REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By SOLYMAN HEATH,
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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

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

HON. JOHN S. TENNEY, LL. D.
HON. JOSEPH HOWARD,
HON. RICHARD D. RICE,
HON. JOSHUA W. HATHAWAY,
HON. JOHN APPLETON,
HON. JONAS CUTTING,
HON. SETH MAY,

} ASSOCIATE JUSTICES.

ATTORNEY GENERAL.

HON. JOHN S. ABBOTT.

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, 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 310, 4th line of syllabus, erase the words "portable cupboards, when fastened to the walls."

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CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1855.

PRESENT:

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

COUNTY OF PENOBSCOT.

† BRYANT *versus* CROSBY, *Executor.*

Representations by the vendor of personal property, as to its condition, made a month before the sale is consummated, are too remote to be admitted in evidence.

When evidence has been introduced of *representations* respecting personal property by the vendor, some of which are mere *opinions*, and others regard essential *facts* which amount to a warranty; and the Court are requested to instruct the jury that *such representations* imply a warranty to their extent, the request may properly be refused. A Judge is not required to separate the matters contained in *one request*, and make a portion of it, which is pertinent, his instructions to the jury, and withhold the rest.

A warranty to be effectual must be *intended* as such by the parties; but to constitute a warranty, it is sufficient, if the *words* used *implied* an under-

taking on the part of the owner, that the things sold were what they were represented to be.

If a contract in writing for the bailment of property, signed by the bailee, contains a recital that the same, for a valuable consideration, was previously sold, transferred and delivered by him to the bailor, it is evidence that such previous contract was *executed*, and the *title* to the property passed to the bailor, although portions of it were crops not harvested.

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

ASSUMPSIT, on the following contract, signed by defendant's testator, as surety, dated Nov. 30, 1847.

"Received of Nathaniel Bryant four hundred and seventy-five sheep and twenty-five rams, now in good order and condition, for which we jointly and severally promise to deliver to him at E. T. Morrill's house in Atkinson, thirty-five hundred pounds of wool, one half of it to be delivered in June, 1848, and the other half in June, 1849. The wool to be equal in quality to that grown on said sheep, well washed on the sheep, and done up in good order and condition; and the stock and the wool sheared from them, and all increase, shall be and remain at all times, the property of said Bryant, until payments are made as above, and the same shall be well kept at our risk, and on failure to make any payment as aforesaid, or if they pass out of our hands, said Bryant may take them at any time and we will pay all expense and damage."

Several indorsements were on the back. There was also this memorandum thereon, under date of August 26, 1850, and signed by E. T. Morrill, the principal.

"The amount due on this obligation this day, is six hundred and sixty-three dollars and twenty cents."

The plaintiff, under notice, at a former trial of this cause, produced a bill of sale which was left on the files of the Court, and was read by defendant, viz.: —

"Atkinson, Aug. 26, 1850.

"In consideration of six hundred and sixty-three dollars and twenty-one hundredths, paid by Nathaniel Bryant of Dexter, I this day sold, transferred and delivered to said

Bryant of Dexter, the following personal property on my farm in Atkinson, viz.:—

20 tons of hay, the same in my barn,	$100 00
1 Stud horse,	100 00
600 bushels of oats, being all standing and growing on said farm as estimated, and those already harvested, and I am to harvest those not harvested, and put the same into the granary, in my barn, in good condition, to be at said Bryant's disposal at any time he calls for the same, at 25 cents per bushel,	150 00
2 Oxen, almost ten years old, of light red color,	40 00
2 Cows, one nine, the other twelve years old, both red, at	25 00
1 Bull, three years old, at	20 00
11 Rams, marked with red paint,	13 20
1 Gray mare, three years old, and one sucking colt,	85 00
50 bushels of wheat as estimated, which I am to harvest and deliver when called for in good condition,	50 00
1 Old mare, dark red color, 20 years old, at	25 00
1 Yearling colt, red color,	25 00
50 bushels of corn, which I agree to harvest in good condition, and deliver the same as soon as the same can be threshed out in merchantable order,	30 00
	$663 20

"Said property having all been left in my charge, I hereby agree to keep the same safely, in good condition, all at my risk, and in case of loss or any deficiency in the oats, or wheat or corn, or loss in any shape, I agree to pay the same to the said Bryant, he having the right to take any part or the whole of the same, any time he may wish so to do.

"E. T. Morrill."

"Witness to signature and delivery,

"Otis Cutler."

On the back of this paper were sundry indorsements of many of the articles as having been received, with the prices, amounting to $554,00.

The hay, oats, and part of the wheat, were not received by plaintiff; but more corn than was designated in the above paper.

The defendant called one Nason as a witness, who testified, that in a conversation with Bryant a few days after he got this bill of sale, he told him he had got his pay of Morrill, and took out this bill of sale and read over some of the articles ; that he told him, he might lose this yet, Bryant replied, "Morrill has no right to sell any of the property without paying me the proceeds."

The defendant offered to prove false representations made by Bryant in relation to the sheep, as affecting the contract for the sheep, on the ground of fraud and warranty, during the negotiation for them, and a month before the date of the contract; but the Judge refused to receive the evidence.

The defendant introduced evidence, that at the time Morrill went after the sheep and the contract was completed, Bryant showed samples of the wool from his sheep, and said, that the ewe sheep would clip from three to five pounds per head on an average; the bucks from five to nine pounds. He was told they looked small to shear so much. Bryant said they would shear more than they looked, the wool was solid all over them. He was asked if they would winter well. He said that they would — they required more care, but would winter as well as common sheep. He was asked if there were not some old sheep among them. He said no; that he did not keep any old sheep, except the bucks; that he usually got rid of his old sheep, before winter; and that the sheep were healthy.

It was in evidence that between two and three hundred of the sheep died the first winter and spring after the contract, of a disease in the head; and that the fleeces of the ewe sheep that lived did not average over two and half pounds each when sheared.

Some of the testimony tended to prove that a large number of the sheep were old, poor and diseased, at the time of sale; and some tended to show fault on the part of Morrill

in keeping the sheep, and that they died from want of proper food, water, and by exposure.

Some evidence was introduced by defendant tending to show, that the plaintiff's flock was unhealthy, and that a large number of his sheep had died the same year of the contract, and died of the same disease, and that Bryant knew, or had good reason to believe, that the sheep sold to Morrill had the same at the time of sale.

Other evidence was in the case tending to show the selection was made by Morrill and his satisfaction with the sheep, and that when sold they were in good condition and the flock healthy, and that Morrill examined the flock in Oct. previous to the sale.

The defendant requested the Court to instruct the jury:

1st. If Bryant represented to Morrill, that those ewe sheep would shear from three to five pounds of wool per head, and that Morrill could pay for the sheep by the wool from the sheep, in two years and have wool left, and also, that the sheep were young, healthy and would winter well, and made these representations in good faith, and they were untrue, and made as an inducement to the sale, these representations would imply a warranty to the extent of them.

2d. Also, that if these representations were made by Bryant, knowing them to be untrue, they would still imply a warranty to the extent of them, and would also constitute a fraud.

3d. Also, that if he knew there was a disease in his flock, or had good reason to believe there was such disease, and did not disclose this to Oliver Crosby, the surety, he is discharged.

4th. That in order to constitute a warranty, it was not absolutely necessary that Bryant himself should intend, at the time of the representations, to bind himself by a warranty.

5th. That the bill of sale of August 26, 1850, if they believed the testimony of Nason in relation to what Bryant

said to him about having got his pay, and his testimony relating to said bill of sale, was evidence of payment in full of the contract of Nov. 30, 1847.

6th. That the taking of the bill of sale, August 26, 1850, if it had reference to the indebtedness on the contract of Nov. 30, 1847, and they believed the evidence of Nason, before referred to, was evidence of an implied agreement on the part of Bryant to forbear payment on said contract, and was a discharge of the surety. These requests were refused, except as embraced in the instructions following:—

The Court instructed the jury, *that* the plaintiff's right to recover depended upon the contract of Nov. 30, 1847; *that* the defendant seeks to avoid the contract upon the ground of fraud, and if not fraudulent to reduce the damages in consequence of a breach of warranty made by plaintiff; *that* the assertion in the contract of Nov. 30, that the sheep were in good order and condition, might be regarded as a representation by plaintiff; *that* if a representation falsely made by plaintiff, knowing its falsehood and with intent to deceive, and the principal, Morrill, in the exercise of common care and prudence was thereby deceived, that it would avoid the contract; *that* if the contract was entered into by Morrill in consequence of representations by plaintiff as to the age and condition of the sheep, or the amount of wool they would shear, and those representations were false, and known to be so by plaintiff, uttered by him with intent to deceive, and Morrill in the exercise of ordinary care and prudence was thereby deceived, that it would be void; *that* if there was no fraud, then they would inquire whether there was warranty or not; *that* the warranty, if any, was verbal; *that* a warranty was a contract to which, as to all other contracts, the assent of the contracting parties was necessary; *that* it must be so understood and agreed and intended by the parties; *that* to constitute a warranty the word warranty need not be used, it is enough if the words actually used, implied an undertaking on the part of the owner, that the things sold are what they are

represented to be; *that* if there was a warranty, the defendant was entitled to a reduction in damages, to the full extent of all damages sustained in consequence of a breach of said warranty; *that,* by the contract or bill of sale of Aug. 26, 1850, from Morrill to plaintiff, the plaintiff would be liable only for what he received, and had the beneficial use of, and not for what remaining in the hands of Morrill, went to his use and benefit, and were disposed of without plaintiff's consent; *that* as to the oats, wheat and corn, not then harvested, the title to them did not pass by that instrument to plaintiff, and he would be liable only for such portions of the same as actually went into his hands; *that* as to the hay, Bryant was liable to account for only so much, if any, as he had the benefit of; *that* the contract of Aug. 26 did not discharge the surety, but that plaintiff might at any time have sustained a suit against Morrill, notwithstanding the same.

The Court instructed the jury, that they had a right to take into consideration, the fact that Morrill, on Aug. 26, 1850, gave a bill of sale of property to pay the amount of the indebtedness, on the contract of Nov. 30, 1847, as rebutting the presumption of fraud.

A verdict was returned for plaintiff, and the defendant excepted to the rulings, instructions, and refusals to instruct, of the Court.

J. Crosby & G. W. Ingersoll, supported the exceptions.

1st. The false representations made by the defendant ought not to have been excluded. They were made during the negotiation for the trade. This bore directly upon the question at issue, the question of fraud. Chitty on Cont. 397 and note; Parsons on Cont. 463. This evidence tended to prove the issue. 1 Greenl. Ev. § 51.

2d. The requested instruction as to a warranty should have been given. *Henshaw* v. *Robbins,* 9 Met. 83. What is a warranty. Chitty on Cont. 389 and 394; 4 C. & P. 45; Parsons on Cont. 462–3.

3d. The third requested instruction is authorized by the case of *Franklin Bank* v. *Cooper*, 36 Maine, 179.

4th. The contract declared on has been paid. The evidence of Nason sustains this position, and there was nothing in the case to disprove it. The parties agreed that the bill of sale was payment of the contract; but the Judge instructs the jury that it was not a payment in opposition to the presumption arising from the paper itself and of all the testimony in the case. The Judge withdraws the question of payment (Aug. 26, 1850,) entirely from the jury.

Why did not the title to the oats, wheat and corn then standing, pass by the bill of sale? Notwithstanding something additional remains to be done, yet the property passes, if such be the intention of the parties, especially when there has been a delivery or the consideration has been paid. It cannot be said the property did not pass for such a cause. *Macomber* v. *Parker*, 13 Pick. 175; *Riddle* v. *Varnum*, 20 Pick. 280; *Damon* v. *Osborn*, 1 Pick. 476.

Here this property was paid for and delivered.

Nor does the fact that the risk was upon Morrill change it. *Barker* v. *Roberts*, 8 Greenl. 101.

The contract is not within the statute of frauds. Chitty on Con. 267, 270, 271; *Whitmarsh* v. *Walker*, 1 Met. 313. *Claflin* v. *Carpenter*, 4 Met. 580; *Cutler* v. *Pope*, 13 Maine, 377.

The hay it was then in the barn and delivered. Bryant could take all this property on demand, and could follow it into the possession of a third person. What more was wanting to complete his ownership?

The sixth requested instruction should have been given; and all the instructions of the Court on the question of payment were erroneous.

5th. In the contract of Aug. 26, 1850, there was an implied agreement to forbear payment by which the surety is discharged. *Bates* v. *Churchill*, 32 Maine, 31.

Blake, contra, argued, that the instructions as to the warranty were correct, but, if erroneous, it was no cause for

setting aside the verdict. No evidence of a *warranty* by parol was admitted, upon which it was necessary for the Court to rule. The contract of sale was in writing and containing no words of warranty, parol evidence is not admissible to add a warranty. 8 Bing. 48; 1 Parsons on Cont. 470; Long on Sales, 210; 4 Taunt. 779.

The elements of a warranty were correctly stated by the Judge and applied to the facts of the case.

As to the wheat, oats and corn, not then harvested, they did not pass by the bill of sale. These growing crops might all be destroyed before maturity; if not, Morrill might not harvest them; something remained to be done by Morrill. 3 Mason, 112; 3 N. H. 382.

It was in these respects an executory contract, and title would not pass. 15 Johns. 349. But whether it passed or not is immaterial, as it was all at the risk of Morrill, and plaintiff was only to account for what he received.

RICE, J. — The first exception taken was to the exclusion of certain statements, in reference to the sheep, made by the plaintiff in presence of William F. Morrill. These alleged representations were made a month before the contract of Nov. 30, was consummated. Testimony so remote and uncertain in its character was properly excluded.

Upon the point of warranty no error is perceived in the instructions given by the presiding Judge. It is contended, that the specific instructions which were requested upon this branch of the case, and which were withheld by the Court, should have been given; especially those contained in the following request: —

"If Bryant represented to Morrill that those ewe sheep would shear from three to five pounds of wool per head, and that Morrill could pay for the sheep, by the wool from the sheep in two years, and have wool left, and also, that the sheep were young, healthy and would winter well, and made these representations in good faith, and they were

untrue, and made as an inducement to the sale, these representations would imply a warranty to the extent of them."

It is not always easy to determine whether certain language does or does not imply a warranty; much will depend upon the situation of the parties, and the condition of things when the language is used, and to which it will apply.

It is certain that the word warrant need not be used, nor any other of precisely the same meaning. It is enough if the words actually used impart an understanding on the part of the owner that the chattel is what it is represented to be; or an equivalent to such undertaking. 1 Parsons on Contracts, 463.

A warranty will not be implied from loose conversations between the vendor and vendee, in which the vendor may praise his goods, or express an opinion as to their qualities, or the advantages that may result to the vendee from the purchase. No expression of opinion, however strong, would import a warranty. But if the vendor, at the time of the sale, affirms a fact, as to the essential qualities of his goods in clear and definite language and the purchaser buys on the faith of such affirmation, that, we think, is an express warranty. *Henshaw & al.* v. *Robbins*, 9 Met. 83.

The declarations of Bryant as to the amount of wool the sheep would shear per head, the time in which Morrill could pay for the sheep, and whether he would have wool left after paying for them in a given time, are obviously matters of opinion, and must have been so understood by the parties. They were mere speculations as to the future, of the correctness of which one could judge as well as the other. They were not affirmations of existing facts in relation of the quality of the sheep. But the statement that the sheep were young and healthy was a representation of a different character, and such as, if made as an inducement to the sale, would strongly tend to prove an express warranty.

These various representations of the plaintiff were all grouped together in one request, and the Court was desired

to give a particular construction to the whole, as matter of law. To have complied with such a request would have been erroneous. When parties incorporate into a request matter which is impertinent or improper, with other matter which is pertinent and proper, the Court will rightfully reject the whole. A Judge cannot be called upon to dissect a long request, presented perhaps, for the first time, while he is submitting a case to the jury, and select the sound from the unsound; giving the former to the jury and rejecting the latter. For this reason this request was properly withheld.

Pertinent and correct instructions were given upon the matters contained in the second and third requests.

The fourth request was properly declined. If a party uses language which imports a warranty, the presumption is, that he *intends* it as such. To have given the instruction as requested, would have tended to mislead the jury.

The fifth request was as follows: — The defendant contended and so requested the Court to instruct the jury, that the bill of sale of Aug. 26, 1850, if they believed the testimony of Nason, in relation to what Bryant said to him about having got his pay, and his testimony relating to said bill of sale, was evidence of payment in full of the contract of Nov. 30, 1847. This was refused, and upon this point the Judge instructed the jury, that by the contract or bill of sale of August 26, 1850, from Morrill to plaintiff, the plaintiff would be liable only for what he received, and had the beneficial use of, and not for what remaining in the hands of Morrill went to his use and benefit, and were disposed of without plaintiff's consent. As to the oats, wheat, and corn not then harvested, the title to them did not pass by that instrument to the plaintiff, and he would be liable only for such portions of the same as actually went into his hands, and that as to the hay, Bryant was liable to account for only so much, if any, as he had the benefit of.

The refusal to give this instruction, when taken in connection with those actually given upon the same point, is worthy of consideration.

It will be observed that the paper in the case, dated August 26, 1850, does not purport to be a contract of sale from Morrill to Bryant. It is simply a receipt or contract of bailment given by Morrill to the plaintiff, in which he recites the terms of a contract made that day between the same parties. It is as follows:—

"Atkinson, Aug. 26, 1850.

"In consideration of six hundred and sixty-three dollars and twenty-one hundredths, paid by Nathaniel Bryant of Dexter, I this day *sold, transferred* and *delivered* to said Bryant of Dexter, the following personal property on my farm in Atkinson, viz.:—" Then follows a list of the property.

"The paper concludes as follows:—"Said property having been left in my charge, I agree to keep the same safely, in good condition, all at my risk, and in case of loss or any deficiency in the oats, or wheat, or corn, or loss in any shape, I agree to pay the same to said Bryant, he having the right to take any part, or the whole of the same, at any time he may wish to do so."

When this case was before the Court on a former occasion, 36 Maine, 563, some incidental remarks were made by the Judge, who drew the opinion, upon the character of the contract of Aug. 26, 1850. The case at that time, did not turn upon any question arising out of that contract. The remarks then made upon that point may not, therefore, have received the consideration which would have been given them if the disposition of the case had depended upon the construction of this contract.

The Court, however, were then of opinion, that the contract of Aug. 26, 1850, was an absolute bill of sale, and could not be construed as a mortgage; that it did not appear by its terms to be in any way connected with the contract of Nov. 30, 1847, but that parol evidence would be admissible to show, that the property sold, or the agreed price of it, was to be applied in payment of the first contract.

Some confusion may have arisen in not keeping in view the distinction between the contract by which Morrill *sold, transferred* and *delivered* to Bryant certain property, and the receipt given by Morrill for that property in which he recites the terms of the former contract, and agrees to keep the property subject to the order of Bryant.

An important practical question is, what was the consideration paid for the transfer of the property on the 26th of Aug. 1850? The defendants say it was the payment of the balance due on the first contract. The fact, that the consideration was the precise amount found due by the parties on the old contract, on that day, is significant and would, perhaps, under the circumstances when taken in connection with the testimony of Nason, authorize such an inference. If such was the fact, the result would be that the original contract was paid thereby, unless there was some reason to prevent the sale of Aug. 26, 1850, from being fully executed.

Did that property pass? The receipt shows a valuable consideration, and recites that it was sold, transferred and delivered. This receipt was signed by Morrill, and comes from the possession of Bryant. There is no evidence in the case tending to show that it was given by mistake, or that any of the recitations therein are untrue.

But it is contended that the oats, wheat, and corn, not then harvested, did not pass by that contract. So far as the corn is concerned, there is now no controversy, as more was afterwards delivered, as appears by entries on the back of the receipt, than was included in the contract.

Under what circumstances growing or standing crops can be passed between vendor and vendee, has frequently been considered by courts of law.

In *Crosby* v. *Wadsworth*, 6 East, 602, it was held that a crop of growing grass was such an interest in and concerning land as to bring it within the statute of frauds and to require the contract to be in writing.

In *Parker* v. *Stainland*, 10 East, 562, it was decided that

a crop of potatoes, which were in a condition to be harvested, were chattels, and would pass by parol. BAILEY, J., in this case remarked, that "in the cases of *Crosby* v. *Wadsworth*, and *Waddington* v. *Bristowe*, the contracts were made for growing crops of grass and hops, and therefore the purchaser of the crops had an intermediate interest in the land while the crops were growing to maturity, before they were gathered; but here the land was considered as a mere warehouse for the potatoes till the defendant could remove them, which he was to do immediately.

In *Warwick* v. *Bruce*, 2 M. & S. 205, which was also for a sale of potatoes, Lord ELLENBORO' remarked, "here is a contract for the sale of potatoes at so much per acre; the potatoes are the subject matter of the sale, and whether at the time of the sale they were covered with the earth in the field, or in a box, still it was a sale of a mere chattel."

In *Whipple* v. *Foot*, 2 Johns. 418, it was decided that wheat growing on the ground, was a chattel, and as such, subject to be taken on execution; and in *Newcomb & al.* v. *Ramer*, cited in a note in 2 Johns. 421, it was held that a crop of growing wheat would pass by parol.

In *Whitmarsh* v. *Walker*, 1 Met. 313, it was held that an oral agreement for the sale of mulberry trees growing in a nursery, and raised to be sold and transported, would be valid without writing.

In *Cutler* v. *Pope*, 13 Maine, 377, it was decided that grass already grown, and in condition to cut, may be sold by parol; and there is no objection to such sale, arising from the statute of frauds.

Numerous other cases might be cited, in which the principles in the cases above have been adopted with different degrees of modification. The cases in New York go the full length of sustaining the sale of *growing* crops as chattels. In England and in this State, the courts have not extended the principle, in terms, so far, though cases may be found, which by analogy, fall very little short of the rule established in New York.

But the application of the rule which has been adopted in this State, will be decisive of this case. The oats and wheat were not only grown and in condition to be cut, but a portion of the oats had actually been harvested. The corn was subsequently all delivered with an additional quantity. The quantity was determined by estimation. There was therefore nothing in the nature or situation of the property to prevent it from passing by parol. *Cutler* v. *Pope*, 13 Maine, 377.

But if the property were within the statute of frauds the result would be the same, because the testimony of Neal would certainly authorize the inference, that the contract of sale was in writing. If it should be contended, that the paper in the case, dated Aug. 26, 1850, is the only contract of sale, the answer is still the same, that being also in writing.

Nor can there be any objection on the ground, that the sale was not fully consummated, that something further remained to be done by the vendor. The consideration was paid; the property designated and delivered. The fact, that Bryant desired a particular disposition of the property subsequent to the sale to him, and that he made an arrangement with Morrill to take charge of the property and keep it for him, can have no effect upon the sale. For that purpose he could contract with Morrill in the same manner and with the same legal effect as with any other party. And in neither case would the contract of bailment affect the prior contract of sale. So, also, as to the hay in the barn, there is no reason perceived why it did not pass by the sale.

On these points we think the instructions were erroneous, and for this reason there must be a new trial.

If the jury shall find the recitations of a sale, contained in the paper dated Aug. 26, 1850, are correct, and that the consideration for that sale was the balance due on the original contract, the result must be that that contract was thereby paid and discharged, and that this action cannot be maintained.

Exceptions sustained, verdict set aside and new trial granted.

† CURTIS, *Petitioner for Partition, versus* CURTIS *& als.*

An heir apparent, who releases all his present and future claim and interest in his father's estate, with a covenant, that neither he nor any one through him, shall ever claim any right to the same, which release is made with the knowledge and consent of his father, and there is no fraud on the part of the grantee, is precluded from setting up, afterwards, title to any part of the estate, either as heir or devisee.

ON REPORT, HATHAWAY J. presiding.

PETITION FOR PARTITION. Jacob Curtis, jr. pleaded that the petitioner had no interest, title, or seizin in the land described in the petition.

The petitioner and the respondents were the children of Jacob Curtis, deceased.

The title of Jacob to the land described in the petition appeared by the copies of deeds in the case.

By the will of Jacob, made in March, 1848, his personal, and one half of his real estate, were devised to his son Jacob, jr.; and the other half to his other children, five in number.

Thomas R., one of his children, died before the testator without issue.

The respondent, Jacob, jr., produced a deed of quitclaim from the petitioner, dated in Aug., 1848, acknowledged and recorded, releasing to him, his heirs, executors, administrators and assigns, "all the estate, right, title, interest, claim and demand whatsoever, both at law and equity, which the said John Curtis (petitioner,) now has or hereafter can have, either by will or descent, or otherwise; in, to, or out of, all and singular the lands, tenements, hereditaments of my father, Jacob Curtis, senior, of said Hampden. To have and to hold the same together with all the privileges and appurtenances thereunto belonging to the said Jacob Curtis, jr., his heirs and assigns, forever, so that neither I, the said John Curtis, my heirs or assigns, or any other person, persons in trust for me or them, or in my or their name or names, or in the name, right or stead of any of them, shall, will, can or may by any ways or means whatsoevér hereafter claim, have,

challenge or demand any right, title, or interest, property, claim and demand of, in, to, or out of the aforesaid premises or their appurtenances, or to any part thereof forever."

On this deed was indorsed the assent and approval of Jacob Curtis, senior.

The Court were authorised to render a legal judgment thereon.

Knowles & Briggs, for the respondents, argued that the petitioner had no rights in the estate either as heir or legatee, and cited *Boynton* v. *Hubbard*, 7 Mass. 112; *Fitch & al.* v. *Fitch*, 8 Pick. 480; *Trull & ux.* v. *Eastman*, 3 Met. 121.

J. Godfrey, for petitioner.

RICE, J. — Jacob Curtis, sen'r, on the 28th day of March, 1848, being the father of six children, then living, disposed of all his estate real and personal by will. He devised all his personal estate and one undivided half of all his real estate to Jacob Curtis, jr., with whom he appears to have lived. The other half of his real estate he devised in equal proportions to his five remaining children, viz., John, Jeremiah, Thomas R., Sarah and Eliza.

On the 12th day of August, 1848, John Curtis, the petitioner and one of the five children above named, in consideration of two hundred dollars, paid by Jacob Curtis, jr., conveyed by deed of quitclaim, "all the estate, right, title, interest, claim and demand whatsoever, both at law and in equity, which the said John Curtis now has, or hereafter can have, either by will, or descent or otherwise, in, to, or out of all and singular the lands, tenements, hereditaments of my father, Jacob Curtis, sen'r, of said Hampden." This deed contains a full covenant of non-claim on the part of the grantor, his heirs and assigns; and upon the deed is the following memorandum signed by Jacob Curtis, sen'r, and witnessed, to wit; — I, Jacob Curtis, sen'r, give my assent and approval to the above deed."

The deed was entered of record August 31, 1848.

Thomas R. Curtis, one of the legatees above named, deceased in August, 1852, leaving no issue. The testator died in Sept. 1852, and his will was duly proved and allowed in probate court.

By the decease of Thomas R. without issue, before the death of his father, the testator, his legacy, being equal to one tenth part of the real estate of the testator, lapsed, and there being no residuary clause in the will, was undisposed of thereby, and consequently, on the decease of the testator, descended, under our statute of distribution, in equal proportions to all the children of the testator then living, including Jacob, jr.

The rights of the petitioner at that time, independent of his deed above referred to, would stand thus; he took as legatee, under the will, one tenth part of the real estate of the testator, $= \frac{5}{50}$. He inherited as heir at law one fifth of the lapsed legacy of Thomas R., which was undisposed of by the will, which was $\frac{1}{5}$ of $\frac{1}{10} = \frac{1}{50}$, making his entire interest six fiftieths of all the real estate of the testator.

Such would be his rights in the estate were it not for his deed, by which it is contended he has divested himself of all his interest therein, both as legatee and heir.

It is laid down by Lord Coke, Co. Lit. 265, *a*, when a son releases in the life of his father, the release is void because he hath no right at all at the time of the release made, but all the right was at that time in the father; but after the decease of the father the son shall enter into the land against his own release.

But if there be a warranty annexed to the release then the son shall be bound, for albeit the release cannot bar the right for the cause aforesaid, yet the warranty may rebut and bar him and his heirs of a future right which was not in him at that time; and the reason wherefore the warranty shall bar the future right is for avoiding circuity of action, which is not favored in law.

There are two reasons why sales of expectant estates by heirs should be discountenanced; one that it opens the

door to taking undue advantage of an heir in distressed and necessitous circumstances; the other is founded on public policy, in order to prevent an heir from shaking off his father's authority, and feeding his extravagance by disposing of the family estate. Sugden on Vendors, 370.

It was decided in *Boynton* v. *Hubbard*, 7 Mass. 112, that a contract made by an heir, to convey, on the death of his ancestor, a certain undivided part of what shall come to the heir by descent, distribution, or devise, is a fraud upon the ancestor, productive of public mischief, and void as well at law as in equity.

The doctrines of this case, in the broad terms in which they are laid down by the learned Judge who delivered the opinion of the Court, cannot, it is believed, be sustained by authority, but must be received with qualifications.

In *Fitch* v. *Fitch*, 8 Pick. 480, it was held that a covenant by an heir expectant, that he will convey the estate which shall come to him by descent or otherwise, is valid, if made with the consent of the ancestor, and for a sufficient consideration, and without advantage being taken of the covenantor.

In *Trull* v. *Eastman & ux.*, 3 Met. it was decided that a release by an heir apparent, of his estate in expectancy, with a covenant of non-claim, is, if made fairly, and with the consent of the ancestor, a bar to the releasor's claim thereto, by descent or devise, after his ancestor's death.

Such is also the rule in equity. The whole doctrine of courts of equity with respect to expectant heirs and reversioners, and others in like predicament, assumes that one party is defenceless, and exposed to the demands of the other under the pressure of necessity. It assumes also that there is a direct or implied fraud upon the parent or other ancestor, who from ignorance of the transaction is misled into a false confidence in the disposition of his property. Hence it should seem that one material qualification of the doctrine is the existence of such ignorance. If, therefore, the transaction has been fully made known, at the time, to

the parent or other person standing *in loco parentis*, and is not objected to by him, the extraordinary protection generally afforded in cases of this sort by courts of equity, will be withdrawn. *A fortiori* it will be withdrawn if the transaction is expressly sanctioned and adopted by such parent, or person *in loco parentis*. *King* v. *Hamlet*, 2 Myl. & K. 455; 1 Story's Eq. § 339.

In the case at bar the testator was connusant of the whole transaction, and gave it his express approval. There is no suggestion that fraud was practiced on the part of the grantee, nor that any undue advantage was taken of the grantor. But, on the contrary, so far as appears, it was a family arrangement, deliberately and understandingly entered into by the parties, by which the petitioner obtained a full equivalent for all the prospective rights which he relinquished. To permit him now to repudiate that arrangement, would be to enable him to practice a fraud upon others, rather than to relieve him from an unconscionable contract.

Petition dismissed, with costs for defendants.

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† HUNNEWELL *versus* HOBART *& al.*

Although there was conflicting evidence upon the issue tried, yet if it so strongly preponderated against the verdict of the jury, as to produce the conviction in the Court, that their judgment was controlled by some improper bias, the verdict will be set aside.

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

TRESPASS, *quare clausum*, and for carrying away sundry articles of personal property.

The plaintiff's legal settlement was in the town of Madison. He resided with his family in Bangor, and was supplied for many months as a pauper. Several notices had been given to the overseers of Madison of such supplies, and the defendants, acting under their authority, went to Bangor, and removed plaintiff's family and their furniture to Madison.

For this act of the defendants this action was brought.

A verdict was returned for plaintiff.

A motion was filed to set it aside as being against the law, and the evidence introduced: — and if so, or the instructions given were erroneous a new trial should be granted.

The instructions need not be stated, as the case was disposed of on the motion. The evidence will be understood by the opinion of the Court drawn up by

RICE, J. — The breaking and entering charged in the plaintiff's writ is not denied by the defendants. They, however, justify in their pleadings: — one as an overseer of the poor for the town of Madison, and the other as an agent of that town, acting under authority of the overseers of the poor. They claim to have performed the acts which constitute the alleged trespass, lawfully, in the removal of the plaintiff and his family as paupers, from Bangor to Madison, the place of their legal settlement.

That the legal settlement of the plaintiff was in Madison, is not controverted. That he had received supplies, as a pauper from the city of Bangor, during a considerable portion of the year 1849, and up to January 9, 1850, appears from the evidence. Nor is the authority of the defendants to act in behalf of the overseers of the poor of the town of Madison, contested. The principal question at issue between the parties, seems to be, whether the plaintiff was, on the 11th day of January, 1850, a pauper, and as such, liable to be removed with his family, from Bangor, his place of residence, to Madison, his place of legal settlement. It is incumbent on the defendants to show that such was his condition.

The evidence shows that the plaintiff protested against the right of the defendants to remove him, and alleged that he was both able and willing to provide for the support of himself and family. It also appears from the evidence that his family, on the day of their removal, was not in a state of destitution.

On the part of the defence, it appeared that the city of

Bangor had sent notice, on four different occasions, during the year preceding the alleged trespass, to the overseers of the town of Madison, informing them that the plaintiff and his family had fallen into distress, and were being relieved by the city, as paupers.

It also appears that the authorities of Bangor continued to furnish such supplies until the day before the defendants arrived in that city, for the purpose of removing the plaintiff and his family.

The reason given by the plaintiff for desiring assistance, was the sickness of his wife. Though it does not appear affirmatively at what time his wife died, the legitimate inference from other facts in the case is, that her death occurred as early as the twenty-fourth of December, 1849. Supplies were furnished to the plaintiff until January 9, 1850. The evidence does not disclose any change in the condition of the plaintiff and his family between the 24th of Dec. 1849, and the time of his removal, or that he was in any better situation to provide for his necessities on the 11th of January, than he had been for several days or weeks preceding that time.

When a man has been supplied, at his own solicitation, as a pauper, for many consecutive months, and is at the moment feeding his family with, and himself eating the bread of legal charity, just furnished, it would seem to require some evidence more than his naked assertion, to satisfy an unbiased mind that he was not still a pauper, and especially so when that same man permits members of his family to be supported at the public charge from that day forward.

Though overseers of the poor, by law, have the care and oversight of all such poor and indigent persons as are chargeable to their respective towns, and are holden to furnish them support when they shall stand in need of assistance, they cannot decide, conclusively, whether a given person is, or is not a pauper. They are, however, required to act according to their best discretion, and should furnish assistance when in their judgment the exigencies of the case re-

quire it. But the question, whether they have erred, can only be settled, conclusively, in this Court.

The law in this case was very fully, and, we think, fairly stated by the presiding Judge. If he erred in any particular, the defendants had no right to complain of the error. A single proposition in the charge, standing alone, might be open to objection, but taken in connection with other parts of the charge, and as it must have been understood by the jury, was not exceptionable.

It is the province of the jury to consider and weigh conflicting testimony, and where there is evidence on both sides, courts will not feel authorized to disturb the verdict of a jury, unless the result is so manifestly erroneous as to make it apparent that it was produced by prejudice, bias, or by some mistake of law or fact in the case. *West Gardiner* v. *Farmingdale*, 36 Maine, 252.

In this case, we think the evidence as reported, preponderated so strongly in favor of the defence upon the point upon which the case must have turned, as to force the mind to the conclusion, that the judgment of the jury must have been controlled by some improper bias. For this cause the motion is sustained. *Verdict set aside and a new trial granted.*

Knowles, for plaintiff.

J. S. Abbott, for defendants.

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† CALL *versus* CARROLL.

Where the upland, on the shore of a river subject to the flux and reflux of the tide, has been run out into lots, the flats appurtenant, when not otherwise settled by the owners, must be divided, under the operation of the Colonial Ordinance of 1641, according to the principle recognized in the case of *Emerson* v. *Taylor*, 9 Greenl. 42.

And where such original lots are *subdivided*, without any stipulations as to the flats, the division of the latter, as between the vendor and vendee, must be governed by the same rule, but in no event to affect the flats of adjacent proprietors.

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

CASE, for damages alleged to be caused by defendant's boom.

The plaintiff was owner of a portion, and tenant of the remainder, of the premises described in his writ.

Defendant occupied a dock southerly of and adjoining the plaintiff's dock. Against his dock the defendant has a boom, which when at rest is in the right place, but when the tide sets up stream, it floats up twenty-four feet at the extreme outer part in tide-waters, above its resting place; and when the tide ebbs, it floats thirty-five and one-half feet below its resting place.

In 1801, the upland, including that of the parties, was run out into lots. The lots numbered 13 and 14 have since been subdivided, and the question here arises as to the proper division of the flats appurtenant to the respective owners of adjacent portions of these two lots.

A plan was before the Court, but the matter will be readily apprehended without a diagram.

It was agreed to submit the case to the decision of the Court upon the evidence, to be decided according to the legal rights of the parties; if a default should be entered, the damages to be assessed by the clerk.

W. Fessenden, for defendants, contended, that the principles of equity should govern cases of this description, and that no general rule can be laid down which will apply to all cases. The decision of *Emerson* v. *Taylor*, 9 Greenl. 42, was not a guide. The proper construction of the Colonial Ordinance was given by the Courts of Massachusetts in *Valentine* v. *Piper*, 22 Pick. 89, and *Gray* v. *Deluce & al.*, 5 Cush. 9.

That if our Courts followed the rule in the case alluded to, the owners of flats were liable to be divested of them in every division of the lots.

That where the flats lie within a cove as in this case, the principle of *Gray* v. *Deluce & al.*, was the only one that could do justice to the parties.

That the principal use of these flats was for the booming of timber and rafts, and if the booms must be hung according to the rule in *Emerson* v. *Taylor*, it would be inconvenient to all parties. They should be hung at right angles to the current of the river, but cannot be so done unless the Massachusetts rule is adopted.

J. A. Peters, for plaintiff, relied on *Emerson* v. *Taylor*, as furnishing the rule in this case, and also cited *Treat* v. *Chipman*, 34 Maine, 34.

APPLETON, J. — In the case of *Emerson* v. *Taylor*, 9 Greenl. 42, this Court established a rule for the ascertainment of the side lines of water lots from the upland to the low water mark under the Colonial Ordinance of 1641, which has since been adhered to in this State. In that decision the Court say they are not aware of any cases in which this mode of apportioning appurtenant flats among contiguous owners of the upland would not be applicable, but if any such case should occur requiring the application of a new principle it must be applied.

In 1801 the lots on the river were run out and a division of the upland was then made. Those lots then run out have since been subdivided. The controversy in this case arises between the respective owners of adjacent portions of the original lots Nos. 13 and 14.

When the land of the Commonwealth of Massachusetts was first run out into lots, whatever rule is to be regarded as applicable to the division of flats, by that rule, certain flats were given to and required by each lot of the upland thus divided. The flats appertaining to each lot consequent upon such division, were as much parts of the original lots as the uplands, — and when granted, were as much included in the terms of the grant, if that followed the original location, as the upland.

If the division of the shore into lots were to be regarded as cotemporaneous, the rule adopted in *Emerson* v. *Taylor*,

most obviously commends itself as of the highest equity between conflicting parties.

If the original lots are subdivided, then the question occurs, to what extent and how far is the rule there established, to be regarded as applicable to the smaller lots into which the original lot may have been subdivided.

When the shore is straight, no difficulty is likely to arise as to the proper application of the Colonial Ordinance. But each stream has its curvatures and sinuosities, and it frequently becomes a matter of grave moment and great nicety to determine how the division of the flats is to be affected by such curvatures and sinuosities.

It is apparent when the shore is curved that the base line of lots will vary according to each division or subdivision of the upland and that the flats will vary according to each base line arising and consequent upon such division and subdivision.

The flats of a lot as established by the original and cotemporaneous division of the upland cannot be altered or changed by each subdivision. If it were so, the flats would be a variable quantity, increasing or diminishing with the increase or decrease of adjacent lots as they might be affected by the base lines of each new and lesser or larger lot. If it were, an owner of a lot, by sale or by purchase might vary the base line of his lot, and by claiming flats according to such new base line appropriate to himself a portion of flats which previous to such change of the size of his lot, had belonged to an adjacent proprietor.

The principle of *Emerson* v. *Taylor* applies when the lots are all run out at the same time. When original lots are subdivided, it may be regarded as a satisfactory rule for dividing the flats at the point of division, and as between the vendor and vendee; but it cannot be so construed as to affect the flats of adjacent proprietors.

The division of the uplands appears to have been made in 1801, and the flats of the lots then run out must be ascertained by the application of the principle of *Emerson* v.

