liabilities of the

corporation and of its corporators, as such in consequence thereof, that can be varied by an Act of the Legislature; and not the private contracts made between the corporation as one party and of its corporators as the other. And there can be no distinction between contracts to pay money for its stock, and contracts to pay it for any other purpose.

There is nothing in the case of the *Meadow Dam Co.* v. *Gray*, 30 Maine, 547, in the least degree opposed to these positions. That corporation was, by the Act of July 31, 1846, authorized to erect a dam across the south branch of Castine river to exclude the tide waters from the flats above, thereby rendering them capable of cultivation. The charter did not require any amount of capital to be subscribed. The defendant having subscribed and agreed to take one share, thereby became a shareholder without any condition to be performed by the corporation. By an additional Act, approved on August 10, 1848, the corporation was required to construct a sufficient gate or lock for the passage of vessels or boats through the dam. Objection was made by the defendant to the payment of his subscription, because the liability of the stockholders was increased by the burden imposed by the additional Act. The Court decided, that, as he had become a stockholder, his assent to the additional Act must be considered as given by the acceptance of a charter, in which the Legislature reserved the right to amend or alter it. The question presented was, whether the defendant had thereby been discharged from the performance of an existing legal contract; not whether he should thereby be made a party to one not legally binding. Nor whether, that to which he had assented should be waived without his consent. His contract was not in the least affected by the Act, while the responsibilities of the corporation of which he was a member were increased, and so might his own be as corporator indirectly, but not as a party to a contract.

It is also insisted, that the defendant, by various acts and declarations, has exhibited himself as a stockholder and

officer of the corporation, and that he is thereby estopped to deny the authority of the corporation to collect the subscriptions to its stock, or that he has waived all objections to it.

The defendant does appear by written documents signed by him, and by acting as an officer and shareholder, and by the payment of money, to have asserted, that the corporation was in a condition to do many acts, and to proceed to build the road.

These declarations appear to have been made and the acts to have been performed in the character of an officer or corporator of the corporation, which was allowed until December 31, 1857, to complete the location of the road; and there was no other limitation of the time for obtaining its entire capital stock. Corporators may, unless prohibited by the charter, organize and put the corporation into a condition to sue and be sued, to enter into contracts to secure the capital required, to employ agents to do it, and to procure information by surveys or otherwise, and exhibit the same to the public as an inducement to subscribe for shares, without having secured the capital required to authorize proceedings for the accomplishment of the main design. The danger in such cases is, that it may have nothing with which it can pay expenses. If the corporators do many such acts and contribute to pay the expenses, and do it in anticipation of having the amount accounted for when the capital shall be obtained, it would afford no satisfactory proof that they intended to proceed with the main enterprise without the capital required by the charter, or that they had assented to assessments on the shares for that purpose. The defendant and others might have proceeded, as they would seem to have done, upon a misapprehension of the facts, supposing that the capital had been obtained, when it had not been, and without any intention to attempt to have assessments made, or the road built, until the capital had been obtained. No estoppel *in pais* or waiver can justly be allowed to deprive a person of rights, who has

been acting under a misapprehension of facts. There is nothing presented in the report of the case necessarily inconsistent with a full determination to require a strict adherence to the charter, and the terms of the subscription.

There is, however, a more perfect answer to this position. It is, that the corporators could not by any acts alleged to operate by way of waiver or estoppel, relieve the corporation from its obligation to have the capital required by its charter. If a vote had been passed by them with entire unanimity, that they would waive all objection on account of a deficiency of capital, and that they would proceed to make assessments on the shares subscribed and to build the road, it would have been but a violation of the charter, and illegal and void. Otherwise they might by vote relieve the corporation and themselves from all obligation to have any capital, and acting upon the same rule, they might relieve themselves and the corporation from any obligation imposed by the government, and make their charter, whatever they desired it to be, however different from that granted to them by the State.

Upon the testimony presented, the action cannot be maintained; but according to the terms of the report it is to stand for trial.

39 583
70 408

† INHABITANTS OF HERMON, *Pet'rs for Certiorari, versus* COUNTY COMMISSIONERS OF PENOBSCOT.

The County Commissioners are authorized by law to lay out a way wholly within the limits of a town.

ON FACTS AGREED.

Petition for the writ of *certiorari.*

A road was laid out and established by the County Commissioners of Penobscot in the town of Hermon, on a petition to them for that purpose.

Two county roads had previously been established and

opened through that town, and this connected the one with the other.

It was agreed that if the Commissioners had power to lay out this road as a *county road*, then the petition to be dismissed, otherwise the prayer thereof to be granted, and the costs to be also determined by the Court.

*A. W. Paine*, for respondents, cited 7 Mass. 162; *New Vineyard* v. *Somerset*, 15 Maine, 21; *Harkness* v. *County Commissioners*, 26 Maine, 353 and 406.

*A. Sanborn*, for petitioners, cited R. S., c. 25, § 32; 31 Maine, 367; *At. & St. Law. R. R. Co.* v. *Co. Com.*, 28 Maine, 118.

TENNEY, J. — This is a petition for a writ of *certiorari* to the respondents to certify their record, touching the location of a way, as a county road in the town of Hermon, that the same record may be quashed.

Several supposed errors on the record are relied upon in the petition. But all are founded in the alleged want of jurisdiction in the County Commissioners to locate and establish a way, in one town alone, on an original petition presented to them.

This is the case of a way wholly in the town of Hermon, but it connects two county roads with each other, which are of considerable extent, reaching from the city of Bangor to the town of Carmel, and which we may suppose are much used by the public.