Taylor. The flats, as thus established, remain and must remain unaffected by the subdivisions of the original lots. The owners of lots 13 and 14, by the subdivisions of their lots, could neither enlarge their own flats, nor diminish those of the adjacent proprietors, by any acts of theirs. The lots in dispute are adjacent parts of these lots, and the flats at the point of division of these portions of the original lots must be regarded as identical with the flats of those lots and as unchanged by the divisions which have taken place since their location. According to these principles, the plaintiff is entitled to recover. *Defendant defaulted.*

DRUMMOND *& ux. versus* DRUMMOND *& al., Executors.*

A testator devised one undivided fourth part of his mills and real estate connected therewith, to his executors, in trust for S. U. D. during her natural life, on the condition that they were to retain the income of that part, and pay over the same towards removing the incumbrances on the mill property, and towards the consideration agreed to be given for it, until one fourth of the incumbrance and one fourth of the consideration remaining unpaid were discharged; subject also to its proportion of the repairs: —

He also devised to his executors all his real and personal estate, excepting the fourth part for the use of S. U. D., to be held by them in trust for the payment of his debts, legacies and bequests; and to pay over the increase thereof, subject to the support of his family, to the payment of said debts, legacies and bequests, until the same were fully paid, when said trust estate was to cease: —

Several legacies of money were given, but no provision in the will was made for his widow: —

He also bequeathed all the residue of his estate to his three children in equal shares: —

The dower of the widow in the mills was determined to be one third of the rents and profits — and after the proportional part of the incumbrances and consideration unpaid at the time of testatator's death, of the fourth part of the mills devised for the use of S. U. D. were discharged, the executors withheld from the devisee one third of the net income of said fourth to discharge the widow's claim for dower: —

It was held that such *specific* devise was subject to dower, without contribution or remuneration from the *residuary* estate.

ON FACTS AGREED.

ASSUMPSIT, to recover money alleged to be due the female plaintiff, under the provisions of the will of Jacob Drummond, deceased.

The first devise in the will was to his executors, of one undivided fourth part of the Drummond mills, fixtures, mill privilege and real estate, conveyed to the testator by a certain deed named, "to have and to hold the same in trust for the use of Sarah U. Drummond, during her natural life," with remainder over.

"The aforesaid bequest and devise is made on the condition that my said executors are to retain the income of said fourth part of said mills, and to pay over the same towards removing the incumbrances on said mills and real estate, and towards the consideration given for said mills, until one fourth of the incumbrances on said mills and real estate, and one fourth of the consideration agreed to be paid for the same, and that may be unpaid at the time of my decease, shall have been fully paid and discharged, said incumbrance and consideration being a mortgage, and all the unpaid notes given at the time I purchased one undivided half of said mills; said undivided fourth is also to be liable and subject to pay its proportional part of all the expenses of the repairs of said mills, fixtures, flumes and dam."

The will contained several specific bequests of money to be paid after the discharge of the testator's debts.

The ninth item in the will was as follows:—

"I give and bequeath to my said executors and their successors, all my real estate, excepting said undivided fourth part of said mills, and all my personal estate, to be held by them in trust, for the payment of my debts, legacies and bequests herein made, and to pay over the rent and income thereof, subject to the support of my family, to the payment of said debts, legacies and bequests, until the same are fully paid, when said trust estate is to cease. It is to be optional with my said executors to sell my personal property and apply the proceeds thereof towards the payment of said debts and legacies."

By the tenth item, the testator's interest in "Dow's block and store No. 6," being three undivided fourths, was conveyed to his executors and their successors in trust for his three children during their lives with remainder over.

By the fourteenth item the residue of the estate was bequeathed to his children in equal shares.

The executors named in the will were also appointed trustees of the property and estate given them in trust, for the purposes therein mentioned.

This suit is instituted by Alexander Drummond and Sarah U. Drummond, his wife, to obtain her supposed rights under the first devise in the will.

All the incumbrances upon the estate devised in trust for her had been paid off before the commencement of this suit, and a surplus of money remained in the defendants' hands as the net income of such fourth part.

At the time the testator made his will, and at the time of his decease he owned the whole of the "Drummond mills," three fourths of "Dow's block and store No. 6," also his homestead, valued at $3800; and the three quarters of the mills and his homestead were disposed of only by the residuary clause in the will, and it was admitted, that the annual net income of the homestead and three quarters of the mill property was more than one third of the income of all his real estate.

The testator left a widow who petitioned for dower, and commissioners were appointed by the Probate Court, who were of opinion that no assignment could conveniently be made by metes and bounds, and therefore made none; and the executors have since paid her one net third part of the whole rents and profits of the real estate.

The executors withhold from plaintiff one third part of the net profits and income of the quarter part of the mill so devised for her use, they claiming that it is not exonerated from the charge of dower.

No provision was made for the widow by the will, other than appears in the extracts herein set forth.

If the defendants had no right to withhold the third part of the income of that part devised in trust for the female plaintiff, they are to be defaulted; otherwise a nonsuit is to be entered.

Wakefield, for defendants, argued that there being no provision in the will for his wife, the testator intended her dower should be a charge upon all his real estate, and that nothing could be inferred from the language of the bequest, that the fourth part in trust for plaintiff, was to be exonerated from that burthen. The language of the ninth clause plainly indicated the same thing. In that clause this fourth was exempted from the payment of his *debts*, and if from dower also, it should have been mentioned. Besides, the bequest of the residue of the estate to his three children, is as *specific* as this bequest, and according to the proposition of plaintiffs, that part of the estate should be exonerated also.

The provisions of c. 92, § § 14 & 15, do not help plaintiffs' construction. Dower is not a debt. He also argued that there was a manifest consistency between the case of *Blaney* v. *Blaney*, 1 Cush. 107, and the case at bar.

A. W. Paine, for plaintiffs, relied 1st, upon the various provisions of the will as showing a manifest intention on the part of the testator to exempt this fourth from the charge of dower.

2d. That the uniform tenor of the decisions, and the well settled principles of law regulating devises, are, that the specific devise of a thing or estate, is an exoneration of it from all charges against the estate or property of the deceased, unless an intention to the contrary is plainly manifested in the language of the will. 2 Jarman on Wills, 395, [552] to [556]; 3 Greenl. Cruise, 359; *Hayes* v. *Seaver*, 7 Greenl. 237; *Humes* v. *Wood*, 8 Pick. 478; *Hubbell* v. *Hubbell*, 9 Pick. 561; *Adams* v. *Brackett*, 5 Met. 280.

3d. That no other claim can be made by defendants except that the *residuary devise* should be regarded as *specific*. It was so regarded at common law, but this was never adopted here. On the contrary, residuary devisees here take

subject to all the permanent charges against the property of the estate, including not only debts and legacies, but the rights of posthumous children, and widows. *Hayes* v. *Jackson*, 6 Mass. 149; *Blaney* v. *Blaney*, 1 Cush. 107; *Bradford* v. *Haynes*, 20 Maine, 105.

4th. That it appeared the undevised real estate was sufficient to satisfy the claims of the widow to dower, and no necessity exists to take away any part of plaintiffs' devise to satisfy her.

APPLETON, J. — The claim of the wife to dower in the real estate of her husband extends to each and every parcel of real estate of which he was seized during coverture. It is in no respect subject to the will and control of the husband. He can neither limit nor restrict it. He cannot relieve one portion of his estate from this burthen, and impose it upon another. The right of the wife remains unaffected by any act of his.

Upon examining the will of Jacob Drummond, under which these parties respectively claim, it will be perceived that no specific provision is made for the widow. Her name is not even mentioned in the will. Her legal rights receive no addition from the bounty of the testator. From this, it would seem that it was his intention to leave the legal rights of his wife unaltered; — that the disposition of the law was identical with his wishes, and that being identical, there was no occasion for any specific bequest. In the absence of any controlling provisions, clearly indicative of a different intention, the fair inference would seem to be, that he designed his wife should have the right to his property which the law would give her, and consequently that her right to dower should extend over his whole estate.

The rights of the wife as they exist by law, remaining intact and unaffected, it remains to consider, whether upon the will, the law raises any superior equities among the different objects of the testator's bounty, or exonerates any portion of the estate from the superincumbent right of

dower, which by the common law rests equally upon the whole.

Jacob Drummond, by his will, bequeathed all his estate, real and personal, to his executors, whom he appoints trustees, of which Alexander Drummond, one of the plaintiffs, was one, in trust for the use of his (Alexander Drummond's,) wife, &c., to pay debts, legacies, and in trust for the use of his three children.

In the first clause in the will, under which the plaintiffs claim, the testator bequeaths one undivided fourth part of the Drummond mills, so called, to the trustees named in the will, "to have and hold the same in trust for the use of Sarah U. Drummond, wife of my brother, Alexander Drummond, during her natural life," &c., with remainder over. After providing for various contingencies, it is then added, that "the aforesaid bequest and devise is made on the condition that my said executors are to retain the income of said fourth part of said mills, and to pay over the same towards removing the incumbrances on said mills and real estate, and towards the consideration given for said mills, until one fourth of the incumbrance on said mills and real estate, and one fourth of the consideration agreed to be paid for the same and that may be unpaid at the time of my decease, shall have been fully paid and discharged, said incumbrance and consideration being a mortgage, and all unpaid notes given at the time I purchased one undivided half of said mills and real estate of the heirs of said John Parsons."

"Said undivided fourth is also to be liable and subject to pay its proportional part of all the expenses of the repairs of said mills, fixtures, flumes and dam."

The fourth of the Drummond mills, it will be seen, is thus made subject to its proportional share of the mortgage given for their purchase and liable for its share, for all the repairs which the mill and dam may require. This share is therefore not exempted from any incumbrances. No allusion is made to dower, and no language indicating any inten-

tion to relieve this undivided share from its common liability to dower.

The ninth clause in the will is as follows: — "I give and bequeath to my said executors, and their successors, all my real estate, excepting said undivided fourth of said mills, and all my personal estate, to be held by them in trust for the *payment of my debts, legacies and bequests herein made,* and to pay over the rent and income thereof, *subject to the support of my family,* to the payment of said debts, legacies and bequests, until the same are fully paid, when said *trust estate is to cease.*"

Upon the termination of the trust created for the payment of debts and legacies — the trustees are to hold the two thirds of the Dow's block and store No. 6, one third in trust for each of the children of the testator, with remainders over.

The claim of the plaintiff is, that the estate devised to trustees for her use, should be exempted from dower, and that the same should be a charge upon the remaining three fourths of the Drummond Mills. In case the devise had been of a specific portion of lands, the proposition is that the remaining portions of the estate should remunerate the specific devisee for any loss incurred in consequence of the dower, which may be set apart for the widow. If there should not be other real estate, then the personal estate should contribute, and the ultimate result would be that dower would be a charge upon the personalty. At all events, the plaintiff is not entitled to recover, unless the specific devisee of real estate has a right to have the estate devised exonerated from dower by giving the widow dower on the residuary estate devised, or in charging upon the estate thus devised, the value of the dower estate, and in compelling the same to contribute to the specific devisee such sum as will remunerate him for the loss incurred in consequence of dower. The question to be determined is whether the plaintiffs have such legal or equitable rights.

The general principle seems well established that in case

of the devise of an estate charged with a mortgage by the devisee, that the devisee has a right as against the personal or real estate not specifically devised, to have the mortgage discharged, and that the assets of the estate will be so marshalled as to accomplish this result. The claim to exoneration is founded on "the notion that the personal estate of the testator who made the mortgage, had the benefit of its creation, and therefore shall be the fund to liquidate it; and cases which do not fall within the reason, are excluded from the operation of the rule. Thus it is clear that when the estate has come to the last owner, either by devise or descent, incumbered with a mortgage, and he has done no act in his lifetime evincing an intention to make the debt his own, the personal estate (not having had the benefit of the mortgage,) will not be liable to pay it; but the devisee or heir of the last owner will take it *cum onere;* nor, it seems, will the act of such last owner, rendering himself personally liable to the debt, in every instance transfer it to himself as between his representatives, unless such appears upon the whole transaction to have been his deliberate intention." 2 Jarman on Wills, 557.

The right of the widow to dower in the estate of her deceased husband, which descended to the heir at law, or which may have been specifically devised, in no sense constitute a debt against his estate; it is no legacy from him, nor is the personal estate so benefited that it should upon any recognized principles of law, be held to contribute to remunerate the specific legatee for loss arising from dower. It in no sense is an incumbrance within the principles applicable to a case like the present.

The ninth clause in the will imposes upon the estate the payment of "debts, legacies and bequests." But from this language, no inference is to be drawn that the deviser intended that the burthen of dower should be removed from the specific devises, and be imposed upon the residuary estate. The specific trust thus created would seem by necessary implication to negative the claim of the plaintiffs.

The counsel for the plaintiffs have referred to the case of *Blaney* v. *Blaney*, 1 Cush. 107. In that case it was held that where the estate of a devisee is taken for the dower of the testator's widow, the right of the devisee to contribution, under stat. of 1839, c. 96, is the same as it would have been under R. S. c. 92, § 25, if the estate devised had been taken for the payment of the testator's debts. The right to contribution in case a portion of the estate devised is taken for dower, rests in Massachusetts entirely upon the special provisions of their statute. But in this State no such statute has been passed. The rights of the parties here must be determined by R. S., c. 92, § § 14, 15, 16, or by the principles of law or of equity, according to none of which are the plaintiffs entitled to the relief claimed. The case of *Blaney* v. *Blaney* must, therefore, when justly regarded, be held as adverse to the plaintiffs, and as an authority confirmatory of the conclusions to which we arrive.

The result is, that the estate specifically devised must bear, without contribution or remuneration from the residuary estate, the burthen of the dower of the wife of the testator therein. *Plaintiffs nonsuit.*

SHEPLEY, C. J. did not concur.

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† RICKER *& al. versus* FAIRBANKS *& al. and Trustees.*

In the construction of a contract, reference must be had to the intention of the parties, as ascertained from their situation, and the whole scope of the contract.

Thus, where a railroad company agreed to pay a contractor ninety per cent. monthly, of the estimated amount of the work done and materials procured in the construction of their road, under the report of their engineer, and another clause in the contract authorized the engineer to declare the contract abandoned, and any sum due the contractor to be forfeited to the company, whenever he should find that the covenants of the contractor were not performed; *it was held*, that where the engineer had put an end to such contract, it did not operate to discharge the company from the payment of the ninety per cent. found to be due from them, *prior* to such determination.

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

TRUSTEE PROCESS.

The plaintiff summoned the Oldtown and Lincoln Railroad Company as the trustees of Fairbanks and Morgan, on July 1st, A. D. 1854.

The principal defendants were contractors with the O. & L. R. R. Co. to grade, bridge, gravel, &c., a certain section of their road for the price therein stipulated.

Those portions of the contract bearing upon the question before the Court were as follows: —

"Or in case it should appear to said engineer, that the work has not progressed with sufficient rapidity, he shall have the power to withhold the estimate hereinafter provided for, or to determine that this contract has been abandoned, and in the event of such determination, this agreement on the part of said corporation, shall become null and void, and any balance of money due shall be forfeited by the said party of the first part, to the said corporation."

"The payments within the limits of this contract shall be made as follows: — between the first and tenth day of each month, after the commencement of the work, said engineer shall estimate the quantity of work done, and materials delivered, and give a certificate of the same, and upon presentation of said certificate to the treasurer of said corporation, nine tenths of the amount then due for work specified in said certificate shall be paid to the party of the first part as aforesaid, provided however, that no estimate shall be made, or certificate given within one month after the commencement of the work."

"And it is hereby further agreed, that if the said party of the first part shall not, on his part, well and truly perform all the covenants herein contained, said engineer may dismiss them from the work; and in that event, this contract shall become null and void; and any balance for work done on said road, which would have been due the said party of the first part, shall be forfeited, and become the right and property of the corporation."

The railroad company, by their treasurer, made a disclosure in substance as follows:—

"That under this contract the estimates of the amount performed by said defendants each month, were made up to and including the month of May, 1854, and were paid to them less ten per cent., before the service of the writ.

"That before the service of this writ, at the solicitation of defendants, they had advanced them, to be taken out of the month of June, 1854, estimates when made up, the sum of $1110."

The estimate of the amount due under said contract for the month of June was made up by the engineer on the first day of July, 1854, and the treasurer saw it in his hands at eight or nine o'clock on that day. A copy of the same was furnished the defendants by the engineer on the fourth of the same July in the forenoon, but was never presented to the treasurer or company by the defendants, although they called on the treasurer on the third or fourth of July about their pay, and then learned of this trustee process.

"On the fourth of July the defendants failed and abandoned their contract. Notice was given by the engineer to the treasurer on July 6, of such abandonment, that certain laborers in the defendants' employ were unpaid, and that in consequence thereof the engineer had determined that said contract had been abandoned by said contractors, and any amount due thereon had become forfeited to the company. Notice was also given to defendants that for non-fulfilment of the contract, the engineer had declared it abandoned by them; and on the tenth of the same July the directors of the company approved of the doings of their engineer.

"There was no failure in respect to the contract on the part of the company. The June estimate, exclusive of the ten per cent. retained, was $3296,05. The company out of that estimate paid the sum due the laborers on July 12th, $1049,20.

"But the company claim that nothing is due said defend-

ants or is in their hands to be attached, because the said contract was forfeited by them."

On this disclosure the trustees were discharged, to which order the plaintiff excepted.

Blake, in support of the exceptions.

The company are liable for the June estimate, less the ten per cent., the sum advanced and the sum paid to the laborers. The estimate had been completed on the first day of July, a certificate made out, a new month immediately commenced, and it then became imperative on the company to pay. It was after this liability was established by the requisite doings of the company, that the contract was put to an end, which could not affect what had been already earned.

The defendants broke no contract until July 4th. That worked no forfeiture save of the reserved ten per cent. If any other construction is to be given, then the forfeiture of the contract had a retrospective operation upon funds agreed to be paid previously.

From the whole contract this construction can only prevail. The ten per cent. was liable to forfeiture until the time arrived it was due and payable; and so with the ninety per cent., it was liable to forfeiture until *it* became due.

It is too late for the company to repudiate the June estimate, as not binding upon them, for they have recognized it, and out of it paid $1049 to the men, retaining it out of funds belonging to the contractors, and paying *their* debts with it.

The construction I contend for is supported by *Lord* v. *Belknap*, 1 Cush. 279; and the case of *Dailey* v. *Jordan*, 2 Cush. 390, does not conflict with it.

J. A. Peters, for the trustees. The contractors in this case forfeited any thing earned by their failure to fulfil their contract. Here the contract was an entirety, and must all be performed before any compensation can be received. *Miller* v. *Goddard*, 34 Maine, 102; *Davis* v. *Maxwell*, 12 Met. 286.

The contract in this case is similar to those, with this dif-

ference, — the performance of portions of the contract is a condition subsequent, instead of precedent, to certain payments. A forfeiture may as well occur in one kind as the other.

The engineer had the right in certain contingencies to declare the contract abandoned. He did so. In that event, the contract stipulates "that any balance of money due shall be forfeited by the said party of the first part to the corporation."

This seems to be clear and express.

The payment of the June estimate was dependent upon the fact that the engineer had not determined before its payment, that the contract had been abandoned. This is made thus dependent by the express language of the contract. *Babcock* v. *Wilson*, 17 Maine, 372; *Cunningham* v. *Morrill*, 10 Johns. 203; 2 Parsons on Contracts, 42, notes.

As to the ten per cent. reserved, there can be no question but that it is dependent. *Lord* v. *Belknap*, 1 Cush. 279.

RICE. J. — The contract in this case, between the principal defendants and the R. R. Co., is similar in its general provisions to one which was before the Court in the case of *Williams* v. *Androscoggin & Kennebec R. R. Co.*, 36 Maine, 201.

In that case the Court say: — "It was manifestly the intention of the parties that monthly estimates should be made of the work performed, and payment for three fourths the amount thereof, on presentation of the engineer's certificate. The amount thus found, was due absolutely, and depended upon no contingency. There was nothing due and payable until the expiration of each month, and whether the one fourth which was reserved, should ever become payable, depended upon the contingency of the contract being fully performed; for it was stipulated that if the parties of the first part should not well and truly perform all their covenants, any balance for work done on said road, which would have

been due to said party of the first part, shall be forfeited, and become the right and property of the company."

The contract under consideration varies from the one in the case cited in some of its details; one tenth the amount earned, only, being made a contingent reservation in this, instead of one fourth in that. This contract also contains the following provision, which does not appear to have been incorporated into the one in the case cited, to wit:—"And it is hereby further understood and agreed, that the said party of the first part shall pay the laborers in their employ, and for materials used, monthly, and in case the said party of the first part fail to do so, the said corporation shall have full right and authority to retain in their hands for the payment of the workmen employed and materials used by said party of the first part, on the work contracted for, such an amount of each estimate as the engineer of said corporation may deem proper for that purpose." This is a salutary provision, and so far as the company have made payments under it, and in accordance with its terms, they ought to be protected, and we perceive no reason why they should not be permitted to retain the amount of $1049,20, being the amount paid to the laborers by the engineer, as appears by the disclosure.

There is another stipulation in the contract, under which it is contended that the whole sum found due the contractors for work performed in June, was contingent, and has been forfeited to the company. It is as follows:—"In case it should appear to said engineer that the work has not progressed with sufficient rapidity, he shall have the power to withhold the estimate hereinafter provided for, or to determine that this contract has been abandoned, and in the event of such determination, this agreement on the part of said corporation shall become null and void, and any balance of money due, shall be forfeited by the party of the first part to the corporation."

In the construction of contracts, reference should always be had to the intention of the parties. That intention is to be ascertained by taking into consideration the whole scope

of the contract, and the situation of the parties thereto. This contract contains a stipulation for the payment of 90 per cent. of the whole amount earned in each month, on the presentation of the engineer's certificate. That amount becomes due, absolutely, on the first day of each month. The sum then due, is determined, specifically, by the engineer's certificate. The only contingency which can affect any portion of it, is the right which the corporation has to retain so much as may be necessary to pay the laborers, and for materials, under the provision above referred to.

Now it is obvious from the situation of the parties, as well as from the whole scope of the contract itself, that it was intended that the 90 per cent. stipulated to be paid monthly, should be so applied as to enable the contractor to prosecute and complete the work for which he had contracted. The construction contended for would put it in the power of the corporation, to embarrass the contractor by withholding his monthly payments, and then, in case he, by reason of such embarrassment, should fail to progress with the work with sufficient rapidity, by their engineer to determine that the work had been abandoned, and any balance due the contractor, however large, forfeited. A construction which should offer so large a premium for wrongdoing should not be adopted unless the language used will admit of no other reasonable explanation. Such explanation may be had by excluding the monthly estimates after they become due, from the operation of that provision. This we think is the fair construction of the contract when all its provisions are considered.

The result is, that the exceptions must be sustained, and

Trustees charged.

† GILMORE, *in Equity, versus* GILMORE *& als.*

In equity proceedings, where the claims set up by one of the parties against the other, are resisted on the ground of fraud, and that question is presented to the Court, and judicially determined in favor of such claims, and the case is sent to a *master* to find the amount due, *he* is unauthorized to reëxamine the question of fraud.

Nor can he rightfully receive any testimony bearing thereon, but all the legal evidence had at the hearing, bearing upon the question to be determined by the master, may, by him, be considered.

A party to a bill, who, in his answer, professes himself ready to pay a note which he had given, when it could be done with safety to himself; and after the decree that the same should be paid to a receiver appointed by the Court, sets up a prior *part payment* of the note, and refuses to pay the same in full, and the accumulated interest thereon while the suit was pending, is liable and punishable for a contempt of Court.

IN EQUITY. This case was before the Court as reported in vol. 36, p. 544, and now comes up again on exceptions to the report of the master, and for instructions by the receiver then appointed by the Court.

The charge in the original bill was, that Martin Gilmore, one of the defendants and co-partner with plaintiff, having possession of certain notes described against one Pendleton, the property of the firm, transferred and delivered them to Patterson, another defendant, for the purpose of deriving benefit therefrom, personally, and with the design of defrauding plaintiff and creditors of the firm, and that Patterson had knowledge of these facts and thereby became a participator in the alleged fraud.

Pendleton, in his answer, admitted that he gave the notes and was ready to pay the same according to their tenor, to any party entitled to receive the same, and prayed the direction of the Court.

A receiver was appointed to obtain and collect the notes and pay over the proceeds according to the direction of the Court.

Patterson, in his answer, denied the fraud alleged, and set up certain claims against the firm which he had surrendered when he received the Pendleton notes.

The Court found that Patterson was guilty of no fraud, and referred the amount of his claims to a master.

At the hearing before the master, the complainant introduced his depositions used at the former hearing; also the mercantile books of the firm of M. & J. C. Gilmore, to show the absence of allusion to any transactions between said M. & J. C. Gilmore and said Patterson; also sundry business letters from Martin to J. C. Gilmore before Patterson received the notes.

This evidence of the complainant was objected to.

The master also admitted, against Patterson's objections, evidence of what Martin Gilmore said and did at other times than those of which Patterson had offered evidence, as bearing upon the question of fraud; and according to his report, the master found that there was a conspiracy by Martin Gilmore and Patterson to defraud the creditors of M. & J. C. Gilmore, and that the claim set up by Patterson, was, for the most part, fraudulent; and disallowed the larger part of it, referring some of the items to the consideration of the Court.

The counsel for Patterson excepted to the admission of the testimony and to the proceedings before the master, as transcending his authority and manifestly unjust in the particulars named in his bill, and prayed for the appointment of another master.

The receiver made return of his doings, *that* he had called on Patterson and received the notes in controversy; *that* he had called on Pendleton to pay them, but he declined unless an allowance was made on them of between three and four hundred dollars, which he claimed had been paid upon the notes, but not indorsed thereon. He also declined to pay any interest on said notes since the commencement of the suit, alleging that he had always been ready to pay the true sum due whenever he could find any one to whom he could safely make the payment.

No such partial payment appearing in the *answer* of Pendleton, the receiver declined to allow it, or to remit the in-

terest, since which time Pendleton had paid no further attention to the payment of the notes.

He prayed the direction of the Court, and whether they would issue their summary process against said Pendleton for his neglect to comply with the decree in this case.

N. Abbot, for Patterson.

Rowe & Bartlett, for complainant.

RICE, J. — This case is now before us on exceptions to the master's report.

At the original hearing of the case in Penobscot County, the question of fraud and collusion between Martin Gilmore and Patterson, was distinctly before the Court, and all the evidence which the parties produced, bearing upon that question, considered by the Court. As the law then stood, the Judge before whom the trial was had, was authorized to decide all matters of fact arising in the case. The burden of proof to establish fraud was upon the party alleging it. The evidence introduced at that time failed to satisfy the Court of the existence of fraud and collusion between Martin Gilmore and Patterson. The charge was therefore repelled. This Court have held that the decision of the Judge upon that point was conclusive. 36 Maine, 544. That question cannot, therefore, be reëxamined unless it be upon a rehearing by the Court, duly granted, for some sufficient cause not heretofore presented.

The question of fraud having been thus settled, the case was sent to a master to determine the amount that was due to Patterson from the late firm of M. & J. C. Gilmore. In this examination the master was not authorized to hear testimony to determine the question whether there was fraud on the part of Patterson and Martin Gilmore, as that question had already been judicially determined.

So far, therefore, as testimony was admitted and considered by the master for that purpose, his action was erroneous. The letters of Martin Gilmore, and certain declarations made by him, and also the books of M. & J. C. Gil-

more, appear by the report, to have been admitted solely for this purpose. They should have been rejected.

The declarations of Patterson as to the amount due him from the firm of M. & J. C. Gilmore, made in his answers, not being responsive to the allegations in the bill, were not evidence upon that point. But his answers before the master, when examined as a witness, on oath, were legitimate evidence to be considered by the master. Such, also, is the character of the testimony of J. C. Gilmore. All the depositions used at the trial may be properly referred to by the master, and so far as they tend to show the amount of indebtedness of the firm of M. & J. C. Gilmore to Patterson, may be considered by him.

For the reasons above, the exceptions must be sustained, and the case remanded to the master for further hearing. In his further examination the master will report in full, the evidence produced before him, and his decisions thereon, and if the parties are examined, that examination will be on written interrogatories and answers.

The defendant, Pendleton, refuses to pay to the receiver the amount of his notes, according to the decree of the Court, unless a very considerable portion of the principal and interest, apparently due thereon, shall be abated, and the receiver asks the direction of the Court.

In his answer, Pendleton professed his readiness, at all times, to pay over the amount of his notes, when he could do so with safety to himself. No claim for abatement from the sum apparently due was then set up by him, nor was there any suggestion in his answer that any portion of said notes had ever been paid, or that the whole amount thereof was not justly due from him.

Under these circumstances, this refusal to pay his note to the receiver, has the appearance of a disposition to palter with the authority of the Court, if not to practice a fraud upon those who are interested in the proceeds of the property in his hands. Such a course cannot be approbated nor permitted. It is therefore decreed that an attachment im-

mediately issue from the office of the Clerk of the Courts for Penobscot County, against the said Pendleton, as for a contempt of Court, and that said Pendleton be thereon arrested, and committed to prison, and there detained until he comply with the decree of the Court by paying to the receiver the amount of his notes, both principal and interest, without abatement, together with all costs that may arise by reason of said attachment, or he be discharged from his imprisonment by order of this Court, or due process of law.

Exceptions to master's report sustained, and case remanded for further hearing.

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† FOSTER, *Plaintiff in Review, versus* HINCKLEY.

A party, who on the trial of a writ of *review*, obtains the reversal, in effect, of the original judgment against him, by means of a certificate in bankruptcy, is not entitled under the statute of this State to recover costs.

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

This was an ACTION IN REVIEW.

At the June term, 1843, the defendant in review recovered a judgment against plaintiff and one Brown, who has since deceased.

In June, 1844, Foster, the plaintiff, obtained a certificate of discharge in bankruptcy from all his debts due Jan. 28, 1843.

In his petition, in 1853, for a review, he set out that certificate. This petition was granted — the writ of review sued out, and, at the Jan. term, 1855, the plaintiff pleaded his discharge in bankruptcy and produced his certificate in Court.

Judgment was thereupon rendered for the plaintiff in review, and he moved for costs, which motion was denied.

The other matters being arranged by the parties, the question of costs alone remained for the determination of the Court on exceptions to the ruling.

J. A. Peters, for defendant in review.

W. C. Crosby, for plaintiff in review.

TENNEY, J. — The review was obtained by authority of the statute of 1852, c. 250, and the writ therein was entered October term, 1854, and continued to January term, 1855, when the original defendant pleaded his discharge in bankruptcy, and produced his certificate in Court. Judgment was thereupon rendered by consent, in favor of the original defendant.

The plaintiff in review presented his motion for costs in the action of review, and relied upon R. S., c. 124, § 10, in its support. The defendant in review resisted the motion and invoked the statutes of 1844, c. 115, and of 1848, c. 60. No greater reason is perceived for the allowance of costs, when the certificate, obtained after judgment in the original action in favor of the plaintiff therein, upon a review of the action, should be pleaded and produced, and cause a reversal of the judgment, than when the certificate of discharge should have been obtained after the commencement of the original suit, and should be used successfully to defeat it. And we think, upon an examination of all the statutes bearing upon the question, it is very clear that the Legislature did not intend, that the distinction should be made.

Under R. S., c. 124, § 6, and the statute of 1848, c. 60, the trial upon the review, if one should take place, would be upon the issue, whether the original defendant had prepared himself to take the benefit of the latter Act. The former provides, that the cause shall be tried on the issue joined in the former suit; or the Court "may admit additional issues." By the statute of 1848, referred to, "in any action when the defendant shall plead and rely upon his certificate in bankruptcy, as matter of defence, and when the said certificate was obtained after the commencement of the suit, such defendant shall recover no costs," &c. The terms, "action" and "suit," in this statute, evidently refer to the same general cause, under the formal processes, which

bring the subject before the Court. The pleading referred to therein, is to the original process, and the "suit," after the commencement of which, the certificate of discharge was obtained, is the same. Any other construction would give the statute of 1848 a very limited application.

After the trial of an action of review, there is but one judgment designed to remain effectual, in the whole cause, excepting in those cases, which fall under sections 12 and 13 of c. 124 of R. S. But "judgment on the review shall be given as the merits of the cause upon law and evidence shall require, without any regard to the former judgment." In this case, the judgment rendered upon the review in favor of the plaintiff in review, amounts to a reversal of the former judgment, and the case does not fall within the exceptions, and the judgment in the original action becomes a nullity, and can have no effect. This provision renders it manifest, that after the writ of review is sued out, and the parties are in Court, the original process and the writ of review are intended to be treated as one suit.

Exceptions overruled. Costs for plaintiff in review disallowed.

GOWEN *versus* SHAW.

Assumpsit, by one tenant in common against his co-tenant, for use and occupation of the common property, will not lie on an *implied* promise.

But when a tenant in common has received more than his share of the rents of the common property in money, or as bailiff of the other, assumpsit to recover it may be maintained by his co-tenant.

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

ASSUMPSIT, to recover the rents and profits, and for use and occupation of an undivided half of lot No. 8, east side of Marsh Island, in Oldtown.

The plaintiff claimed title to three fourths of the lot by deed from one Augustus Gowen, executed in Nov. 1842, and, in Dec. following, petitioned for partition thereof. That pe-

tition was resisted by defendant as to two quarters of the lot claimed, but, in 1848, the prayer of the petitioner was granted and three fourths of the lot were set out to plaintiff by metes and bounds, and all the proceedings in relation thereto affirmed by the Court.

From the time plaintiff's title originated to the time of partition, three quarters of said lot were occupied by Benj. Shaw, senior, under the defendant; the other fourth being occupied by a tenant under the plaintiff.

In Oct. 1847, the plaintiff conveyed by deed all his interest in the premises to one Albert N. Gowen.

This suit was commenced in May, 1850, to which was pleaded the general issue and the statute of limitations.

There was no evidence that the under tenant of the defendant ever paid him any rent for the three quarters of the lot while plaintiff's petition was pending.

Upon this evidence, a nonsuit or default was to be entered, as the Court might determine the legal rights of the parties.

Hilliard, for defendant. The rights of the parties must be determined as they exist at common law, modified by the statute of Anne. By the 4th Anne, c. 16, if a tenant in common receives rents and profits, otherwise than by actual occupation, he is made a bailiff of his co-tenant, and is accountable according to his title. *Sargent* v. *Parsons*, 12 Mass., 148; *Sturdivant* v. *Smith*, 29 Maine, 387; *Munroe* v. *Luke*, 1 Met. 459.

To maintain this action, the plaintiff should have shown that defendant had received rents and profits from B. Shaw, senior, more than his proportion; that he has failed to do. *Mason* v. *Mason*, Law Reporter, July, 1848.

I. Washburn, jr., for plaintiff.

1. The form of this action is right. Assumpsit is maintainable. *Munroe* v. *Luke*, 1 Met. 459. This case is approved in 31 Maine, 34. The judgment in partition is sufficient evidence of seizin, as appears from Met. before cited. I refer, also, to 8 Pick. 376. No other action will lie but

this, as there was no actual ouster. 13 Maine, 25. He cannot be remediless.

2. It is not necessary to prove that the defendant actually received rents or profits from *another*. It is enough that he occupies the premises by himself or agent. Such occupation implies a promise to pay reasonable rent. *Jordan* v. *Jordan*, 4 Maine, 175; *Cummings* v. *Noyes*, 10 Mass. 433; *Porter* v. *Hooper*, 13 Maine, 25.

3. The presumption is that defendant did receive rent for income.

APPLETON, J. — This is an action brought by one co-tenant against another to recover for the use and occupation, and for the rents and profits of the common property.

Each tenant in common is seized *per mi and per tout*, and has a right to occupy the whole if his co-tenant does not interfere. The common law gives no remedy for a mere sole use and occupation by one tenant. Where one tenant in common has the sole occupancy, no action is maintainable upon an implied promise. To entitle the plaintiff to recover for use and occupation an express promise must be shown. *Sargent* v. *Parsons*, 12 Mass. 148; *Wilbur* v. *Wilbur*, 13 Met. 404.

It has been repeatedly held in Massachusetts that the stat. 4 & 5 Anne, c. 16, which provided, that an action of account might be brought by one joint tenant or tenant in common against another, as bailiff, for receiving more than his just share or proportion of the rents and profits of the common estate, has been adopted and practised upon as law prior to the adoption of their constitution, and therefore must be considered as the law of that Commonwealth. *Brigham* v. *Eveleth*, 9 Mass. 538; *Munroe* v. *Luke*, 1 Met. 459. In the case already cited, of *Brigham* v. *Eveleth*, it was held, that where money had in fact been received and the liability to account had resulted in a duty to pay money, that *indebitatus assumpsit* might be maintained.

But the plaintiff fails to show that the defendant has re-

ceived any rents or profits and does not bring himself within the stat. of Anne, even if that were to be regarded as part of the law of this State. "Though an action" says WILLES, C. J., in *Wheeler* v. *Horne*, Willes, 208, "therefor may be brought by one tenant in common against another, since this statute, yet it is an action of a very different nature from an action of account against a bailiff at common law. Because a bailiff at common law is answerable not only for his actual receipts, but for what he might have received of the land, without his wilful default, as is expressly held in Co. Lit. 172, a, and in many other books; but by the plain words of the statute, a tenant in common, when sued as bailiff, is answerable only for so much as he has actually received more than his just share and proportion." This, as is remarked by POLLOCK, C. B., in *Stinton* v. *Richardson*, 13 Mees. & Wels. 17, has not been contradicted by any subsequent decision and must be regarded as law. No case can be found where an action of assumpsit can be sustained unless where one tenant has actually received rents and profits, or holds the share of the other as bailiff. *Mason* v. *Mason*, 1 Law Rep. N. S. 119. The case of *Munroe* v. *Luke*, 1 Met. 459, and of *Buck* v. *Spofford*, 31 Maine, 34, which have been cited by the counsel for the plaintiff, are in no respect adverse to the principles here advanced. In both of those cases the defendant had received the rents and profits in money, and was justly held to account for the same. But such was not the fact here. There is no evidence that the defendant has received any thing from the tenant occupying the premises. The burthen was on the plaintiff to show that he has in his hands more than his just share and proportion. This the plaintiff has entirely failed to do and must therefore submit to a nonsuit.

Plaintiff nonsuit.

† VEAZIE BANK *versus* WINN.

To charge an *indorser* of a check drawn upon a bank, it must be presented for payment within a *reasonable time;* and the holder is allowed until the next day after receiving it, for that purpose.

Where a check is dated at, and drawn upon a bank in *Boston*, and there is no evidence in the case, that before presentment it was held by any one residing out of that city, a presentment of it for payment three days after it was drawn, is too late to charge the indorser.

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

ASSUMPSIT, on the following check: —

"GROCERS' BANK.

"$3126,88. Boston, Nov. 4, 1854.

"Pay to John Winn, Esq., or order thirty-one hundred twenty-six dollars, $\frac{88}{100}$. E. Paulk.

"To the Cashier."

This check was indorsed in blank by the payee.

Plaintiffs gave in evidence the check and notarial protest.

By the protest it appeared that the notary, at the request of the cashier of the Exchange Bank, presented the check at the Grocers' Bank on Nov. 7th 1854, for payment, which was refused; and that he notified the drawer and indorser.

The defendant gave in evidence the statute of Massachusetts in force at the date of the check and protest.

On this evidence the Court were authorised to render judgment by nonsuit or default, according to the legal rights of the parties.

Peters, for defendant.

This check was drawn at Boston and payable there, and is not entitled to grace. In the matter of *Brown*, 2 Story, 502; *Bowen* v. *Newell*, 5 Sandf. 326; *Taylor* v. *Wilson*, 11 Met. 44. Not being presented until three days after it was due, the indorser is discharged.

On such paper only, a reasonable time is allowed to present it, and one day is considered reasonable time. *Boehm* v. *Sterling*, 7 T. R. 423; *Down* v. *Halling*, 4 B. & C. 330; *Rothschild* v. *Corney*, 9 B. & C. 388.

A. Lyon and *E. Kent*, for plaintiffs.

TENNEY, J. — A check is, in form and effect, a bill of exchange, 3 Kent's Com. § 44. The difference between one and the other is, that the former is drawn upon a bank, or on the house of a private banker, is payable on presentment, and the bank or banker is not entitled to days of grace upon it, although payable on some other day than its date. It may pass from hand to hand, and a reasonable time to each party receiving the same to present it for payment, is allowed; and the next day after receiving it, is held to be such reasonable time. *Taylor* v. *Wilson*, 11 Met. 44.

As between the holder of the check and the indorser, it ought to be presented with due diligence. 3 Kent's Com. § 44, pp. 46, 58. And the holder must not only show a demand, or due diligence to obtain the money of the drawer of the check, but he must give reasonable notice to the indorser, to entitle him to a suit against him. Ibid. 72.

In the case of *Mohawk Bank* v. *Broderick*, 10 Wend. 304, it was held, that to charge an indorser upon a check for money, it must be presented with all dispatch and diligence consistent with the transaction of other commercial concerns; that greater diligence is required in presenting it, than in presenting bills of exchange; and what would be a reasonable time, depends on the circumstances of each particular case.

If a check on a banker be delivered to a person distant from the place where it is payable, it will suffice to forward it by post or otherwise, to some person residing in the latter, on the day after it is received, and it will suffice for him to present it on the third day. Chitty on Bills, 420, (8th Am. Ed.) *Rickford* v *Ridge*, 2 Campb. 537.

The check, upon which this action was brought, is dated at Boston on Nov. 4, 1854, and drawn upon a bank in that city, in favor of the defendant, and by him indorsed in blank, with no date, additional to that on the check. No facts are disclosed by the case, excepting what appears upon the check,

and in a copy of the notarial certificate; and on the latter, it is stated, that the check was presented at the bank, on which it was drawn, (having been delivered to the notary for that purpose, by Joseph M. Marsh, cashier of the Exchange Bank, which is understood to be a banking house in the city of Boston,) on Nov. 7, 1854, and payment was refused upon a demand then made. There is no evidence whatever, that the plaintiffs were the holders of the check prior to the time, when it was presented for payment, or that it had then been held by any party excepting the defendant, and the Exchange Bank.

The burden of showing a demand, within a reasonable time, in order to hold the indorser, is upon the plaintiffs; and the paper having been drawn in Boston, upon a bank situated there, presumed to have been indorsed by the defendant on the day of the date, and held after the negotiation by a bank, in the same place, the presentment cannot be regarded as having been made, under these circumstances, within a reasonable time.

It becomes unnecessary to examine the question, whether the defendant had notice of the demand, such as was made. According to the agreement of the parties, the plaintiffs must be *Nonsuit.*

† VEAZIE BANK *versus* WINN.
SAME *versus* SAME.

An action, against the maker of a note payable at a bank, commenced on the last day of grace, without evidence of a prior demand at a reasonable hour on that day, or that the suit was commenced *after* the business hours at the bank, is *premature.*

ASSUMPSIT.

These suits were against the makers of promissory notes, dated at Bangor, Sep. 18, 1854.

One of the notes read thus: —

"Two months after date, value received, I promise to pay

E. Paulk or order, four thousand dollars at the Veazie Bank."

The other thus: —

"Two months after date, value received, I promise to pay D. F. Leavett or order, twenty-one hundred dollars, at either bank in Boston."

The general issue was pleaded.

The payees indorsed the notes and they were discounted by plaintiffs.

These suits were commenced on Nov. 21, 1854.

After the notes and indorsements were read to the jury, the causes were withdrawn by consent, and submitted to the decision of the full Court upon the evidence, the writs making a part of the case, to render judgment by nonsuit or default, according to the legal rights of the parties. Some evidence was introduced by defendant which had no bearing on the ground of the decision.

Peters, for defendant, argued that these actions were premature, there being no evidence of a previous demand, and no evidence at what time of the day the writs were made; and cited *Greeley* v. *Thurston*, 4 Greenl. 479; *Flint* v. *Rogers*, 15 Maine, 67; *Staples* v. *Franklin Bank*, 1 Met. 43.

A. Lyon and *E. Kent*, for plaintiffs.

TENNEY, J. — A suit may be properly brought against the maker, upon a negotiable promissory note on the last day of grace, after the demand of payment, made at a reasonable hour of that day, and a refusal. And if a note is payable at a bank, a suit may be properly commenced on the last day of grace, after banking hours, without demand and notice. But it seems to be regarded as settled in this State and in Massachusetts, and also in other States, upon what is considered the weight of authority in England, that an action cannot be maintained, if brought on the last day of grace, unless previously demanded on that day, or unless made payable at the bank on that day. *Greeley* v. *Thurston*, 4 Greenl. 479. *Staples* v. *Franklin Bank*, 1 Met. 43.

These suits were instituted upon promissory notes, which were in the bank on the last day of grace, and the cases furnish no evidence of a previous demand, or that they were commenced after the expiration of business hours at the bank, consequently they were premature.

Plaintiffs nonsuit.

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† FOSTER *versus* GODDARD.
FOSTER *& ux. versus* SAME.

A traveler, with his horse and carriage, where the highway is unobstructed, without notice of a carriage behind him, may use any part of it wrought for the public accommodation.

And when such traveler, in the exercise of ordinary care, suffers damage in his person or property by a collision with another carriage, through want of such care in its driver in attempting to pass by him in the same direction, arising either from attempting to pass on the side he ought not to under the circumstances, or from having a horse unsuitable for that occasion, he is entitled to recover the same of such negligent driver.

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

These were two actions on the case to recover damages sustained by a collision of carriages in the highway, alleged to have happened through the fault of the defendant; the first for damage to plaintiff's property, the second for injury to his wife.

The plaintiff's wife and one Mrs. Foster, were riding in his chaise down one of the streets in Bangor, the horse being on a walk, when the defendant, driving the horse and wagon of one Frost, who was with him, overtook the plaintiff's wife on the right side, overturned the chaise and threw her into the gutter.

Upon the question of the exercise of ordinary care on the part of defendant much evidence was introduced; and it was agreed that the full Court should render judgment by nonsuit or default, drawing inferences from the testimony as a jury might, and assess the damages if a default should be entered.

Knowles, for defendant, contended that he was rightfully attempting to pass to the right; that it was the legal side of the road for him to pass; that the injury was occasioned by inevitable accident, owing to sudden fright or impulse of the horse, which rendered it impossible to control or manage him.

Rowe and *Bartlett* for plaintiff.

The defendant turned out on the wrong side. One who overtakes and wishes to pass another, should go on the left. This is a settled principle in England. Steph. N. P., 984; 5 Petersdorf's Abr. 55.

Here there was no occasion for going to the right; there was room enough on the other side. The defendant saw the condition of the chaise, and should have taken room enough in passing it. For a case similar to this, see *Mayhew* v. *Boyce*, 1 Stark. 423.

As a general principle, every one who overtakes and attempts to pass another on the road, does it at his own risk. R. S., c. 26, § 3.

TENNEY, J. — If a party seek to recover damage for an injury done to him, by the collision of another's carriage with his own, on the highway, and shows that he was in the exercise of ordinary care, at the time; or if not using such care, and the want thereof in no wise contributed to produce the injury; but if it was occasioned by the other party in consequence of the want of ordinary care in him, he will be entitled to recover. *Kennard* v. *Burton*, 25 Maine, 39; *Noyes* v. *Shepherd & al.*, 30 Maine, 173; *Moore* v. *Abbot*, 32 Maine, 46.

That the injury complained of by the plaintiffs, was by a collision of the wagon, driven by the defendant, with the plaintiff's chaise, there is no controversy.

No want of ordinary care in the female plaintiff, who was driving the chaise at the time of the accident, has been proved, or attempted to be shown, excepting, that as the chaise came down the hill, where the collision took place, it inclined to the right, in the traveled part of the way, so that as it

proceeded, it was gradually approximating to that side of the street.

A party having before him the entire road, free from carriages, or other obstructions, and having no notice of any carriage behind him, in season to stop, or to change his course or position, is at liberty to travel upon such parts of the way as suits his convenience or pleasure, and no blame can be imputed to him. This is properly inferable from R. S., c. 26, § 3.

It was in proof, that Mrs. Foster was driving the chaise at a walk or slow trot down the hill, in company with another lady. The first notice which they had of the defendant's approach, before the collision, was the noise of a vehicle, like a horse running with a carriage; that there was not time to stop the horse, before the disaster took place; and if he had been stopped, the collision would not have been avoided, and that nothing was heard as having been said by the defendant, till after the collision.

From all the facts in the case, it is very clear, that the horse with the chaise, in which Mrs. Foster and the other lady were riding, was driven with ordinary care, and that neither contributed in the least to produce the injury, by any act or omission, which did not conform to the law.

Has it been shown, that the accident took place, in consequence of any want of ordinary care on the part of the defendant? It is proved, that when the defendant's wagon came to the top of the hill, on which the collision occurred, before entering upon any considerable descent in the way, the horse inclined to go to the left, into Broadway, a street tending from the one in which he had traveled, and in which the defendant intended to proceed down the hill; that in the attempt to give him the desired direction, he struck him with the whip, which effected his purpose; that this stroke of the whip was not improper, and was no more violent than was necessary to cause obedience in the horse to the rein; that at the time the horse attempted to go into Broadway, and was brought back to the proper course, he

slackened his speed, and when the defendant struck him, it brought him more under control, and he was more manageable after he was struck than before, and the striking did not increase his speed; but from the evidence, the horse must have been traveling at a rate, which it cannot be doubted, came up to the utmost verge of prudence, for the place, and under the circumstances, which existed; but it is manifest that he was not frightened. At the time the defendant's wagon commenced the descent of the hill, from Broadway, the plaintiff's chaise was several yards below, proceeding in the same direction, inclining slightly to the right in its progress; that it was on the right of the centre of the street, and a wide space in the street was on the left, which according to the testimony of the plaintiff's witnesses, was free from carriages or any thing which could be an obstruction; that the defendant made ineffectual endeavors to reduce the speed of his horse down the hill; but it did not appear, that he made any attempt to turn the course of the horse so that he might pass on the left of the chaise, but in driving on the right thereof the collision took place.

But Mr. Frost, who was the owner of the horse driven by the defendant, and in the wagon with him at the time, states, that when they were at Broadway, on the top of the hill, they saw two chaises in the way below them, and it was to avoid a collision with them, that the defendant attempted to drive by the chaise of the plaintiff upon the right; and he states, that when he last saw the other chaise it was only two rods below Broadway; and he cannot say, where it was at the time of the collision; that when he first saw it, it was just ahead of that of the plaintiff, but he took no notice of it after the other inclined to the right; and he did not know which way it went, whether it went down the hill, or turned back and went the other way. This evidence, touching the presence of the other chaise, is not confirmed by other witnesses, who had good opportunity of seeing all that took place; but they testify that they saw at the time no other chaise, excepting that of the plaintiff.

In a subsequent deposition, he makes no mention of another chaise, but gives as a reason for the defendant's passing to the right of the plaintiff's chaise, that the defendant could not have changed his course, and gone to the left of the latter on the south, and passed it, at the time that he first perceived it was diverging from a direct line to the right, because he was so near to it that he would inevitably run into it. The testimony of Frost in the deposition first taken, that the defendant's wagon wheels, upon the left side, passed on to the ridge of earth, thrown from the gas pipe trench, and threw the defendant out first, and after passing about ten feet further threw out the deponent, and by the time he had risen up, the wagon had righted, and had struck the chaise, having gone twelve or fourteen feet from the place where the latter had fallen, can have no essential influence upon the result of the case. The carelessness of the defendant, if any there was, would seem to consist in his attempt to go upon the right side of the chaise instead of the left. If this course was a prudent one, for any reason, and in passing, he was not wanting in ordinary care, he cannot be held liable. On the other hand, if there was no obstacle to his passage on the left, and it was without ordinary care, that he passed upon the right, his liability is not taken away or qualified, if he was thrown out of the wagon in the manner stated by Frost.

By the evidence adduced by the plaintiff, it is quite apparent, that the defendant was wanting in ordinary care at the time of the disaster, in driving the horse; or that the horse himself, if he could not be controlled, when it does not appear that he was frightened, was unsuitable to be used in that place and under the circumstances in proof. The evidence introduced in explanation is unsatisfactory, for such purpose. And when the whole is examined, we think the plaintiffs are entitled to recover. *Defendant defaulted.*

In the action *John B. Foster* v. *John Goddard*, damages $250.

In the action *John B. Foster & ux.* v. *John Goddard*, damages $300.

† VEAZIE *versus* HOLMES *& al. and* ADAMS *and* BENSON, *Trustees.*

A bill of sale made in good faith, for a valuable consideration, of a certain quantity of pickets, a portion of which were manufactured, and the remainder to be manufactured, with a delivery of those made, and a place fixed for the delivery of the balance, and a delivery accordingly, vests the title of such pickets, so set apart, in the vendee, as against the creditors of the vendor.

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

The question in this case was whether the trustees were chargeable on their disclosure and the evidence furnished.

From their disclosure it appeared that defendants, a few days before the service of this writ, had agreed to consign to them a lot of pickets. They were received with a memorandum of the amount, signed by defendants, "agents."

After the service of the writ they were informed by one Wellington Reed, that he owned the pickets, and he showed them a bill of sale signed by defendants, as follows:—

"Oldtown, Aug. 17, 1853.

"In consideration of supplies advanced and to be advanced by Wellington Reed, to the firm of Holmes & Estabrook, picket and lath manufacturers, in the Veazie block, we hereby agree to sell, and do sell to the said Wellington Reed, all the spruce and pine pickets that we (may) have on hand, or may have on hand, to the amount of fifty thousand pickets, at eight dollars for spruce, and thirteen dollars for pine, per thousand."

Foss, a witness to the bill of sale, according to his deposition in the case, was present at the time, and saw the delivery of the pickets, manufactured for the security of certain supplies that Reed let them have from time to time. Those pickets which were not then sawed, were to be delivered on the bridge at the west end of the new block of mills, and were afterwards so delivered, and such supplies were all furnished before the bill of sale. He was the keeper of Reed's books, but had no knowledge of any credit of them upon his books.

The supposed trustees being satisfied that the property belonged to Reed, had, before making their disclosure, paid over to him and by his order, to defendants, the balance in their hands.

The presiding Judge ordered the trustees to be discharged, to which order the plaintiff excepted.

Britt, for trustees.

A. W. Paine, for plaintiff.

1. The facts show a case of fraud. The bill of sale is in form absolute, and it is not for the parties to show it otherwise. Some of the pickets were manufactured, and some not — two different kinds are designated — no receipt for the amount given, and no account appears to have been kept. If absolute, what were defendants to have for their services? and what was to be done with the payments for the pickets? The appearance of the whole thing is to keep off creditors, or else a secret trust which is regarded as fraudulent. *Coburn* v. *Pickering*, 3 N. H., 415.

2. But if, according to the testimony of Foss, the bill of sale was merely as collateral, then it was absolutely void as to creditors. *Richardson* v. *Kimball*, 28 Maine, 463; *Gorham* v. *Herrick*, 2 Maine, 87; *Whitaker* v. *Sumner*, 20 Pick. 399.

3. If it was a mortgage, it should have been recorded. R. S., c. 125, § 32.

4. The sale, so far as it was intended to include pickets not then manufactured, is entirely void and ineffectual to pass any title. *Pettes* v. *Kellog*, 7 Cush. 456; *Jones* v. *Richardson*, 10 Met. 481; *Turner* v. *Bachelder*, 17 Maine, 257; *Garland* v. *Hilborn*, 23 Maine, 442.

5. There was something more to be done, to determine the quantity or price, and hence the plaintiff's title is incomplete. *Houdlette* v. *Tallman*, 14 Maine, 400; *Stone* v. *Peacock*, 35 Maine, 385.

6. At best, the claim of Reed is but a collateral one, to secure him for supplies advanced and to be advanced. If nothing is due, the claim is satisfied, and the lien discharged.

It is for Reed to prove the indebtedness. Such proof is wanting. If there was any at the time the contract was made, *non constat*, that it was not all paid.

7. The future earnings of a debtor cannot be sold or assigned, so as to defeat a creditor's claims. *Mulhall* v. *Quinn*, 1 Gray, 105; *Hall* v. *Jackson*, 20 Pick. 194; *Carrique* v. *Sidebottom*, 3 Met. 297.

TENNEY, J. — At the time of the service of the writ on Seth E. Benson, the supposed trustee, he had in his hands some pickets, which were sent to him by the principal defendants, "agents," after Aug. 17, 1853. When Adams was served with the writ, he had in his hands money, the avails of other pickets, which were sent to him in the same manner, also after Aug. 17, 1853. And before they had either of them paid the avails, they were notified by Wellington Reed, that all the pickets sent to them after that date were his, under a sale from Holmes & Estabrook. The question is, whether these pickets were the property of Reed when they were received by the consignees, Benson and Adams, or not.

The bill of sale from Holmes & Estabrook, to Reed, of Aug. 17, 1853, by its terms, was a sale of "all the spruce and pine pickets which we have on hand, or which we may have on hand, to the amount of fifty thousand, at $8 for spruce, and $13 for pine, per thousand," in consideration of supplies advanced, and to be advanced, by Wellington Reed.

Foss was present at the time the bargain was made, and witnessed the bill of sale. He testifies that for the security of the supplies which Reed let Holmes & Estabrook have from time to time, delivery was made of the pickets, which were then sawed; and that those which were not sawed, were to be delivered on the bridge at the west end of the new block of mills, and that they were delivered; and that the supplies were received by Holmes & Estabrook before the bill of sale was given.

The written contract, upon a fair construction, was a sale of the pickets then on hand, and of those which were expect-

ed to be manufactured afterwards. It is absolute upon its face, and notwithstanding the witness states that the delivery was made for *security* of supplies, it is manifest from his account of the transaction, and what is shown to have been done by the parties thereto, it was not designed to be the security of a mortgage or a pledge, but what it purports to be upon its face, and that the pickets were delivered under it, as an absolute transfer. It is evident that the property was not to be retained by Reed any longer than was necessary for its conversion into money, which was to be his, and applied in payment of supplies advanced, and to be advanced. It was not a mortgage, and therefore not necessary to be recorded. And its form is not proved to be so inconsistent with the design of the parties, as to present fairly the legal question of its being a fraud upon attaching creditors.

If the contract of sale was *bona fide*, it was valid, although it was an agreement in part for the sale of pickets not then in existence, and from materials which were not owned by Reed. The case is distinguished from those referred to by the plaintiff's counsel upon this point. It appears that Holmes & Estabrook were in the process of making pickets, in a mill used for the purpose, and if the pickets were actually delivered to the vendee afterwards, in pursuance of the contract, and nothing was omitted which was contemplated by the parties to make the sale complete, it may be regarded as legally perfected.

The evidence being, that a place was designated where the pickets, not manufactured at the time the writing was executed, were to be left by one party and taken by the other, and that they were in fact delivered, and nothing indicating that they were not entirely separate from all others, every thing was done, required by law, to make it a binding transaction, if free from fraud.

It is insisted that the change of possession of the property is wanting in the case, it being carried from the place of manufacture by the vendors, to the consignees. This, alone, would not render the attempted sale invalid. It often

happens that the vendor of property, as a part of the very contract of sale, engages to perform certain service connected with the chattels sold, which requires that he should have it in possession; and it is not legally improper that the possession, after it has been taken by the purchaser, should be in the vendor, who may be employed afterwards to remove it, or perform any other act upon it, if this possession is in submission to the title of the vendee.

Whether the contract was *bona fide*, is a question of fact. If it was the design of Holmes & Estabrook to dispose of the property to defraud or delay their creditors, and Reed, knowing that design, aided therein, his claim cannot be upheld. It is proper to consider the situation and business of the parties to that contract. One party were manufacturers of pickets, and had had supplies of the other party, who had the means of making advances thereof, and had done so to them. And as they probably would need more, it was not singular that they should provide for the payment of those supplies, which their future wants would require, as well as for the articles which they had before received, and which were not paid for prior to the bill of sale. Reed would honestly wish to receive the money due for any claim he then had, and to make a contract for other sales, upon receiving satisfactory evidence that he would be safe in so doing.

The transportation of the pickets to the consignees, was caused by Holmes & Estabrook, while they professed to be the owners; and they could probably continue to do it afterwards with as much facility as Reed could procure it to be done, and at no greater expense. It does not appear that Reed was apprised of the indebtedness of Holmes & Estabrook, in such an amount as would expose their property to attachment, or that they wished for any unlawful purpose to dispose of it. In view of all the facts and circumstances, though the suspicions of a creditor after the sale may have been awakened, that there was some sinister design in the

parties to the sale, we are not satisfied that the transfer was a fraud upon creditors' rights.

It is contended, that as Reed had received a considerable amount from the avails of sales of pickets delivered after the bill of sale, it is not shown that he had any claim against Holmes & Estabrook, at the time of the disclosure of the trustees, one of whom paid to Reed personally, and the other on his order, the sums which were in their hands, respectively, at the time of the service of the writ on them. If the payment to Reed was of money belonging to him, no injury can result to any one. If Adams and Benson paid it, when it was held by the attachment, it furnishes no reason for their discharge as trustees. The plaintiff cannot at one and the same time claim to hold the trustees, and invoke the payment made by them to Reed, as a ground for the payment of the same amount to him. *Exceptions overruled,* —

Trustees discharged.

APPLETON, J., concurred in the result.

TORREY *versus* FOSS.

An indorsee may maintain an action against the indorser (payee) of a promissory note, without notice of its dishonor, where the note was made for the accommodation of the *payee*, and *he* agreed to take care of it, although at the time it was made and when it fell due, the maker was indebted to the payee.

Upon a *lost* note the owner may maintain an action at law without furnishing indemnity to the defendant, if it appear at the time of trial that the limitation bar may be interposed to prevent a recovery by any *bona fide* holder.

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

ASSUMPSIT, on two notes of hand signed by Dexter Andrews, and payable to defendant, or his order, at Merchants' Bank, Boston, and by him indorsed.

One note for $487,00 dated Bangor, Oct. 26, 1847, was payable in four months. The other for $400,00, dated Bangor, Dec. 24, 1847, was payable in five months from its date.

This action was commenced on Dec. 19, 1853.

The larger note was produced on the trial. The other note was not produced, and evidence tending to prove its loss was admitted. The plaintiff also produced the certificate of a notary containing a copy of the note alleged to be lost, and that the same was presented at the Merchants' Bank for payment, and was dishonored, and that he notified the indorser.

This protest and notice did not appear to have been made in a manner to charge the indorser. No notice as to the other note was proved.

Plaintiff introduced evidence tending to show that these were accommodation notes, to enable the defendant to raise money, or turn them out where he was owing, and that the maker, in respect to Foss, was not to pay them. It also appeared that the maker at that time had goods of defendant, and the latter was buying stock for him; and that at the time the notes were made, Andrews was owing Foss about $200, and continued to owe him about that sum when the notes were due.

Upon the note produced, Foss had paid $250.

Plaintiff offered to give such indemnity as the defendant's counsel should be satisfied with, or the Court might order at the trial or afterwards, to protect defendant against injury from the loss of the note.

The title of plaintiff to the note was proved, and upon the evidence, it was agreed to submit the case to the decision of the full Court.

Rowe and *Bartlett*, for defendant.

1. On the special counts, the action is not maintainable, for as to the Oct. note, notice was not given, and on the Dec. note the proof offered, fails.

2. Nor can the action be sustained on the money count. The defendant was entitled to notice. He had paid on the first note a sum sufficient, added to what the maker owed him, to balance that note. And this was owed to him at the time the note was given, and the sum has remained due ever

since. Chitty on Bills, p. 438 to 444; 7 East, 359; 2 Campb. 503; 16 East, 433; 7 Maine, 126; 10 Peters, 572.

3. The December note is not destroyed, but merely lost or mislaid. It was indorsed in blank. Defendant may be called upon as indorser to pay it again. If compelled to pay it to this plaintiff, he will want it as evidence in a suit against the maker. In such cases, the only remedy is in equity, where suitable indemnity can be enforced and no suit at law lies upon the note as settled in England and New York. *Hansard* v. *Robinson*, 7 B. & Cr. 90; *Ex parte Greenway*, 6 Vesey, jr. 812; *Rowley* v. *Ball*, 3 Cowen, 303; Story on Promissory Notes, § § 106, 112; *Meyer* v. *Johnson*, 3 Campb. 326; Story's Equity, § 82.

A contrary doctrine has been established in Massachusetts which according to the reasoning of the Court arose from the want of a court of equity there. Pennsylvania has followed Massachusetts for a similar reason. In this State, the question is unsettled. As there is here a court of equity having full power, there would seem to be no reason why the doctrine of England and New York should not be adopted.

Blake, for plaintiff.

No notice to the defendant was necessary, the notes being made for his accommodation alone, and he was to pay them in any event. One note is here.

The other note is lost or destroyed. Its loss is well established by the proof.

When the note is lost, judgment may be ordered on condition of satisfactory indemnity. Such has been the practice in Massachusetts and Maine. Since 1811 the question has not been raised, but it has been assumed by the profession that an action well lies on a lost or destroyed note, all other things necessary being proved. *Page* v. *Page*, 15 Pick. 369.

Here an offer of indemnity has been made, but really it is unnecessary, as the note is outlawed.

Where there is no danger from a *bona fide* holder, no in-

demnity is needed. *Hinsdale* v. *Miles*, 5 Conn. 331; *Swift* v. *Stevens*, 8 Conn. 431; *Peabody* v. *Dunton & al.* 2 Gal. 351. In Alabama the action at law is maintainable upon a negotiable note merely lost. *Bank of Mobile* v. *Hilman*, 12 Ala. 214. And the same doctrine is recognized in Vermont. *Reynolds* v. *French*, 8 Verm. 85.

TENNEY, J. — As it respects one note, declared upon in this action, no evidence is offered of a demand upon the maker, or notice of its non-payment to the indorser. On the other note in suit, neither the demand upon the maker, nor notice of the dishonor to the defendant as the indorser, appears from the evidence to have been sufficient to hold the latter. But a question in the case is, whether any demand or notice to the defendant was by law required.

The notes were made for the accommodation of the indorser, in order to raise money or to be turned out to his creditors at Bangor, and payable at the Merchants' Bank, in Boston. The maker had no funds in the Merchants' Bank at the time either note became due; or before or since those times. The defendant was to pay the notes, and did pay on one of them the sum of $250, about the time it became payable. No arrangement was at any time made, between the defendant and the maker, that the notes should be paid by the latter, or that it should be his duty so to do, but on the contrary, the defendant always told the maker he would take care of them. It appears, however, that the defendant was buying stock for the maker, who was having goods of him; and there had been no time since the making of the first note, when there was not a balance due to the defendant from the maker of the notes, till the time when these facts were disclosed in his testimony for this case. But it is satisfactorily shown by the evidence, that notwithstanding the fact, that the balance of accounts was in favor of the defendant, during the whole of that time, at the end of which it was a little short of two hundred dollars, it was never the expectation of either, that this balance should be appli-

ed to the payment of the notes, or that it was not fully understood by them, that the means of paying the notes should be furnished by the defendant, aside from such balance.

It was held in *Bicherdike* v. *Bollman*, 1 D. & E., 405, that if the drawer of a bill has no effects, in the hands of the drawee, no notice is necessary. Judges in England have expressed some dissatisfaction, that this exception to the general rule of requiring notice to an indorser, of the dishonor of a bill, should have been made. But it has not been denied to be the established law there, in cases, where the doctrine of that case was applicable, although the principle has been refused to be extended, and has been restricted in some cases.

In the case of *Orr* v. *Maginnis*, 7 East, 359, Lord ELLENBOROUGH sustained the doctrine of *Bicherdike* v. *Bollman*, but remarked, "I shall anxiously resist the further extension of the exception. The case is different where there are no effects of the drawer in the hands of the drawee, at the time, because the drawer must know, that he is drawing on accommodation; but if he have effects at the time, it would be dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary." And in the case of *Rucher* v. *Hiller*, 16 East, 43, the same Judge says, "where the drawer draws his bill, in the *bona fide* expectation of assets in the hands of the drawee, to answer it, it would be carrying the case of *Bicherdike* v. *Bollman*, further than has ever been done, if he were not, at all events, entitled to notice of the dishonor." And he says, in *Claridge* v. *Dalton*, 4 Maule & Selwyn, 226, "even where there are not any funds, if the bill be drawn under such circumstances as may induce the drawer to entertain a reasonable expectation, that the bill will be accepted and paid, the person so drawing is entitled to notice." And LE BLANC, J., in the same case says, "if the bill be drawn in the fair and reasonable expectation, that in the ordinary course of mercantile transactions, it will be accepted or paid

when due, the case does not range itself under that class of cases, of which *Bicherdike* v. *Bollman* was the first.

BALDWIN, J., in *Dickens* v. *Beal*, 10 Peters, 572, regards as well established, the exception to the general rule, "that notice of the dishonor of a bill must be given to the drawer, when he has no funds in the hands of the drawee. But to this exception modifications are recognized, as if the drawer has made or is making a consignment to the drawee, and draws before that consignment comes to hand; if the goods are *in transitu*, but the bill of lading is omitted to be sent to the consignee; if the goods were lost; if the drawer has any funds or property in the hands of the drawee; or there is a fluctuating balance between them in the course of their transactions; or a reasonable expectation that the bill would be paid; or if the drawee has been in the habit of accepting the bills of the drawer, without regard to the state of their accounts, this would be deemed equivalent to effects; or if there was a running account between them; in such cases it is treated as a fair commercial transaction, in which the drawer has a reasonable expectation that his bill will be honored, and he is entitled to the same notice as a drawer with funds or authority to draw without funds. But unless he draws under some such circumstances, his drawing without funds, property or authority, puts the transaction out of the pale of commercial usage and law; and as he can in nowise suffer by the want of notice of the dishonor of his drafts, that it is deemed a useless form."

Judge STORY, in his Com. on Bills, § 311, lays down the rule, that if a drawer draws a bill, without having funds in the hands of the drawee, or expectation of funds, or any arrangement or agreement on the part of the drawee, to accept the bill, he will not be entitled to notice, and will not be discharged by the want of it. But although the drawer has no funds in the hands of the drawee, to meet the bill, yet if he has the right to expect the funds in the hands of the one on whom he draws for that purpose, or if he has the

right to expect the bill to be accepted by the drawee, in consequence of arrangement with him; or if upon taking up the bill, he would be entitled to sue the drawee, as if he be an accommodation drawer for the drawee or payee, or any subsequent indorser, then he is entitled to strict notice of the dishonor. Notes to § 311.

The same doctrines, which in respect to bills, we have considered, will also apply to negotiable promissory notes; and the duties and obligations, are the same in reference to the non-payment of bills and notes, as they are in cases of non-acceptance of bills. Story on Bills, § 378.

From the principles, which have been referred to, in the cases cited, it is manifest, that the right of the drawer, that notice of the dishonor of a bill should be given to him, is upon the ground that such are the transactions between him and the drawee or acceptor, that the former has a reasonable expectation that the bill will be accepted and paid by the latter. But if, on the other hand, it is for the accommodation of the drawer of a bill, or the payee of a promissory note, that the one is accepted and the other is signed by the maker, and it is positively agreed that the bill shall be paid by the drawer, and the note by the payee, after they are indorsed and negotiated, without any reference to a balance of the accounts in favor of the drawee or payee against the acceptor or the maker, the dishonor of the paper is no more than the one who was bound by the agreement to meet it, by payment, must have known would take place, and the want of notice would in no wise operate to his injury, and the case would fall within that of *Bicherdike* v. *Bollman*, and others of the same class. In such cases, the reasons for requiring notice, totally fail.

In the case before us, notwithstanding a balance was in the hands of the maker of the notes, by the agreement between him and the defendant, the paper was to be provided for by other means of the defendant, and at no time was it expected that this balance was to be appropriated for the payment, and the case is to be treated as it would be if

nothing was in the maker's hands belonging to him. After the agreement between them, such as the evidence shows that it was, it would have been an absurd expectation on the part of the defendant, that because the maker of the notes was owing him a sum short of two hundred dollars, he should have transmitted funds to the Merchants' Bank, sufficient to meet the two notes which he had signed.

But it is further insisted in defence of the note dated December 24, 1847, that the note not having been produced at the trial, the action cannot be maintained thereon, notwithstanding it was lost after its dishonor, and notwithstanding the plaintiff voluntarily offers indemnity against all injury arising from any call for payment hereafter by one who may be the actual holder of the same. And the defendant invokes the law of England and of the State of New York, that a suit at law cannot be sustained, but that the only remedy is in equity, where proper indemnity may be enforced, though it is admitted at the same time that in Massachusetts it is otherwise.

A question somewhat of this kind was presented to Lord HARDWICKE, sitting in chancery, as reported in 1 Vesey, sen., 344, in the case of ***Walmsley*** v. ***Child***, in which he says, on the subject of lost instruments in writing, "in case of notes, no *oyer* is demanded of them; and proving the contents being sufficient, and nothing standing in the plaintiff's way;" and he refers to a case on a bill of exchange, which was drawn on the defendant, and indorsed in the third place to the plaintiff, by whom the bill was either lost or mislaid, as appeared by the affidavit annexed, and the prayer of the bill was, that the defendant might be decreed to pay the plaintiff the money, as last indorser, according to the acceptance, the plaintiff first giving the defendant security to save him harmless against all former assignments, which was so ordered. And Lord HARDWICKE remarks upon this case, "if the plaintiff could at law prove the contents of his bill, and the indorsement and the loss of it, he might have brought his action at law upon that bill, without com-

ing into this Court; but he was apprehensive the course of trade might stand in his way at law, and therefore came into this Court upon terms, submitting it to the judgment of the Court, whether they were not reasonable."

The case of *Messop* v. *Eaden*, 16 Vesey, 430, was a bill for the payment of a promissory note, which had been cut in two parts, one being produced, and the other alleged to be lost, and offering an indemnity. It was contended in behalf of the plaintiff, *that the mere loss of the instrument*, gave the Court jurisdiction. Sir WILLIAM GRANT, Master of the Rolls, said to them, "your argument is in direct contradiction to that of Lord HARDWICKE, who, in the case of *Walmsley* v. *Child*, assumes that this Court has no jurisdiction, *except for the purpose of ordering indemnity, where indemnity is necessary*. I am very unwilling to turn the plaintiff round, thinking upon the merits, the justice of the case is with him; but at the same time, I am afraid of breaking in upon the rules established as to the jurisdiction of the courts, that where a party can recover at law, he ought not to come into equity." The bill was dismissed.

In *Greenway, ex parte*, 6 Vesey, 812, it was the object of the petitioner to be admitted to prove under a commission of bankruptcy, in respect of a bill of exchange alleged to be lost after indorsement. The affidavits stated that the bill was returned from America, protested, and the ship was captured on her return. Lord Chancellor ELDON said, "to enable you to prove in respect of this bill, there must be a complete indemnity, going to all the consequences against the holder, if the bill has not been paid, and against any demand that may be made by future possible holders, if it should have been paid." And he further remarked, "I could never understand by what authority courts of law compelled parties to take indemnity." The order was made as prayed for, upon giving an indemnity.

The two cases referred to have been treated as opposed to others in England; and among the latter is that decided in 1827, of *Hansard* v. *Robinson*, 7 Barn. & Cres. 90, in

which Lord TENTERDEN, C. J., says, "upon this question, the opinions of Judges, as they are to be found in the cases quoted at the bar, have not been uniform, and cannot be reconciled to each other. Amid conflicting opinions, the proper course is to revert to the principle of these actions on bills of exchange, and pronounce such a decision as best conforms thereto. Now the principle upon which all such actions are founded, is the custom of merchants." "What, then, is the custom in this respect? It is, that the holder of the bill shall present the instrument at maturity to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor, paying the bill, has the right to the possession of the instrument for his own security, and as his voucher and discharge, *pro tanto*, in his account with the drawer." "As far as regards his voucher and discharge toward the drawer, it will be the same thing, whether the instrument has been destroyed or mislaid. With respect to his own security, against a demand by another holder, there may be a difference." "If the bill should afterwards appear and a suit be brought against him by another holder, * * * * is he to seek for the witnesses to prove the loss, and to prove that the new plaintiff must have obtained it after it became due? Has the holder a right, by his own negligence or misfortune, to cast this burden on the acceptor, even as a punishment for not discharging the bill, on the day it became due? We think the custom of merchants does not authorize us to say that this is the law." "The holder may tender sufficient indemnity to the acceptor, and if it be refused, he may enforce payment thereof in a court of equity."

Mr. Chitty, in his Treatise on Bills, at page 296, (8th Am. ed.) says, "it is now settled, that whether the note or bill was lost before or after it became due, or after actual demand of payment, and an express promise to pay, still that no action at law can, if it were negotiable, be sanctioned, though it has been contended, that a distinction ought to be

taken between an undue and an overdue bill, and that the promise to pay ought to bind."

It is said, in 1 Story's Equity Jurisprudence, § 86, "in the cases which we have been considering, the lost note, or other security, was negotiable. And according to authorities, this circumstance is most material, for otherwise, it would seem, that no indemnity would be necessary, and consequently *no relief could be had in equity.*" "But," it is added, "the propriety of this exception has been somewhat doubted; for the party is entitled, upon payment of such a note or security, to have it delivered up to him as a voucher of its payment and extinguishment, and it may have been assigned in equity to a third person. And although, in such a case, the assignee would be affected by all the equities, as between the original parties, yet the promisor may not always, after a great length of time, be able to establish those equities by competent proof; and, at all events, he may be put to serious expense and trouble to establish his exoneration from the charge."

In Massachusetts, when what is now the State of Maine was a part thereof, it was held, that where notes declared upon in a writ were lost, parol evidence of their contents was competent, (*Jones* v. *Fales*, 5 Mass. 101,) and this may be regarded as the settled law of that Commonwealth and of this State, where the defendant is not exposed to danger from the claim of an actual holder, other than the plaintiff. *Weston* v. *Hight*, 17 Maine, 287.

In New York, where the lost note was not negotiable, or if so, had not been negotiated, the plaintiff would be entitled to recover at law. *Partard* v. *Tuckington*, 10 Johns. 104.

The Court say, in their opinion, in *Rawley* v. *Ball*, 3 Cow. 303, "Chitty in his Treatise on Bills, p. 173, (ed. of 1817,) is of the opinion, that where the bill has been lost after it became due, there is no reason why the person who lost it should not be permitted to proceed at law, without offering indemnity, inasmuch as the law would in such case secure

all the parties to the bill against future liability, and to the person who becomes the holder of it, after it falls due. This is undoubtedly correct, provided the maker of the note or the acceptor of the bill could prove that it came to the hands of the holder after it became due."

The doctrine deducible from the cases in England and in New York, which are regarded as authority upon this subject, is, that as in Massachusetts and in this State, a suit at law may well be maintained, upon negotiable paper, which has been lost after it was indorsed, on proof of its contents, if the defendant is not exposed to a liability to pay a second time to a holder who may afterwards make the claim. And although the bill or note was dishonored before its loss, yet as the party sued may not be able to show that fact, or if he can, he may be put to trouble and expense in doing it, and as the plaintiff's redress is ample in equity, where the defendant can be protected against subsequent liability, it is the only jurisdiction in such a case, which can properly afford security to the defendant, and allow the plaintiff to recover.

Judges in Massachusetts have, from an early period, by *dicta* and practice, shown an inclination to allow a party to recover at law on a lost note, which was negotiable, by a tender of sufficient indemnity. *Freeman & al.* v. *Boynton*, 7 Mass. 483; *Donelson* v. *Taylor*, 8 Pick. 390.

In an action upon a note brought in 1815, which had been lost in 1797, it was objected that the note might still be in existence, and be again demanded of the defendants, by a *bona fide* holder. But the Court held, after so great a lapse of time, it was incumbent on the defendants, to show either that the note existed, or that it had been demanded of them; and that it must be presumed that no demand would be made. *Peabody* v. *Denton*, 2 Gall. 351.

The question was directly decided in Massachusetts, in the case of *Fales* v. *Russell*, 16 Pick. 315, where two negotiable promissory notes of hand, payable to one Calef or order, and indorsed in blank, were stolen before maturity.

The Court assumed that, according to the law as then administered in England and New York, it would be held, that the plaintiff could not recover in a suit at law; but the Chief Justice, in the opinion of the Court, says, "if this rule is adopted for convenience, and is not founded upon principles which exclude the action of a court of law, then it will not apply, where there is no such remedy in chancery." And it is again said, "upon a case like this, where a note has been lost after it was due, it has often been held that a plaintiff is entitled to recover without the note. But the title is in fact the same; the only difference is, that the defendants are exposed to a greater risk in the one case than in the other, because, if lost before it was due, there is no possibility, that it may have been negotiated to a *bona fide* holder, in the ordinary and regular course of business, before it was due." And the plaintiff was allowed to take judgment in the action, by furnishing sufficient and reasonable security.

If the plaintiff was entitled to recover in the case just referred to, upon the filing of reasonable security for the protection against a *bona fide* holder, it is not perceived that any substantial reason existed against the judgment, without the security. As evidence, the security could not make out a stronger case for the plaintiff, and it could not impair the defence, to which the other party was entitled. As Lord ELDON said, he could never understand by what authority courts of law compelled parties to take the indemnity.

But where a long time has elapsed, after the party owning the paper caused it to be presented for payment at its maturity, and soon after lost it, it certainly raises a strong presumption in fact, that it has been destroyed, which in New York has been understood to give jurisdiction to courts of law, as appears by the case cited, of *Rawley* v. *Ball.* And by the authority of *Peabody* v. *Denton,* the burden may properly be upon the defendants, to show that the note existed, or that it had been demanded of them, where they claim to be exonerated, and deny their liability, and at the same time refuse to make payment, on the tender of ample indemnity.