The question involved does not differ materially from those presented to this Court, in the cases cited for the respondents, in which it has been held, that the Commissioners did not exceed their jurisdiction, and the writ was denied.

We see no reason for reversing those decisions, and the writ is denied, and the petition dismissed with costs for the respondents.

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65 513
67 277
69 455
79 174

## † REED *versus* WILSON.

After pleading the general issue, no objection can be taken by the defendant, to the non-joinder of his joint co-promisor.

An *indorsee* of a witnessed note, made *before* the passage of the Act of 1838, c. 343, may maintain an action *after* that Act was passed, although more than six years elapsed between the date of the note and the commencement of the suit.

Of the burden of proof.

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

ASSUMPSIT.

This suit, commenced in August, 1853, is brought upon three notes of hand, dated May 25, 1835, running to one Springer, and by him indorsed.

The defendant is sued alone, but it is alleged in the writ that the notes were signed by defendant and one Babcock *jointly;* and that Babcock since the date of the notes, and before this suit was commenced, was decreed a bankrupt under the laws of the United States.

Defendant pleaded the general issue, and relied upon the statute of limitations.

No testimony of the bankruptcy of Babcock was presented. The notes purported to be witnessed; and evidence tending to show that the witness was out of the State, and the genuineness of his signature was produced, as also rebutting testimony that they were not witnessed at the time of their execution.

The defendant requested these instructions:—that from the want of all evidence as to the bankruptcy of Babcock, the plaintiff is not entitled to recover because the action was not brought against both promisors, the note appearing to be *joint;* and that the statute of limitations of 1821, governed the case as the action was in the name of the indorsee.

These instructions were not given.

The defendant also contended, that upon the testimony

the burden of proof was upon the plaintiff to show that the notes were duly witnessed; and the Court instructed the jury that such was his duty, and if he had proved the subscribing witness to be out of the State, and that his signature was genuine, that was sufficient until the contrary appeared.

The verdict was for plaintiff, and defendant excepted.

*Peters,* for defendant.

That the non-joinder of the *joint* promisors should defeat the action, cited *Harwood* v. *Roberts,* 5 Maine, 442; Greenl. Ev. vol. 2, § 133, and same § 25.

He also insisted that the limitation Act of 1821, governed this case. That the instructions given were not sound, he cited *Powers* v. *Russell,* 13 Pick. 69.

*W. C. Crosby,* for plaintiff, cited *Robinson* v. *Robinson,* 1 Fair. 240; *Fogg* v. *Virgin,* 19 Maine, 352; *Quimby* v. *Buswell,* 16 Maine, 470.

Rice, J. — Assumpsit upon three notes of hand, dated May 25, 1835, signed by the defendant jointly with Jotham Babcock, now alive, and running to one Springer, and by him indorsed. In the plaintiff's declaration, it is alleged that Babcock had been *decreed* a bankrupt.

The defendant pleaded the general issue with a brief statement, setting up in defence the statute of limitations.

Under the general issue, the defendant claims to avail himself of the non-joinder of Babcock. In this he was overruled by the presiding Judge.

If any person be omitted as defendant, who ought to be joined, in any action founded on a joint contract, whether on a specialty or not, the objection can only be taken advantage of by plea in abatement. 1 Saund. 291, b, note 4; *Mitchell* v. *Tarbut,* 5 T. R. 651; *Wright* v. *Hunter,* 1 East, 20; *Robinson* v. *Robinson,* 1 Fairf. 240; *Trustees of Ministerial and School Fund in Dutton* v. *Kendrick,* 3 Fairf. 381. And though the joint obligation be in writing, and the declaration show it to have been made by a party

not joined, it is no variance at the trial. 1 Saund. Pl. 11; *Mountstephen* v. *Brooke*, 1 B. & A. 224; *South* v. *Tanner*, 2 Taunt. 254.

The defect in this case, being apparent upon the record, the defendant might have availed himself of its existence by motion, as well as by plea in abatement. *Chamberlain* v. *Lake*, 36 Maine, 388. But the motion must be filed within the time allowed for pleas in abatement, otherwise it will be overruled. *Nickerson* v. *Nickerson*, 36 Maine, 417. By pleading the general issue, the defendant must be held to have waived all objection to the non-joinder of his co-promisor.

The statute of limitations of 1821, did not apply to this case. The action was commenced after the passage of the Act of 1838, c. 343, and falls under the provisions of that statute. *Quimby* v. *Buzzell*, 16 Maine, 470.

The instruction of the Court, "that the burden of proof was upon the plaintiff to prove that the notes were duly witnessed, and that if he had proved the subscribing witness to be out of the State, and that his signature was genuine, that was sufficient until the contrary appeared," was not erroneous. It was tantamount to saying, that by proof of the genuineness of the signatures to the note, the plaintiff had made a *prima facie* case, sufficient, in the absence of other testimony, to authorize a verdict in his favor. This was right.

*Exceptions overruled.*

*Judgment on the verdict.*

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65 541
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† PENOBSCOT & KENNEBEC RAILROAD CO. *versus* DUNN.

The plea of the general issue, to an action by a corporation, admits its legal organization under its charter, so far as to maintain suits at law.

An agreement to take and fill a given number of shares, in an incorporated company, is equivalent to a promise to take and pay for such shares.

Of conditional subscriptions to stock in such companies.

When a subscription is made on condition, that a certain number of shares shall be subscribed for before the corporation shall be organized, the *records*

of its proceedings showing that the required number had been taken, are competent and *prima facie* evidence, that the condition has been performed.

And where a subscription is based on a further condition, that the company is not to enter into any contracts for the construction of its road, until a given number of shares are taken, the books of the *directors*, in the absence of countervailing evidence, are competent evidence to show the fulfillment of the condition, if the directors had authority to act.

And the doings of a board of directors, *de facto*, whose acts have been ratified by the corporation, are unobjectionable, although the records of the corporation show another board to have been previously elected, but no evidence of their accepting the trust.

Where one of the conditions of the subscription to the capital stock of the corporation was, that not more than five dollars on a share should be assessed at *one time*, and the directors laid two or more assessments at the same time, but required not more than five dollars at one payment, such assessments are binding.

Whether directors of a corporation have power to release a subscription to the capital stock of the company, without consideration, *quere?* But if they possessed such power, and the release is optional with the subscriber, he must elect within a *reasonable time*.

A recognition and claim of representing such shares, long after such action of the directors, may well be considered an election to keep the shares subscribed for.

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

Assumpsit. This action was brought to recover the amount of certain shares in the capital stock of the corporation subscribed for by defendant, and for assessments made thereon.

The plea was the general issue.

After the evidence on the part of plaintiffs was submitted, it was agreed to report the cause for the consideration of the full Court; and if upon the evidence the action is maintainable, a default to be entered and damages assessed by the law Court; otherwise to stand for trial.

In the charter introduced were these provisions; "The capital stock of said corporation shall consist of not less than four thousand, nor more than ten thousand shares; and the immediate government and direction of the affairs of said corporation shall be vested in seven, nine, or thirteen directors, who shall be chosen by the members of said corporation in the manner herein provided, and shall hold their

offices until others shall have been duly elected and qualified to take their places."

"Any seven of the persons named in the first section, were authorized to call the first meeting by giving notice in one or more newspapers published in Portland, Augusta, Bangor, and Boston."

The charter authorized the president and directors "to make such equal assessments from time to time on all the shares in said corporation, as they may deem expedient and necessary in the execution and progress of the work, and direct the same to be paid to the treasurer of the corporation. And the treasurer shall give notice of all such assessments; and in case any subscriber or stockholder shall neglect to pay any assessment on his share or shares for the space of thirty days after such notice is given as shall be prescribed by the by-laws of said corporation, the directors may order the treasurer to sell such share or shares at public auction, after giving such notice as may be prescribed as aforesaid, to the highest bidder, * * * and such delinquent subscriber or stockholder shall be held accountable to the corporation for the balance, if his share or shares shall sell for less than the assessments due thereon, with the interest and cost of sale."

The location of the road was required to be made and filed with the County Commissioners by Dec. 31, 1850.

The defendant subscribed a paper containing these terms: "The subscribers hereby agree to take and fill the number of shares set against their names respectively, in the capital stock of the Penobscot & Kennebec Railroad Co., on the terms and conditions following, viz:—

"1st. Whenever any assessments upon said shares shall be called for by the directors of said corporation, every shareholder shall have the right to pay into the treasury the amount of one hundred dollars on each share, including previous payments, and shall be thereafter entitled to interest at the rate of six per cent. per annum, payable semi-annually, from the treasury on the stock so paid in full,

until the last assessment shall be called for and payable by the directors of the company. Assessments shall not exceed five dollars on each share at one time, or more than one hundred dollars in all.

"4th. The corporation may be organized when four thousand shares shall have been subscribed, but no contract for the building and completing the road shall be entered into until seven thousand shares shall have been subscribed."

Other provisions were embraced in the subscription paper, about which no questions arose.

To this paper the defendant subscribed "thirty shares," November 15, 1850. To another paper, of similar import, the defendant afterwards subscribed "ten thousand dollars, $10,000," Aug. 24, 1852.

The records of the stockholders were introduced, showing the organization of the company, the report of the committee upon the subscription to the capital stock, which set forth, that four thousand and sixty-seven shares were taken, and the adoption of certain by-laws.

In July, 1851, a board of directors was elected consisting of Messrs. Wood, Smith, Moor, Poor, Strickland, Pickering and Appleton.

In July, 1852, the records of the stockholders showed the election of Messrs. Stanley, Crocker, Cummings, Churchill, Wood, Kimball and Pickard, as directors. The records indicated no action on the part of this board.

Among the by-laws adopted by the corporation, was the requirement, that each member of the board of directors must be, at the time of his election, a shareholder in the capital stock of the company; and they should hold their office until others were chosen in their stead, and accepted the office. They were also authorized to dispose of the residue of the capital stock authorized by the charter, and not subscribed for at the time of the organization, in such manner, at such times, and from time to time, as they shall judge most for the interest of the company.

By those laws the treasurer was required to issue certi-

ficates of stock to all persons entitled thereto, and keep suitable books showing the number of shares held by the respective stockholders from time to time.

At a meeting of the directors on July 27, 1852, as appeared by the records, the directors passed the following vote: —

"Whereas information has been given us that the amount of $600,000 cannot be obtained in subscriptions to the stock of this company, being the sum required to make the subscriptions in Bangor binding; therefore, voted, that the subscriptions to the capital stock of the Penobscot and Kennebec Railroad Co. made up to the present time in the city of Bangor, Waterville and towns in the vicinity, be and are hereby declared not binding on said subscribers only so far as they shall elect to pay said subscriptions."

The directors transacted some of their business with only a majority of the board present, without notice having been given to the others. All the doings at such meetings were subsequently ratified by the entire board.

The records of the directors showed that twenty several assessments had been laid upon the shares subscribed for by defendant, and in some instances more than one assessment was made at the same time, but payable at different times. The amount of all the assessments was $100 to each share.