It is proved in this case, by the deposition of Benjamin Thompson, that he was the keeper of the plaintiff's books, attended to his accounts and notes, and had charge of his business generally, and had held this relation to him from Aug. 1847, to the time his deposition was taken; that he knows the handwriting of the maker of the note dated Dec. 24, 1847, for $400, payable in five months after date, and also the indorser of the same, and that the handwriting of Dexter Andrews, the maker, and I. B. Foss, the indorser, are genuine; that the plaintiff was the owner of such note; and that the same was sent to Samuel H. Blake, of Bangor, and he has not since seen it, or had knowledge of its payment. The affidavit of the plaintiff is in the case, that the note was sent to Samuel H. Blake for collection, soon after it became due, and protested. Afterwards he wrote to Blake to return the note to him, which Mr. Blake informed him that he did do, by mail, in a letter to him, but that the letter was never received by him, though he had made diligent search therefor; that he has not seen said note since it was sent to Blake; that he has made much search to find it, but has been unable to do so, and he supposes the same is lost; and the balance, after deducting the indorsement, is unpaid, and is due to him. It is admitted that Mr. Blake has made diligent search for the note heretofore, and mostly at his office, and among his papers, without finding it.

The note is satisfactorily shown by the affidavit of the plaintiff and the evidence, not objected to, to be lost; and the copy of certificate of the notary public who protested the note for non-payment, together with a copy of the note thereto annexed, sufficiently shows its contents.

The writ was dated December 19, 1853, almost six years after the maturity of the note, and although not so long as the time which elapsed in the case of *Peabody* v. *Denton*, yet we are not aware of any principle of law, which will effectually distinguish the two cases.

The defendant must be treated as being *now* protected

against any future liability to a *bona fide* holder, by the statute of limitations, unless he has in some legal manner renewed his promise, which he could have shown, if it had been done. And for this reason his security is as ample, as it would be by a sufficient bond with sureties.

Defendant defaulted.

BUNKER *versus* GILMORE *& al.*

An *assignee* of an unnegotiable note who has commenced a suit thereon, but who subsequently assigned his interest to a third person, not having indorsed the writ, or any proceedings being had to require it of him, is not disqualified from being a witness in such suit.

The party objecting to the competency of a witness is limited to those objections *only*, which were presented at the trial.

If a debtor is summoned as the trustee of his creditor, and before making his disclosure, due notice is given him that the claim had been assigned to a third person before service was made on him, and he neglects to disclose such assignment, his being charged as trustee and payment of the amount in his hands upon execution, will not protect him from again paying the same to the assignee.

The return of the officer, as to the *time* of serving the writ upon the trustee, cannot be contradicted by the *disclosure* of such trustee.

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

ASSUMPSIT, upon an unnegotiable note dated Oct. 25, 1850, payable to plaintiff in thirty days.

The defence was that the sum claimed had been paid on an execution in favor of one Bissell against plaintiff and defendants as his trustees.

It appeared that defendants were notified before making a disclosure, that the note had been assigned to one Warren Bunker before the trustee process was served — the note being exhibited and indorsed by the plaintiff: — but in the disclosure by one of the defendants, the other being dead, no mention was made of such assignment or any notice of it to the trustee.

In his disclosure one of the defendants stated that the

writ was served on him at an earlier date than appeared by the officer's return thereon.

In the progress of the trial, the plaintiff called Warren Bunker as a witness, who on the *voir dire*, testified that at the time this suit was commenced, he was the plaintiff in interest, the note being assigned to him; but that since he had assigned his interest in the suit to one Herrick, who was then the plaintiff in interest.

It was objected that the witness was interested, and on the plaintiff's counsel depositing $50 with the clerk as security for costs, the witness was allowed to testify. But the defendant's counsel still objected, the only ground being his interest by the provisions of c. 223, of laws of 1846, and no other.

The presiding Judge instructed the jury that if the note in suit had been assigned to Warren Bunker before the service of the trustee process upon defendants, and if they had been notified that such an assignment had been made — and the evidence of it was offered them as stated, in season for them to disclose the fact in their disclosure as trustees, if they did not disclose the fact, the judgment against them as trustees and their payment of the money to Bissell would not shield them and they would be liable in this action.

The defendants also contended that as the disclosure was a part of the evidence, and by that it appeared that the trustee writ was served earlier than was stated by the return, the jury should weigh this with the other evidence to ascertain when the writ was in fact served: — but the Judge ruled that the sheriff's return upon the writ was conclusive and that the jury should be governed by that alone.

The jury found specially that the note was assigned before the service of the trustee writ, and that defendants had notice of it before the disclosure.

A verdict was returned for plaintiff.

W. Fessenden, for defendant.

J. A. Peters, for plaintiff.

APPLETON, J. — This suit was originally commenced by Warren Bunker, who, as assignee of the nominal plaintiff, claimed title to the note in controversy. Since its commencement he has assigned his interest to John J. Herrick, for whose benefit this demand is now prosecuted.

Warren Bunker having thus parted with his interest in the demand, was called as a witness by his assignee. The only objection taken, was, that he was interested in consequence of the provisions of c. 223, being "an Act respecting assignees," approved Aug. 10, 1846. This Act provides, in any action brought in the name of an assignor, that the name and place of residence of the assignee, "if known, shall at any time during the pendency of such suit, *if thereto required by the defendant,* be indorsed upon the back of the writ or process, or further proceedings therein shall be stayed, in case of neglect or refusal so to do, when required as aforesaid." When Bunker was called as a witness, he had ceased to be an assignee. While he was such, and while he was prosecuting the suit for his own benefit, the defendants had taken no measures to compel his indorsement or to fix his liability. But it is not necessary to consider, whether after such assignment the defendants could rightfully have required such indorsement, inasmuch as they have never made such requirement, and if they had, the case finds that an amount satisfactory to the defendants to meet their costs, has been deposited. No interest, therefore, arising under this statute is perceived to exist.

But it is now insisted that the witness was in other respects interested, and that consequently he should have been excluded. The objection, as taken, was specially limited to the interest arising from the provisions of the statute to which reference has been had. The defendants must be bound by that limitation, and cannot now be permitted to set up any other interest as affecting his testimony, even if it existed. The substantial ground of objection to the introduction of evidence must be explicitly stated at the trial, or it will not be heard in bank, if the party could have ob-

viated the objection if properly made. *Jackson* v. *Christman*, 4 Wend. 478. "If counsel," remarks MARCY, J., in *McAllister* v. *Reab*, 4 Wend. 489, "will not discriminate the objection so as to draw the attention of the Court to what is conceived objectionable in the decision made, they are precluded from urging it as a cause for reversing the judgment." Objections in all cases should be so taken as to call the attention of the Court to the points claimed to be erroneous. *Jones* v. *Osgood*, 2 Selden, 235. It is not proper practice, that evidence should be admitted on the trial, subject to objections, without a statement of the specific exceptions at the time. *McConihe* v. *Sawyer*, 12 N. H., 396.

By R. S., c. 119, § 35, "when it appears, by the answer of any person summoned as trustee, that any effects, goods, or credits in his hands *are claimed by a third person in virtue of an assignment from the principal debtor, or in some other way*, the Court may permit such claimant, if he see cause, to appear and become a party to his suit and maintain his right." By § 36, "should such claimant not appear voluntarily, notice may be issued and served on him, in such manner as the Court may direct." When that notice has been given, the assignee may appear and protect his rights as against the plaintiff in the trustee process. These provisions are more general than those of the Act of 1821, c. 61, § 7, of which, to a great extent, they are a reënactment. The object of the statute is apparent. The adjudication upon the validity of the assignment, when contested, is to be made, not upon the disclosure of the trustee, but upon the issue made, and the proof offered upon that issue, between the plaintiff in the trustee suit and the claimant of the demand, or other property, in the hands of the trustee, who, as to that question, are the real parties litigant. If the assignee, being duly notified, shall not appear, then, by § 38, "the assignment shall have no effect to defeat the plaintiff's attachment." It is therefore most manifestly the duty of the trustee to disclose all claims upon the funds in his

hands, of which at the time of his disclosure he may have become apprised. It is no part of his duty to determine whether they are valid or not. If he knows of such claims he should state all facts relating thereto, within his knowledge. *Fiske* v. *Weston*, 5 Greenl. 411. If he neglects or omits so to do, the responsibility of such neglect or omission is upon him.

The assignment of a note not negotiable, may be by indorsement and delivery, or by delivery alone. *Littlefield* v. *Smith*, 17 Maine, 327. The evidence shows the note to have been assigned and in the hands of the assignee on the day it was given. As between the assignor and assignee, the title to the note in suit became vested in the latter.

But it is not enough that there should be an assignment and delivery of the claim assigned. The assignee should give notice of the interest he has thus acquired to the individual, who by the assignment has become his debtor. If he does not, in case such debtor should be summoned as the trustee of the assignor, and be adjudged trustee, such adjudication, and the subsequent payment of the demand, would constitute a perfect bar to any suit by the assignor. If he does, then the debtor being summoned as trustee, if he would discharge his duty to the assignee and avoid all risk, should disclose the information he may have received, in order that the assignee, being notified, may interfere for the protection of his rights.

In this case, the evidence shows that the defendants were notified on the day the note was given, that the note had been assigned. After they had been summoned as trustees, they were informed by the attorney of the then assignee, that the note in controversy was the property of Warren Bunker, and had been assigned to him before the service of the trustee upon them; that he offered to show them the evidence of it; that he showed the note with John Bunker's indorsement thereon, and inquired if they wanted any evidence of the handwriting, and requested them to set out these facts in their disclosure, and to disclose the assignee's claim;

that to this the reply was made, that Bissell, the plaintiff in the trustee suit, would take care of the matter.

The jury have likewise found that the note in suit was assigned before the service of the trustee writ on the defendants and that they had seasonable notice thereof. This action has been pending about five years. The disclosure of the trustees was made at the same term in which this cause was tried, yet the defendants carefully avoided disclosing any of the facts which had been communicated to them, and of which the jury found they had knowledge. Under such circumstances, it is impossible to doubt that there was collusion on the part of the trustees, to enable the plaintiff in the trustee suit to collect this debt, notwithstanding it had been assigned. As the defendants neglected to disclose facts communicated to them by the assignee and his attorney, so that they might have been notified to appear, they are neither legally nor equitably entitled to protection. If the defendants had disclosed all the facts within their knowledge and upon such facts there had been even strong suspicions that the assignment was fraudulent, still, the Court would not have charged them as trustees, if the plaintiff in that suit had not requested the assignees to be summoned, so that its validity might have been tried by a jury. *Johnson* v. *Thayer*, 17 Maine, 401.

The return of the officer, as to the date of the service of the trustee writ, cannot be contradicted by the trustee. It is not necessary, to protect the rights of the assignee, that the debtor should have been informed of the assignment before the service of the trustee writ on him. It is enough that it was in fact made before that time. The jury have found such to be the case here. The defendants, though specially requested, having neglected to make a full disclosure of the facts communicated to them, have no just ground of complaint if they be held liable in this action.

Exceptions overruled. — Judgment on the verdict.

† GODFREY, *Administratrix, versus* DWINELL.

Upon the refusal of the promisor to fulfil an agreement in writing, for a valuable consideration, to convey real estate, the *administratrix* of the promisee may maintain either a bill in equity for a specific performance of the contract, or an action at common law to recover damages for its breach.

ON FACTS AGREED.

ASSUMPSIT, on the following contract signed by defendant: —

"Received of Samuel Godfrey three thousand dollars, for which I promise to convey the lot and house at Oldtown, where he now lives, also the lots of land in the town of Chester, conveyed to me by Ira Wadleigh — and also one lot of land in Township No. 4, containing one hundred acres, conveyed to me by J. & I. Wadleigh."

Samuel Godfrey deceased in 1840, and the plaintiff was duly appointed administratrix of his estate.

In her said capacity, in May, 1854, she made a demand in writing on defendant to convey the premises to her as such administratrix, which he declined to do.

The Court were authorised to enter judgment by nonsuit or default, as the law required; if by default, a referee was to decide the value of the premises at the time of demand, and judgment to be rendered for that sum with the interest.

Rowe & Bartlett, for defendant, maintained that if the agreement was a valid subsisting contract at the time of the intestate's decease, no demand for a deed having been made in his lifetime, then the right to a conveyance vested in his heirs, and they alone had a right to claim it.

The purchase money had been paid; nothing remained to be done but the execution of a deed. Equity regarded that as done, and Dwinell held the title as trustee for the purchaser. The heirs may come in and insist on a specific performance of the contract. Story's Eq. § 790; 1 Fonb's Eq. book 1, c. 6, § 9, and cases there cited. *Seton* v. *Slade*, 7 Ves. 264, 274; 1 Sug. Vend & Pur. c. 4, § 1; *Broome* v. *Moncke*, 10 Ves. 597; Adam's Eq. 140.

The heirs, after a proper demand and refusal, may either bring a bill for a specific performance, or an action for damages. But this plaintiff can maintain neither. A payment to her would not release the defendant from the claim of the heirs. *Boynton* v. *P. & S. Railroad,* 4 Cush. 467.

A. Sanborn, for plaintiff, relied on R. S., c. 112, § 28.

APPLETON, J. — It may be conceded, as is contended by the counsel for the defendant, that a court of equity would decree against the defendant a specific performance of the contract in suit, yet it would by no means follow from that concession, that the present action may not be maintained.

The contract between the plaintiff's intestate and the defendant, is a chose in action, which by operation of law vests in the administratrix. The plaintiff having given bonds for the faithful performance of her official duty, has the rightful control over it. She was the proper person to demand its performance. She has made such demand, and the stipulated conveyance has not been executed.

By R. S., c. 112, § 28, it is provided that the Judge of Probate "may authorize any executor or administrator of any deceased person, whose estate is subject to his jurisdiction, to execute deeds, in order to carry into effect bonds, agreements, or covenants, in writing, whether sealed or not, whenever it shall be made to appear to them on petition of the person contracted with as aforesaid, or by his heirs or assigns, or personal representatives, that the deceased in his lifetime, entered on any such contract to convey real estate to him, but was prevented by death," &c. The authority of the Judge of Probate being in such case had, the conveyance is valid.

By the last clause of the same section, it is enacted, that "whenever any executor or administrator shall receive any such conveyance, he shall stand seized of such estate, to the same uses and for the same purposes as he may be of real estate set off to him on execution." It will be perceived that while the sanction of the Judge of Probate is necessary

to legalize a conveyance from an executor or administrator, it is not to receive such conveyance. By virtue of his position as executor or administrator, he may receive it. Receiving a conveyance, it necessarily follows that he may surrender or cancel the contract which has been performed by the execution and delivery of the deed in accordance therewith. The land conveyed in such case would be assets in the hands of the executor or administrator, to be held as assets of the estate, and to be disposed of in accordance with the provisions of R. S., c. 108, § § 26, 27, 28.

The defendant, upon demand, refused to execute a deed of the premises which he had contracted to convey. Had a conveyance been made to the administratrix, the statute provides for its appropriation as assets to meet the debts of the estate or for its distribution. The defendant refusing to execute a conveyance, it was for the administratrix to determine the remedy to be pursued. She might, by proceedings in equity, compel a conveyance, or by a suit at common law obtain compensation in damages of the defendant for his refusal to convey. In one alternative she would hold the land, in the other the damages, recovered in trust, to be disposed of according to law.

As the defendant, when called upon, refused to convey, it is not for him to take exceptions to the mode in which redress is sought. If the administratrix has in any respect acted unadvisedly or negligently, it is a matter regarding only those interested in the estate.

The action is legally maintainable, and a default must be entered. *Defendant defaulted.*

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† PHILLIPS *versus* INHABITANTS OF VEAZIE.

For injuries to travelers occasioned by a necessary alteration of an highway, through want of sufficient notice or warning of such change, the town is primarily liable, although such change is being effected by a railroad company, under the authority of their charter.

Suggestions made by the presiding Judge in the course of his charge to the jury, as to any facts in the case, but which are left to their determination, are not open to exceptions.

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

CASE, for damages sustained by plaintiff from a defective highway in the town of Veazie.

The Penobscot Railroad Company under their charter, located their road across one of the highways of Veazie, and at the time of the accident to plaintiff, were making the necessary alterations in the highway to correspond with the grade of their road. A sidewalk from two to three feet above the traveled part of the road had been maintained for several years, and the railroad company had made a cut near to the sidewalk, and between that and the traveled part of the way, for six or eight rods, a part of it being six feet deep.

The plaintiff, ignorant of the alterations in the highway, was traveling over it on foot, in a dark night, and was found in the deepest part of the cut with his thigh bone broken.

There was evidence tending to show that the company had put up a slab three and one half feet high with stakes across the sidewalk, about two rods from the place where the plaintiff was found.

The counsel for defendant requested the following instructions: —

1. If the Penobscot Railroad Corporation, at the time of the accident, were lowering said highway, by their construction of their railroad across said highway and the company had not completed said alterations, at the time of the accident, the town of Veazie is not liable in this case, even if the corporation had caused a defect at the place of the accident, by which the injury was caused.

2. If the said railroad corporation, in pursuance of their charter, were in the act of constructing their railroad across said highway, and for this purpose were lowering said highway to accommodate the grade of their road, and had not at the time of the accident, completed said alteration, and

given notice thereof in writing to one of the selectmen of the town of Veazie, and the injury was caused by a defect in the highway made by the corporation, in making such alteration, the defendants are not liable.

3. That if the railroad corporation, in constructing their track across said highway, used ordinary care and prudence in keeping said highway safe and convenient for travelers, and the injury was occasioned by the alteration or change in the highway made by the corporation, the defendants are not liable.

The first two requested instructions were refused, the third was given.

In the course of his charge, the Judge remarked, that although in this case, the fence across the sidewalk might have been sufficient notice and a guard to those who had knowledge of it, yet the jury could judge, whether to those who had no knowledge of it, it might not, perhaps, in the darkness of night, have contributed to increase the danger against which it was intended to guard, and have been itself a defect in the road.

Other instructions in the cause were not objected to. A verdict was returned for plaintiff, and defendants excepted to the refusal to give the requested instructions, and to the one above given.

Wakefield, for defendants.

1. The instructions requested should have been given. The railroad corporation had absolute and exclusive power to raise or lower the highway, and the town could not interfere while that process was going on. R. S., c. 81, § 8. By the 14th § of the same Act, the railroad company is required, while such acts are being done, to provide suitable and temporary ways.

The defect was made by the corporation and the highway was under their charge alone, and it is only after the alteration has been completed that the town has any authority over it.

The statute makes a distinction as to the liability of towns

by indictment, and for damages; because they are liable to an indictment it does not follow that they would be in damages. c. 25, § 57.

2. The right of action of towns against railroad corporations, is too limited to admit of any other construction of the statute. R. S., c. 81, § 11.

3. The instruction given as to the fence across the sidewalk, was erroneous; the fence could not at the same time be a notice and warning, and itself a defect. The jury were misled by the suggestions of the Judge.

Peters, for plaintiff, supported the proceedings of the presiding Judge, and cited *State* v. *Inhabitants of Gorham*, 37 Maine, 451; *Currier* v. *Inhabitants of Lowell*, 16 Pick. 170.

The remarks of the Judge about the fence, was a matter of fact for the jury; no law was attempted to be given in that particular.

APPLETON, J. — This was an action on the case, brought by the plaintiff to recover compensation for an injury sustained in consequence of a defect in the road over which he was passing.

There seems to have been little question as to the situation of the road, and that its defective condition was occasioned by the acts of the Penobscot Railroad Co., in constructing their road over that of the defendants.

The Court instructed the jury, that "if they were satisfied by the evidence beyond any reasonable doubt, that the highway was defective, and that the defendants had reasonable notice of the defect in it, and that ordinary care was not exercised to give notice to the public, or to put travelers on their guard against danger of injury occasioned by such defects in the highway, caused by the changes made and being made therein: and that the plaintiff in the exercise of ordinary care, and without fault on his part while traveling over the road was injured by reason of such defect alone, he would be entitled to recover pay for the

actual damage occasioned to him by such injury." This instruction would seem sufficiently favorable to the defendants. It is not perceived to afford good ground of exception.

The plaintiff was traveling in the night, and so far as the evidence indicated, ignorant of the condition of the road. It seems there was a fence erected across the sidewalk on the road, for the purpose of notice and protection. In reference to this state of things, the presiding Judge remarked, "that although in this case the fence across the sidewalk might have been sufficient notice and a guard to those who had knowledge of it, yet the jury would judge whether to those who had no knowledge of it, it might not, perhaps, in the darkness of the night, have contributed to increase the danger against which it was intended to guard, and have been itself a defect in the road." It is urged that this was erroneous. But this was not and could not have been understood to be an instruction as to any matter of law arising in the cause. It was simply a suggestion as to a matter of fact, the force and effect of which, was specially reserved for the consideration of the jury. No rule of law was given, nor was intended to be given for their guidance.

The injury was primarily occasioned by the acts of the Penobscot Railroad Corporation, and the instructions requested, were, that if so occasioned, no action could be maintained against the defendants. In *Currier* v. *Lowell*, 16 Pick. 170, a similar question arose, in reference to which the Court say, "that the case stands in regard to travelers just as if the inhabitants of the town were making extensive alterations in a highway, or were making a new bridge, or repairing an old one upon a highway. They must conduct the work in such a manner as that the persons and property of the travelers passing, shall not be unreasonably exposed. Suppose a road or bridge was carried away by a torrent, the Legislature intended that repairs should be made in a reasonable time, and the proper guards or cautions should be set up and made known to travelers, to prevent injuries. The

remedy for the traveler who is injured in person or property is immediately against the town, upon which the liability is imposed by statute." It was held in *Elliot* v. *Concord*, 7 Foster, 204, that towns are liable in the first instance, for special damages occasioned by any obstruction placed in a public highway, without right, by any person or corporation. In that case, a railroad company was required by its charter so to construct its railroad as not to obstruct the safe and convenient use of any highway. While building an embankment for their track across an highway, a traveler sustained special damages from the obstruction. The town in such case was held primarily liable to the person sustaining damages. In *Batty* v. *Duxbury*, 24 Vermont, 155, the Court decided that where railroads obstruct the highways, towns must provide a suitable and proper way for the public to pass around the obstructions, and use proper and reasonable precautions to divert the travel from such highways to the byway, while they remain unsafe for the public, and though the railroad be bound to make the byway, and fail to make it safe for public use, this will not exonerate the town from liability, for the town is primarily liable to the traveler. The town must make the road reasonably safe for travel, or see it so made by others. In *State* v. *Gorham*, 37 Maine, 451, this Court held, where bridges and abutments, erected by a railroad company, constituted part of the highway, which the town was bound to keep in repair, that in case of want of repair, the town was liable to indictment. According to the principles determined in the cases just cited, the instructions given must be regarded as correct, and those refused, as having been properly refused.

Exceptions overruled.

Judgment on the verdict.

† WESTON, *Administrator, versus* HIGGINS.

In trover, when the property of plaintiff is once established, possession by defendant will not draw after it that presumptive evidence of ownership, which will excuse him from proving title.

Of presumptions in cases of insanity.

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

TROVER, for a note of hand given by defendant to Philip Putnam, plaintiff's intestate.

Putnam, after a short and severe sickness, died at the house of defendant. During that sickness he was possessed of the note in controversy. He said to one who visited him, "Mrs. Higgins, (defendant's wife,) takes perfect care of me, and shall be well rewarded for it."

Some evidence tended to show that he was unsound in mind a part of the time, and other evidence to the contrary.

When plaintiff called for the note, defendant's wife said she had it, and that Mr. Putnam gave it to her. The defendant said we cannot give the note up. She said he gave it to her a few days before he died. No one was present at the time.

After Putnam's decease, defendant made out a bill against his estate for care and watching nine days and nights, $36; washing, &c., after his death, $10.

The defendant's counsel requested the Court to instruct the jury, *that* the possession of the note by Mrs. Higgins was *prima facie* or presumptive evidence that she owned it.

This request was denied and this instruction given — that the possession of the note by Mrs. Higgins was evidence proper for their consideration, in connection with the other evidence in the case, and they should give it such weight as they believed it deserved.

Defendant also requested the instruction — *that* the presumption of law was that Putnam was sane, and that he must be presumed sane till proved insane.

This was given with the addition, that it was also a gen-

eral rule that a person proved to be insane, would be presumed to continue so till the contrary appeared.

A verdict was returned for plaintiff, and exceptions taken to the refusals to rule and the instructions given, by defendant.

A. Sanborn, in support of the exceptions, maintained, that the addition to his second request was hypothetical, irrelevant, calculated to prejudice the minds of the jury, and improper.

The first request should have been complied with. Possession was presumptive evidence of property. The exceptions to this rule in the case of goods proved to have been stolen did not arise. Mrs. Higgings was involved in no charge of that character. *Brown* v. *Ware*, 25 Maine, 411; *Millay* v. *Butts*, 35 Maine, 139; *Linscott* v. *Trask*, 35 Maine, 150.

Knowles & Briggs, contra.

TENNEY, J. — The plaintiff's intestate, died at the house of the defendant, where he had worked for some time, after a sickness of but few days continuance. His disease was one which caused great suffering at times; and evidence was in the case, tending to show that his reasoning powers were so affected as to be impaired; and other evidence was introduced of a contrary tendency.

It was not in controversy, that the note in question was the property of the intestate, and in his possession after the commencement of the sickness of which he died, and was afterwards, and before his death, and subsequent thereto, in the possession of the defendant's wife, it being claimed as having been a present from him. No attempt was made in the defence to show that the intestate had given the note to the defendant or to his wife, otherwise than by her declarations. The deceased, during his sickness, spoke of the kindness of the defendant's family, and stated that they should be rewarded. It however appeared from a bill of the defendant against the estate of the intestate, that he charged

the sum of thirty-six dollars for care and watching with him, nine days and nights.

The Judge was requested by the defendant to instruct the jury that the possession of the note by the defendant's wife was *prima facie* or presumptive evidence, that she owned it. The instruction was not given according to the request, but the jury were instructed that the possession of the note by her was evidence proper for their consideration, in connection with the other evidence in the case, and such weight should be given to it, as the jury thought it deserved.

It is true, that "as men generally own the property they possess, proof of possession is presumptive evidence of *ownership.*" 1 Greenl. Ev., § 34; and it is said in Phillips on Evidence, vol. 1, p. 123 — "possession is *prima facie* evidence of property. Possession with an assertion of property, or even possession alone, gives the possessor such a property as will enable him to maintain an action of trover or trespass against a wrongdoer. Thus it has been held, that an agister of cattle may maintain trespass against a person for wrongfully taking them away," — and proof of the mere possession will support an indictment for larceny.

It has never been understood that in an indictment for stealing goods, or an action of trespass for an invasion of the plaintiff's possession of personal chattels, or of trover for their conversion, the possession of the defendants was presumptive evidence of ownership, so that it could prevail against the possession of the prosecutor or the plaintiffs, of a recent date, before the possession was acquired by the latter. But in the extracts made from elementary works cited, the principle is, that such charges may be maintained against the accused having present possession, by the proof of a previous possession of the party, where title is asserted.

If the plaintiff's intestate had recovered after the defendant had obtained possession of the note in question, and this action had been instituted by him, could it be doubted, that upon the proof of the fact, that he had possession of the note only three days before it was found in the hands of the

defendant, that this would be *prima facie* evidence of ownership in him, instead of the subsequent possession in the defendant, being presumptive evidence of his ownership?

In this case, the possession and ownership of the note by the plaintiff's intestate, was not contested. The action was against the defendant for a wrongful conversion of the note; he surely could not be entitled to the instruction that his possession alone imposed upon the plaintiff the burden of establishing the negative proposition, that his intestate did not understandingly give the note to the defendant or his wife, to be retained as the property of the one to whom it was delivered.

The instruction to the jury, that a person proved to be insane would be presumed to continue so till the contrary appeared, is supported by authority believed to be uniform, unless the want of mental soundness arises from causes which are temporary only in their influence. *Halley* v. *Webster*, 21 Maine, 461. And this instruction was not the subject of exceptions because erroneous as an abstract principle, but in this case it was purely hypothetical, there being no evidence on which it could be based, as the defendant's counsel insisted.

It appears, however, that this instruction was given in connection with another given on the request of the defendant's counsel, that the presumption of law was, that the intestate was sane, and that he must be presumed sane till proved insane, and there was evidence that in connection with the excessive pain which he suffered, he some times conducted in a manner which the jury might believe arose from mental unsoundness. *Exceptions overruled.*

† INHAB'TS OF OLDTOWN *versus* INHAB'TS OF FALMOUTH.

A minor child of parents who are paupers, bound to service by the selectmen, by written indentures, until twenty-one years of age, is not *thereby emancipated.*

Such child follows the settlement of his father, within this State, until he acquires one of his own.

ON FACTS AGREED.

ASSUMPSIT, for supplies furnished to one Robert Herrington, a pauper, whose settlement is alleged to be in Falmouth.

No question arose as to notice or answer.

The pauper was born in Falmouth in 1802, and his parents had, at that time, a legal settlement in that town.

On Feb. 12, 1814, the town of Falmouth was divided, and a portion of it incorporated into the town of Westbrook.

The parents of the pauper never lived in that part of Falmouth which remained Falmouth after that division.

At the time of the division the mother lived on territory which became Westbrook, and was then supported as a pauper by Falmouth. The father was absent.

So early as April 25, 1807, the parents of the pauper were chargeable to Falmouth, and on that day, Robert, the pauper, was bound by indentures by the selectmen of the town, until he should reach twenty-one years of age, to one Merrill, who lived in that part of the town, which, after the division, remained as Falmouth, and remained there until he was fourteen years of age, when he ran away. He loitered in neighboring places eighteen months, when his father took and carried him to Vermont, where he remained with him a short time, and then went to sea, and did not return to this State for eleven years after.

Upon a division of the paupers, under the Act of 1814, the mother of Robert, was assigned to Westbrook — her son George to Falmouth — Robert, the present pauper, was then living in Falmouth under the indentures.

The Court were authorized to render judgment by nonsuit or default, according to the law of the case.

Hilliard, for plaintiffs.

Kent, for defendants.

RICE, J. — By the Act of the Legislature of Massachusetts passed February 11, 1794, twelve modes were provided in which a legal settlement might be obtained, two of which only will be noticed.

By the second mode, legitimate children follow and have the settlement of their father, if he have any within the Commonwealth, until they gain a settlement of their own; but if he shall have none, they shall in like manner, follow and have the settlement of their mother, if she shall have any.

By the eleventh mode, any minor who shall serve an apprenticeship to any lawful trade, for the space of four years, in any town or district, and actually set up the same therein within one year after the expiration of said term, being then twenty-one years old, and continue to carry on the same for the space of five years therein, shall thereby gain a settlement in such town.

The pauper did not obtain a settlement in his own right, under the eleventh mode, because he did not set up his trade in Falmouth as therein provided, if the business of farming can be called a trade.

At the birth of the pauper, his father and mother had their legal settlement in Falmouth, in that part now Westbrook, and never lived in that part of the town, which, after the division, remained Falmouth.

At the time of the division of the town, the mother of the pauper was supported by the town as a pauper, but his father was absent from the town.

By the Act of separation, among other things it is provided, that all persons who are now absent from said town of Falmouth, and shall hereafter become chargeable as pau-

pers, shall be returned to and maintained by that town in which they obtained their inhabitancy, before their removal.

Under the facts, as they exist in this case, had the father become chargeable, the town of Westbrook would have been liable for his support. Does the settlement of the pauper follow that of his father, under the general law then in force?

When the town was divided the pauper was living with James Merrill, as a servant, under indentures entered into by said Merrill with the overseers of the poor of the town of Falmouth. Merrill lived on territory within the present town of Falmouth.

The fact, that a minor is bound as an apprentice or servant, by the overseers of the poor, does not render such minor a pauper. *Leeds* v. *Freeport*, 10 Maine, 356; *Milo* v. *Harmony*, 18 Maine, 415.

But it is contended that the pauper was emancipated by the act of the overseers of the poor, in binding him to service, and obtained a settlement in his own right, under the Act of division.

The law is well settled, that a minor, who has been emancipated, may acquire a legal settlement in his own right. But we find no case, and none has been cited, in which a minor has been held to have been emancipated, from the fact that he had been indented as a servant or apprentice by the overseers of the poor.

In *Milo* v. *Harmony*, it was held that a minor, who was bound to service, was emancipated; not, however, by the act of binding, but by the death of the parents. Emancipation is, ordinarily, matter of contract, or agreement. When the parents are living, there must be consent proved on their part, or acts from which such consent may be inferred, to constitute emancipation. It is not accomplished by removing the child from the control of the parent, *in invitum*, by the overseers of the poor, though both parent and child may, for the time being, be paupers. The overseers of the poor, may, it is true, bind as apprentices or servants, the

minor children of poor and indigent persons, who are themselves unable to afford them suitable support, and the control of such persons over their children, may thereby be temporarily, or even permanently, suspended. But if the child should be discharged from its indentures, and the parent become of sufficient ability to furnish it support while in its minority, he would at once be reinstated in all the rights of a parent, in as full a manner as if he had never been visited by misfortune.

In the case at bar, the father was poor, and unable to support his wife and children, and they consequently became a charge upon the town. But it does not appear that he ever intended to abandon this child, or consent to his emancipation. On the contrary, after the pauper departed from his master, his father, on his return from Vermont, took charge of him and removed him out of the State, thus distinctly repelling the idea of abandonment or emancipation.

We think the facts, as agreed, show clearly that the pauper has a derivative settlement from his father, and that the settlement of his father was in Westbrook, and not in Falmouth. *Plaintiffs nonsuit.*

VEAZIE BANK *versus* PAULK.

By c. 69, R. S., it is provided, that if any person upon any contract, shall take or reserve, directly or indirectly, for loan of moneys, &c., above the rate of six dollars upon one hundred dollars, for one year, in an action thereon against the debtor, he may avoid such excess.

It is also provided by the Act of amendment to R. S., c. 77, § 49, that no bank in this State shall be permitted to take any greater rate of interest or discount on any note, draft or security, than at the rate of six per cent. a year; but such interest or discount may be calculated and taken according to the established rules of banking; *provided*, that in discounting drafts, bills of exchange, or other negotiable securities, payable at another place, the bank so discounting the same, may, in addition to said interest, charge the then existing rate of exchange between the place of discounting, and the place where such security may be payable.

Banking corporations, as to *usury*, are subject to this general law, modified in the Act relating to Banks; and when, in discounting paper, a greater rate

than the legal interest is taken or reserved by the bank, such *excess* only can be avoided in an action brought by them upon the paper.

And when the paper discounted, on which illegal interest is taken, was made for the *accommodation* of the borrower, and this was known to the bank, the defence of usury is available by the parties to the paper, as to such *excess*.

An action may be commenced on a note, on the same day it is legally protested for non-payment.

ASSUMPSIT.

This, and five other suits, commenced on the same day of the date of the protests, upon bills of exchange, in which defendant was either drawer or indorser, were submitted to the decision of the full Court, under this state of facts.

The defendant offered evidence to prove usury in the discounting of each piece of paper — that interest at the rate of one per cent. per month, or more, was taken and reserved; and that all the paper was discounted by the bank for defendant, being accommodation paper, and made for the purpose of raising money thereon, by way of discount, not being put in circulation or made any use of until discounted by plaintiffs.

If the evidence offered is admissible, to defeat the actions, the cases are to stand for trial; but if plaintiffs are entitled to judgment, defaults are to be entered and damages assessed by the Court.

A. W. Paine, for defendant.

The defence in these cases is usury, and arises under c. 77, § 49 of the Bank Act. The paper in question has been made and discounted in direct violation of this provision, and is therefore a void contract. 1 Parsons on Cont. 381, note. *White* v. *Buss*, 3 Cush, 448; 31 Maine, 247; 32 Maine, 448.

Here every part of this contract was tainted, and there can be no separation whereby the contact is vacated. *White* v. *Franklin Bank*, 22 Pick. 181, and cases cited; *Atlas Bank* v. *Nahant Bank*, 3 Met. 581; *Western Bank* v. *Mills*, 7 Cush. 539; *Collins* v. *Blautern*, 1 Smith's L. C. 413.

Such being the law upon general principles regulating contracts, it becomes an important and more doubtful

question whether the statute of usury, c. 69, R. S., will save the notes from that fate.

Notwithstanding this Act affected banks as well as individuals in its application, the Legislature saw fit to enact this also that "no bank in this State shall be permitted to take any greater rate of interest or discount on any note, draft, or security, than at the rate of six per cent. a year.

This is not to be presumed to have been enacted for no object. It was after the Act before cited, and if inconsistent with it, then operated as a repeal *pro tanto*, or as modifying its effect to the same extent.

That such was its design and effect may be inferred from the consideration of the subject about which they were legislating, the system of banking, that it might be restrained and regulated so as to be as little obnoxious as possible; and by examination of the various sections of the law, this intention will be seen to have been carried out.

To the prohibitions contained in this law no penalty is enacted. The State forbid, and there the matter stands.

The prohibition as to interest is absolute, and nothing appears in any other part of the Act to prevent it from having its full effect.

When two statutes are passed, one subsequent to the other, on the same subject, the latter is to be construed as controlling the former.

Again, it may be doubted whether our law against usury was really intended to embrace banks, at all, those being left to be treated with by a law made especially for them. This appears from the law itself.

I am aware that the Court in Massachusetts did decide that banks were within the prohibitory effect of the general usury laws. But their reasoning on the subject only strengthens the ground of this defence. They had only one general Act.

In the cases at bar the general law does not invalidate the contract, and the language and provisions are applicable only to *persons*.

And then superadded to this is another law made particularly for banks. The reason of the construction given in Massachusetts does not lie here, and it by no means follows that the construction would require it.

The only authority banks have to loan and negotiate moneys on banking principles, is subject to the restrictions mentioned in that chapter. One of these restrictions is contained in § 49, and is positive and definite.

The consideration of public policy as well as the principles of law, require that these contracts should be declared illegal and void.

If the public wish the law otherwise and in their folly desire that banks should be permitted to violate the law with impunity, the Legislature have only to say so, and the object is effected. *U. S. Bank* v. *Owens*, 2 Pet. 527; 22 Pick. 181.

A minor question is here raised, that at all events the usurious interest shall be deducted. To this there is no objection, and therefore provision is made for the assessment of damages.

But we claim exemptions from a contract made in violation of law.

We object also that the actions are prematurely commenced.

Kent, for plaintiffs.

RICE, J. — These actions were submitted together, and depend upon substantially the same principles.

Chapter 69, § 1, R. S., establishes the legal rate of interest, in this State, at six dollars upon one hundred dollars, for one year; and at that rate for a greater or less sum, and for a longer or shorter term.

By § 49 of Bank Act, passed in 1841, no bank in this State is permitted to take any greater rate of interest or discount, on any note, draft or security, than at the rate of six per cent. a year.

These Acts went into operation at the same time, and their

provisions, so far as the rate of interest is concerned, are entirely consistent with each other, except in this, that interest or discount may be calculated by banks according to the established rules of banking, and when the securities discounted are payable at another place, they may, in addition to said interest, charge the then existing rate of exchange between the place of discounting and the place where such security may be payable.

The two statutes are to be construed together, the general law being modified by the specific provision of the banking law, so far, and only so far, as the latter varies from the former.

Banking companies are within the provisions of the statute against usury. *Maine Bank* v. *Butts*, 9 Mass., 49. Formerly, the penalty for taking usurious interest, was the forfeiture of the entire sum loaned. On general principles, a contract made in violation of law, cannot be enforced in a court of law. But it is competent for the Legislature to provide a penalty less severe for an infraction of law, and it has so done in relation to usurious contracts. By § 2, c. 69, R. S., the penalty provided for usurious contracts, is a forfeiture of the excess over and above the legal rate of interest. This statute is general in its terms, and applies as well to corporations as to natural persons, and in all cases, unless modified by specific statute provisions.

Where accommodation paper, no matter what may be its form, is discounted by a party, with knowledge of its true character, the defence of usury may be set up between the parties to such paper, and the party by whom it is originally discounted, and the excess of interest above the legal rate avoided. The penalty of the statute cannot be evaded by a mere change of form. The actions in this case were not prematurely commenced.

According to the terms of the report, the actions are to be defaulted, the defendants to be heard in damages by the Court.

† ROGERS *versus* MCPHETERS.

In the deed of the Land Agent of this State was this reservation: — "Reserving however to actual settlers thereon the right to perfect their titles to such lands in the same manner as if this conveyance had not been made": — *Held*, that such reservation was designed only for those who had contracts in writing by which titles could be perfected.

Parol evidence is not admissible to determine the *intention* of the parties to a deed. *That* is to be gathered from the deed itself.

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

WRIT OF ENTRY.

The State formerly owned the premises, and the demandant claimed them under a deed from the Land Agent, in which was this reservation: — "Reserving however to actual settlers thereon, the right to perfect their titles to such lands in the same manner as if this conveyance had not been made."

The tenant offered to prove that he had occupied the premises for fourteen years; that the Land Agent told him to go on and work it out; that the Agent thought it worth 75 cents per acre; that no price was agreed upon; that by request of one acting under the Agent, he worked out ten dollars on the road, which was to go in part pay for the land.

He also offered to show, by parol, that at the time the deed to plaintiff was made, the reservation therein was intended to cover all such cases as tenant's; that when individuals have gone on and commenced making farms, the State, in their sales, has protected the settler, before sales were made; that the intention was to protect all who had taken up land and not fully settled for the same.

It was agreed, if the evidence was admissible, and would constitute a defence in whole or in part, the cause was to stand for trial; otherwise a default to be entered.

Knowles & Briggs, for tenant, argued that the tenant was an actual settler, and one intended to be protected by the reservation in the deed.

Kent, for demandant.

APPLETON, J. — The plaintiff, to establish his right to recover, read in evidence a deed of the demanded premises from the State, in which was reserved "to actual settlers thereon, the right to perfect their title to such lands in the same manner as if this conveyance had not been made."

It is in proof that the defendant, or those under whom he claims, commenced making a farm on the land in dispute, some thirteen or fourteen years ago, with the verbal consent of the Land Agent of the State, but without fixing any price for the land, or making any agreement whatsoever for its purchase. A verbal contract to purchase, being within the statute of frauds, c. 136, would not have been binding. But in this case, no contract, verbal or written, appears to have been made. The legal title to the demanded premises remained in the State until they were conveyed to the demandant. As against the State, the defendant had no legal right to perfect his title to these lands, for he had not entered into any contract, upon the performance of which, his title to the same was to become perfect. The demandant taking the title of the State, is bound to perform all its obligations. But as the defendant has no rights against the State, so he has none which can be set up in opposition to those of the demandant.

The intent of the parties to the deed is to be gathered from its language, and that neither protects nor recognizes the rights now claimed by the defendant. No principle is better established, than that parol evidence is not admissible to change or alter the meaning or effect of the reservation made in the conveyance under which the demandant derives his title. *Defendant defaulted.*

† WILSON *versus* RING.

A mortgagee in possession of real estate, for condition broken, cannot be dispossessed thereof by the mortager, in a suit at *law*, even after payment of the mortgage debt. In such case the remedy is in equity.

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

WRIT OF ENTRY.

As evidence of his title to the premises, the demandant produced a mortgage deed of one W. G. Bent & al. to Royal Willard, and an assignment to himself, executed and recorded in 1835, together with the last two notes recited in the condition.

The tenant claimed title by a mortgage from said Willard to one Gordon, in 1834, who was admitted to have been the owner of the premises, and had then conveyed them to Willard.

The latter mortgage with the notes was assigned to one Weston, who assigned it to one Ramsdell by whom it was foreclosed.

The tenant subsequently obtained the title of Ramsdell, and the possession has ever been held by him and those under whom he claims.

Demandant alleged fraud in the transfer of the Gordon mortgage, and offered to prove that the notes described therein had been paid by Bent; and that to uphold the mortgage it was assigned to Weston in trust, for the use and benefit of Bent, and that Ramsdell knew about plaintiff's mortgage.

Other evidence was offered not material to an understanding of the case.

It was agreed that if the testimony offered by demandant was admissible, and would affect the legal rights of the parties, the cause is to stand for trial; but if the evidence by tenant furnished a good defence to the suit, a nonsuit to be entered.

A. W. Paine, for tenant, made several objections to the maintenance of the suit, among which was, that demandant's

remedy, if any where, was in equity. *Howard* v. *Howard*, 3 Met. 557.

N. Wilson, pro se.

APPLETON, J. — It is well settled when the mortgage debt has been paid, though after breach of condition, that the mortgagee cannot maintain a writ of entry to obtain possession of the mortgaged premises.

It is equally well settled, that the mortgagee having entered into possession for breach of condition, and thus having the legal estate, may successfully resist the suit of the mortgager at law, though the debt may have been paid since such entry. In such case, his remedy is by bill in equity. *Parsons* v. *Willis*, 17 Mass., 420.

In this case, the assignee of the first mortgage, after breach of the condition, having the mortgage and notes duly assigned, entered and foreclosed the mortgage. The tenant, an innocent purchaser, claims under his foreclosure. The plaintiff's title is subsequent in the time of its origin, to that of the defendant's. According to all the authorities, his remedy, if any, is by bill in equity. *Hill* v. *Payson*, 3 Mass. 560; *Parsons* v. *Willis*, 17 Mass. 420; *Howard* v. *Howard*, 3 Met. 557. *Plaintiff nonsuit.*

† MCQUESTEN *versus* SANFORD.

To charge a carrier with the loss of personal ornaments packed in a trunk with the baggage of the owner, it must satisfactorily appear that the trunk was not rifled *after* it was so packed and *before* it reached the possession of the carrier.

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

TROVER, to recover the value of a gold watch and chain, gold breast pin, two gold rings and two gold cuff pins.

A demand of the property was admitted.

The defendant was captain and part owner of the steamer Boston, running between Boston and Bangor.

Plaintiff, a married woman, introduced the deposition of John Allison, of Boston, who testified that she was at his house, in Boston, in June, 1853, and had a trunk with her, and left about the 17th of that month. She left his house in company with her daughter, to take the steamboat; she went down in a hack. He saw the trunk carried on board defendant's boat, by one acting under his orders; he could not say the trunk was locked when he last saw it, but he was guarding the baggage for some five minutes before it was taken on board, and if it had not been locked, he should probably have noticed it; it was not open.

She also introduced D. F. Leavitt, who testified that in June, 1853, he went to the Boston's wharf, at Bangor, to get his wife's and plaintiff's baggage; he took plaintiff's trunk from the baggage master; in taking it up by the handle on the top, he found it give a little and then saw the lid was held down by the straps, being unlocked and the catch or staple out. He did not open it but left it at plaintiff's house in the same condition he found it.

The plaintiff also testified that she packed her trunk the day before she took the boat, at Amesbury, and came from there to Boston by railroad. The articles sued for were put into a box and placed in the bottom of the trunk; it contained clothing, and a rack was in above, containing a music book and a shawl. At eleven o'clock of the day she left Boston, she unlocked her trunk and put some things on top, and then locked it again. At four o'clock the same afternoon, she left and went on board of the steamer. When the trunk was brought home, it was unlocked and the jewelry was all missing. The trunk seemed to have been overhauled and the box, in which the jewelry was placed, was near the top of the trunk.

The plaintiff also put into the case a description list of the articles in the trunk, alleged to have been lost, under § 5, c. 44, of Acts of 1853.

There was evidence, also, as to the value of the articles.

It was agreed that the full Court should decide upon the

admissibility of the testimony, much of it being objected to, and the effect of it, and enter judgment by nonsuit or default.

Rowe & Bartlett, for defendant, made several legal objections to the maintenance of this suit, which it is unnecessary to notice, as they were not involved in the decision. They also insisted that there was no proof of loss by the fault of defendant. Plaintiff's own statement, if received, rendered it probable that the trunk was rifled before it reached the steamer.

There might have been opportunity at Amesbury after it was packed; on its way to Boston; after it arrived there, and before she opened it, for she made no examination there; and there was ample opportunity after she opened it, from eleven to four o'clock.

Ingersoll, for plaintiff.

TENNEY, J. — It is agreed by the parties in this case, that the Court may decide upon the admissibility of the testimony, &c., and the effect thereof; and enter a nonsuit or default, or give such other direction as the rights of the parties may require, upon the law and the evidence.

At about 11 o'clock, in the forenoon, at Boston, the plaintiff unlocked the trunk containing the articles alleged to have been lost, put some things on the top, without making any examination, or taking notice that it had an appearance different from that which it presented after it was packed at Amesbury, and then locked it. About four o'clock, in the afternoon of the same day, she went to the steamboat, and the trunk was taken on board by the direction of the defendant. During this interval of five hours, it may be inferred from the evidence, that the trunk was at Mr. Allison's, in Boston; but its situation, and want of exposure to be opened without the knowledge of the plaintiff, or any one interested, to have it kept in safety, is not at all shown. It does not appear that the plaintiff saw it during this time; and for aught which appears in the case, the contents could have

been taken from it with as much facility, and without her knowledge, as they could have been while they were in the defendant's charge. It is true, Mr. Allison saw the trunk when it was taken on board the boat, and he states, if it had not been locked he should probably have noticed it. But he could not say it was locked at that time, and the witness who received it of the baggage master at Bangor, testified that he took up the trunk by the handle on the top, found it give, and then saw that the lid was held down by the straps, that it was unlocked, and the catch or staple was out. From this evidence, it is manifest that the trunk might have been in the same condition when it was first taken by the defendant's order, and if it was then unlocked, Mr. Allison might not have noticed that it was so, more than did the other witness who received it afterwards.

The evidence fails, also, to make it certain that the trunk was not opened and rifled after it was packed at Amesbury, and before the plaintiff unlocked it at Boston. The jewelry might have been taken before her arrival, and the derangement of the remaining contents of the trunk escape her notice, when she made no examination on opening it.

The evidence of a tortious taking, while the goods lost were in the defendant's charge, is insufficient to satisfy us that he should be holden in this action, even if the legal grounds taken by the plaintiff's counsel, are correct. There is, therefore, no basis for a decision of the questions of law, which have been presented and discussed in argument.

Plaintiff nonsuit.

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† LARRABEE *versus* WOODMAN.

Defendant quitclaimed to plaintiff his interest in a township of land, after there had been contracts to sell certain lots to settlers, and the plaintiff gave a bond to save him harmless from his obligations and contracts pertaining to the lots sold, and was to receive the sums then due, or what might be due from the settlers on their contracts; and the bond also recited that one of the settlers owed *about* $130, when in fact he owed only $30:—*Held*, in an

action to recover the difference, that the bond showed no undertaking on the part of the defendant that such sum should be collected, but that the parties left the sum due from settlers as uncertain, and that no action would lie against defendant for money by him received prior to the contract.

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

ASSUMPSIT, on an account annexed, and for money had and received. The writ also contained a count as follows: "For that plaintiff agreed to hold said defendant harmless of a certain bond of Woodman and others to one Gelerson, and said defendant in consideration promised that said Larrabee should have and collect the sum due from said Gelerson to entitle him to a conveyance under said bond, and that said sums should be about $130: and now said plaintiff avers that at said very time said Charles had collected of said Gelerson all that there was to be paid by said Gelerson and said Larrabee long since conveyed to said Gelerson and held said Woodman harmless of same, whereby said defendant was, by his agreement, bound to pay said plaintiff said sum as aforesaid and interest."

The defendant, in connection with two other persons, owning a township in Aroostook county, the proprietors had sold certain lots and given bonds to convey the same on payment of the consideration; and had mortgaged the same to one Lewis & Woodman to secure certain notes of hand.

The plaintiff purchased the defendant's interest, and according to the testimony, "was to step into Woodman's place, and Woodman was to step out."

On the trade being made, the plaintiff gave to defendant a bond, the sums represented as due from settlers being taken from defendant's statements, and that part of it bearing upon this case was as follows:—"Now whereas said Charles has this day quitclaimed me his interest in said land, I do therefore, in consideration thereof, promise and agree with said Charles Woodman, to hold him harmless of one third part in amount of said notes now remaining unpaid, meaning to keep said notes and mortgage to uphold my

own title and to enforce said notes if I please, but to make, to said Woodman, payment of such sum or sums as he may be bound to pay, and actually pay, from their enforcement in any way against him, meaning this agreement shall apply only to such notes specified in said mortgage, as are at this date unpaid in part or in the whole. * * * And for said consideration, I further agree to hold him harmless of any bonds, agreements or obligations, for the conveyance of small lots in said township, being mostly or wholly settler's lots, to the following individuals, to wit:—Josiah Gelerson, one lot of one hundred and fifty acres, according to the bond given, * * * * said Charles to be held harmless of his obligation to said settlers, by me, and I am to receive and be entitled to have all sums due, or that will become due from said settlers, as consideration money of said lots, there being due about $130 from said Gelerson, Cummings uncertain, Leighton about $54, from said Tuck about $450.

This bond was made in May, 1850. In July, 1849, the defendant received from Gelerson, $166,02; and at the time the bond was made, Gelerson, in fact, owed for his land only thirty dollars, which he afterwards paid to plaintiff, and obtained his deed.

The case was submitted to the full Court, with power to draw inferences as a jury might, and render judgment by nonsuit or default.

Kent, for defendant.

The contract was that Larrabee was to step into defendant's place. The fact of more or less being due from Gelerson, whether $30 or $130, does not appear to have been any part of, or inducement to, the contract.

Larrabee recites, that *about* $130 was *supposed* to be due from Gelerson. Had it turned out, in this or either of the other cases named, that a larger amount than was supposed, was found actually due, Woodman could not have claimed the excess.

It was, in fact, a jumping trade. Woodman collected not a cent after the trade.

If the money is claimed on the ground of misrepresentation, the action is not in the proper form.

The bond of plaintiff is not signed by defendant, and does not bind him.

Rowe & Bartlett, for plaintiff.

It is clear that in equity and good conscience, defendant holds $100 which belongs to plaintiff, whether he received it before or after the contract. On all the facts, he must be held to have received it after. He represented it then to be due, and ought not to set up his own fraud. He may have made a mistake in dating the receipt.

But if he received it before the contract, then he held the money from the time of such contract, as plaintiff's trustee.

By mistake, arising from misrepresentation of Woodman, the plaintiff paid him more money than he was bound to pay on the basis of the trade. That excess can be recovered under the money count.

APPLETON, J. — The defendant, having an interest in a township of land in the county of Aroostook, on the 25th May, 1850, quitclaimed the same to the plaintiff, who then, in consideration therefor, gave him back a bond conditioned, among other things, to save him "harmless of any bonds, agreements or obligations for the conveyance of small lots in said township" * * "being mostly or wholly settlers' lots, to the following individuals, to wit, Josiah Gelerson, one lot of one hundred and fifty acres, according to the bond given," and to other individuals enumerated in the plaintiff's bond to the defendant; "said Charles to be held harmless of his obligation to settlers by me; and I am to receive, and be entitled to receive, all sums *due*, or that *may be due*, from said settlers, as consideration money of said lots, there being due *about* one hundred and thirty dollars from Gelerson," &c. Upon settlement with Gelerson, it appeared that the sum due from him was about thirty dollars, which he paid, and received from the plaintiff a deed in conformity with the terms of his bond from the defendant.

This suit is brought to recover the difference between the sum paid and one hundred and thirty dollars, "about" which amount, it would appear from the plaintiff's bond, he expected to have been due.

The parol evidence introduced in the defence tended to show that the transaction was this, "the plaintiff was to step into Woodman's place, and Woodman was to step out, that was the whole bargain." The amounts supposed to be due were stated as matters of estimate, but not of certainty. In such a bargain, there would necessarily be very considerable uncertainty as to the result.

The plaintiff claims to recover upon a special contract, according to which, as he alleges, the defendant "promised that said Larrabee should have and collect the sum due from said Gelerson, to entitle him to a conveyance under said bond, and that said sum should be *about* one hundred and thirty dollars." The parol evidence of the plaintiff fails to show that there was any such contract, nor is its existence a legal inference from the terms of the bond given by the plaintiff to the defendant. No engagement was made by the defendant in that bond. The engagement was rather made with and to him.

When the money indorsed on the bond was received by the defendant, it was as much his money as any money in his hands, and belonging to him, nothing has since occurred by which the defendant has agreed to transfer that amount to the plaintiff.

The use of the word "about" shows that the amount due was uncertain. By the bond the plaintiff was to have "all sums due, or that may be due." What those sums might be, both parties chose to leave indefinite. Had the parties agreed upon a definite sum, or made their negotiation upon the basis of some fixed amount being due, nothing was easier than for the plaintiff to have required a guaranty for such amount, and then his rights would have been definitively settled. No sum was agreed upon, and the inference from the

whole transaction is, that none was intended to be fixed or determined as and for the sum due from the settlers.

Plaintiff nonsuit.

† LANGLEY *versus* ADAMS *& al.*

Bail taken on mesne process is discharged by a subsequent increase of the *ad damnum*.

ON FACTS AGREED.

DEBT, on a bail bond.

Henry A. Head, one of the defendants, signed a bail bond for the other defendant in a former suit.

While that suit was pending, the *ad damnum* was increased, on motion of the plaintiff, and by consent of the counsel for Adams, under leave of Court. Judgment was entered for plaintiff and execution issued and a return made thereon by the officer of *non est inventus*.

In the present suit no service was made on Adams, and Head only appeared.

If this suit is maintainable against Head, a default was to be entered; otherwise, a nonsuit.

M. L. Appleton, for defendant, cited *Bean* v. *Baker*, 17 Mass. 591; *Hill* v. *Hunnewell*, 1 Pick. 192; *Willis* v. *Crooker*, 1 Pick. 204; *Brigham* v. *Este*, 2 Pick. 420; *Putnam* v. *Hall*, 3 Pick. 445; *Mooney* v. *Kavanagh*, 4 Greenl. 277.

Knowles & Briggs, for plaintiff.

RICE, J. — The action is debt upon a bail bond. No service, in this action, has been made upon Adams. Head only defends. The case finds that the plaintiff, in 1847, sued out a writ against Adams, (the principal in the bond now in suit,) on which he was arrested and held to bail. Head became his surety. The *ad damnum* in that writ was one hundred and forty-seven dollars. After the bond had been given and

the action entered in Court, without the knowledge or consent of the defendant Head, the *ad damnum* in the original writ was increased.

This was a material alteration in the contract for bail into which the defendant had entered, and by which his liability was changed. He had a right to insist on terms of his contract as originally made, and it was not competent for other parties, without his consent, to increase his liability on that bond. By so doing, they destroyed its validity as to him. *Bean* v. *Baker*, 17 Mass. 591; *Hill* v. *Hunnewell*, 1 Pick. 192; *Willis* v. *Crooker*, 1 Pick. 204.

The nonsuit was properly ordered and must stand.

APPLETON, J., having been of counsel in this case, took no part in the decision.

NASH *& al. versus* BABB *& al.*

The neglect or refusal of a poor debtor to expose and deliver property on which a lien is certified by the justices who hear his disclosure, on a legal demand being made, is, in effect, a forfeiture of his bond.

And the damages to be recovered, in an action upon such bond, are not necessarily determined by the disclosure, or the adjudication of the justices as to what property a lien was given, but from all the evidence in the case.

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

DEBT, on a poor debtor's relief bond.

A certificate of discharge of the debtor, according to § 31, of c. 148, R. S. was relied upon in defence; and evidence, under objections, tending to prove that, by reputation, the debtor was worthless at the time of the examination.

The plaintiff produced the disclosure, and a certificate of the justices granting a lien on one carpet, one clock, one feather bed, one sofa, fifty bushels of oats, and hay exceeding ten tons, in the barn where the debtor lived; also an execution on the creditor's judgment with the officer's return thereon, within thirty days from the time of the examination, that he had demanded the property named in the certificate,

and the debtor neglected and refused to deliver, expose, and discover to him the same, and he therefore returned the execution in no part satisfied.

The cause was submitted to the full Court.

Knowles & Briggs, for defendants.

1. The disclosure does not show that any of the property enumerated in the justices' certificate was liable to that lien. R. S., c. 148, § 34.

2. The justices are not required by law to give such certificate. If the property disclosed liable to be levied on by the creditor, be more than enough to satisfy the execution, then the creditor shall have a lien on so much as the justices in their record shall judge necessary. *Idem.*

3. A lien of this kind is created, if at all, by law, and not by the record of the justices. *Torrey* v. *Berry*, 36 Maine, 589; *Hatch* v. *Lawrence*, 29 Maine, 480.

A. W. Paine, for plaintiff.

The debtor having refused to surrender the personal property disclosed, shall receive no benefit from the certificate of discharge. R. S., c. 148, § 34.

The facts proved bring the case within the exact language of that section.

The bond is thus forfeited and plaintiff entitled to actual damages. The disclosure shows enough set apart by the justices to pay the judgment; and also other property of which the debtor was once owner, and which has never been lawfully disposed of. The whole disclosure shows a fraud upon creditors.

The Court are authorised to draw inferences as a jury, and here is property enough withheld to pay our debt.

Upon all the evidence submitted the damages are to be computed. *Torrey* v. *Berry*, 36 Maine, 589.

TENNEY, J. — It appears by the officer's return on the execution in favor of the plaintiffs against the principal defendant in this suit, that within thirty days after the disclosure of the debtor, the property on which the creditors

had a lien, by the justices' certificate, was demanded and there was a refusal to deliver the same. By this refusal, the debtor lost the benefit of the certificate of the justices of the peace and quorum, who administered to him the poor debtor's oath; and the bond is to be treated as broken. R. S., c. 148, § 34; *Hatch* v. *Lawrence*, 29 Maine, 480.

When the debtor refuses to deliver property upon which the lien attaches, on a legal demand, he cannot invoke his disclosure, as conclusive evidence, touching the property which he owned, and which was not exempt from attachment. He cannot withhold the property, which should have been delivered, when properly demanded, thereby depriving the creditor wrongfully of his lien, and confine him to the facts stated in his own disclosure, or to the judgment of the justices upon those facts, in the question of damages upon a suit, for the breach of the bond. "The amount assessed shall be the real and actual damage and no more." Statutes of 1848, c. 85, § 2; *Torrey* v. *Berry*, 36 Maine, 589. The creditor may prove that the debtor was the owner of other property, beside that which is referred to in the justices' certificate, as subject to a lien, that was liable to be attached by a creditor, if it could be reached; or that goods were fraudulently disposed of to prevent an attachment, all which could be considered in making up the damages.

The disclosure is properly relied upon as evidence on the question of damages in this case. The account given of property, by the debtor therein, which he admits that he once owned, is very indefinite and unsatisfactory. Parts of it, which he represents as having been transferred to others, is not shown to have been sold in a manner, which makes the transfer a legal sale against his creditors.

The amount of the judgment, when obtained, was not far from the sum of seventy-five dollars. The damages in the present action can in no event exceed the sums named in the execution, issued upon that judgment, including interest thereon. For this amount, the judgment against the defendants should be entered. *Defendants defaulted.*

† STATE OF MAINE *versus* MORAN.

The offence to which the accused in a criminal proceeding, is called upon to answer, must be distinctly alleged.

But a complaint, that the respondent kept or deposited certain intoxicating liquors intended for unlawful sale, in a certain place, *or by some other person with his consent*, is insufficient and void.

Practice. Of the mode of presenting questions to the Court, arising under c. 48, of Acts of 1853.

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

COMPLAINT, under c. 48, of Acts of 1853.

When the case was called in the Court of trials, it was agreed to submit the complaint to the decision of the full Court. If it should be adjudged bad, a *nolle prosequi* to be entered; if sufficient, then to be remanded to the criminal term for trial.

The complaint alleged that certain intoxicating liquors were kept or deposited by defendant, *or by some other person with his consent*, for unlawful sale, &c.

Waterhouse, for defendant, objected to the complaint as void for uncertainty. 2 Russell on Crimes, 714; *State* v. *Milo*, 32 Maine, 55.

No one appeared on behalf of the State.

RICE, J. — This case is not regularly before us. The facts should have been settled before the case was brought here; or if presented on a question of law, it should have been so presented, that the defendant would have been precluded from further litigation in case the decision should be against him. The course adopted in this case, would, if permitted, postpone a final decision in this class of offences, in manifest contravention of the intention of the statute, and cannot be adopted as a rule of practice.

The complaint charges that certain liquors, described therein, were kept or deposited by one Patrick Moran, or by some other person with his consent, &c., and that said liquors were intended for sale, in this State, in violation of law. All substantive allegations in criminal proceedings should

be specifically and definitely set out, to the end that the person accused, may be apprised of the precise offence with which he is charged, and that the record of the proceedings may protect him from future prosecution for the same offence.

For a person to keep or deposit intoxicating liquors, intended for illegal sale, in this State, is an act prohibited by law. To consent to such deposit or keeping by some other person, is a different and distinct act; and whether there are provisions in the statute by which the person thus consenting, may be punished, we do not now decide. It is uncertain with which of these acts the complaint charges the defendant, and in that respect it is clearly defective.

According to the agreement a *nolle pros.* is to be entered.

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† JORDAN, *in Equity, versus* FAY.

The specific performance of a contract in writing, concerning land, cannot be compelled in a court of equity, if the description of the land is so vague and uncertain, as to require a resort to parol evidence to ascertain its boundaries, and there is no reference in the memorandum to other description which would make it certain.

BILL IN EQUITY, for a specific performance of the contract following:—

"North Lincoln, Oct. 24, 1853.

"Received of Thomas M. Jordan, Esq., thirty dollars, on account of a lot of land, joining a small tract now occupied by Michael Micue; and when said Jordan fulfils an agreement in relation to a line fence, then he is to have a deed of the same, for which this amount is in part. C. J. Fay."

The bill alleged a performance of the agreement in relation to the line fence; set out the boundaries of the land referred to, and a demand for a deed upon the respondent, and his refusal to give one.

To this bill, the respondent filed a general demurrer.

Peters, in support of the demurrer, denied the validity of

the memorandum, on account of the statute of frauds, and cited *Atwood* v. *Cobb*, 16 Pick. 227.

And if the object of the statute is to protect one against the uncertainties of verbal contracts in relation to real estate, certainly the rule will apply when a written contract is as liable to perversion, as a verbal one could be.

J. E. Godfrey, for plaintiff.

Courts of equity will decree a specific performance when the contract is in writing, and is certain, and is fair in all its parts, and is for an adequate consideration, and is capable of being performed. The form of the instrument is unimportant. Story's Eq. Jurisprudence, vol. 2, § § 751, 770.

If the description be sufficient to ascertain the estate to be conveyed it will pass the conveyance. *Worthington & al.* v. *Hyler & al.* 4 Mass. 196.

A grant of all the lands I own in said town, the bounds to be found in the county records, is a sufficient description. *Field* v. *Huston*, 21 Maine, 69.

Courts of equity will conform preliminary contracts to the real intent of the parties. Story's Eq. Juris. vol. 1, § § 152, 154, 159.

And they supply omissions in deeds. Same, § 166.

TENNEY, J. — This suit is for a specific performance of a contract, in writing, to sell land, in the following words and figures, viz.: —

"North Lincoln, Oct. 24, 1853.

"Received of Thomas M. Jordan, Esq., thirty dollars, on account of a lot of land, joining a small tract now occupied by Michael Micue; and when said Jordan fulfils an agreement, in relation to a line fence, then he is to have a deed of the same, for which this amount is in part.

"C. J. Fay."

And the bill alleges, that the land, so agreed to be sold and conveyed, is that which is described therein, by courses and distances, metes and bounds.

The defendant demurs generally to the bill, and as a ground against the power of the Court, to decree a specific performance, as prayed for, the statute of frauds is insisted on.

The memorandum signed by the defendant, is defective. It should have described the land with such certainty, that it could be understood from the writing itself, without parol proof; unless that appears in the writing itself, or by some reference, contained in it, to something else, which is certain, it does not comply with the statute. *Blagden* v. *Bradbear*, 12 Vesey, 446; *Tawney* v. *Crowther*, 3 Bro. 318; *Bagdell* v. *Drummond*, 11 East, 142; *Parkhurst* v. *Van Cortland*, 1 Johns. Ch. 273.

By the memorandum, the only description of the lot is, that it is joining a small tract, now occupied by Michael Micue, and there is in the writing no reference, by which the land can be determined with any greater certainty, than by the memorandum. The location, size and shape of the lot, are entirely wanting in the description, and without a resort to parol evidence, it would be impossible to ascertain what land was intended to be the subject of the agreement; and it forms no ground for a specific performance.

Demurrer sustained. — Bill dismissed with costs.

PARSONS *& al. versus* HATHAWAY *& al.*

By § 17, c. 148, R. S., among other things, it is provided, that the bond given by a debtor for his release on mesne process, shall be conditioned, that he will, within fifteen days after the last day of the term of the Court, at which the judgment shall be rendered in such suit, notify the judgment creditor, for the purpose of disclosure, &c.

The condition in such bond is saved by a notice, within fifteen days after the last day of the *term* at which judgment is rendered, although there had been an *adjournment* of the Court, and a *special judgment* had been entered *prior* to such adjournment.

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

DEBT, on a bond given on arrest on mesne process.

The original suit on which the bond was taken, was entered at the October term of the Supreme Judicial Court, 1853, and defaulted.

On the sixth day of the term, the Court ordered that judgment be entered up according to verdicts, opinions, *defaults*, &c., as of that day, and that all matters not otherwise disposed of, stand continued to the last Tuesday of November following, to which time the Court was adjourned.

The term continued to the 24th day of the following December, when it was adjourned without day.

The debtor, on the 26th of the same December, cited the plaintiffs before two justices of the peace and quorum, and disclosed, Jan. 14, 1854, and took the oath prescribed.

The Court were authorized to render judgment by nonsuit or default, as the law required.

A. Sanborn, for defendants.

Hilliard, for plaintiffs.

RICE, J. — The condition in the bond given by the debtor, under the provisions of § 17, c. 148, R. S., is this, he will, within fifteen days *after the last day of the term* of the Court, at which the judgment shall be rendered in such suit, notify the judgment creditor, &c. This has reference to the last day of the term, and not to the day on which a special judgment has been entered up. The day of final adjournment is the last day of the term. Any other construction would make as many last days of a term as there should happen to be adjournments during the term. Such a construction is not admissible. *Plaintiff nonsuit.*

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† STATE OF MAINE *versus* MCALOON.

An indictment against a receiver of stolen goods, knowing them to be stolen, which contains no allegation of the ownership of the property, or that the principal has been duly convicted, is fatally defective.

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

INDICTMENT, as follows: —

"The jurors for the State aforesaid, on their oath present, that Newell Burrill, otherwise called Joseph Burrill, of Bangor, in the county of Penobscot, on the 24th day of Nov. 1854, at said Bangor, three sleigh shawls, &c., (describing the property) and all of the value of thirty-seven dollars, then and there in the possesion of said Thomas H. Goodale and Walter Smith being found, feloniously did steal, take and carry away against, &c. * * * * And the jurors aforesaid, upon their oath aforesaid, do further present, that Thomas McAloon, of said Bangor, in said county, afterwards, to wit, on the same day the goods and chattels aforesaid, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have, and did then and there aid in concealing the same, he, the said Thomas McAloon, then and there well knowing the said goods and chattels to have been feloniously stolen, taken and carried away, against," &c.

On this indictment defendant was convicted.

A motion, during the same term, was made in arrest of judgment, for these reasons: —

1. It did not appear by the indictment, but that the property in the goods alleged to be stolen, was in Newell Burrill, *alias* Joseph Burrill.

2. It did not appear, but they were the property of respondent.

3. It is not alleged whose property the goods were.

This motion was overruled, and defendant excepted.

C. P. Brown, sustained the grounds set out in the motion.

The ownership of the goods alleged to be stolen, must be stated in the indictment. 2 Russell, 154 and 169; 2 Russ. on Crimes, 168 and 185.

For aught that appears the goods were either Burrill's or defendant's. It must affirmatively appear that an offence has been committed; all may be true as stated in the indictment, and still this party guilty of no crime. *State* v. *Godfrey*, 24 Maine, 233.

Abbott, Atty. Gen., *contra*, argued that the exceptions

should be overruled, as it did not appear that the motion was seasonably filed. Rule 26. And that the Court is not at liberty to depart from its own rules in criminal cases. This rule (as to motions in arrest) could not apply to any other than criminal cases, as in civil matters it was not allowed by statute. He did not argue as to the alleged defects in the indictment, as he had not been furnished with a copy.

GOODENOW, J. — The 26th Rule of Court, referred to by the Attorney General, was probably intended to be applied to civil cases only. It was made before the statute disallowing motions in arrest of judgment in civil cases.

The late Rule 19, was made since this case was tried, and is confined to criminal cases. It requires that motions in arrest of judgment, in criminal cases, shall be filed and presented to the Court for adjudication, during the term in which the accused has been found guilty.

At common law the defendant may move at any time in arrest of judgment, before sentence is actually pronounced upon him; and even when the defendant waives the motion, yet if the Court, upon a review of the whole case, are satisfied that he has not been found guilty of any offence in law, they will themselves arrest the judgment. 1 Chitty's Crim. Law, 663. As a general rule, it is necessary to allege, in an indictment for larceny, the ownership of the goods stolen to be in some person. There were some cases, under English statutes, where it was unnecessary either to allege or prove the ownership of the property stolen; but they were exceptions to the general rule. Roscoe's Crim. Ev. 579.

In an indictment against a receiver of stolen goods, it is necessary to allege and prove the ownership of the property stolen; or that the principal has been duly convicted.

The indictment in this case contains no such allegation. It is fatally defective.

Exceptions sustained. — Judgment arrested.

RICE, J., took no part in the decision.

† McKENNEY, *Petitioner for Certiorari, versus* COUNTY COMMISSIONERS OF PENOBSCOT.

Where, on an appeal from the County Commissioners, a jury is empannelled to view and award damages for land taken by railroad companies, the presiding officer has no authority to give instructions to them in matters of law.

But where this assumption of power is exercised at the request of one of the parties to the proceedings, *he* cannot complain, even if the instructions are erroneous.

If the presiding officer gives erroneous instruction to such jury, whether the party suffering thereby without fault, may not obtain relief by *certiorari*, *quere*.

PETITION for a writ of *certiorari*.

The petitioner was owner of a small parcel of land, a portion of which was taken by the Penobscot & Kennebec Railroad Company. He was dissatisfied with the damages awarded by the Commissioners, and requested a jury.

At the view and hearing of the jury, the petitioner claimed damages for a high embankment made by the railroad, a *part* of which only rested upon his land; also for damages to his garden by the wash of the earth and gravel from the whole embankment on to his garden. The evidence tended to show that in addition to the damage of taking his land, it was greatly increased by the fill in front of his lot and dwelling house.

The counsel for the petitioner requested the presiding officer to instruct the jury, *that* in estimating and awarding damages, they might take into consideration the injury already caused to his premises by the wash of the earth and gravel from the embankment, and the liability to future injury from the same cause; and in addition to the value of the land taken, they might add the injury caused to the residue of his premises by all the fill and embankments of the road in front of his lot, the base of any part of which rested upon his land taken.

These requests were refused, and the jury were told that they should not allow any damages occasioned by that part of the embankment which stands on land not belonging to

petitioner, nor any damages which might probably arise in future by the washing down of dirt and gravel.

The jury returned a verdict, and the petitioner excepted to the instructions and the refusal, which were allowed by the officer in charge of the proceedings before the jury.

Wakefield, for petitioner, contended that his request should have been complied with, and that the mode for computing damages, given to the jury, was erroneous.

He also contended that c. 41, of Acts of 1853, § § 9, 14 and 15, have modified the R. S. on that subject. The language in these sections is similar to that used in the R. S. of Mass. c. 39, § 56.

The proceedings in this case were under the law of 1841, and the decision of *Dodge* v. *County Com. of Essex*, 3 Met. 380, was in point.

Certiorari was the proper process to correct the errors of inferior tribunals. *Dow* v. *True & al.*, 19 Maine, 46.

Rowe & Bartlett, contra, sustained the correctness of the rulings and cited *Rogers* v. *Ken. & Port. R. R. Co.*, 35 Maine, 319.

The statute did not allow railroad companies to throw, or wash, gravel or dirt on to land not taken by them. For all illegal acts by them the common law afforded redress.

RICE, J. — From the facts before us we infer that the petitioner was dissatisfied with the amount of damages awarded him, against the Penobscot and Kennebec Railroad Co., for real estate taken for the use of that corporation, and had demanded a jury, under the provisions of the statute.

At the hearing before the jury, the petitioner requested the presiding officer to give certain instructions, as matter of law, as to the rule of estimating damages. The instructions requested were refused, and negatived by those which were given.

It is provided in § 3d of c. 81, R. S., that the damages to be paid by any railroad corporation, for any real estate taken by it, under the provisions of this chapter, when not

agreed upon, shall be ascertained and determined by the County Commissioners, under the same conditions and limitations, as are by law provided, in case of damages by laying out highways.

By § 16 of c. 25, relating to highways, the Commissioners, if they see cause, may appoint some person, specially qualified for the purpose, to preside at the view and hearing of the jury; and by § 17, the person who shall preside at the trial, shall keep order therein, and shall administer an oath to the jurors for the faithful discharge of their duty, and to all the witnesses examined, in the usual form.

The jury are required to view the premises, and also to hear and examine all such legal evidence as may be laid before them, with the observations of the parties, or their counsel thereon.

The verdict of the jury, or the report of the committee, duly returned to the said Commissioners, and by them accepted and duly recorded, shall be conclusive on the parties, by § 19.

There is no provision in the statute authorising the presiding officer to give instructions to the jury as to matter of law, nor for alleging exceptions to his rulings by the parties. The whole proceeding, therefore, both on the part of the presiding officer and the excepting party, was extra-official, on those points.

But the petitioner is not in a position to complain of this assumption of power on the part of the presiding officer, as it appears to have been assumed at his solicitation. Nor was he aggrieved by the refusal to give the instructions requested, nor by those which were given. He was entitled, under the statute, to a full compensation for all the damages sustained by him for real estate taken by the corporation, of which he was the owner. But the fact, that a portion of his land had been taken by the corporation, did not entitle him to incidental damages occasioned by the fill or embankment resting upon land which belonged to other parties. We do not intend to decide, that in case the instructions of

the presiding officer had been erroneous, and had not been called out by the party complaining, relief would not be granted, in this mode of proceeding. But as this case stands before us, the *Writ is denied.*

† PERLEY *versus* DOLE.

The plaintiff, being a bankrupt, deposited certain negotiable and negotiated promissory notes with the executor of his father's will, and afterwards procured them by giving a bond of indemnity to secure the executor against any liability to the creditors and legatees of the estate, and also against the claims of plaintiff's assignee in bankruptcy, or the assigns of such assignee; at the same time he passed over the notes to his surety on such bond, to indemnify him for signing the same. The surety transferred the same notes to the defendant taking a bond from him against his said liability. After these proceedings, the plaintiff's assignee in bankruptcy sold his right in this and other property, and the purchaser, in an action of trover against the executor, obtained a judgment for the value of the notes; — *Held*, that defendant had a right to withhold the notes from plaintiff and that trover would not lie.

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

TROVER, for four promissory notes.

After the evidence was introduced, it was agreed that the full Court might render a legal judgment upon the evidence admissible.

The facts in the case are fully stated in the opinion of the Court, drawn up by

TENNEY, J. — In January, 1844, after the death of Allen Perley, senior, the plaintiff, his son, put into the hands of Edward Todd, the executor of his last will and testament, the notes in controversy, all which were negotiable, and were indorsed in blank by him, and on April 12, 1844, wishing to obtain possession of them, they were redelivered to him on his causing a bond to be given to Todd, executed by his brother, Allen Perley and others, to indemnify him and save him harmless from all charge or liability, for or on account of said notes, or their proceeds, by or in behalf of

the creditors, heirs, devisees or legatees of said Allen Perley's estate, and from all claim upon the same by the assignee in bankruptcy of the plaintiff and the assigns of said assignee, and from all and every other person or persons, so that said Todd should suffer no loss therefrom, and be under no liability on account of said notes; and at the same time, and a part of the same transaction, the notes were delivered by the plaintiff to Allen Perley, as an indemnity upon his liability upon the bond. On May 21, 1844, Allen Perley having sold to the defendant all his interest in the estate of his late father, Allen Perley, as a part of the same contract, assigned and delivered the notes to him also, and in consideration, the defendant gave to Allen Perley a bond to indemnify him from all liability upon the bond given to Todd, on April 12, 1844. In 1846, Rufus Dwinal having purchased the notes, with other things, at the sale by the plaintiff's assignee in bankruptcy, obtained a judgment against Todd for a conversion of these notes, as a part of the plaintiff's assets, for their value. This judgment the plaintiff's counsel treat as having been paid; and it is in evidence, that Allen Perley considering that his liability upon the bond to Todd was fixed, after the date of the bond from the defendant, and the delivery of the notes to him, and on a payment by the defendant, that liability was discharged.

The counsel for the plaintiff insists, that by the judgment in the suit against Todd, and the discharge of the same by the debtor, the title of the notes vested in the plaintiff. This proposition cannot be admitted. Ordinarily after judgment in an action of trover, and the payment of that judgment, the property, if in existence, is regarded in law as that of the debtor; and in this case, it would, under such facts, be that of Todd. But in the conversion, he had surrendered the property, and taken in lieu thereof the bond of Allen Perley for his indemnity, and the notes were the property of the latter, certainly, till he should be discharged from his liability, either absolute or qualified.