The subscription books were also introduced, and the newspaper notices of assessments.

Defendant's proxy to one Barrett was put into the case to act for him at the meeting of the corporation in July, 1853, and evidence that at said meeting Barrett voted for defendant, representing 130 shares.

Plaintiffs introduced some of the stockholders as witnesses, subject to objections.

*Kent*, for defendant, maintained, that as to the first thirty shares no action can be maintained, except for such balance as remained after a sale of the shares; and to sustain any action for assessments, a legally constituted company must be proved. He also argued the definite admissions by plead-

ing the general issue. *Boom* v. *Lamson*, 16 Maine, 224; *Day* v. *Stetson*, 8 Maine, 365.

The objections to the legality of the organization were:

1st. That the original call, and not a copy of the record should have been produced.

2. That the notice was not proved either *aliunde* or by record.

3. That the records are not evidence of the required number of shares being subscribed; they purport to give the report of a committee. As to the proper matters to be proved by records, he cited *Fuller* v. *Sholwell*, 7 S. & R. 14; Greenl. Ev. vol. 1, § § 491, 493; *Louden* v. *Lynn*, 1 H. Black. 214, (note;) 3 S. & R. 29; 10 Johns. 154.

And the same objection lies to the want of any legal evidence, that the conditions were complied with so as to maintain an action on the subsequent subscription.

He also objected to the authority of the directors, according to the records of Pickering and others, making assessments, when it appeared by the stockholders' records, that other directors had been previously chosen, and that the proceedings, in electing directors, were illegal.

He also maintained that defendant was released from the subscription of thirty shares by the action of the directors; if their doings were good for any thing they were good for that. It was certain the defendant did not elect to pay for the shares. *Union Turnpike Co.* v. *Jenkins*, 1 Cain's; Angel & Ames on Cor., § § 231 and 280; *Marlborough Manufacturing Co.* v. *Smith*, 2 Cow; 11 Mass. 288.

The assessments were not legally made. The charter authorized them to be made from time to time; but many of them are here laid at the same time, though payable at different times.

It did not appear that the directors of 1853, by whom sixteen of the assessments were made, were stockholders as required by charter. The plaintiffs must show they were such *de jure;* in tax cases the assessors must be such *legally.*

He also objected to the members of the corporation as

witnesses, being parties to the suit. *Oldtown Bank* v. *Houlton*, 21 Maine, 501.

He also argued as to the effect of the proxy to Barrett, that it only related to the 30 shares, and even if defendant admitted thereby that he was a stockholder, it did not hinder him from contesting the legality of the proceedings.

*Rowe & Bartlett*, for plaintiffs.

The organization of the company is admitted by the general issue. 16 Maine, 224; 17 Maine, 34; 12 Maine, 224.

It is shown also by the records kept according to the by-laws, which are the best evidence. *Owings* v. *Speed*, 5 Wheat. 420; *Highland Turnpike Co.* v. *McKeen*, 10 Johns. 154; *Coffin* v. *Collins*, 17 Maine, 440; 3 Met. 133 and 282; 7 Met. 592.

And those records are *prima facie* evidence that all the steps required previous to the organization, had been taken. *Wood* v. *Jefferson Co. Bank*, 9 Cowen, 194.

It requires only an organization *de facto*, to maintain this suit. 1 Met. 359.

The assessments were made by directors *de facto*, which is enough. *Charitable Association* v. *Baldwin*, 1 Met. 359; Angell & Ames on Corp., pp. 272, 273.

The directors were such also *de jure*. They were chosen in 1851, and accepted the trust. No evidence is in the case that those elected in 1852 ever accepted the trust or claimed the right to act; and the evidence is full that the board of 1851 continued to act till 1853.

The directors had no power to release defendant from his subscription; it was made unconditionally. The vote should be limited to the subscriptions made after the organization in Bangor, on condition of raising $600,000. The vote as to any other subscriptions, was *nudum pactum*. But if it were otherwise, the defendant has ratified his subscription by his acts through Barrett, long after the vote was passed.

In making assessments, the real meaning of the contract has been observed; the condition obviously was, that not more than $5 should be required at one time.

Stockholders were competent witnesses by c. 181, Acts of 1855; but if not, their testimony in this case is immaterial.

RICE, J. — It was decided in *Oldtown & Lincoln Railroad Co.* v. *Veazie*, ante, p. 571, that a plea of the general issue does in our practice admit the existence of the corporation, with a capacity to sue and be sued. It cannot be an admission of more than this. There is nothing in the plea authorizing it. The decided cases do not; the plea contains no language that the corporation has performed its duties in other respects, or that it has performed its part of a condition by which a conditional contract with it has become binding.

By the pleadings therefore, it is admitted that the plaintiff is competent to be a party in Court, and is properly in Court; and being a corporation acting only by force of its charter, this admission necessarily implies a legal organization under that charter.

The action is assumpsit, and based upon two subscriptions to the capital stock of the corporation. These subscriptions so far as their terms become material, are as follows: —

"The subscribers hereby agree to take and fill the number of shares set against their names, respectively, in the capital stock of the Penobscot and Kennebec Railroad Company, on the terms and conditions following, viz: —

"4th. The corporation may be organized when four thousand shares shall have been subscribed, but no contract for building or completing the road shall be entered into until seven thousand shares shall have been subscribed."

An agreement to take and fill a given number of shares in an incorporated company, is equivalent to an agreement to take and pay for such shares. Upon such agreement, assumpsit will lie for the stipulated price of the shares. *Bangor Bridge Co.* v. *McMahon*, 10 Maine, 478.

A subscription to the capital stock of an incorporated company, is a contract between the subscriber and the company. The subscriber may simply agree to take a given amount of stock, and in that event the remedy of the corpo-

ration, in case of neglect to pay assessments, is upon the stock; or he may agree to take and pay for the stock absolutely, or upon such conditions as he may choose to incorporate into his subscription. Such conditions are ordinarily incorporated into subscriptions for the protection of the subscriber, and to insure the completion of the enterprize.

Where a subscription is made upon condition that the company shall not be organized, or shall not enter upon the principal object of its organization until a given amount of its stock shall be subscribed, such condition is a condition precedent, and the company will not be authorized to enforce the collection of such subscription until they have complied with such conditions on its part.

A person might be willing to become a stockholder in a railroad corporation, which should have four hundred thousand dollars of its stock subscribed before its organization, and seven hundred thousand before entering into a contract for building and completing its road, who would be unwilling to subscribe to its stock without restriction. Such a condition would provide for a capital amply sufficient to secure a full preliminary exploration and survey of the route for a road, and ensure the prompt construction of the road.

The right of the corporation to assess the stock of the defendant, depended upon the conditions in his subscription. If the company have complied with those conditions, then its right to assess under its charter and by-laws, and in conformity therewith, immediately accrued, and such assessments if legally made, may be collected. If the conditions in the subscription had not been performed on the part of the company, then the assessments cannot be collected, and it matters not what may have been the form of the assessments.

To show that the number of shares had been subscribed requisite to authorize the organization of the company, the plaintiff introduced the records of the proceedings of the stockholders. By these records it appears that before the organization there had been subscribed of the capital, four thousand and sixty shares. It is objected by the defendant

that the stockholders' records are not competent evidence by which to prove the amount of subscriptions.

These books not only contain the names of the persons who had subscribed to the capital stock of the company, and the amount subscribed by each person, but also show that more than four thousand shares were represented and voted upon at the organization.

In the case, *Highland Turnpike Co.* v. *Keene*, 10 Johns. 154, the Court say, "the general rule is, and it is a rule essential to public convenience, that corporation books are evidence of the proceedings of the corporation, but then it must appear that they are the corporation books, and that they have been kept as such, and the entries made by the proper officer, or some other person in his necessary absence.

The books of a corporation established for public purposes, are the best evidence of its acts, and ought to be admitted whenever these acts are to be proved. *Owings* v. *Speed*, 5 Wheat. 420; *Coffin* v. *Collins*, 17 Maine, 440.

Where a charter requires two thirds to form a quorum, and it was stated on the minutes that on due invitation the corporators met, that was held tantamount to saying that two thirds met. *Com.* v. *Woelper*, 3 S. & R. 29.

In *Wood* v. *Jefferson County Bank*, 9 Wend. 194, SAVAGE, C. J., remarked, that the Act of incorporation did not make any set of men a corporation *ipso facto*. There was something to be done. Books of subscription were to be opened; stock was to be subscribed for; that stock was to be distributed by commissioners; and those persons to whom the stock was thus distributed become stockholders. The stockholders were then to choose directors, and they a president and cashier.

"The books of the bank were produced, showing the election of the president and cashier. The production of the books showing the election of the officers was *prima facie* sufficient to show that the previous requisitions of the statute had been complied with, and that the corporation then had an existence."

We think these records were competent evidence, and that they are sufficient to show *prima facie*, that the number of shares necessary to authorize the company to organize according to the terms of the charter, and the condition in the defendants' subscription, had been subscribed before the organization.

The by-laws of the company, Art. 7th, provide that the directors shall have power to dispose of the residue of the capital stock authorized by the charter, and not subscribed for at the time of the organization, in such manner, at such times, and from time to time, as they shall judge most for the interest of the company.

The records of the directors show that on the 31st day of July, 1852, a committee of the directors was authorized to dispose of the residue, or any portion of the residue of the capital stock of the company remaining on hand, and not subscribed for at the time of the organization of the company, and not subscribed for under the direction of said committee since their appointment, on such terms and in such manner as they may judge most for the interest of the company.

This committee reported at a meeting of the directors, held on the 3d day of May, 1853, that they had procured subscriptions, as stated in their report, and had disposed of 4999 shares; and also submitted the books of subscription and a list of subscribers.

Whereupon it was voted by the board of directors that, "it now appearing that a subscription exceeding seven hundred thousand dollars having been obtained on the books of the corporation, that the contract for the construction of the road, made by the committee appointed for that purpose, with W. B. S. Moor, provisionally, with the amendments and alterations on sheet marked A, annexed to said contract, and concluded and signed by said Moor and James Dunning, be and hereby is ratified and confirmed."

As has been before remarked, it was essential, to make the subscription of the defendant obligatory on him, that the

company should obtain a subscription of four hundred thousand dollars before it organized, and of seven hundred thousand dollars before a contract was entered into for building and completing the road.

The procurement of a given amount of subscriptions was one of the preliminary measures necessary to enable the company to organize and prosecute the enterprise of constructing a road. No good reason is perceived why the books of the company may not be received as evidence to show that these requirements of the charter and by-laws have been complied with, as well as other pre-requisites, prescribed by the same authority. The acts of the directors, within the scope of their authority, are the acts of the company, and the books of the directors in which are recorded their authorized official acts as directors, are also the books of the company. We therefore are of opinion that the books of the directors, in the absence of countervailing evidence, are sufficient to show, that the subscriptions required to authorize the company to contract for the construction of the road have been obtained, provided the directors had authority to act in the premises. This authority is denied.