The plaintiff has never caused this liability to be discharged in any way; but Allen Perley, in a transaction between himself and the defendant, has procured it to be done. If Allen had done it directly himself, he would be entitled to hold the notes for his indemnity. Having used them as a means of obtaining his own discharge, by putting them into the hands of the defendant, who has paid the money, to secure him for his contract, to save Allen Perley harmless from, and on account of his liability on his bond to Todd, the defendant has been guilty of no wrong in withholding the notes from the plaintiff. The latter now treats the notes as having been his, under the will of Allen Perley, at the time they were put into the hands of Todd, the executor; and the judgment against Todd shows, so far as it is in evidence in this case to affect either party, that they were in law his property, when he was declared a bankrupt; and his creditors must be considered as having had the benefit of the value of this property as a part of his assets. He parted with the same, in order to obtain the possession of it from Todd, and upon conditions, which have never been fulfilled, or absolutely. The law certainly cannot be obnoxious to such a reproach, as to allow him to recover the value of that property, of the one who has obtained the possession of it consistently with his own agreement, when he voluntarily placed it in the hands of his brother, and he has actually paid all that was necessary to save Todd harmless from all loss, after the suit and the judgment against him. *Plaintiff nonsuit.*

J. H. Hilliard, for plaintiff.

Rowe & Bartlett, for defendant.

† MAYO, *Administrator, versus* BABCOCK *& al.*

In an action of covenant broken under a quitclaim deed, in which are no covenants against incumbrances, save those which may originate under the grantor, if the declaration does not allege the incumbrances complained of at the time of executing the deed, to have originated *from*, *by*, or *under* the *grantor*, it will be bad on demurrer.

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

COVENANT BROKEN.

A general demurrer was filed to the plaintiff's declaration, and joinder.

The writ alleged that defendants, by their deed duly executed, &c., conveyed to plaintiff's intestate, "their right, title and interest, in whatever manner derived, in and unto the real estate (described in the writ) to hold, &c., so that neither the said defendants, nor their heirs, or any other person or persons claiming from or under them, or in the name, right or stead of them, shall or will, by any ways or means have, claim or demand any right or title to the aforesaid premises or their appurtenances. Now the plaintiff in fact saith, that at the time of making and executing said deed, the said tenements were not free from all incumbrances and claims from or under them, the said defendants, but that a portion of said premises had, prior to that date, been sold and conveyed to Messrs. Wm. and Jeremiah Colburn for the non-payment of taxes assessed on a portion of said property, amounting, &c. * * * each of said several taxes having been assessed upon said property prior to the date of the deed aforesaid, and were and remained unpaid and a claim and incumbrance upon said property, when said property was in and belonged to the said defendants, which said tax and claim, said defendants, by their deed aforesaid, covenanted to pay and cancel; but said defendants," &c.

The case, by consent of the parties, was submitted to the full Court, and if the action was maintainable, to stand for trial; otherwise, a nonsuit to be entered.

W. C. Crosby, in support of the demurrer.

(Several objections were urged against the maintenance of the action by an administrator, which it is unnecessary to notice.)

The covenant contained in the deed set out in the declaration, is for non-claim and quiet enjoyment merely. *Pike* v. *Galvin*, 29 Maine, 187.

The plaintiff has not set out any cause of action for any one to have against these defendants.

No action lies on a covenant for quiet enjoyment until the grantee is disturbed by eviction or ouster. 1 Mass. 464; 2 Mass. 438; 2 Hill, 105; 1 Sumner, 263; 17 Mass. 587; Yelv. p. 30, note. He alleges no eviction or disturbance. He does not allege that the taxes were assessed while the property was held by defendants, or that they were legally assessed at any time. No damage was suffered by the intestate.

Breach of covenant for quiet enjoyment must be specifically set forth. *Blanchard* v. *Hoxie*, 34 Maine, 376; 4 Pick. 87.

The conclusion of his declaration does not aid it. "He ought not to have made a conclusion in law, without showing to the Court the matter of fact, whereby it might appear to the Court whether the law is as the party has taken it to be, or not. 3 Saund. 180; 12 Pick. 67; 13 Pick. 117.

N. Wilson, contra.

RICE, J. — The case comes before us on a demurrer to the declaration. In the defendants' argument several objections have been urged against the competency of the plaintiff to maintain this action. Whether the defendants can avail themselves of these objections on general demurrer, may admit of doubt. Upon that point, however, we now give no opinion.

The plaintiff's intestate claimed title to the premises by virtue of a quitclaim deed from the defendants, in which is found the following covenant: — "So that neither the grantors, nor their heirs, or any other person, or persons, claim-

ing from or under them, or in their name, right, or stead of them, shall or will, by any way or means, have, claim, or demand any right or title to the aforesaid premises, or their appurtenances, or to any part or parcel thereof forever."

This deed contains no covenants of seizin, of good right to convey, of freedom from incumbrances, nor of general warranty, but simply a covenant of *non-claim.*

The covenant of non-claim asserts nothing respecting the past or the present. It is only an engagement respecting future conduct. *Pike* v. *Galvin*, 29 Maine, 183.

The breach set out in the plaintiff's declaration is, "that at the time of making and executing said deed, the said tenements were not free from all incumbrances and claims, from and under them, the said defendants, but that a portion of the said premises had, prior to that date, been sold and conveyed to William and Jeremiah Colburn, for the non-payment of taxes assessed on a portion of said property, amounting, when the plaintiff paid the same, on the 10th of February, 1853, to the sum of twenty-four dollars and fifty-six cents; also the plaintiff was compelled to pay, and did pay, to the treasurer of the town of Orono, to redeem another portion of said property from the taxes and interest, and expenses on account of the same, on the 20th day of July, 1853, the further sum of forty-three dollars and seventy-three cents; each of said several taxes having been assessed upon said property *prior to the date of the deed aforesaid,* and were and remained unpaid, and a claim and incumbrance upon said property when said property belonged to the defendants."

The defendants only covenant against claims arising from or under them. Incumbrances upon the estate, which did not thus originate, are not within the terms of their covenants.

The plaintiff alleges, that the taxes which he has been compelled to pay, were assessed upon the premises *prior* to the date of the defendants' deed; but how long prior, or whether the premises were owned by the defendants at the

time when the taxes were assessed which the plaintiff has paid, does not appear. It therefore does not appear that this claim or demand for taxes, originated from, by, or under the defendants. *The declaration must therefore be adjudged bad, on demurrer.*

HAYNES *versus* HAYWARD.

A distinction between *masts* and *logs* is recognized by the laws of the State; but under some circumstances the latter term may include the former.

But where a contract in writing is made to sell certain "logs," and the scale of a designated surveyor is agreed upon as the basis of the settlement between the parties, the "logs" described in the scale bill are the only articles sold, notwithstanding the surveyor enumerates a "mast" as scaled in the same bill.

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

REPLEVIN, for a mast.

Defendant claimed title under a bill of sale from plaintiff, the essential part of which was as follows:—

"Said Haynes agrees to sell, and does hereby sell to said Hayward & Co., of Bangor, all the logs cut and hauled into the Joe Merry waters, the present lumbering season, by J. & F. H. Cowan, and marked NHX."

By the same contract, Haywood & Co. agreed to purchase the said logs at the prices fixed therein; and the quantity to be determined by the scale of J. K. Gilmore.

It was afterwards indorsed upon the contract, and signed by the parties, that "the scale of Mr. Gilmore is to be taken in settlement."

The mast in controversy was cut by the persons named in the bill of sale, and bore the same mark of the logs, and was taken possession of by defendant as one of the firm of Hayward & Co., at the place where the logs were to be delivered.

The several kinds of logs described in the contract, as white pine, Norway pine and spruce, were scaled by Gil-

more and his account of the same made out; "also one mast, scaling 2,930 feet."

Other evidence as to conversations between the parties when the contract was made, was introduced subject to objection.

Upon so much as was legally admissible, the Court were authorized to render such judgment as the law required.

Blake, for defendant. Under the term "logs" the title to the mast in question passed to defendant. The word "logs" is the most comprehensive one in use to designate and embrace any stick of wood. It is the generic term, and mast, mill-log, board-log, fire-log, are specific kinds.

The title then passed, unless excepted; and the burden is on plaintiff to show that this particular stick was excepted. All the conversations, as well as declarations of defendant, were merged in the written contract, and can have no bearing on the question under consideration. Any thing to contradict or vary the written contract, must be excluded.

Nor does the scale bill throw any light upon the question. Gilmore was the agent of plaintiff to ascertain only the *quantity* of logs cut.

The scale bill was not made until after the contract was executed, and of course it was not before them, and the contract was made with no other reference to Gilmore's scale, than as a means of ascertaining the quantity.

Sewall & Knowlton, for plaintiff.

1. The laws of the State make a distinction between "logs, masts, spars and other lumber." R. S., c. 67; also c. 72 of laws of 1848, and c. 216 of 1851. It is presumed the parties entered into their contract with reference to the law. *Heald* v. *Cooper,* 8 Greenl. 32.

2. The scale bill, which is made a part of the contract, makes the same distinction.

3. But if masts may be embraced ordinarily under the term "logs," under this contract it cannot be so construed.

What Gilmore calls logs, defendant was to take, and nothing more.

APPLETON, J. — On March 25, 1853, the plaintiff contracted with the firm of Hayward & Co., of which the defendant is a member and whose rights he represents, to sell them "all the *logs* cut and hauled into the Joe Merry waters the present lumbering season, by J. & F. H. Cowan, and marked NHX." The contract, after specifying the prices, proceeds as follows, "the foregoing sale and prices are based upon the wood scale of John K. Gilmore, whose certificate of quantity shall be conclusive between the parties." In the close of the contract there is a further stipulation, that if the scale of Gilmore should not be satisfactory to either party, it may be rescaled and the certificate of the person by whom the logs may be scaled, shall be conclusive as to quantity between the parties.

The scale bill of Gilmore, to which reference is made and which is admissible in evidence between these parties, purports to be of logs scaled and counted, from Jan. 1, 1853, to April 9, 1853, and besides the logs, contains the admeasurement of one mast.

On April 9, 1853, it was agreed by the parties to the contract of sale, "to discount, from the prices before named, twelve and one half cents per thousand, and the scale of Mr. Gilmore is to be taken on settlement." This agreement is indorsed upon, and made part of, the contract of March 25, 1853, under which the defendant derives his title to the logs then contracted to be sold.

The question in controversy is, to whom the mast, the quantity of which appears in the scale bill of Gilmore, belongs.

The statutes of this State recognize different kinds of lumber, designated by different names and appropriated to different uses. There are logs, masts, spars and other lumber. It is insisted that in the contract, under which the defendant claims, the word "logs" includes within its meaning

"masts." Being a word of enlarged signification, it might, under some circumstances, receive such a construction. So it might, in some supposeable use of the term, be held to embrace "spars." But, in this case, nothing indicates that it is to receive an enlarged meaning. The quantity, by the terms of the contract, is to be ascertained from the scale bill of Gilmore, and that is to "be taken in the settlement." The scale bill is therefore in terms incorporated in the contract. Being incorporated in the contract, the sale is of a certain specific amount of logs, scaled by Gilmore, and of nothing else. There may have been masts and spars, which are a distinct species of lumber, in Gilmore's bill, but they are not included in the contract. That provides that the scale bill of Gilmore, or, if any dissatisfaction should arise as to his scale, of some one to be agreed upon, shall be final and conclusive. The contract is finally closed, by mutual consent, upon the basis of his scale of the logs. In that scale, the mast was not included. The distinction between masts and logs is to be found in the statute and in the scale bill of Gilmore, and by the adoption of that bill, it must be deemed as part of the contract, by the mutual assent of all parties.

The mast cannot therefore be regarded as having been included in the logs sold. The plaintiff is entitled to recover.

Defendant defaulted.

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† FREESE *versus* MCINTYRE.

A release under seal by the judgment debtor, of land set off on execution, to the judgment creditor, is a waiver of any defects in the levy, and confirms in the latter, the title to the land.

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

ASSUMPSIT, for use and occupation of certain real estate.

This suit was commenced in Aug., 1848, for rent of the previous six years.

The occupation of defendant was proved, and the title

of the plaintiff was by a levy made in the early part of 1842, and a quitclaim deed from the defendant to one Trask, in Dec. 1844, and from Trask, at the same time to himself. The latter deed was not acknowledged until the last part of 1851.

Trask testified that in receiving the deed he acted as the agent of plaintiff, and let to the defendant the land, who promised to pay a reasonable sum beyond the payment of the taxes; and that the rent beyond the taxes was worth $5 per year.

The levy appeared to be defective.

A. W. Paine, for defendant, made several objections to the levy. He also maintained that the plaintiff proved no title before the commencement of this suit. The law did not presume a deed to be delivered until it was acknowledged; and if the plaintiff had no title, the promise was invalid — no other consideration existed for it.

N. Wilson, for plaintiff.

GOODENOW, J. — This is an action of assumpsit, for use and occupation of land, from 1841 to 1848, inclusive. On the 14th of February, 1842, the plaintiff made a levy of an execution which he then had, on land of the defendant.

It is contended by the defendant that this levy was void, because the appraisers did not state that "they entered upon or viewed the premises at all; neither does the officer's return state the fact:" and because it does not appear that "they appraised and set off the premises, after viewing the same, at the price specified," and because the "description and appraisement of the land is not indorsed on the execution and signed by them."

It is apparent, from an inspection of the return of the appraisers, that there are serious objections to it; and they probably would have been deemed sufficient to have defeated the title of the plaintiff, if the defendant had chosen to insist upon them, and to avail himself of them. It appears that he was present when the levy was made, or that he

chose one of the appraisers; that possession of the land levied upon, was delivered by the officer to the plaintiff's attorney, and that the execution was returned satisfied; and by the deposition of John Trask, the officer who made the levy, that as the agent of said Freese, about one year after the levy, he rented the premises levied upon "to said McIntyre, he agreeing to pay as rent thereof, the taxes which might be assessed on said premises, and such further reasonable sum as said premises were worth, per annum." It also appears satisfactorily to us, that on the twenty-first of December, 1844, the said McIntyre released, sold and quitclaimed all his right to said premises to said John Trask; and on the same day said Trask, by his deed, remised and released and quitclaimed all his right to said premises to the plaintiff; and said Trask deposes, "that said conveyance was made by said McIntyre to me, in order to perfect the title to the land levied upon, and was taken by me for the benefit of the judgment creditor, and my conveyance to said Freese, was of that portion levied upon on his execution, in pursuance of the purpose of said McIntyre's deed to me."

These proceedings constitute a substantial release of all errors, and a waiver of objections to all defects which existed in the return of the appraisers, and a complete confirmation of the title of the plaintiff to the land levied upon.

If the appraisers did in fact "enter upon or view the premises," (which is highly probable, from the fact that they speak of the land as having been *shown* to them by the plaintiff's attorney, and from the fact that they describe it minutely, by courses, distances and monuments, and from the fact that they could not have done their duty faithfully, without so viewing the premises,) the Court, no doubt, would, upon an application of the plaintiff, have allowed the officer to amend his return according to the truth of the case, and in this manner, the title of the plaintiff might have been made valid against the defendant. The mode adopted to remove the objections to the levy, and to con-

firm the title, was perhaps more simple and convenient, and quite as effectual as the other would have been.

From the testimony of Mr. Trask, we are authorized to conclude that the relation of landlord and tenant existed, between the plaintiff and defendant, in about one year after the levy; and that five dollars per annum, would be a reasonable rent for the premises. The writ is dated August 7, 1848. *Judgment for plaintiff for twenty-five dollars — Damages, with interest from date of writ, and costs.*

APPLETON, J., did not sit in this case.

† WEEKS *versus* MERROW.

A minor, who voluntarily abandons his father's house, without any fault upon the part of the latter, carries with him no credit on his father's account, not even for necessaries.

ON FACTS AGREED.

ASSUMPSIT, for board of defendant's minor son.

The parties lived in different towns and had no acquaintance with each other.

Defendant's minor son left his home, ample provision being there made for him, without his father's consent or knowledge, and worked elsewhere. He subsequently boarded with plaintiff, whose business it was to accommodate boarders, to recover pay for which this suit was brought.

If, under such circumstances, the father is liable for the board of his minor son, a default is to be entered; otherwise, a nonsuit.

D. D. Stewart, for defendant, cited *Angel* v. *McLellan,* 16 Mass. 28; Story on Contracts, § § 57, 58. *Raymond* v. *Loyl,* 10 Barbour, 483; 2 Kent's Com. 193.

N. Wilson, for plaintiff.

RICE, J. — Where a child leaves his parent's house, voluntarily, for the purpose of seeking his fortune in the world, or to avoid the discipline and restraint so necessary for the

due regulation of families, he carries with him no credit; and the parent is under no obligation to pay for his support. *Angel* v. *McLellan*, 16 Mass. 28.

This doctrine is well sustained by authority, and though, at times, it may operate with apparent severity, is based upon sound principles. To permit a minor, at his election, to depart from his parent's house, with power to charge that parent with his support, would tend to the destruction of all parental authority, and invert the order of family government.

If a minor is forced out into the world by the cruelty or improper conduct of the parent, and is in want of necessaries, such necessaries may be supplied, and the value thereof collected of the parent, on an implied contract. Such, however, does not seem to be the case at bar.

According to the agreement a nonsuit must be entered.

Plaintiff nonsuit.

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† WALKER *versus* PEARSON.

Where a lot of land is conveyed, within which is fenced a portion of the street, and the monument called for by the deed is described as standing in the line of the street, there being no uncertainty in the location of the monument or street, and no reference to the *fence*, no part of the street is embraced in the deed.

ON FACTS AGREED.

COVENANT BROKEN, for breach of the covenant against incumbrances.

The deed of defendant was executed in Sept., 1847, and read thus, "beginning at a post in the south-westerly line of Court street, standing in front of the double house, now occupied by Carlton S. Bragg and Hiram Emery, and running thence, &c., (on two lines of the lot,) thence, between said lots, to Court street, thence, on Court street, to the first mentioned bounds,—together with the buildings standing thereon."

Court street, the highway alleged to be an incumbrance on part of the land conveyed, was duly laid out in 1836. The south-westerly line of the street was about three feet inside of the line on which the front fence of this lot, as well as the neighboring lots, on that side of the street, stood at the time this deed was made, and continued to stand until 1854, when it was removed by the town authorities.

Before this removal there was never any post in the south-westerly line of the street as laid out.

There was a post in the *front fence*, where the dividing line between the two tenements, named in the deed, intersected it.

On the dividing fence, about six feet from this post, stood another post, at the time the deed was made.

The Court were authorized to draw inferences as a jury might, and render judgment by nonsuit or default, as the law might require.

A. W. Paine, for defendant.

Rowe & Bartlett, for plaintiff.

RICE, J. — Two monuments are referred to in the deed; one a post in the south-westerly line of Court street, the other the street itself. It turns out that there is no post standing in the line of the street, as indicated in the deed, but there is a post standing three feet without that line, and another three feet within it. The identity of this monument is therefore uncertain. Of its location, as called for in the deed, there is no uncertainty, nor is there any uncertainty as to the location of the street, which is the other monument referred to in the deed. There can be no doubt that the parties intended Court street to be the exterior line of the lot conveyed. No reference is had to the fence then standing on the street, which would have been done had the parties designed to indicate that as a monument.

Plaintiff nonsuit.

STATE OF MAINE *versus* BRADBURY.

A way by *dedication* of the owner of the land does not become a *public highway*, without *user* for twenty years, or an *acceptance* on the part of the town.

Repairs made upon it, by a *surveyor* of highways, do not constitute *such acceptance*. *He* has no authority to bind his town.

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

INDICTMENT, for a nuisance by erecting and maintaining a building upon a common highway and public road in the town of Oldtown.

The evidence tended to prove a dedication of the way in 1832, but it was not made or used until 1836.

It appeared that at different times up to 1847, certain persons acting as surveyors of highways, in the same district, had declined working on the way, and had been so directed by the selectmen, denying that it was a town road.

There was evidence tending to prove that persons purporting to act as surveyors, had worked upon and repaired the same; and it appeared that the road had been used for many years for public travel. One person, acting as such surveyor, gravelled the way in 1844, and repaired it in 1851.

On this part of the case the instructions of the presiding Judge were: — *that* the dedication might be shown on the part of the party making it by acts or declarations; but to make it a legal street, it must have been accepted by the legal authorities of the town; — *that*, if the surveyors of the town repaired the way, it would be an acceptance by the town; — *that* three or four days work would be such an acceptance; — *that* if any person, acting as a surveyor, gravelled the street, it would be an acceptance; and *that*, if thus dedicated, and thus accepted, it would then become a highway, if generally used by the public, without proof of use for any particular length of time.

A verdict was returned against the defendant, and his counsel excepted to the instructions.

Knowles, for defendant.

A surveyor of highways has no authority beyond that

given by statute. *Jones* v. *Lancaster*, 4 Pick. 152; *Plummer* v. *Sturtivant*, 32 Maine, 328. His duty is limited to making and repairing legal roads of the town within his limits. He cannot bind the town by any contract or any act of his beyond this authority. The power contemplated in the instructions is not given by the statute and would be dangerous. Towns are not exposed to such hazards.

Abbott, Atty. Gen., for the State, argued that the instructions were in accordance with well known recognized principles, and cited *Hobbs* v. *Lowell*, 19 Pick. 405, and the cases referred to in that case.

APPLETON, J. — The defendant was indicted for a nuisance, by erecting or maintaining a building upon a common highway and public road, in the town of Oldtown. By R. S., c. 1, § 3, R. 6, "the word highway may be construed to include county bridges, and as equivalent to county road or county way." The origin of the road in dispute is shown to have been by dedication of the owner and for private purposes. If it be regarded as either a private or town way, it is not a highway within the meaning of the term, and the government, in such case, will have failed to sustain the allegation in the indictment, that it is a public highway. *State* v. *Sturtivant*, 18 Maine, 66; *State* v. *Strong*, 25 Maine, 298.

It is obvious that injuries to travelers might occur in passing over roads, which had been used and repaired by the public, without having been legally laid out, and when the town, in which they were located, would not be legally liable in consequence of such defect in their legal location. To meet this class of cases, provision was made by R. S., c. 25, § 101, by which it was enacted, that if "it shall appear that the county, town, or plantation, against which such suit is brought, has at any time, within six years before such injury, made repairs on such way or bridge, it shall not be competent for such county, town, or plantation, to deny the location thereof." It was held, in *State* v. *Strong*, 25 Maine, 297, that this did not prevent the town, when indicted for

neglecting to repair such highway, from denying its existence.

The evidence satisfactorily establishes the origin of the road, and that it was dedicated to the public by the owner of the land over which it passed. It is not alleged, or pretended, that this road has been laid out according to the provisions of the statutes regulating the laying out of highways.

Having been dedicated to, and having been used by, the public, after such dedication, for a period short of twenty years, the inquiry arises, whether the town of Oldtown has so assented to, or accepted the way thus dedicated, that the same has become a public highway, which they are liable to keep in repair and for the non-repair of which they may be indicted.

It appears that at times the officers of the town have forbidden the surveyors, in the district in which the way is located, doing any labor thereon. It likewise appears, that at other times work has been done upon the same, by the acting surveyor, or surveyors, of the town of Oldtown.

Among other instructions, the presiding Judge instructed the jury, "that if Wadleigh made out a plan of lot No. 15, and laid out lots and streets, such streets would be only private streets until accepted by the public, when they would become public streets; that the dedication might be shown, on the part of the party making it, by acts or declarations, but to make it a legal street, it must have been accepted by the legal authorities of the town; that if the surveyors of the town repaired said way, it would be an acceptance by the town; that three or four days work would be such an acceptance; that if Hiram Smith, in 1844, as surveyor, gravelled said street, it would be an acceptance; and that if any person, acting as a surveyor, performed these acts upon the street, it would be sufficient; and that if the government had proved that the surveyors acted as such, it was not necessary to show further, by the records of the town, that they were duly elected or appointed; or that the way in question was assigned to such surveyor by the select-

men of the town; *that if thus dedicated and thus accepted, it would then become a highway,* if generally used by the public, without proof of use for any particular length of time."

The dedication of a road to the public is the act of the person dedicating. The evidence is satisfactory as to the fact of such dedication. In England, it was formerly held, that the assent of the inhabitants of the parish was necessary to give it validity, but more recently the law has there been held otherwise. *Rex* v. *Leake*, 5 B. & Adol. 462. In this country, the weight of authority is in favor of the necessity of acceptance, to render the corporation liable, in case the road dedicated and accepted should become out of repair.

It is not enough to sustain the present indictment, to show that the town had accepted the road as a town way; for the defendant is not indicted for a nuisance to a town way. The cases already cited, show that it cannot be sustained by proof of the existence of a town or private way. *State* v. *Strong*, 25 Maine, 297.

The question raised by the instructions given, are of no slight practical importance; for if an acting surveyor, by a single act of labor, or by a series of acts, can give a binding assent to the dedication of a public highway, or a town way, so as to render the inhabitants liable to indictment for any defect, or want of repair of such ways, then the statute may be utterly disregarded, and the power of establishing and laying out ways, may be practically exercised without the knowledge and against the wishes of the inhabitants of the town, and without recourse to the constituted authorities to whom this subject has been entrusted.

The location of county roads is conferred by law upon County Commissioners.

The authority of an highway surveyor is solely derived from the statute. No power to bind the town, by assenting to the dedication of a road, by laboring upon one which has been dedicated, is there perceived. If he has such power, then by one days labor upon a dedicated road, he may ren-

der the town liable to indictment in all cases, whenever it should become out of repair. The location of public ways would be withdrawn from the constituted authorities, and any land owner, with the coöperation of a surveyor, may establish roads *ad libitum*, and impose upon the public all the obligation of keeping them in repair, notwithstanding they may be unnecessary or inexpedient.

It was held, in *Rowell* v. *Montville*, 4 Greenl. 270, that no adverse appropriation or use of land, as a road, for a period short of twenty years, was sufficient to raise the presumption of a grant; nor to impose upon the town the obligation to pay damages occasioned by its neglect to keep the road in repair. In *State* v. *New Boston*, 11 N. H., 413, the Court say, that "an express, formal dedication to the public, an acceptance by some public agent, properly authorized, or by long use of the public, would, upon the authorities, constitute a public highway; though, unless there had been an acceptance, express or implied, it seems the road would not become a highway." "Any individual," says RUGGLES, C. J., in *Oswego* v. *Oswego Canal Co.*, 2 Selden, 257, "may lay out a way or a thoroughfare through his own land, and may dedicate it as such to the public use. But such dedication does not confer upon the towns, in which the lands lie, the duty of improving or keeping in repair as a public highway, the land so dedicated. This will conclusively appear from a reference to the provisions, which have been in force in our highway Acts for half a century. The power of laying out, altering and discontinuing highways, has been exclusively conferred on the commissioners of highways in the respective towns." * * "Streets and roads dedicated by individuals to public use, but not adopted by the local public authorities, or declared highways by statute, are not highways within the meaning of the highway Acts."

In *Remington* v. *Millard*, 1 R. I., 93, the Court say, that "under the statute of Rhode Island, the fact that the town council have declared a way to be an open highway and has ordered it to be repaired at the expense of the town, is not

evidence of an acceptance by the public, because the town council are not to be deemed the general agent of the public. In no case is a declaration of a town council of any binding force, unless the way has been actually used as a highway for twenty years." It was decided in South Carolina, that there must be some act of acceptance by the constituted authorities where a way has been dedicated. *State* v. *Carver*, 5 Strobh., 217. A road dedicated to the public must be accepted by the county court, on its records, before it can be a public road. *Kelley's case*, 8 Grat. 632. "It is clear," remarks LEIGH, J., in this case, "that there must be, not only a dedication, but an acceptance. What constitutes the latter? Is the mere passing over the road by individuals an acceptance? If so, what numbers must pass to amount to one? Obviously if the acceptance depends upon the number of passers, there will often be great uncertainty whether the road is public or not, which may give rise to much troublesome litigation. To guard against this uncertainty and litigation, the right of acceptance ought to be in some public body." It was held, in *Hyde* v. *Jamaica*, 27 Vermont, 443, that a town must accept a road dedicated to them before they will be bound to keep it in repair, and that a highway surveyor has no power to adopt as public highways, roads already traveled. "To constitute a highway by dedication, which the town are bound to repair, there must be," says BENNET, J., "a dedication of the land by the owner, and an acceptance of the dedication by the town; otherwise it would be in the power of an individual to impose upon a town a liability to make and keep in repair a road *nolens volens*." So in *Curtis* v. *Hope*, 19 Conn. 154, it was held, that to create a highway by adoption, the road must have been made and accepted by the public.

The conclusion is, that an highway surveyor, *as such*, has no authority to accept a way which has been dedicated to the public.

The case of *Hobbs* v. *Lowell*, 19 Pick., 405, has been pressed upon our consideration, as establishing the law as

given in the instructions, to which exceptions have been alleged. The authority of that case is weakened by the very elaborate and able opinion of MORTON, J. In that case, in the conclusion of his opinion, SHAW, C. J., says, "we consider the questions, whether the assent of the public is necessary to an effectual dedication, and how it is to be given or withheld, do not arise in the present case, and the Court gives no opinion upon them; they must be considered as open for consideration whenever they occur."

The government were bound to show the road a public highway. They have failed to do so. There is and can be no authority on the part of a surveyor to assent to, or accept, a dedication of a way, so as to make the same a public highway or county road, and render the town liable to indictment for its want of repair. The instructions given were erroneous, and a new trial must be granted.

Exceptions sustained,
and new trial granted.

RICE, J., concurred in the result.

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† PHILLIPS *versus* PHILLIPS.

The covenants in a collector's deed of land sold for the non-payment of taxes, that the proceedings in the assessment and sale were according to the provisions of law, are not evidence that the necessary preliminary steps were taken to pass the title to the grantee, in an action against one in possession under a recorded deed.

ON FACTS AGREED.

WRIT OF ENTRY.

The demandant claimed title to the premises under a deed from a collector of taxes, containing covenants of the grantor that the taxes were assessed and published, and notice of the intended sale of the land given, according to law; and that in all respects he had observed the directions of the law.

Before, and at the time of the date of the collector's

deed, and when this suit was instituted, the tenant was in possession of the premises, under a duly executed and recorded deed.

The Court were authorized to render judgment upon these facts.

A. Sanborn, for tenant. The deed of the collector is not *prima facie* evidence even that the statute requirements in the sale of land for taxes, have been fulfilled. *Brown* v. *Wright*, 17 Verm. 97; *Reed* v. *Field*, 15 Verm. 672. The requisitions as to advertising and selling must be proved. c. 123, § 16, of laws of 1844.

Knowles & Briggs, for demandant.

TENNEY, J. — The demandant claims under a deed dated April 17, 1841, from Humphrey Grant, professing therein to have been the collector of taxes for the town of Hermon in the year 1840, in which deed are recited the assessment of taxes upon the lot described in the writ, the commitment of the same to the collector, and the non-payment thereof, and the subsequent sale of the premises on account of the omission of payment, to the demandant. The deed contains covenants, that the taxes were legally assessed and published, and notice of the intended sale of the premises given according to law, and that in all respects the proceedings touching the sale were such as are required by legal provisions. This is the only evidence introduced in support of the action.

The tenant was in possession of the premises, before and at the date of the collector's deed, and of the writ, under a deed from Samuel Lowder, duly executed, acknowledged and recorded, conveying the same to him, his heirs and assigns.

The title of the demandant cannot prevail. *Brown* v. *Veazie*, 25 Maine, 359. In this case, WHITMAN, C. J., who delivered the opinion of the Court, says, "sales of real estate, for the non-payment of taxes, must be regarded, in a great measure, as an *ex parte* proceeding. The owner is to

be deprived of his land thereby, and a series of acts, preliminary to the sale, are to be performed, to authorize it, on the part of the assessors and collector, to which his attention may never have been particularly called. It has therefore been held, with great propriety, that to make out a valid title under such sales, great strictness is to be required; and it must appear, that the provisions of the law preparatory to, and authorizing such sales, have been punctiliously complied with." *Plaintiff nonsuit.*

† HAYNES *versus* FULLER *& al.*

A bond for the conveyance of real estate, on the conditions being performed within ten days, which provides that it shall be void in case of the accidental non-reception of the deed of the premises from certain persons in whom the title is supposed to be, is binding, although at the time of its execution, the title to the land is not held by the persons supposed.

And such a bond is valid, although the agent of the obligors, holding the title, is unable to make the conveyance to the defendants, within the time allowed, through pressure of business.

A waiver in writing of strict performance of a specialty, must clearly appear. It must be the act of the party having something to waive, and not of the party pleading it.

The performance of a contract under seal, cannot be waived by a parol *executory* agreement.

But where the performance of the condition of a bond is limited to ten days, by the instrument, and an agreement made on good consideration to waive the performance as to time, is proved, but no time fixed for the performance, in determining what is a reasonable time, regard must be had to the original contract, and forty days delay would be too late.

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

DEBT, on a bond dated July 11, 1854. The writ was dated Sep. 8, 1854. The essential part of the condition was, "that if the said Haynes, his heirs or assigns, within ten days from the date hereof, shall make payments in money and good notes, as hereinafter stated, we bind ourselves to sell and convey to said Haynes, the following described parcels of land, at $5 per acre, one third part to

be paid in money, on reception of deed, and the remainder in equal payments, with annual interest and taxes, in satisfactory paper, on one and two years. It is hereby provided that this bond is not to be binding in case of the accidental non-reception of the deed of said land by us for the Joy heirs."

The general issue was pleaded, and by way of brief statement, the defendants alleged performance of the conditions; likewise a waiver of strict performance by plaintiff, and a reasonable time given within which time a proper deed was tendered to plaintiff.

The plaintiff introduced his bond, on the back of which was this writing, signed by defendants: — "July 21, 1854. We hereby acknowledge the receipt of eight hundred dollars, and the tender of balance of first payment of land within described, and of the notes."

There was also another writing on the back of the bond, signed by defendants, without date, as follows: — "If the within described land is conveyed, the within named Henry P. Haynes having paid as agreed, and duly demanded a deed of us, we hereby promise to pay him one hundred and five dollars for the hemlock logs and bark, peeled by Person Whittier and Joshua Tate, when we shall convey the land to him according to the bond, we having said logs and bark for that sum, and charging said Haynes nothing for what we have paid, or are to pay, said Whittier and Tate for peeling same, or for what we have paid, or are to pay for hauling out and looking after the bark, having four months to get off the logs."

By the deposition of Nehemiah Ball, introduced by defendants, it appeared, that he purchased the land described in the bond, of the Joy heirs, as agent of defendants, on July 8, 1854, — that he was requested by defendants to make a conveyance of a portion of this land to them, about the 20th of said July, but was prevented by press of business, — that, on Sept. 6, 1854, he conveyed a part of it, and in the same Sept. the balance of it, to said defendants, (the

witness lived in Massachusetts,) that he went home on July 25th, and on next, and ten following days, was confined to his bed by sickness, and to his room for ten days in addition, and unable to transact business.

This deed was introduced, and also a deed of part of the same land from said Nehemiah Ball to defendants, dated Sept. 6, 1854, and of the balance by a deed of Sept. 25, 1854. They also introduced their own deed of the land to plaintiff, dated Sept. 8, 1854, and evidence that it was tendered to him on the ninth of the same month, which plaintiff refused, saying the bond was broken.

On the 21st and 22nd of August of 1854, a large part of the land described in the bond was burnt over by an accidental fire.

There was evidence tending to show that plaintiff, the first part of August, 1854, claimed to own this land, and said he had a bond for a deed, sought a surveyor to run out a portion of the land into lots, and that he had employed some one or more to peel bark upon the tract, and had taken some away. On the ninth of August, the surveyor was directed to run off a meadow lot for plaintiff's father.

It also appeared that Whittier and Tate, had bargained with defendants before the bond was given, as to cutting from a parcel of this land and had peeled bark upon it, and they continued to work thereon after the giving of the bond.

The plaintiff also introduced evidence tending to prove, that when the first payment was made, defendants said they had not a deed ready — their deed from Ball had not come, but that plaintiff should have a deed in the course of three or four days, and that plaintiff said it would make no difference if he could have it then. That one of defendants, on Aug 1st, told plaintiff he would send the deed when it was ready, if he got it before the convention, at any rate he should be at the convention, and it might be relied upon then. (This convention was on Aug. 8th.) But no deed was then given.

It also appeared that the contract in relation to the logs and bark, upon the back of the bond, was a short time before August 20, of that year.

When the first payment was made, nothing was said to plaintiff about the title being in Nehemiah Ball.

The Court were authorized, upon the evidence reported, to render judgment by nonsuit or default.

Peters, for defendants.

1. The bond was only to be effectual upon a contingency — and there was an *accidental non-reception of the deed from the Joy heirs.* If so, this action is not maintainable, but only one for money had and received.

2. On the merits of the case our defence is, that there was a waiver of strict performance, and that a deed was procured and tendered within reasonable time.

The time for the performance of a sealed instrument may be enlarged by parol. 7 Cowen, 48; 3 Johns. 528.

The evidence of waiver is in the acts of possession, by plaintiff, of the premises up to, and even after the fire, for he took off some of the timber after that.

There is also evidence of waiver in the indorsement written by plaintiff on the bond. It contains this phrase; "*when we shall convey the land to him according to this bond.*" This makes it evident that the land might be conveyed after that indorsement, which was made just before the fire.

Now if there was a waiver and the time was not agreed upon, then the deed is to be given in a reasonable time.

We tendered it in a reasonable time. The delay was occasioned by Nehemiah Ball, not by defendants, and he was unable to give it earlier on account of sickness.

Plaintiff was not injured by the delay; the land became injured during the delay; that was the act of God, not of these defendants.

A. Sanborn, for plaintiff.

APPLETON, J. — On the 11th day of July, 1854, the defendants gave the plaintiff a bond, the condition of which was, that "if the said Haynes, his heirs or assigns, within ten days from the date hereof, shall make payment in money and good notes, as hereafter stated, we bind ourselves, our heirs, executors, administrators or assigns, to sell and convey to the said Haynes, his executors, administrators or assigns, the following described parcels of land, situated in Corinth, (here follows a description,) at five dollars per acre, one third to be paid in money on *reception of the deed*, and the remainder in equal payments, with annual interest and taxes, in satisfactory paper, in one and two years, &c., and it is hereby provided that this bond is not to be binding in case of the *accidental non-reception of the deed of said land*, by us, for (from) the Joy heirs," &c.

At the date of this bond, the title of the land to be conveyed was in one Nehemiah Ball, who, on the 8th of July, had, at the instance of the defendants, procured a conveyance of the same from the Joy heirs to himself.

The fact, that when the bond was given, the title had passed from the Joy heirs, affords no ground for regarding the contract as null and void. The defendants were well aware of that, for Nehemiah Ball was their agent in the negotiation by which the title was procured. The very implication of the bond is, that the title was not in the defendants, but that it was thereafter to be obtained by them. The defendants cannot take advantage of the circumstance, that the Joy heirs had parted with the title, for it was through their procurement, and for their benefit. So far as regards the plaintiff, it was immaterial to him where it might be at any time, if it should be conveyed to him at the expiration of the bond.

The time in which the payments were to be made, and in which the title was to be conveyed, was but ten days from the date of the bond. The object of the proviso, by which it was to be void in case of "accidental non-reception" of the deed, would seem to be to guard against any accidents,

by mail or otherwise, which might prevent the seasonable conveyance of the deed.

As the title to the premises was in Nehemiah Ball as early as the 8th of July, and as he was the agent of the defendants in procuring it, no reason is perceived, why an effort should not have been made forthwith upon the execution of the bond, to obtain a conveyance of the Joy title. It would appear, however, from the testimony of Ball, that no request for a deed was made, till about the 20th of July, and that the only reason why it was not then executed, was on account of the pressure of business. This request for a deed was made of him while he was in this State, which he did not leave for home till the 24th of July. The pressure of business can afford the defendants no excuse for not obtaining seasonably a deed. It only amounts to this; that on July 25th, Mr. Ball had other business, which he regarded as of more importance, than the execution of a deed to the defendants, of the land, which he had purchased as their agent. It does not appear but that if the request had been made at an earlier day, it would have met with a ready compliance. But the "non-reception" of a deed cannot be regarded as "accidental," because it may have been occasioned by delay in demanding or the pressure of other engagements on the part of the person by whom it was to have been executed.

No such accident in the non-reception of the deed is shown, as will entitle the defendants to regard the bond as not binding on them.

At the expiration of the time limited in the bond, the money payment was duly made, and the following receipt signed by the defendants: —

"July 12, 1854.

"We hereby acknowledge the receipt of eight hundred dollars, and the tender of balance of first payment of land within described, and of the notes. "James Fuller,

"Benj. Ball."

The defendants not having at this time the title, request-

ed further time in which to procure it, promising that it should be ready in a few days, with which the plaintiff expressed himself fully satisfied. The plaintiff took possession of the premises for which he had contracted, and exercised various acts of ownership over them. No deed being had, the defendants were again called upon, and again promised to convey in a short time, or as soon as they should obtain the title. While things were in this condition, some time after the 8th of August, a fire commenced in the neighborhood, and while it was raging and before it had done any injury to the lands referred to in the bond, the following indorsement thereon, written by the plaintiff, was signed by the defendants: —

"*If the within described land is conveyed,* the within named Henry P. Haynes, having paid as *agreed, and duly demanded a deed of us,* we hereby promise to pay one hundred and five dollars for the hemlock logs and bark peeled by Person Whittier and Joshua Tate, *when* we shall convey the land to him, according to the bond, we having said logs and bark for that sum, and charging said Haynes nothing for what we have paid, or are to pay, said Whittier and Tate for peeling the same, or for what we have paid, or are to pay, for hauling out and looking after the bark, having four months to get off the logs. "James Fuller,

"Benj. Ball."

Subsequently, the plaintiff, on the eighth of September, commenced the present action. The next day, the defendants having two or three days previously acquired from Nehemiah Ball the title of the Joy heirs, made a tender of a deed of the premises, which by their bond they had contracted to convey.

The defence set up is, that the plaintiff had waived the condition of the bond, so far as regarded the time of its performance; and that a reasonable time in which to procure a deed had not elapsed, and consequently the action was prematurely commenced.

The indorsement on the back of the bond cannot be re-

garded as a waiver of the previous non-delivery of the deed, and as giving further time in which to procure the same. The defendants were not the parties to waive their own neglect, or to grant further delay. They were the parties to whom, if to any, favors were to be granted; for they had not previously complied with their contract and were not then in a condition to do it. It is rather a clear and distinct recognition of an existing liability on their part. They admit a payment to have been made according to the terms of the bond, and that a demand for a deed has been duly made. They admit all the facts necessary to the successful maintenance of a suit.

It is difficult to perceive how the plaintiff, by taking an admission from the defendants of their liability, can be regarded, by so doing, as having waived a discharge of it. The defendants were in fault and so admitted. "If the within land is conveyed," to the conveyance of which the plaintiff was then entitled by reason of a full performance on his part of all that was to be done and performed by him, then the defendants promised to account for the value of certain logs and bark, when they should make such conveyance. Whether it would be conveyed, is left uncertain. The defendants entered into no new stipulations as to their conveyance. No time is fixed in which a conveyance might be made. No waiver is made of past neglect. The plaintiff set no time in which a deed might be executed, nor did he obligate himself to receive a deed from the plaintiff thereafter, if one should be offered. He only took an acknowledgment, which would enable him to commence a suit, and a promise from the defendants, in case they should convey, to pay him a certain sum of money. This is not a waiver by the plaintiff but rather a promise to him.

It is further claimed in the defence, that there is a parol agreement to waive strict performance on the part of the defendants, and that such agreement is binding.

A party shall not be allowed to insist upon a forfeiture arising from a non-performance, which is the result of his

own acts. The counsel for the defendants have relied upon the case of *Fleming* v. *Gilbert*, 3 Johns. 530, as establishing the doctrine, that the time of performance of a written contract may be enlarged by parol. But in *Delacroix* v. *Bulkeley*, 13 Wend. 71, SAVAGE, C. J., says, "the case of *Fleming* v. *Gilbert*, as stated in the opinion of the Court, was upon a bond, the condition of which substantially was, that the defendant should, by a certain day, procure and deliver to the plaintiff a certain bond and mortgage, and discharge the same from the record. The defendant did procure the bond and mortgage and offered them to the plaintiff, and offered to do whatever he required further, to discharge the mortgage of record; but the plaintiff not knowing what was necessary, entered into another agreement respecting further proceedings, by reason of which the defendant was prevented from taking further measures to discharge the mortgage of record. This case is put upon the principle, that he who *prevents* a thing from being done, shall not avail himself of the non-performance he has occasioned."

A contract not under seal, rescinding a specialty, where such contract is fully executed and carried into effect, is valid. *Allen* v. *Jacquish*, 21 Wend. 628. But a contract in writing will not be deemed to have been waived by a mere parol executory agreement, entered into by the parties, to vary or modify its terms. *Adams* v. *Nichols*, 19 Pick. 275. So it was held in *Richardson* v. *Cooper*, 25 Maine, 450, that a parol agreement to change a written contract, constitutes no defence to the original contract, while the same remains executory, unless its execution has been prevented by the act of the party attempting to enforce the written contract.

This suit, as has been seen, was commenced while the agreement for delay, if there was one, remained executory, and before the deed of the defendants was tendered. The defence cannot be brought within any of the principles established in the cases to which we have just adverted.

It has however been held in New York, that after breach of a sealed contract, a right of action might be waived or released by a new parol contract in relation to the same subject matter, or by a valid parol executed contract. But a mere assent without any consideration, will not be sufficient. *Delacroix* v. *Bulkeley*, 13 Wend. 71.

In *Harbrook* v. *Tappen*, 15 Johns. 200, in delivering the opinion of the Court, THOMPSON, C. J., says, "all that the defendant ever said as to the extension of the term, was, that if the plaintiff would perform his contract, he would take no advantage of its not being done on the precise day. This could not be called an agreement to extend the time. No day was fixed to which the performance was postponed; and it would be a violent and unnatural construction of the plaintiff's conduct to consider it as intended to waive his covenant and enter into a new agreement, especially as such parol agreement would be void under the statute of frauds." These remarks apply with peculiar force to the present case, where it would be difficult to point out any specific or definite agreement, or any valuable consideration for the same, had one been proved.

If an agreement for delay had been fully established, and shown to be for a sufficient consideration, it would be a matter of grave question, whether the defendants had not been guilty of great and unnecessary delay in its performance. The defendants, by their bond, were to procure a deed in ten days. The excuse which might have sufficed in case of an "accidental non-reception" of the deed, would apply only to the time limited in the bond. In determining what would constitute a reasonable time, regard must be had to the original contract. The deed was delayed over forty days from the time in which, by the contract, it should have been ready, being over four times the original term in which it was to have been procured. This would hardly seem to be a reasonable time, in which a negligent party, resting upon the clemency of his antagonist, should have made amends by his promptness for past omissions.

The defence is not sustained, and a default must be entered. *Defendant defaulted.*

PENOBSCOT RAILROAD COMPANY *versus* DUMMER.

A promise in writing to take and fill a certain number of shares in a chartered company, by a subsequent organization of the company, and an acceptance of the subscription, becomes a binding contract.

No legal assessment of shares in a corporation can be made, when the number, required by the charter, is not first taken.

But its records regularly kept, without any proof to destroy their effect, are competent to show its corporators, and whether the required number of shares were taken.

Where the terms of a subscription are, that not more than five dollars shall be assessed at the *same time*, if no more is required to be *paid* at one time, it is no valid objection that other assessments were voted at the same time.

Where the terms of a subscription required, that seventy-five per centum of the estimated cost of any sections of the railroad should be subscribed for by *responsible persons*, before commencing its construction, if the subscription is obtained in good faith, assessments will be valid, although some of the subscriptions, to make up that amount, should turn out to be worthless.

No other demand for payment of assessments to maintain an action, is necessary, than that prescribed in the by-laws of the corporation.

ASSUMPSIT, to recover fifteen assessments, of five dollars each, on five shares in the capital stock of the Penobscot Railroad Company.

At the trial, before HATHAWAY, J., after the evidence was out, it was agreed that the full Court, upon report of the evidence, should enter judgment by nonsuit or default, according to law.

The cause will readily be understood from the opinion.

E. Kent & J. H. Hilliard, for defendants.

I. Washburn, jr. and *Rowe & Bartlett*, for plaintiffs.

SHEPLEY, C. J.,—This suit has been commenced to recover the amount of several assessments made on five shares of the capital stock of the corporation. The general issue having been pleaded, the existence of the corporation, with capacity to sue, is thereby admitted.

The defendant subscribed for five shares in the month of March, 1851. The corporation was not organized until the following month of May. The subscribers for the stock agreed to take and fill the number of shares set against their names, in the capital stock of the Penobscot Railroad Company, upon certain conditions. Several objections are made to the maintenance of the action.

1. The first is, that there being no such corporation existing, when the agreement was made, there is no binding contract.

It amounted to a written proposal to take so many shares, and when the corporation had been organized and had accepted that proposal, a valid contract was made. When the corporation was organized, the shares subscribed for were recognized as shares of its stock and the subscribers therefor as corporators. This was sufficient to complete the contract. *Railroad* v. *Palmer*, 34 Maine, 366; *Thompson* v. *Page*, 1 Met. 565.

2. The second objection is, that the capital required by the charter was not obtained; and that no legal assessments could therefore be made. This is a valid objection, if sustained.

The additional Act, approved on August 21, 1850, required, that the capital should consist of not less than one thousand, nor more than six thousand shares. At the meeting for organization, a committee appointed for that purpose reported, that twelve hundred and ten shares had been subscribed for, stating the names of the subscribers and the number of shares, which each had agreed to take. That report was accepted by the corporation, and those persons were thereby recognized as corporators and shareholders. The defendant and most of the others appear to have been present and to have acted as stockholders.

It is still insisted, that one thousand shares had not been taken, because it appears, that the subscriptions made for Samuel Dakin and for the town of Orono were not binding. The subscription for Dakin appears to have been made by

Gideon Mayo. The corporation appears to have regarded the subscription as made by Dakin and to have chosen him as one of its directors, to which office he was not eligible, unless he was a stockholder. He appears to have accepted the trust and to have acted in that capacity, and he does not appear to have denied at any time the authority of Mayo to subscribe for him. This would seem to be a sufficient recognition of the validity of that subscription by both of the parties.

The subscription for the town of Orono appears to have been made by certain persons assuming to have authority to make it. The shares thus subscribed for appear to have been paid for in part by money of the town. There is no proof, that the subscription was not made by those duly authorized to make it. The corporation has accepted, as before stated, that subscription as valid, and has received payment in part for those shares.

When a corporation has proceeded regularly to ascertain its corporators and the owners of shares in its capital, and has entered them in its records, all parties become thereby *prima facie* entitled to the rights thus secured to them. The records are competent and sufficient evidence of them, unless proof be introduced to destroy their effect.

3. The third objection is, that the assessments were not legally made.

One reason assigned is, that Dakin, not being a stockholder, could not be legally chosen a director. Its insufficiency has been already noticed.

Another reason assigned is, that several of the assessments were made at the same time.

The subscription was made in terms, requiring that "assessments shall not exceed five dollars on each share, at one time."

It might have been an important consideration, to have no greater sum payable and called for at one time. The time when those assessments should be voted, could be of little, if of any importance. The design appearing to have

been, to protect the shareholders from the payment of more than five dollars on each share, at one time. The language should be so interpreted as to secure to them the benefits intended, without otherwise embarrassing the movements of the company.

4. Another objection is, that the corporation has not in its acts conformed to the terms of the subscription, and to the provisions of the third section of the Act of 1850. The provision is, "said company shall not engage in, nor commence the construction of any section or sections of said railway, until seventy-five per centum of the estimated cost of said section or sections shall have been subscribed for, by responsible persons."

The intention would seem to have been to allow the company to proceed, for certain purposes, with the capital to be received for one thousand shares, but to prohibit it to commence the construction of any section of the road, unless a subscription should be obtained from responsible persons, for three-fourths of the estimated expenses, for the purpose of preventing a waste of capital upon the whole line of the road, when it might never be able to complete it. A large amount appears to have been subscribed for H. C. Seymour, by Hervey Nash, before the construction of the road was commenced. Nash testifies, that Seymour "told him a month before he subscribed, that he had agreed to subscribe for stock to the amount of $170,000, and that he told him to subscribe for him, and he did so, and that he considered him responsible for that amount."

It is however insisted, that he and another person were not responsible for the amount by them subscribed.

If the company obtained subscriptions to the amount required in good faith, from persons apparently able to pay or to procure others to pay for the shares, it could not have been the intention to render its proceedings illegal and void, if those subscriptions should finally prove to be of little value. That would have exhibited an intention to impute crime to misfortune. It is upon the apparent

condition of men and things, that business must be transacted by corporations as well as by individuals, while success may depend much upon the care exercised to ascertain their true condition. The testimony does not show, that the company did not act in good faith in receiving those subscriptions, or that it had not at that time reason to conclude, that payment would be made for those shares, although the death of Seymour and the insolvency of his estate may lead to the conclusion, that he was not at that time a responsible person for that amount.

The provision of the statute imposing this obligation upon the company, does not appear to have been intended to prevent assessments upon the shares. Money might have been necessary for other purposes.

5. Another objection is, that no demand for payment of the assessments was made before the suit was commenced.

The fifth section of the statute requires, that notice should be given "as shall be prescribed by the by-laws of said corporation."

The twelfth by-law prescribes the manner, in which it should be given.

The treasurer appears to have given the notices required. No other demand was necessary. *Defendant defaulted.*

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† SAVAGE *& ux. versus* BANGOR.

When by reason of snow drifts, that part of the highway prepared for travel, becomes impassable, and a passage way outside and over the gutter of the road is used instead of it, for damages sustained by travelers over such passage way, in the use of ordinary care, the town is liable.

If a thaw and a rain occur prior to the accident, it is sufficient notice to the town that such passage way is unsafe.

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

CASE, for damages received by the female plaintiff, by reason of an alleged defect in the highway which the defendants were bound to keep in repair.

After the evidence was out, it was agreed to report the case for the consideration of the full Court, to be decided by nonsuit or default, according to the legal rights of the parties; and if a default was directed, the Court were authorized to assess the damages upon the evidence reported.

The facts found by the Court appear in the opinion.

A. Sanborn, for defendants.

Knowles & Briggs, for plaintiffs.

TENNEY, J. — The plaintiffs seek compensation for an injury alleged to have been received by the female plaintiff in January, 1854, by the upsetting of a stage sleigh, upon a public highway, which it is admitted, the city of Bangor is bound to keep in repair.

It appears that for the distance of about thirty-five rods, the part of the highway, which had been prepared for the travel, when not covered with snow, was impeded with deep drifts for some time previous, without any attempt to make a path through them; and that the way for the passage of carriages had been broken out near the fence, which bounded the road, over wood piles and bob sleds, and was the only one which could be used. The day before the accident it rained, and the snow melted. The place where the sleigh upset was where this way turned to go into the center of the road, at which there was a pool of water, and it was impossible to determine whether the passage was safe or not. The ice over the ditch, which had formerly been sufficiently strong to bear the coach, had been so affected by the thaw, that the runners of the sleigh broke through, and fell into the water about two feet. The sleigh was upset, and the female plaintiff, who was sitting upon the box with the driver, was thrown into the water, and the sleigh rested upon her person, until she was extricated. Evidence was introduced on both sides touching the extent of the injury received.

It is objected to the maintenance of the action, that the accident occurred on a passage-way, which was not that which had been prepared for the travel, when the whole was free

from obstruction by snow drifts, and the case of *Johnson* v. *Whitefield*, 18 Maine, 286, is relied upon in support of the objection. It was therein decided that "while the town has done its duty, when it has prepared a pathway of suitable width, in such a manner that it can be conveniently and safely traveled with teams and carriages, as required by the statute, the citizens are not thereby deprived of the right to travel over the whole width of the way as laid out."

The case cited is in no sense analogous to the one before us. Here, the city had omitted entirely to prepare such a pathway, at the time of the accident. The traveler was obliged to abandon his intention of passing over the road, attempt to break through the drifts, which had long been unbroken, or pass over the only way prepared for use, which was then unsafe and inconvenient.

It would be unreasonable, and by no means in accordance with the provisions of the law, that the city should be exonerated from liability on account of an accident, which was caused by a defective passage-way, near the exterior limits of the road, wholly or partially over the gutter, when the traveled portion, wrought into a road, was at the time impassable, because at a different season of the year, before, it was all which the statute required, and the passage-way, upon which the injury was done, was the only one where travelers could pass. Such a construction would require, that when the ground is covered with snow, every traveler must know the precise spot where the road was prepared for travel before the snow fell, and if the only path was upon another part of the highway, and that path defective, he must pass thereon at his own risk, or continue his course upon the wrought portion, notwithstanding the impediments, or terminate it altogether.

It is competent for the proper agents of the town, to change the wrought portion of the road at pleasure. And if they should suffer the part formerly traveled to become ruinous, and its use should be attended with great peril, and should work the road for travel on a different line,

within its limits, no one would maintain, that an ordinary defect in the latter, which caused an injury, would not subject the city to the liability of making compensation. And whether the defect in the part formerly prepared and used, is by the removal of the substances of which it was composed, or by the placing of obstructions thereon, would have no effect to make the liability greater in one case than in the other; and whether the obstructions were drifts of snow, or other things, is quite immaterial.

It is denied by the city of Bangor, that it had notice of the defect, if one existed in the highway, so that it can be chargeable. Notice is necessary, but actual notice is not in all cases required. If the defect had existed for so long a time, that citizens must be presumed to have known its existence, that notice is sufficient. Open and visible defects, such as could be prevented by common and ordinary diligence, towns and cities are by law bound to notice and guard against. *Lobdell* v. *Inhabitants of New Bedford*, 1 Mass. 153.

In this case, the city is supposed to have known by its officers, that the traveled way at the time of the accident, was on a part of the highway, which must be disturbed materially by the melting of the snow; that water would probably settle into the gutter, under the ice, which, by those means and others, which would produce material changes in this passage during a thaw, would naturally render it more unsafe and inconvenient than before. The rain and the warm weather had continued so long a time before this accident, that the officers of the city must have been admonished, that this portion of the road would require attention; and they were bound to put it in a condition less perilous, than that in which it was found.

It is necessary, that the plaintiffs should show that there was the exercise of ordinary care on the part of the plaintiff injured, and in the manner in which she was carried in the sleigh, in the charge of the driver. The latter was a witness without objection. The manner in which he drove

his horses was such, that it would seem, that no blame could be imputable to him, in that respect. The horses were entirely under his control, so far as the evidence shows the facts. No want of care appears, touching the selection of the particular place on which he drove them. The driver says, in his testimony, that it was impossible to tell whether it was safe going over the pool of water or not. By this it is understood, that the condition of the road was unusual, that a part was covered with water; but no means were presented by which he could determine the effect, which the water had produced; the safety could not be determined with certainty, by a traveler, without experiment. It does not appear that he was wanting in ordinary care.

From the whole evidence in the case, it is believed that the plaintiffs are entitled to recover the damages, which have been sustained.

It is not clearly proved, that any bruises or injury, upon particular parts of the person of the female, were inflicted. That she was thrown into the water, and was exposed to danger, is fully shown. The state of her health before and afterwards, from the whole evidence, is left quite indefinite and uncertain. But it appears, that generally she suffered, in this respect, more, subsequent to the accident, than previously. How far this was the result of the injury for which the city is accountable, or the fruit of the exposure, while in her wet clothes during a ride of considerable distance, it is difficult to determine with certainty.

According to the agreement of the parties, a default must be entered, and damages awarded for the sum of one hundred and fifty dollars.

APPLETON, J., living in the defendant town, took no part in the opinion.

† HAYNES *versus* ROWE, *& al.*

In an application for insurance, the words, "for the benefit of captain and owners," and in a policy, "on account of whom it may concern," do not necessarily secure insurance, in case of loss, to one having an interest in the property insured.

The right of one to recover upon a policy must depend upon his interest acquired as a party to the *contract.*

Where the owner of a vessel and the master who sails her on shares, direct the same person to procure an insurance on freight, without designating the portions to each, it may well be presumed, where their interests are equal, that they are alike interested in the policy.

And where the owner became bound for the master for supplies of the vessel, and by consent of the master, his security was to be by insurance on the freight, such owner is entitled to indemnity from the insurance, although no assignment of the policy was ever made by the master.

If a witness be disqualified, by reason of interest, at the time of giving his deposition, and at the time of trial that disqualification is removed by statute, the deposition is admissible.

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

ASSUMPSIT, for money had and received.

The defendants had in their hands $415,89 being the amount of the insurance on the freight of schooner Statira, less the premium and commissions of the merchant procuring it, for the legal owners.

The plaintiff owned the schooner, and Isaiah Loud was master, sailing her on shares. One J. Richards shipped a cargo of spars, at Frankfort, to be carried to Philadelphia, and there delivered to E. A. Louder & Co., under an agreement with the master to pay $450 freight.

It was in evidence by one Cram, that when about sailing, the master wanted some provisions which the merchant declined to furnish on his credit. The plaintiff being present, agreed to pay for them, and he proposed to Loud to be secured on the freight, to which he assented. Richards was present, and said he was about writing to get insurance on the cargo, and asked plaintiff if he should write to have the freight insured, to which he agreed. All interested were present.

Richards wrote thus:—"E. A. Louder & Co: I wish you to get insurance $500 on cargo, and $450 on freight, for the benefit of captain and owners. You will settle the expense with Captain Loud when you pay freight, &c."

Louder & Co. thereupon effected insurance thereon, upon an open policy, a part of which was as follows:—"Philadelphia Insurance Company insures $950, on cargo and freight as below, per schooner Statira, whereof ——— is master, at and from Frankfort, Maine, to Philadelphia, say, on—

"Cargo under deck, . . . $225,

"On do. on do. . . . 275,

"And on freight under deck, . . 450, valued at the sum insured; for and on account of whom it may concern; loss, if any, payable to E. A. Lowder & Co."

The $450 on the freight, was, after the loss, paid by the insurers to Louder & Co.

The schooner having been condemned, and with the cargo sold at auction at St. Thomas, by the captain, without remitting any portion of it to Richards, he commenced a suit against plaintiff, and attached the freight money in the hands of Louder & Co. The captain also claimed the whole amount, and it was finally paid to defendants to hold for the right owners.

In June, 1853, the master, under oath, deposed as follows:—"that in Dec. 1851, I requested Joseph Richards, who had shipped a cargo of spars on board the schooner Statira, to procure an insurance of $450 upon the freight, expressly for my own benefit, the premium to be paid by me, and being then master of the vessel, and running her on shares." This was objected to on the ground of interest.

The cause was submitted to the decision of the full Court, with jury powers, to render judgment by nonsuit or default.

Rowe & Bartlett, pro sese.

Neither the policy nor the letter of Richards furnish any

light for whose benefit the insurance was effected. Phil. on Ins. 152.

We must look beyond the policy and letter. Loud testifies that the insurance was made at his request, for his benefit, and at his cost. His testimony is admissible under the Act of March 17, 1855.

If that testimony is believed, it is conclusive. But without that, Richard's letter that Loud was to pay the premium, settles that the insurance was for his benefit.

The plaintiff never authorized or ratified any insurance for freight. He never paid, or became liable to pay, or intended to pay any premium. He could not have maintained an action against the insurance company. *Foster & als.* v. *U. S. Ins. Co.*, 11 Pick. 85; *Catlett* v. *Pacific Ins. Co.*, 4 Wend. 75.

If it is said the insurance was to secure plaintiff against a liability he had assumed for Loud, then that can only apply to Loud's half. There was no assignment from Loud to plaintiff. If Cram's statement be true, which is incredible, it is entirely insufficient to prove a contract between plaintiff and insurers, or an assignment of Loud's policy subsequently procured.

A. Sanborn, for plaintiffs.

TENNEY, J. — The plaintiff seeks to obtain a judgment against the defendants for the sum of $415,89, and accruing interest thereon, on account of that amount in their hands, received from underwriters upon a policy of insurance for freight of the schooner Statira, dated January 10, 1852.

The plaintiff was the owner of the schooner at the date of the policy, and Isaiah Loud was the master of the same, running her on shares. And insurance was effected to the amount of $450. The plaintiff claims to be entitled to receive the amount in the hands of the defendants, on the ground that he procured the insurance; this right the defendants deny, insisting, that the insurance was procured, wholly by the master, and for his benefit.

The master of a vessel, merely as such, has no right to procure insurance for the owners, and such insurance would not be effectual against the underwriters, unless the act of the master, therein, should be ratified. *Foster* v. *United States Ins. Co.* 11 Pick. 85.

The language in the policy, "on account of whom it may concern," or that in the letter of Richards to Lowder & Co., of Dec. 11, 1851, wherein he wishes the latter to procure insurance of $500, on the cargo, and $450 on freight, "for the benefit of the captain and owners," does not necessarily secure any benefit to Richards, the captain, or the owners of the schooner. The person who has an interest in the property insured, cannot for that reason alone, be entitled to the amount covered by the policy in case of a loss. The right to recover, in such event, must depend upon the interest acquired, as a party to the contract.

The question in this case is, was the plaintiff a principal, in whose behalf, or on whose account the insurance was obtained? In answering this question, it is proper to take into consideration several facts, which do not appear to be in controversy; one is the relation, existing between the plaintiff as owner of the schooner, and Loud as the master, and running her upon shares, which is understood to be "share and share alike." Another fact, which may be material, in ascertaining the great question of fact involved is, that Joseph Richards, who had shipped the cargo on board the Statira, was the agent through whom the insurance was effected. The plaintiff relies upon the evidence of Cram, and the letter of Richards to Louder & Co., that it was so; and the defendants rely upon the affidavit of the master, which states, that in December, 1851, he requested Richards to procure an insurance of $450, on the freight.

After the cargo of spars was shipped on board the schooner by Richards, under an agreement with the master to pay $450 for freight, the plaintiff purchased of Hugh Ross, provisions for the master to be used on board the vessel, to an amount of some over $100, and as security for

this liability to the plaintiff, the latter proposed afterwards to the master, that he should procure insurance upon the freight, to which the master assented. At the same time, Richards, being present with the plaintiff and the master of the vessel, said he was about writing to procure insurance on the cargo, and was authorized by the plaintiff to cause insurance on the freight. And on Dec. 11, 1851, Richards wrote to Louder & Co., announcing the shipment of the spars, saying, "I wish you to get insured $500, on cargo, and $450, on freight, for the benefit of captain and owners; you will settle the expense with Captain Loud when you pay freight," &c. The case finds, that thereupon Louder & Co. effected an insurance upon the cargo and the freight, for account of whom it may concern.

The affidavit of the master is in the case, subject to objection. He was so situated in his relations to the fund in the hands of the defendants, that a question could have arisen, at the time, he made his affidavit, whether he was a competent witness. But by the statute of 1855, he was competent, whether he were so before or not. The interest when he made the oath to the affidavit was no greater, than it would have been, if he had been called to testify in the trial, which was after the passage of the statute referred to, and his affidavit was admissible.

The master's statement is, that the insurance which he procured through Richards, was expressly for his benefit, the premium was to be paid by him, he being the master at that time and running the vessel on shares.

The affidavit and other facts in the case, may appear somewhat inconsistent, but it is believed, that one may be reconciled with the other. It is abundantly shown, that the authority given to Richards, to procure insurance on the freight, was at one time, when the owner and master were with him. Upon the receipt of his letter to Louder & Co., they obtained the insurance. The proposition of the plaintiff to obtain insurance on the freight, assented to, by the master, as the security of a sum, but little exceeding one hundred

dollars, would have been carried into effect by an insurance of the amount of indebtedness of the master to the owner. It does not appear, that this arrangement was abandoned; but on the suggestion of Richards, that the plaintiff might desire insurance on a greater amount as freight, he was authorized to obtain it on the sum of $450. This must be understood as carrying out the designs expressed by both master and owner.

If the freight had been earned, one half would have belonged to the owner, and the other to the master. If, therefore, the premium had been paid from the freight, which would have been due from Richards, it would have been from the joint fund, to be adjusted according to the amount insured for each. The master might well understand, that the premium of insurance was to be paid by him, as it was to be done from the freight, which it was expected would be in the hands of Louder & Co., as Richards' consignees. This is not deemed material in deciding the question, on whose account the insurance was obtained.

It not having been arranged, what amount of freight should be the subject of insurance to be procured by the master, and the amount to be covered by the insurance obtained by the direction of the plaintiff, it may well be presumed, from the equal interest therein, and the agency of Richards for both, that the policy was as much for the benefit of one as the other. This would entitle the plaintiff to one half the fund, as the assured therefor.

It is quite evident, that the master assented to obtain insurance on the freight for the purpose of securing the plaintiff for the provisions purchased of Ross, and that he intended to do so in good faith. And the arrangement for obtaining insurance on the freight generally, having been made at the time that the contract with Ross was consummated, and the master agreed to obtain insurance for the security of his liability to Ross for the master, nothing further was necessary, than is disclosed in this case, to vest an interest in the fund in the plaintiff, on account of that liability. It

was therefore made upon consideration, and there was a contract between the owner and the master, which would bind the latter, notwithstanding it does not appear, that any assignment of the master's interest in the policy was made to the plaintiff. *Defendants defaulted,— and judgment for plaintiff for one half of the fund in question, and for the amount of his indebtedness to Ross for the master, in addition.*

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† HUNT, *in Equity, versus* ROBERTS.

Where the parties interested in a bond for the conveyance of real estate, agreed with the defendant, by parol, that he might have an interest in one half of the bond, by making the first payment, and also to hold the title of the other half of the land for security for money loaned them to make the payments for their moiety, by giving a bond to each of them to convey, by deed, one quarter of the premises on being reimbursed for his advances; and such payment was made and the title of the land transferred to defendant, in a suit in equity to compel performance of said contract, it was *held*, that the Court had no jurisdiction to enforce it; —

1. Here was no trust expressed by any writing of the party sought to be charged.
2. Nor did the plaintiff furnish the money whereby a trust could be implied.
3. Nor was the title obtained by the defendant through any fraud, as he held it by consent.

BILL IN EQUITY.

The bill set forth, that on Sept. 18, 1846, one Benj. Dyer, and the plaintiff, were jointly interested in a bond for the conveyance of land, by William Willis: — *that*, being desirous to comply with its requirements, and the defendant wishing to become interested therein, it was agreed that in consideration of his furnishing the money for the first payment, he should have an undivided half of the land, and should hold the title of the other as security for money necessary to pay for the other half of the land, which he was to loan said Dyer and the plaintiff, upon the security of the land — and that he was to give a bond to them conditioned to convey to each one quarter of the tract, whenever

the respondent should be fully paid and indemnified for the money then advanced, or which he might subsequently pay towards the half belonging to Dyer and plaintiff out of the stumpage or other moneys arising from said land, or in any other mode.

That it was agreed, that one Ingersoll, acting for those interested, should forthwith proceed to Portland, with the money necessary for the first payment, that said Dyer, jointly interested with the plaintiff, should go with him and close up the contract with Willis, and that on the return of Ingersoll, the title was to be in Roberts, who was to give a bond to said Dyer and plaintiff.

That said Dyer, acting for plaintiff as well as himself, went with Ingersoll to Portland, carrying the money for the first payment, took up the bond from Willis, Dyer giving his notes for the balance, and receiving a deed of the premises and giving back a mortgage to secure his note for the balance due on the purchase.

That at that time Dyer was insolvent, and Ingersoll, fearing that his equity of redemption might be attached, and thereby deprive the defendant from redeeming the one half, and lose his security for his advance money for the benefit of Dyer and plaintiff, induced Dyer to execute a release of the premises to defendant, promising that defendant should execute a bond securing the rights of said Dyer and plaintiff, and that he would see the same done when he returned to Bangor.

That such release was executed and placed in the hands of Ingersoll, to be delivered to defendant on condition that he should give the bond to said Dyer and plaintiff before stated, and that Ingersoll received said deed upon *such* condition and no other.

That on said Ingersoll's return to Bangor he was met by respondent, to whom he communicated what was done and agreed upon, to which the defendant assented, but fearing an attachment against Dyer, he was urgent that the deeds should forthwith be recorded, and agreed that the bonds

should immediately be given, and thereupon Ingersoll caused all the deeds to be recorded.

That shortly after, defendant, instead of giving Dyer a bond, purchased of him his said quarter and paid $600 therefor.

That soon after the return of Ingersoll, plaintiff called on defendant for his bond, but he fraudulently refused to give it or comply with the conditions on which he received the deed.

That Roberts entered into possession of the premises, and has received large sums of money from the timber and hay cut on said land, and in other modes from the avails of said land.

The bill also alleged repeated demands for an account, and for a bond, and an offer to pay what was equitably due.

The bill prayed for a bond in accordance with the agreement, and for a deed of release of one fourth of the premises.

To this bill the defendant filed a general demurrer.

Rowe & Bartlett, in support of the demurrer, maintained that the Court had no jurisdiction. The bill was for the performance of a contract not alleged to be in writing. R. S., c. 96, § 10.

That the chancery jurisdiction of this Court being limited, it should appear affirmatively in the bill, that the case stated is within its jurisdiction. When the case stated is doubtful, the presumption that it is within its powers exists only in courts having general equity jurisdiction. *May* v. *Parker*, 12 Pick. 34.

That it has no equity powers to compel a specific performance of a parol agreement, or to render judgment for damages sustained by a breach thereof, has been settled in *Wilton* v. *Harwood*, 23 Maine, 131.

That no fraudulent practices were imputed to the defendant in obtaining the property, and therefore the case came within the principle of that decision.

Kent, for plaintiff, supported the bill on two grounds.

1st. Here was a trust, an implied one — there being no writings except the bond and deeds. Where the money is paid by one man and the deed taken by another, a trust results by implication of law. *Buck* v. *Pike,* 2 Fairf. 9; *Baker* v. *Vining,* 30 Maine, 121. The money advanced by defendant, may be regarded as a loan to Dyer and plaintiff; being so, one half was Hunt's. Dyer took Hunt's money to pay, and for his proportion took it in trust. *Phillips* v. *Cramond,* 2 W. C. C. R. 441; *Freeman* v. *Kelley,* 1 Hoff. Ch. 90; Hill on Trustees, 126.

It is not necessary that the funds should be those of the *cestui que trust. Gomer* v. *Tradesman's Bank,* 4 Saund. S. C. 106; or they may be supplied by the nominal purchaser. *Page* v. *Page,* 8 N. H. 187.

Roberts had no assignment of the bond, nor any interest in it. No title or security was to be given to him until Ingersoll returned to Bangor. In all the transactions at Portland, Dyer acted for the plaintiff and himself. The facts, as between Dyer and plaintiff, show a trust. And the facts set forth show also that Roberts took the deed charged with the trust. He had notice of it and is bound to perform it. *Manning* v. *Gloucester,* 6 Pick. 6; *Safford* v. *Rantoul,* 12 Pick. 233; *Earl Brook* v. *Buckley,* 2 Ves. 498.

But, as between Dyer and this plaintiff, the trust was in writing, in the assignment of the bond from Dyer to Hunt. That bond was not by law assignable. The legal title and right remained in Dyer, but he held the other half as trustee. Of all these proceedings the defendant was cognizant. So that the bill may be supported on one of these grounds.

2. But here was fraud, in the doings at Bangor on the return of Ingersoll. The agreement was that when Roberts took the deed, he was to give back a bond. He obtained the deed by a fraudulent pretence and promise, operating upon Ingersoll. Was not this an actual fraud? The case is clearly distinguishable from that of *Wilton* v. *Harwood.*

Rowe, in reply. The money was Roberts' and was paid under an express contract. The law can imply no other or

different one. Nothing is left to implication. If Dyer held the land as trustee of Hunt, Roberts took it discharged of that trust. He violated no trust in receiving his deed. It was done with plaintiff's consent. The complaint is, that Roberts will not perform his part of the contract with plaintiff. If any trust exists under it, there must be some writing signed by defendant. R. S., c. 91, § 31. As to fraud, no such charge is preferred in the bill. There is no pretence that he procured the conveyance to himself by fraud.

TENNEY, J. — The plaintiff prays, that the defendant may be ordered and decreed to make and execute a bond, to convey to him his interest in the land described in the bill, upon the terms and conditions set forth, as the verbal agreement between the plaintiff and Benjamin Dyer, and the defendant; and that he be ordered and decreed to convey by deed of release to the plaintiff, one quarter part of the same land, on being paid such sum as the Court shall decree to be equitably due, which sum he offers in the bill to pay.

The defendant files a general demurrer to the bill, and denies that the Court have jurisdiction of the case, upon the ground, that the bill is for the specific performance of a contract not alleged to be in writing. R. S., c. 96, § 10, clause fourth. It is insisted for the plaintiff, that the Court have power to grant the relief under two heads of equity jurisdiction, as a case of trust and fraud. And it is contended, that the money, which it is alleged in the bill was paid to William Willis, to obtain the deed that was delivered to Dyer, was a loan by the defendant to the plaintiff and Dyer, and created an implied or resulting trust. This proposition cannot be admitted. By the agreement, as stated in the bill, to which the plaintiff, Dyer and the defendant were parties, on the payment of the sum of about $808, by the defendant, which was all that was paid to Willis, a conveyance of the land described in the bond was made to Dyer, and he at the same time gave his promissory

note for the balance of the purchase money, secured by a mortgage of the same land; and Dyer thereupon gave a deed of release of the right in equity of redemption to the defendant. According to the allegations in the bill, it was verbally agreed by the parties named, that in consideration that the defendant should thus obtain the title in the land, acquired from Willis under the bond, he should immediately after give his bond to the plaintiff and Dyer, to convey to them each one quarter part of the land, whenever he should be fully paid or indemnified for money then advanced, or which he might subsequently pay, towards the part belonging to them, &c.

If this verbal agreement had been in writing, and signed by the defendant, it might have been an effectual declaration of a trust, according to R. S., c. 91, § 31; and if so, it could not have been at the same time, merely a loan of the money which was paid to obtain the deed. And it is not perceived, that it can become a loan, because that which was intended to be the same contract, should fail, because not so executed as to constitute an express trust. Such a construction as that contended for, would in effect defeat the statute, and a supposed trust under an express verbal agreement, when not legally declared, would become entirely effectual, as an implied trust, in another mode.

It is again contended, that the assignment by Dyer of an interest in the bond to the plaintiff, created a trust, which was declared in writing, and signed by the party, and this being fully known to the defendant, at the time he advanced the money and became the owner of the equity of redemption, he was bound to execute that trust. If the plaintiff had furnished one half of the money paid to obtain the deed, and the right in equity had remained in Dyer, the latter might have been considered as holding a moiety of the interest thus acquired in trust for the plaintiff. But under the verbal agreement alleged, the title having passed immediately from Dyer to the defendant, in consideration of the money advanced, and the bond from Willis

having been cancelled, by the consent of the plaintiff, Dyer held no estate in trust, before his release, and the defendant took the conveyance, subject only to his verbal contract, and consequently charged with no trust.

Is the plaintiff entitled to relief, on the ground that the defendant fraudulently refused to give to him the bond, after having obtained the right in equity of redemption of the land? It is insisted that this case is something more than a part performance of the verbal contract; that Ingersoll having authority to deliver the deed from Dyer to the defendant, only on the fulfilment of the condition, that the bond should be given to the plaintiff, he was persuaded by the defendant to deliver the deed, under the promise that the bond should be given immediately after. It is alleged in the bill, that after the delivery of Dyer's deed to the defendant, the bond was demanded by the plaintiff, and no objection made that the deed was not fully effectual; but the fraud relied upon, is the refusal to execute and deliver the bond.

This case does not differ essentially from the case of *Wilton* v. *Harwood*, cited for the defendant, in the principles involved. It is stated in the opinion of the Court in that case, "if the Court were to decree specific performance of a verbal contract for the sale of real estate, on the ground, that after part performance, it was a fraud upon one party, for the other to refuse to execute a conveyance, the effect would be to assume under this clause of the statute, the very jurisdiction, intentionally denied under another and more appropriate clause." The plaintiff having consented that the title should be in the defendant, in consideration of a verbal agreement, that he would execute the bond according to that agreement, and having failed to obtain the bond, he cannot have redress in a mode which the law does not authorize. *Demurrer sustained.* —

Bill dismissed with costs.

† HANSON *versus* WEBBER.

An award under a submission as to the ownership of a yoke of oxen, in which three persons claimed separate interests, that one of them should pay a certain sum of money to each of the others, is sufficient evidence that the ownership of the oxen is adjudged to be in him who is to pay the money.

And where the award thus settles the title of the property, and the other claimants are to receive their just proportions of its value, no objection can be made to it for want of *mutuality*.

Nor is an alternative mode of payment therein set forth, conferring a privilege upon the party, if he should accept it, but otherwise to pay a sum certain, any objection to the validity of the award.

In a submission at common law containing no stipulation as to *costs*, the referees have no power over them, and if they award costs, so far it is void.

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

ASSUMPSIT, upon an award.

The submission was as follows:—

"Jan. 12, 1852. We hereby agree to submit the question respecting the oxen sold by A. Webber to Charles Hanson and claimed by Robert H. Libbey, to the determination of S. H. Blake, A. H. Briggs and A. Knowles, Esquires, whose decision in the premises shall settle the whole controversy between the parties as to the ownership of said oxen, and how much shall be paid for the same, and by whom, and who shall be entitled to receive said amount, and we agree to abide by the decision.

"R. H. Libbey,
"C. Hanson,
"A. Webber."