In July, 1851, as appears by the records of the stockholders, a board of directors were chosen consisting of Messrs. Pickering, Strickland, Moore, Wood, Smith, Poor and Appleton.

By the same records it also appears, that at a stockholders' meeting, held on the 27th of July, 1852, by adjournment, being an adjournment of the annual meeting, Messrs. Stanley, Crocker, Cummings, Churchill, Wood, Kimball and Pickard were chosen directors.

There is nothing appearing upon the records either of the stockholders or directors, showing that the board elected in 1852, ever accepted the trust, or acted as directors of the company, under that election.

By the third section of the charter it is provided, that "the immediate government and direction of the affairs of

said corporation shall be vested in seven, nine or thirteen directors, who shall be chosen by the members of said corporation, in the manner hereinafter provided, and shall hold their offices until others shall have been duly elected and qualified to take their places, a majority of whom shall form a quorum for the transaction of business."

The records show, that the board chosen in 1851 continued to act as directors after the annual meeting of 1852, in the same manner as they had done before that time. From that fact, and from the fact that the persons elected in 1852 do not appear to have acted in any instance as a board, the inference is almost irresistible, that the board elected in 1852 were never qualified to act, and consequently, that the board of 1851 were authorized to continue in office under the provision of the charter recited above. That they continued to manage the affairs of the company as directors until the annual meeting of 1853, and that their acts have been approved and ratified by the subsequent action of the corporation is manifest. This would constitute them directors *de facto*, if the functions of the office of directors were not exercised by them by strict legal right. *Charitable Association in Granville* v. *Baldwin*, 1 Met. 359.

There is, therefore, no valid objection to the acts or records of this board of directors on the ground of want of authority.

That assessments shall not exceed five dollars on each share at one time, is one of the conditions in the subscription of the defendant. It is objected, that in several instances the directors laid two or more assessments at the same time. It will be seen, however, that in no instance was payment required of more than five dollars upon a share at one time. The stipulation is evidently designed to protect the subscriber from being called upon to *pay* more than five dollars on a share at one time. That is the substance of the condition, and this we think was not violated by the mode of making the assessments.

As to the objection taken to the legality of the election of directors in 1853, on the ground that an adjournment was had during the process of balloting, it may be remarked, that such a course may not be in conformity with ordinary practice, or the most approved rules of parliamentary proceedings, but we are not aware that it was in violation of any rule of law or any provision of the charter or by-laws of the corporation.

The assessments in this case having all been laid before the annual meeting in 1854, cannot be affected by any irregularity in the proceedings of that meeting, if any such existed. The records, however, disclose no such irregularity.

When a majority of a board of directors appear to have been present at the meetings of the board, at which business is transacted, the presumption is, that all the members of the board were duly notified to attend. *Sargent* v. *Webster*, 13 Met. 497.

At a meeting of the board of directors, held on the 27th day of July, 1852, the following preamble and vote was adopted:—

Whereas information has been given us, that the amount of $600,000 cannot be obtained in subscriptions to the stock of the company, being the sum required to make the subscriptions in Bangor binding:—Therefore *voted*, "that the subscriptions to the capital stock of the Penobscot & Kennebec Railroad Co., made up to the present time, in the city of Bangor, Waterville and towns in the vicinity, be and hereby are declared not binding on said subscribers, only so far as they shall elect to pay said subscriptions."

At that time the defendant was a resident of Waterville, and had subscribed, in 1850, for thirty shares of the stock of the corporation.

By this vote, it is contended that he is released from any obligation to pay for those thirty shares, unless he shall elect to pay for them, and that his resisting the claim of the company in this suit, is evidence of an election on his part not to pay.

Upon this state of facts, two questions arise. First, had the directors authority to release the defendant's subscription? Second, *when* should he make his election whether he would pay or not?

There is no such condition in the subscription of the defendant, as appears to have been incorporated into the subscription in Bangor.

By the 5th section of the charter, it is provided that "the president and directors for the time being, are hereby authorized and empowered, by themselves or their agents, to exercise all the powers herein granted to the corporation, for the purpose of locating, constructing and completing said railroad, and for the transportation of persons, goods and property of all descriptions, and all such powers and authority for the management of the affairs of the corporation, as may be necessary and proper to carry into effect the object of this grant."

It may well be doubted whether these powers would authorize the directors to release a subscriber from his obligation to take stock without any consideration, and there does not appear to have been any consideration, so far as the defendant is concerned, for this conditional release by the directors.

But if the directors were authorized to make this conditional release, the defendant, to avail himself of it must make the election contemplated therein, within a reasonable time. He could not avail himself of the privileges of a stockholder, by reason of his subscription, for those shares, and at the same time repudiate his liability as a subscriber, on the ground that he had elected not to pay under that vote of the directors.

The case finds that at the annual meeting in 1853, a year after the vote referred to, the defendant by his proxy in writing, dated on the 5th of July, 1853, authorized Harrison Barrett to appear, act and vote for him, for the number of shares set against his name, being one hundred and thirty, and that said Barrett did vote on that number of

shares at said annual meeting in the choice of officers by virtue of said written authority. This act so long after the vote of the directors must be deemed an election to pay for the shares to which that vote referred.

It is provided by c. 181, of laws of 1855, § 1, that no person, offered as a witness, shall be excluded by reason of his interest in the event of the action, but his interest may be proved to affect his credibility.

"*Section* 2. — The above section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended."

The witnesses introduced were not parties to this action; it was not brought for their immediate benefit, but they undoubtedly have a contingent interest in the event of the suit, as it may affect favorably or otherwise the value of their stock in the corporation. Persons thus situated are, under this Act, *competent* witnesses.

Other objections which have not been specifically noticed, were made to the preliminary proceedings, affecting the organization of the corporation. But under the pleadings in this case, and in view of the presumption *omnia rite acta*, which "covers multitudes of defects in such cases," these objections cannot prevail.

The defendant, as a subscriber to the stock of the corporation, had a right to inspect the books, and to offer them or their contents in evidence. He has not seen fit to avail himself of this right, or in any other way to offer evidence to control that offered by the plaintiff. From the evidence in the case, we think the legitimate inference is, that there has been a compliance on the part of the corporation with the conditions precedent to be performed by them, and upon the performance of which the liability of the defendant to pay for his stock attached, and therefore, that, according to the agreement of the parties, a default must be entered, with judgment for $13000 damages.

*Defendant defaulted.*

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In an action to recover a forfeiture for a horse being allowed to go at large without a keeper, in the *highway or road*, the plaintiff may rightfully be allowed to amend his writ by striking out "*highway or*," notwithstanding the objection of defendant. *Thornton* v. *Townsend*, 181.

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1. To authorize the arrest of the body under R. S., c. 148, § 2, the certificate must set forth that the debtor is *possessed* of property or means exceeding the amount required for his own immediate support, and that he is about to take with him *such property or means* and reside beyond the limits of the State. *Furbish* v. *Roberts*, 104.

2. An omission of either may avail the defendant on motion. *Ib.*

The authority of an officer to arrest the body of the defendant, in an action of trespass, rests upon the want of property to be attached.
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1. It is provided by statute that in actions pending, an offer to be defaulted for a sum certain, *unaccepted*, is no admission of the cause of action or of any indebtment of the defendant; nor shall such offer be used as evidence before the jury in the trial.

If, when such offer has been made, the plaintiff proceeds to trial, the judgment in the case must depend on the verdict rendered. The *offer* will affect the *costs* only. *Wentworth* v. *Lord*, 71.

2. Thus, where after such offer was made upon the record, and the action tried and verdict rendered for defendant; *held*, that the plaintiff is not entitled to judgment for the offer upon the record. *Ib.*

3. An offer in writing in an action pending in Court, made by the defendant's attorney in these words, "and now on this third day of the term the defendant, by his attorney, comes and offers to be defaulted for the sum of seventy dollars damages in said action;" is a compliance with § 22 of c. 115, R. S. *Gowdy* v. *Farrow*, 474.

4. And an offer so made, unaccepted, cannot be used as evidence for any purpose in the trial of the action. *Ib.*

## OFFICER.

1. A deputy sheriff who attaches personal property on mesne process, is bound to keep it for thirty days after the judgment, and deliver it on demand to any officer having the execution, and authorized to receive it, notwithstanding he ceased to be a deputy after the attachment, and before judgment. *Smith* v. *Bodfish*, 136.

2. By R. S. c. 94, § 24, it is required that the officer state in his return of a levy of real estate "that they appraised and set off the premises, *after viewing the same*, at the price specified." *Huntress* v. *Tiney*, 237.

## PAROL EVIDENCE.



## PAROL REPRESENTATIONS.



## PARTITION FENCES.

## PERSONAL PROPERTY.



## PETITION FOR PARTITION.



## PLEAS AND PLEADING.

## POOR DEBTORS.



See CERTIORARI, 1, 2, 3, 4.

## POSSESSION OF LAND.

## PRACTICE.



## PRESCRIPTION.

One claiming by possession the prescriptive right to abut his mill-dam upon the opposite shore, must show such possession adverse and exclusive for twenty years prior to the commencement of the action.

*Trask* v. *Ford & al.*, 437.

## PRINCIPAL AND AGENT.



## PROBATE COURT.

## RAPE.

1. By the law of this State, rape consists in a man's ravishing and carnally knowing any female of the age of ten years or more, *by force*, and against her will. *State* v. *Blake*, 322.
2. An indictment for an intent to commit that crime, which contains no allegation of *force* or words of *equal* significance, is defective and will furnish no basis for a judgment upon it. *Ib.*
3. Thus, where the defendant is found guilty of an intent to commit a rape, but the indictment alleged the design was to be accomplished *violently*, instead of *by force*, judgment must be arrested. *Ib.*

## RECORDS.

See EVIDENCE, 6, 7, 8, 9.

## RE-COMMITMENT OF REPORTS.

After a report of referees has been accepted, and before judgment, the presiding Judge, for good cause, has power to order the re-commitment of the report to the same referees. *Mayberry* v. *Morse*, 105.

## REFEREES.

See RE-COMMITMENT OF REPORTS.

## REPLEVIN.

1. By § 10, c. 130, R. S., it is provided that *before* serving a writ of replevin the officer is required to take from the plaintiff, or some one in his behalf, a bond to the defendant with sufficient *sureties*, in double the value of the goods replevied. *Greely* v. *Currier*, 516.
2. Such bond with only *one* surety is fatally defective, if objected to by a plea in abatement, or by motion *seasonably* filed. *Ib.*
3. When proceedings in replevin are quashed for such defect, the plaintiff cannot contest, by the introduction of testimony, the right of defendant to a return of the property. *Ib.*
4. By the *illegality* of the proceeding, it is "made to appear" to the Court, on motion, that the property should be returned. *Ib.*

## RES GESTÆ.

See EVIDENCE, 3, 4.

## REVIEW.

See EXCEPTIONS, 12, 13. PETITION FOR PARTITION, 4, 6.

## SABBATH.



## SCHOOL DISTRICTS.

## SCHOOL DISTRICT TAX.

It is no valid objection to the legality of a school district tax laid for removing and repairing a school-house, that the house is taken from the limits of another district; that in removing it is pulled down, and that in repairing it is left in a different shape and size from what it formerly was.
*Tozier* v. *School District No. 2, in Vienna*, 556.

## SCIRE FACIAS.

See EXECUTORS, &c., 7.

## SEARCH WARRANT.

Unless the warrant issued under § 11 of c. 48, of statutes of 1853, shows upon its face that the testimony required before its issue, was not only reduced to writing, but *signed and verified by the oath of the witnesses*, proceedings under it are invalid and void. *State* v. *Carter*, 262.

## SEIZIN.

See DOWER, 1, 2, 3.

## SETTLEMENT.

1. The *annexation* of a small portion of the territory of one town to another adjoining, is not such a *division* as is contemplated by § 1, part 4, of c. 32, R. S. *Starks* v. *New Sharon*, 368.

2. And such annexation transfers the settlement of no persons, unless they have a settlement in the town from which the territory is taken, and *actually dwell on the territory* at the *time* of its separation. — APPLETON, J., dissenting. *Ib.*

## SET-OFF.

1. An account in set-off must be of such a character, that the record will protect the party against an action relating to the same matter.
*Stevens* v. *Blen*, 420.

2. Thus, where the defendant took back a horse he had sold to plaintiff, on his saying, that he would do what was right about it, or would leave it to a third person, and plaintiff had in fact used and damaged the horse while thus owning it, in an action between them, such claim for *use and damage* is not a matter in *set-off*. *Ib.*

3. In *set-off* a charge for rent of real estate, where there is no contract as to the price, cannot be sustained. *Hall* v. *Glidden*, 445.

See EVIDENCE, 26.

## SHIPMASTER.

See VESSELS AND OWNERS, 1, 2, 3.

## SLANDER.



## STATUTES AND CONSTITUTIONAL PROVISIONS, CITED, COMMENTED UPON, &c.

### Constitutional Provisions.



### Acts of Congress.



### English Statutes.



### Acts of Massachusetts before the separation.



### Statutes of Maine prior to the Revised Statutes.

REVISED STATUTES.

STATUTES PASSED SUBSEQUENT TO REVISED STATUTES.



## STOCKHOLDERS.

1. In an action against a stockholder, for the neglect of the corporation to pay a judgment against them, *he* cannot interpose the defence, that there was a variance in the original suit between the proof and the declaration. It is enough that the record shows a good cause of action, and that no such objection was made by the corporation. *Came* v. *Brigham*, 35.

2. The return of an officer upon an execution is sufficient evidence, that he held the execution for the purpose of collecting it. *Ib.*

3. Of the rights of a judgment creditor, under R. S., c. 76, against stockholders. *Ib.*

4. The stockholders of a corporation, for an unsatisfied judgment against it, are liable to such judgment creditor, although he is an *assignee* of the debt against it. *Ib.*

## SUBSCRIPTION.

See CORPORATION, 4, 5, 8, 9. EVIDENCE, 33, 34.

## SURETIES.

1. In contracts of suretyship good faith is required.
*Franklin Bank* v. *Stevens & al.*, 532.

2. If, in such contract there is any misrepresentation or concealment as to any *material* part of the transaction to induce the surety to become a party, it is void. *Ib.*

3. But to be *material* it must be some fact or circumstance immediately affecting the liability of the surety, and bearing directly upon the particular transaction to which the suretyship attaches. *Ib.*

4. Thus, in regard to the bond given by a cashier, in which was a condition that he should account for the money and property which had come into his hands as such cashier, *prior* as well as subsequent to the date of the bond, the knowledge of the agents of the bank, that the books of the bank had been badly kept; that bonds had not been given in previous years; that the Bank Commissioners had omitted to perform their duties; that the directors had been negligent, and the concealment of these facts from the sureties, is not material to the risk assumed, and will not shield them from responsibility; but a knowledge by such agents of the bank, that at the time of taking such bond, the cashier was a defaulter, and a concealment thereof from the sureties, would avoid the bond. *Ib.*

5. Nor can a surety on such bond interpose as a defence against paying for the defaults of the cashier, that the name of *another surety* upon the same bond was obtained by fraud, unless the signature of the latter was a condition by which to obtain that of the former. *Ib.*

6. No action can be maintained against the surety upon a bond given by the cashier of a bank, which purports to secure the bank against *previous delinquencies* of the cashier, if the agents of the bank had knowledge of such default, and it was unknown to the surety, and they *neglected* to inform him, having a reasonable opportunity to do so, before the execution of the bond. *Franklin Bank* v. *Cooper*, 542.

7. Where the surety in such action claims exemption from any responsibility on account of a *fraudulent concealment* of facts affecting the risk by the agents of the bank, which concealment may be proved by facts and circumstances, no one of which of itself would be sufficient, but when combined with and explained by other evidence might satisfy the jury of its existence, although it should appear in the evidence: —

1st, That the surety did not *call for information*, nor *see* the officers of the bank after he was called upon to sign, and before the delivery of the bond, and the agent of the bank had not *avoided* giving the information.

2d, That the agent had only *omitted* to seek after the surety and *volunteer* unsolicited explanations.

3d, That knowing the defendant was to be the surety, and afterwards receiving his bond, *without seeing him*, when he was near at hand and could readily

## TRESPASS.



See CONVEYANCE, 6. DISSEIZIN, 4. PRINCIPAL AND AGENT, 8.

## TRIAL.

See EXCEPTIONS, 4.

## TROVER.



See LEASE, &c.

## TRUSTEES.

See SLANDER.