And the award, signed by all the referees, was in these words:—"Jan. 14, 1852. We have to-day heard the parties to the above agreement of reference, their statements and witnesses, and pleas respectively, and do award that said Charles Hanson shall be paid by said A. Webber the sum of $92,25. And we do further award, that said A. Webber shall pay said Libbey the sum of $50, with the privilege on the part of said Webber, if he shall so choose, to pay said Libbey, in addition to said $50, fifty dollars more and to receive a transfer of the note said Libbey holds against Quim-

by H. Lovejoy, of $100. But if Webber wishes to take the Lovejoy note of $100, at $50, he shall tender to said Libbey said $50, or to S. H. Blake, for him, within six days, and said Webber shall pay costs of reference, taxed at $9, and this is our final award and determination between the parties."

A Sanborn, for defendant.

1. The award is void for not deciding the matters submitted. The great question was the ownership of the oxen. It was necessarily connected with the payment for them by one party to the other. It does not appear to have been considered.

The submission is not general but specific, and no presumption obtains that the award was made upon all the matters submitted. Nor can it be presumed that this question was not made known to them; it appears in the submission. Such presumption arises only when the submission is general. Caldwell on Awards, 106; *Randall* v. *Randall*, 7 East, 81; *McNear* v. *Bailey*, 18 Maine, 251.

2. The award is bad for want of mutuality. Defendant is to pay $92,25, to plaintiff, he having nothing to do therefor. So defendant is to pay Libbey $50, he paying nothing and doing nothing therefor. Com. Dig. 672, Arbitrament, (E. 14.)

3. It is not final, as to the matters submitted. Caldwell on Arbitrament, 114.

4. If not wholly void, it is as to costs. The referees had no authority on that subject. *Peters* v. *Pierce*, 8 Mass. 398.

Knowles & Briggs, for plaintiff, cited 2 Johns. 62; *North Yarmouth* v. *Cumberland*, 6 Greenl. 21; *Dolbier* v. *Wing*, 3 Maine, 421; *Brown* v. *Keith*, 14 Maine, 396; *Strong* v. *Ferguson*, 14 Johns. 161.

TENNEY, J. — The question submitted was respecting the oxen sold by A. Webber to Charles Hanson, and claimed by Robert H. Libbey, and the referees were to settle the whole controversy between the parties as to the ownership of said

oxen, and how much shall be paid for the same, and by whom, and who shall be entitled to receive said amount.

According to the agreement in the submission, the referees heard the parties, and awarded that Charles Hanson should be paid by A. Webber, the sum of $92,25, and that Webber should pay to Robert H. Libbey, the sum of $50, &c.

The award is objected to by the defendant, on the grounds, that the referees have not determined the ownership of the oxen; that it is not mutual, the defendant having been adjudged to pay certain sums, and Hanson and Libbey, who were to receive it, not being required to do anything as an equivalent; and that it is not final.

Lord MANSFIELD says, that "awards are not to be scanned with critical nicety, as they are made by judges of the parties' own choosing; they are to be construed liberally and favorably, so that they may take their effect, rather than be defeated." 1 Burr. 279.

Where a submission is of divers subjects, distinctly enumerated, if it appears from the whole award, that all the matters submitted have been adjudicated upon by the arbitrators, it is sufficient, though each particular is not specified in the award. *Dolbier* v. *Wing*, 3 Greenl. 421.

It is stated in the submission, that the oxen of which the ownership was to be decided, were claimed by Libbey, and that they had been sold by Webber to Hanson; consequently each of the three had at some particular time asserted title to them. The question of ownership being settled, as the great question at issue, the rights of the respective claimants were to be adjusted upon this basis, by the receipt of money by those entitled thereto, and the payment by him, who by the award would have the oxen as the consideration. This would seem to follow, from the subject matter of the submission, which was the title to oxen and the payment for the same, in the mode to be decided, and nothing more.

It having been awarded under the submission, that Web-

ber should pay certain sums to the two other parties, it is certainly to be inferred therefrom, that the ownership of the oxen was adjudged to be in him; and Hanson and Libbey, having the consideration of the same, have no rights in the oxen themselves. No want of mutuality is perceived in the award; one party acquires by the judgment of the referees, the title to the oxen, free from dispute, and the others receive each their just proportion of their value.

The referees state, that they make a final award and determination between the parties, and this appears to have been done, so far that each party cannot fail to know from the award, what he is to receive, and what is to be surrendered as an equivalent, and who is to make the payments.

The alternative mode of payment, which Webber was entitled to make if he chose, would have been the execution of the award, and would have put an end to the whole controversy. This mode was intended to give him a privilege, if he should so regard it; and if he should not accept it, the award was operative against him for the absolute payment of $92,25 to Hanson, and of $50 to Libbey.

The parties having made no agreement touching the costs of reference, the arbitrators in that respect exceeded their authority in awarding costs to the plaintiff. But by the cases referred to, the award for damages is good; but the cost of reference is disallowed.

Defendant defaulted.

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† THURSTON, *Adm'r, versus* LOWDER, *Adm'x.*

By § 23, of c. 120, R. S., it is provided, that no executor or administrator who has given bond and notice of his appointment, according to law, shall be held to answer to the suit of any creditor of the deceased, unless it shall be commenced within four years from the time of his giving bond as aforesaid, excepting in the cases after mentioned.

Moneys collected by an executor, of the United States, for alleged claims of his testator against a foreign government, through the medium of a treaty, are assets in his hands, belonging to the estate.

And where an executor received *such moneys* within four years from his appointment, a part of which was claimed by plaintiff, and that it never was the property of the testator; it was *held*, that an action against the executor therefor, brought after the lapse of four years from his appointment, could not be maintained.

And where a party relies upon an *offer* to prove that the cause of action was fraudulently concealed, as an answer to a plea setting up the limitation bar, such offer, in the report of it to the Court, must *clearly* appear to have embraced all the requirements of the statute in that particular. The time *when* the fraudulent concealment was discovered must not be left in doubt.

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

Assumpsit. The writ in this case was dated Oct. 13, 1851, and contained two counts; one for $5000, and the other for $500, for money in the hands of an executor, alleged to belong to plaintiff's intestate.

The suit was commenced against John Wilkins, executor of the last will and testament of Samuel Lowder, who died during the pendency of the suit, and the defendant, administratrix *de bonis non* of said Lowder's estate, assumed the defence.

The general issue was pleaded, and the statute of limitations relied upon by brief statements.

After a partial hearing of the case, it was agreed that if, in the opinion of the Court, the action was maintainable on the facts offered to be proved, it should stand for trial; otherwise, a nonsuit to be entered.

The plaintiff was duly appointed administrator of the estate of Henry Rider, his intestate, in July, 1832, and Wilkins gave due notice that he had taken out letters testamentary, on September 1st, 1847.

The plaintiff offered to prove that, in 1830, said Rider and Lowder were owners of schooner Topaz, Rider of one, and Lowder of three-fourths; *that* Rider was master, and sailed the vessel on shares, and after paying the wages, and for provisions and supplies, was to receive, in his capacity as master, one half of the gross earnings of the vessel; the other half accruing to said Lowder and himself as owners, according to their interests; *that*, after a voyage to Hayti and several other voyages without returning to her

home port, at Bangor, the vessel was seized, and with all the property on board, including freight money and other proceeds of her voyages, was confiscated, and said Rider murdered by the subjects of the Mexican government; *that* plaintiff and said Wilkins, under the Act of Congress of March 3, 1849, instituted claims before a commission appointed by the United States Government, to carry into effect the treaty with Mexico, the plaintiff claiming one-fourth, and Wilkins, as such executor, three-fourths; *that* it was not known at that time under what terms the said vessel was sailed by Rider, and their award was made according to their ownership of the vessel, viz., $15937,15 to Wilkins, and $5703,66 to plaintiff, which had been paid accordingly to the parties, in May, 1851, with the exception of a portion allowed to Wilkins, to answer a claim made upon it by one William Lowder, under said Act; *that* said awards embraced allowances for outfits and provisions, advanced wages, clothes, watches and wages of the crew, which belonged wholly to said Rider under the contract by which he sailed the vessel.

And so much as was received by said Wilkins on account thereof, and for freights and other earnings of the vessel, which belonged to him as master, was claimed under the count for $5000, in this action.

The plaintiff offered further to prove, that prior to the loss of said vessel, Rider had deposited a quantity of molasses belonging to himself, in Providence, having carried it there in the Topaz, which had been sold by the consignee, and the proceeds, amounting to $469,82, had been paid over to said Lowder in his lifetime; which payment was not known to the plaintiff till about the time of commencing this suit, and he should show that the payment aforesaid had been fraudulently concealed from plaintiff's knowledge till about the time of the commencement of this suit.

This evidence was objected to by defendants, as there was no allegation of that kind in the writ, or counter brief statement.

Rowe & Bartlett, for defendant, as to the claim for molasses, relied upon the statute of limitations. The statute bar operated in the lifetime of Lowder. Rider dying before the expiration of six years from the time of payment, the statute, R. S., c. 146, § 13, saves to his administrator a right to commence an action at any time within two years, after administration granted, but not afterwards. This defence was made known in our brief statement, and no new fact to avoid it, was offered to be proved.

By the same section, Lowder being dead, a suit against his executor, in order to avoid the statute bar, must be brought within two years after letters testamentary granted. No suit was brought.

To charge the defendant as executor by a creditor of the testator, the action must be brought within four years from the time of his giving bond. R. S., c. 120, § 23; 32 Maine, 72.

The same statute also bars the rest of this claim. There is no allegation or proof whereby it can be brought within any of the exceptions provided in c. 120.

Moody, for plaintiff, argued at length upon the several matters raised by the pleadings. As to the statute bar set up, he maintained that it could not be applied to that part of the claim for the government money, as between the plaintiff's intestate and the defendant's testator, the relation of debtor and creditor did not exist. No debt at the time of Lowder's decease was due to plaintiff's intestate.

To be a creditor of the estate of defendant's testator, that relation must have existed in the testator's lifetime, and without that relation there can be no application of this statute.

As to the claim for molasses, the statute bar attached to that unless the proof offered would take it out of its operation.

The payment of the money to Lowder was fraudulently concealed from plaintiff's knowledge until a short period

anterior to this suit. That is an answer to the limitation. R. S., c. 146, § 18.

Kent, also for plaintiff, argued other points made in the case, but which the Court found it unnecessary to examine.

RICE, J. — The plaintiff, in his writ, presents his claims against the defendant. One for a sum of money received by John Wilkins, former executor of the estate of Samuel Lowder, from the United States, under a treaty with Mexico, arising from the destruction, by the citizens of the Mexican government, of a vessel and cargo, of which Lowder and the plaintiff's intestate were joint owners. The other, for a sum of money received by Lowder, in his lifetime, being the proceeds of a quantity of molasses sold in Providence, by the consignees of the plaintiff's intestate.

Lowder deceased in 1847. Wilkins was duly appointed and qualified as executor on his estate, in August of that year. The plaintiff commenced this action, Oct. 13, 1851, against Wilkins, executor, who was then in full life.

The defendant, who now defends this suit, as administratrix *de bonis non*, of Lowder, pleads the statute of limitations, relying upon § 23 of c. 120, R. S., which provides, that no executor or administrator, who has given bond and notice of his appointment, according to law, shall be held to answer to the suit of any creditor of the deceased, unless it shall be commenced within four years from the time of his giving bond as aforesaid; except in cases after mentioned.

The plaintiff contends that these statute provisions do not apply to the principal claim in this case, for the reason that the relation of debtor and creditor never existed between himself or his intestate and Lowder; that the claim and right of action originated after the death of Lowder.

Section 24, of c. 120, provides, that when assets shall come to the hands of an executor or administrator, after the expiration of said four years, he shall account for, and apply

the same in like manner as if they had been received within said four years.

Was the money received from the United States, for Mexican spoliation, assets in the hands of the administrator? In *Foster* v. *Fifield*, 20 Pick. 67, this precise question was raised. SHAW, C. J., in delivering the opinion of the Court in that case, says, "the objection taken to this is, that this money, obtained from the king of the Two Sicilies, by means of a treaty made by the government of the United States, was a new acquisition, and not a part of the assets of the intestate's estate. This proposition is not tenable. Fifield received it as administrator, as trustee for all entitled; first, for creditors, and then for distributees or heirs. It is in the nature of a debt due to the intestate, at the time of his decease, but collected afterwards through the medium of the government."

If this doctrine be sound, and we perceive no reason to doubt its correctness, then, in legal contemplation, the parties sustain the same relation to each other that they would have done had Wilkins collected other moneys, or reduced to possession other assets of his testator, in which the plaintiff had an interest, in his representative capacity, within four years after giving bond, as provided in § 23. We also think that the statute bar applies by necessary implication, from the language used in § 24, cited above.

In this case the plaintiff had ample time to ascertain his rights, before the money obtained from the United States went into the hands of the defendant's predecessor. And after the money was received, there was sufficient time within which to commence his suit, before the statute bar attached. If, therefore, rights have been lost, that loss must be attributed to want of proper diligence in the investigation and prosecution of those rights.

The plaintiff was not concluded by the adjudication of the commissioners of the United States, but might have sought a remedy in this Court, had it been seasonably prosecuted. *Mercantile Ins. Co.* v. *Corcoran*, 1 Gray, 75.

The other claim set forth in the plaintiff's writ, is based upon the assumption, that many years ago, (about 1831,) Lowder received a sum of money, which, with the interest thereon, would now amount to five hundred dollars, for a quantity of molasses, sold by the consignees of the plaintiff's intestate, and belonging to him.

To this claim the defendant also interposes the statute of limitations. To avoid this plea, the plaintiff, as appears by the report of the case, stated that he should show that the "payment for the molasses aforesaid, had been fraudulently concealed from the plaintiff's knowledge till about the time of the commencement of this suit."

The defendant objected to the proof, because there was no allegation of the kind in his writ, or counter brief statement. Without deciding whether, under our system of pleading, such evidence could be offered by the plaintiff, without pertinent allegations in his pleadings, it is clear that the proof here offered is not sufficient to take this case out of the operation of the statute of limitations.

The offer is indefinite as to the time when the alleged fraudulent concealment was discovered. It may have been before the expiration of the four years after Wilkins gave bond as executor. If so, the claim would be barred. Nor does it appear by whom the concealment was practiced, nor that any diligence had been used to discover the fraud. Still further, it is very difficult to perceive how such a fraudulent concealment as the statute contemplates could have been practiced under the circumstances of this case. Certain it is, that to entitle the plaintiff to a hearing, the proof offered should, if produced, have brought his case clearly within the provisions of the statute. This it wholly fails to do. A replication, setting out the same facts which the plaintiff offered to prove would be adjudged bad on demurrer.

There were other matters discussed in the arguments of counsel which it is not necessary to consider, as it is apparent from what has already been said, that the action cannot be maintained. *Plaintiff nonsuit.*

COUNTY OF AROOSTOOK.

† LONG *versus* HAMMOND *& al.*

Where the decree of a court of another government is interposed to judicial proceedings in this State, the jurisdiction of such court may properly become a matter of inquiry.

And where a person residing in this State, petitions a court of bankruptcy in the Province of New Brunswick, and obtains a discharge from all his debts, under the decree of that court, such discharge is invalid and can have no effect even upon a contract entered into in that Province.

But when such court of bankruptcy has jurisdiction of the person applying for the benefit of the bankrupt Act of that Province, and a decree is made in conformity with the requirements of their law, it operates to discharge the contracts of the applicant, and cannot be *impeached* in a subsequent action upon such contracts prosecuted in this State by a citizen of that Province.

The laws of a foreign country, in their effect upon contracts made under them, are recognized, not as having any binding force in our Courts, but on the principle of international comity.

As the bankrupt Acts of New Brunswick give no *liens* upon property attached, the attachment of the property of a petitioner for their benefit, *before* his petition is filed, cannot operate to hold the property after he has obtained his discharge from the contract on which the seizure was made.

ON FACTS AGREED.

ASSUMPSIT, on the following note, dated at Fredericton, Aug. 30, 1847.

"Six months after date, we promise to pay Charles Long, or order, the sum of eighty pounds c'y, for value received.

"A. B. & W. C. Hammond."

This writ was dated March 7, 1848, and on it was attached the defendants' real estate in the county of Aroostook.

The plaintiff and Andrew B. Hammond were, and ever have been inhabitants of New Brunswick. William C. Hammond, the other defendant, at the date of the writ, and ever since, resided with his family in this State.

On Aug. 24, 1848, these defendants petitioned for the benefit of the bankrupt Act of New Brunswick, a fiat was

issued on the 25th of the same August, and their discharge afterwards granted in pursuance of said Act. Their property was surrendered on the 28th of the same August, but no property out of the Province, was, at that time or since has been surrendered to the commissioner in bankruptcy.

At the time of the commencement of this suit, the defendant Andrew B., was the owner of real estate in the county of Aroostook.

Two sections of the bankrupt Act of New Brunswick, under which these proceedings were instituted were as follows:—

"XXIV. And be it enacted, that any bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force at the time of issuing the fiat in bankruptcy against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands made, proveable under such fiat, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter mentioned; and no certificate of such conformity by any such bankrupt, shall release or discharge such bankrupt from such debts, claims or demands, unless such certificate shall be obtained, allowed and confirmed according to such provisions:—provided always, that no such certificate shall release or discharge any person who was a partner with such bankrupt at the time of his bankruptcy, or was then jointly bound, or had made any joint contract with such bankrupt.

"XXV. And be it enacted, that it shall be lawful for the commissioner, authorized to act in the prosecution of any fiat in bankruptcy, already issued, or hereafter to be issued, on the application of the bankrupt named in such fiat, to appoint a public sitting, for the allowance of such certificate, to the bankrupt named in such fiat, whereof, and the purport whereof, sixty days notice shall be given in like manner as is before provided by the twenty-second section of this Act; and at any such sitting, any of the creditors of

such bankrupt may be heard against the allowance of such certificate, but it shall not be requisite for such certificate to be signed by any of the creditors of such bankrupt; and such commissioner, having regard to the conformity of the bankrupt to the laws relating to bankrupts, and to the conduct of the bankrupt, as a trader, before as well as after his bankruptcy, shall judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto, and allow the same, or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require:—provided always, that no certificate shall be such discharge, unless such commissioner shall in writing, under hand and seal, certify to the court of chancery, that the bankrupt has made a full discovery of the estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fulness of such discovery, and unless the bankrupt make oath in writing that such certificate was obtained fairly and without fraud, and unless the allowance of such certificate shall, after such oath, be confirmed by the court of chancery, against which confirmation any of the creditors may be heard before such court."

The court were authorized to dispose of the case by nonsuit or default, according to the legal rights of the parties.

Kent, for defendants.

The general rule is, that a discharge from the contract, according to the laws of the place where it is made, *or*, where it is to be performed, is good every where, and extinguishes the contract. *Very* v. *McHenry*, 29 Maine, 206.

This contract was made in New Brunswick, and according to the law of the case cited, if there has been a discharge there, it is such every where. The discharge under the New Brunswick Act is from the contract. 5 Vict., c. 43, § 14; 6 Vict., c. 4, § 24.

As to Andrew B. Hammond, one of defendants, he is clearly entitled to a discharge under the law of the case

before cited. As to the other, the question is not open. Here is the adjudication and discharge, and it cannot be impeached for want of jurisdiction. No fraud is alleged, and no issue tendered. The proceedings are regular. And this is not a case where we seek to invoke this discharge in a foreign tribunal, against a claim of one of our citizens, made or to be executed here, but one made there, and to one of their own subjects. The Province of New Brunswick had a right over the contract, and these proceedings are binding on the courts of that Province. This defendant could effectually plead this discharge there. Besides, here are no pleadings raising the question of fraud; and if there was evidence of fraud, the plaintiff is estopped to present it by the law governing this contract, as that matter can only be tried in the bankrupt court. *Morrison* v. *Albee*, 2 N. B. R. 145; 5 Vict. c. 43, § 16, also § 17; 6 Vict. c. 4, § 25.

The bankrupt law of that Province is dissimilar to the recent one of the United States.

If any stress is laid upon an attachment made in this case, we answer that is only a conditional lien depending wholly upon sustaining the action. If the remedy on the contract is destroyed, a judgment cannot be rendered. The cases between the late Judge Story and the N. H. Courts have little or no bearing on this case. Those decisions related to the meaning of a clause of our Act; if there had been no saving clause of *liens*, no action could be maintained. No such saving clause is in the New Brunswick Act. No title or right even of possession passes by attachment. The creditor acquires no new right of property. *Atlas Bank* v. *Nahant Bank*, 23 Pick. 480; *Ex parte Foster*, 2 Story, 140, and cases there cited.

Granger, for plaintiff.

The discharge is inoperative for these reasons:—

1. Wm. C. Hammond, before this discharge, at the time, and ever since, has resided with his family in this State. Residence in that Province is an essential requisite to give

jurisdiction to the bankruptcy courts there, and the benefits of the Act are limited to the residents of that Province. Stat. 6 Vict. 1843, § 2.

2. As to the other defendant, though he resided in the Province, he was a tenant in common of certain parcels of real estate in this State which were attached prior to the filing of his petition. And those effects were never surrendered to his assignee. This omission was a fraud. 6 Vict. c. 6, § § 24, 25.

3. But plaintiff, by his attachment, acquired a lien on the estate in Aroostook county. *Harrison* v. *Stevens*, 2 Cranch, 298; *Ogden* v. *Saunders*, 12 Wheat. 313; 2 Kent's Com. 330—1; 6 Bing. 353; 20 Johns. 227; 3 Wend. 538.

This was a right which could not be divested by any proceedings in a foreign jurisdiction under the bankrupt Acts of a foreign country. Cases before cited. *Taylor* v. *Gear*, Kirby, 311; *Fox* v. *Adams*, 5 Greenl. 245.

It is by comity only that effect is ever given to the bankrupt Acts of a foreign country; but it is never extended to enable a debtor to withdraw his effects which have been arrested by attachment.

The provisional assignee under a foreign bankrupt law, acquires no title and no right that he can enforce to the real estate of the bankrupt, out of the jurisdiction of the country enacting the law.

The certificate of discharge cannot therefore defeat this action.

TENNEY, J.—The bankrupt Act, of the Province of New Brunswick, 6 Victoria, (1843,) § 2, secures to those only who reside in the Province, the benefits of its bankrupt laws.

But it is insisted, that a discharge, after a full hearing upon a petition in bankruptcy and proceedings thereon, is in its nature a judgment of a court of competent jurisdiction, and cannot therefore be impeached, for any cause.

The jurisdiction of a court of another government may

be inquired into, and if a want of jurisdiction appears, no credit will be given to the judgments and decrees of that court. *Middlesex Bank* v. *Butman & al.*, 29 Maine, 19, and cases there cited.

It is agreed that one of the defendants resided in this State, as early at least as the time, when the writ was made, which was nearly six months, before he filed his petition, and his residence has continued here since that time. Consequently the court, before which the proceedings upon the petition of William C. Hammond were had, was without jurisdiction in his case, and the decree of discharge is to be treated, here, as void.

The bankrupt Acts of New Brunswick, provide a mode, in which creditors may be notified of the pendency of petitions of their debtors, for the benefit of those Acts, and give them the opportunity of being heard thereon and of making objections to the decrees prayed for. No provision in any Provincial Act, has been referred to, whereby, after the final discharge of a bankrupt, a rehearing can be had, in a suit upon the original contract, upon the question, whether the petitioner shall still be liable or not, on account of fraud alleged to have been practiced by him, or for other cause. Creditors can object to the decree of discharge, and be heard in their objections only in the bankrupt courts. It would seem, that in this respect, the bankrupt Acts of New Brunswick are unlike the bankrupt law of the United States enacted in 1841. In the latter, it was provided, that a creditor, who had not had an allowance of his claim, in the bankrupt court, could institute a suit upon his demand, and the bankrupt's discharge and certificate would be no defence, if impeached, for fraud or wilful concealment; those creditors only, whose claims were allowed, being treated as parties to subsequent proceedings. *Humphreys* v. *Swett*, 31 Maine, 192. Under the Acts of New Brunswick, it seems to have been designed, that all creditors should be parties to the proceedings in bankruptcy, whether their claims had been allowed or not, after the notice required, and their right

to be heard, was regarded as waived, if they omitted to make their objections to the discharge of the bankrupt, in the manner provided.

It is true, that the bankrupt laws of another country cannot govern courts in this, in regard to contracts made in the former, excepting from a principle of indispensable comity, extending the right to other nations, which it demands and exercises for itself. It is treated as a binding principle of international law, subject to the exception, that if the foreign bankrupt law gives to its own citizens or subjects benefits, which it in effect denies to those of other countries, this comity will not be extended to work injustice to the latter, in their own courts.

The general rule is, that a discharge in bankruptcy from the contract, according to the laws of the place, where it was made, or where it is to be performed, is good every where, and extinguishes the contract. *Very* v. *McHenry*, 29 Maine, 206, and cases there referred to.

The contract, in the note in suit, was both made and was to be performed in the Province of New Brunswick, where both parties resided at some time, and it does not appear, that they resided in any other place, so far as it regards the plaintiff and the defendant Andrew B. Hammond. The discharge of this defendant was obtained in pursuance of the bankrupt laws of that Province, and was a discharge of the contract there. The exception to the general rule applicable to discharges of bankrupts under the laws of other countries, cannot be invoked in this case, as the plaintiff is not shown ever to have been a citizen of the United States, but seeks to obtain a judgment in this suit, when prosecuting it, as a resident of New Brunswick.

The plaintiff however insists, that he has the right to prevail in this suit, on the ground, that Andrew B. Hammond fraudulently omitted to surrender to the commissioner in bankruptcy, valuable real estate in this State, at the time that he surrendered his other property; and that this real

estate was attached in this suit, before the petition of this defendant was filed.

If the ownership of this real estate was an obstacle to the discharge of Andrew B. Hammond, the plaintiff having been a party to the proceedings in bankruptcy, had all the opportunity, which the Provincial laws afforded, to present it to the court. If he did so, the objection must have been overruled by a tribunal of competent jurisdiction. If he did not make known this objection, from ignorance of the facts, or other cause, he stands now in the same predicament, in his own country, as other litigating parties do, who fail to make out in their own behalf, the strongest case, which the facts might have allowed, while they had day in court; but so long as the judgment remains in full force, it cannot be collaterally impeached, without some legal provision, which may enable parties to do so. Of such provision, in the laws of New Brunswick, we are not advised. To permit the plaintiff to prevail on this ground, after he has had the opportunity to present and insist upon every objection, which was open to him, in the country where he resided, without success, would be granting the right of being heard on the same question in this Court, in order to avoid the effect of a discharge in bankruptcy which was good there, when obtained, and would be a perfect bar to a suit upon the note, instituted in a court in that Province, at this time, and which, by the rule before referred to, is a valid discharge every where.

The bankrupt Acts of the Province of New Brunswick, do not, as far as those Acts have been introduced, give any lien upon property attached by a creditor, before the filing of a petition by one seeking the benefits of those Acts, so that property may be made available to the creditor, notwithstanding the debtor's discharge. The discharge being from the contract itself absolutely, there can be no basis for a judgment against the property attached.

William C. Hammond defaulted.
Andrew B. Hammond discharged.

COUNTY OF WASHINGTON.

† SAWYER *versus* NICHOLS.

To constitute a valid sale of personal property against the creditors of the vendor, the contract must be *completed*, and possession taken by the vendee, or he must be in a condition to take possession, by the consent of the vendor.

And where the evidence of a completed sale is weak and unsatisfactory, but has a tendency to sustain it, the Court cannot weigh the testimony, and determine its insufficiency as matter of law.

In all such cases the question of the completeness of the sale is to be determined by the jury.

Of setting aside a verdict as against evidence.

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

CASE, against the sheriff for alleged neglect and omission of duty in the service of a writ in favor of plaintiff against one Mayville and Eliphalet Morse, trustee.

The writ in that suit was dated Nov. 6, 1852, and on the eighth of the same month, special directions in writing were given to defendant, as to the attachment. A part of the instruction was as follows:—"You will attach the possession Mr. Mayville bought of Staples on the Danforth plantation, I think, and the hay of Mayville in the barn of Staples, on said possession;—also trustee Mr. Morse, the man for whom Mayville worked last winter."

The plaintiff lived at Calais, and his debtor, Mayville, in township No. 9, about 55 miles from the former place.

Morse testified that, in Nov. 1852, the defendant came to his house after dark, and Mayville was there the same night, —that while defendant was in one part of the house, Mayville and himself went into another part, where he settled the debt he was owing him by giving him a negotiable note, and when they came out where defendant was, he served the writ on him; but that he knew nothing about any such process, until the service was made.

But the principal question was, as to defendant's omission in not attaching the hay.

Upon that point, the testimony, relied upon by defendant, was from one Colburn, who testified that on Oct. 23, 1852, he bought a barn of hay of Mayville, in township No. 8, range 4, and was to give him $10 per ton, and paid him $387 on Dec. 15, 1852; — that the trade was concluded on Oct. 26, when he examined the hay, and they agreed on a man to measure it, and afterwards took it in pursuance of that agreement; — that he lumbered in same township and used it there. It was measured some time after, but at what time he could not tell. Other facts in the case were not in dispute.

Plaintiff requested these instructions: —

That if the jury believe all the facts stated by Colburn, they do not in judgment of law show that there was any change of the property in that hay, as against Mayville's creditors, until after Nov. 10, 1852; — *that* there being no controversy as to any fact necessary to entitle the plaintiff to maintain this action for the value of the hay in the Staples barn, admitted by defendant's counsel to belong to Mayville, prior to the sale to Colburn, and no evidence furnishing any legal excuse for his omission to attach the hay, unless it is in Colburn's testimony, that if they believe the whole of it, it furnishes no legal excuse for defendant, and the jury must return their verdict for the value of the hay not exceeding plaintiff's claim; — *that*, if they believed from the evidence, the defendant had an opportunity to serve the trustee writ on Morse, and omitted to do it, until after Morse had paid Mayville, and Morse was discharged as trustee, in consequence of such neglect, defendant is liable.

That if the jury believe all the evidence in the case, they must return a verdict for plaintiff for the amount claimed in his declaration, not exceeding the value of the hay in the barn on the Staples place.

That the facts stated by Colburn do not authorize the inference that there was a delivery of the property.

These requests were not complied with, excepting so far as found in the instructions given, viz:—

That if defendant was instructed to attach this hay, he was bound to, if it could be done with vigilant and reasonable exertions. Has he furnished any evidence of a reasonable excuse? He relies upon the deposition of Colburn; and it is contended that deposition shows a sale of the hay in October, and before the defendant had an opportunity to attach it. Was that property sold to Colburn so as to pass the property? Several things are necessary to constitute a sale. There must be a contract of sale, and, as against attaching creditors, this is not enough; there must be a delivery of the property sold. Was there a delivery of the hay in question? You will see if there is any evidence of such delivery prior to Nov. 10, 1852, the time when defendant was in that vicinity. If there was not, the property did not pass, and it was open to attachment; although the bargain in every other respect may have been consummated. If that hay was Mayville's, and he had not delivered it to Colburn, and defendant has furnished no other reasonable excuse for omitting to attach it, he is liable for its value, not exceeding the amount of plaintiff's claim.

If defendant had an opportunity to serve the trustee writ on Morse, if he knew that he was the man when he first met him, and neglected to serve the writ on him, whereby that debt was lost to plaintiff, the defendant will be liable for that claim, if the other is not made out.

The jury returned a verdict for defendant, and plaintiff excepted to the instructions and omissions to instruct as requested. He also filed a motion to set aside the verdict as against the evidence.

Granger, in support of the exceptions.

1. All the facts in Colburn's deposition do not show any change of the property in the hay, as against Mayville's creditors, prior to Nov. 10th. *Ludwig* v. *Fuller*, 17 Maine, 162.

2. If there was no change of the property, as against creditors, it is clear that the facts contained in Colburn's

deposition furnished no legal excuse for defendant, and no other excuse being offered, the second requested instruction should have been given. The third request was substantially complied with.

3. But if the first and second should have been given, it is not easy to see why the fourth should not also. If there was no delivery of the hay on the Staples place prior to Nov. 10th, there was no defence to the action.

4. The quantity of hay was not ascertained. Had it been stolen or destroyed, how could it ever have been ascertained in the mode agreed on? *Gilbert* v. *Woodbury*, 22 Maine, 246. In the case cited, the Chief Justice says: — "When the whole testimony, if believed, would not in law establish the fact, the Judge might be required to express the legal effect of the testimony." He also argued the motion.

B. Bradbury, contra, cited 20 Pick. 280, and Parsons on Cont. p. 441.

TENNEY, J. — The trustee writ against James Mayville, and Eliphalet Morse, trustee, in favor of the plaintiff, was dated Nov. 6, 1852, and put into the hands of the defendant for service, with written instructions, which were dated Nov. 8, 1852. The property directed to be attached was not taken by the defendant, and the service was made upon the trustee after he had given a negotiable note for a prior indebtedness to the principal defendant, and after the defendant in this action had seen him, at the house, where the principal and trustee were.

The defendant denied his liability for omitting to attach the hay, on the ground, that it had before been legally transferred to one Colburn, under a sale; and the defence for not making earlier service on the trustee was, that although he might have seen the trustee, he was ignorant that he was the person named as the trustee in the writ; and he made service upon him, the moment he had the necessary information.

The case comes before the Court, on exceptions to the

refusal to give certain instructions in relation to the sale of the hay, and on a motion to set aside the verdict as being against the evidence of the case.

The requisites of a sale, made by a debtor, which would be valid as against his creditors, as stated in the instructions to the jury, were full, and are not the subject of any complaint. Certain specific instructions requested and omitted, are all predicated upon the assumed ground, that the evidence was insufficient to procure a sale as against the plaintiff, and that instruction to this effect should have been given, as a rule of law.

It is true, when the whole testimony, if believed, would not, in law, establish the fact in controversy, the Judge might be required to express the legal effect of the testimony as matter of law. But when the evidence has a tendency to establish the controverted fact, though it may not be strong in its support, and the Judge may well apprehend, that the jury will find it insufficient for the purpose for which it was introduced, the Court has not therefore the right to weigh it, and determine its insufficiency as matter of law. On the other hand, if the evidence upon the most favorable construction for the party offering it, does not tend to show the truth of the proposition stated, it furnishes nothing for the consideration of the jury, and the Judge has the same power to say to the jury, that it fails in the object sought, that he has to exclude it for irrelevancy.

In order to perfect a sale as against creditors of the vendor, a contract must be completed between the parties to it, and possession taken by the vendee, or he must be in a situation to take possession of the articles, by the consent of the vendor. 2 Stark. Ev. 638.

By the testimony of Colburn, he bought a barn of hay of Mayville, the plaintiff's debtor, on Oct. 23, 1852, in township No. 8, range 4, and was to give therefor ten dollars a ton; and on Oct. 26, as he thought, concluded the trade, at that price; the parties to the contract then agreed upon some person to measure the hay; that Colburn examined the hay,

and concluded to take it, and afterwards did take it, in pursuance of that agreement; that he was lumbering on the township, where the hay was cut, and he wanted it in his operations, and used it therein.

The parties to the sale seemed to have supposed, that the sale was not completed, at the time of their first negotiation, on Oct. 23; and that something else was necessary to make it legally perfect. It may have been, that this attempt to make the sale was at a different place from that where the hay was, but when the transaction of Oct. 26, took place, the purchaser *examined the hay*, and consequently was so situated, that he could take possession at that time. Whether the owner gave consent, that the hay should go into the possession of the vendee or not, there is no direct evidence. He had the right to retain it for his security, but this right he could waive. Neither does it appear, whether the consideration was paid before, at the time, or after, the hay was taken from the barn by Colburn. But the hay having been purchased, to be used on the township where it grew, and being afterwards so used, and no payment having been made till Dec. 15th, and no objection to removal before the consideration was paid, being shown, the question of a perfect sale, or otherwise, was for the consideration of the jury. The exact amount of the hay being undetermined, was not inconsistent with the completeness of the sale, if it was perfected in every other respect, and so intended by the parties. But it was incumbent on the defendant, who affirmed the sale, to satisfy the jury, that it was designed to be an absolute transfer, and all that remained to be done, was for the purpose of ascertaining the amount to be paid as the consideration. *Riddle* v. *Varnum*, 20 Pick. 280; *Hawes & al.* v. *Watson & al.* 2 Barn. & Cress. 540.

Whether the evidence was so defective and uncertain in its character, touching the sale of the hay, that it failed to establish the legal transfer, was exclusively for the jury to decide. They may have erred in their verdict upon this branch of the case, but the Court cannot substitute its own

judgment for that of the jury on a question of fact, properly submitted. And we are not satisfied, that the jury were under any improper influence, or had not a full understanding of the case, in relation to the sale of the hay.

The motion to set aside the verdict as being against the evidence of the case, in exonerating the defendant from liability for not making an earlier service on the trustee, must be overruled. It does not appear, that he had personal knowledge of Morse. When he went to the house it was dark, and if he had ever seen Morse, there were not the means of recognizing him, which would have existed under other circumstances. It does not appear that he was informed that Morse was at the house where he stopped; and his directions were, "to trustee Mr. Morse, the man for whom Mayville worked last winter." These directions imply the necessity of some inquiry, which it does not appear, he had opportunity of making, before Mayville, suspecting the object of his journey, went directly to Morse and obtained his negotiable promissory note. The verdict of the jury, cannot for this cause be impeached.

Exceptions and motion overruled.

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† INHABITANTS OF PLANTATION NO. 9 *versus* BEAN *& al.*

When a plea in abatement is overruled by the presiding Judge, the general issue pleaded, and the cause subsequently reported for the consideration of the whole Court upon the evidence, without any stipulation as to the preliminary plea, it is considered as waived.

When a plantation claims to support an action as a corporation duly organized under the Act in relation to elections, they must show a compliance with the provisions of that Act.

Without a return by the assessors, to the office of the Secretary of State, of certain and definite limits of the plantation, the organization is defective and of no validity.

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

TRESPASS *quare clausum*, for logs cut on the public lots in township No. 9, 3d range, in the county of Washington.

On the first day of the term at which the writ was returnable, defendants filed a motion to quash the writ, also a demand for the plaintiffs' appearance, which were overruled.

Being required to plead, the defendants put in the general issue, and a brief statement denying the existence of the plaintiff corporation and their right to bring this suit; and also claimed the right of doing the acts complained of, as the servants of one Prentiss, to whom was conveyed the timber on these lots, in Nov. 1850, by the Land Agent of the State.

By c. 196, of the Acts of 1850, the Land Agent was authorized to sell the timber and grass on all the lands reserved for public uses in townships or tracts unincorporated, or not organized for election purposes.

Under this Act, the Land Agent conveyed the timber cut upon the lots, complained of in this suit, to one Prentiss, by whose authority the defendants acted.

The question raised was, whether the plaintiffs were a legally organized plantation, under c. 89, of Acts of 1840.

One requirement in that Act was, that "the *limits* of all plantations, so organized, shall be described by said assessors, so chosen, and forwarded to the Secretary of State, and by him recorded."

After all the evidence was presented, the cause was taken from the jury, and it was agreed that upon the evidence the full Court should render judgment according to the legal rights of the parties.

The record evidence relied upon appears in the opinion of the Court.

Thacher, for defendants, contended that the preliminary proceedings were not regular, but, if so, that the organization was illegal for want of a description of its limits. He also contended that such organization had been abandoned. Nor was the organization of 1844 perfected.

Fuller, for plaintiffs, maintained that the parol and record evidence shows an organization *de facto*, claiming to be such, choosing officers and exercising the rights of similar organ-

izations. That this was sufficient, he cited 11 Maine, 227; 12 Maine, 381; 36 Maine, 78; 14 Pick. 442; 7 Met. 592; 2 Cush. 37.

If record evidence alone is essential to prove the organization, the proof is sufficient of its loss to authorize the use of the parol.

Such being the case, the sale of the Land Agent was unauthorized and void, and the defendants are naked trespassers.

RICE, J. — This case has been before the Court on a former occasion, 36 Maine, 359. At the return term the defendants seasonably filed a motion in abatement. This motion was overruled, and, under the direction of the Court, the defendants pleaded the general issue. By pleading the general issue, under the direction of the Court, the defendants waived no rights under their plea in abatement. Subsequently, however, by consent of parties, the case was reported for the consideration of the full Court. In that report, no rights under the plea in abatement were reserved to the defendants; but the case was presented on different grounds. This must be deemed a waiver of the plea in abatement and a consent on the part of the defendants to rely upon the general issue with their brief statement. The existence of plaintiffs, as a corporation, can be questioned only by plea in abatement. By pleading the general issue, the legal existence and competency of the plaintiffs are admitted. *Trustees of Ministerial and School Fund* v. *Kendrick*, 3 Fairf. 381.

The plaintiffs claim the right to maintain this action as a corporation duly organized, under the provisions of "an Act in relation to elections," passed Oct. 2, 1840.

The defendants justify under a deed from the Land Agent of Maine to Henry E. Prentiss, dated Nov. 28, 1850.

The plaintiffs claim to have organized under the Act above referred to, in the fall of 1840, and to have continued that organization. No record of such organization was produc-

ed, but we think there is satisfactory evidence that such a record once existed, and that it has been lost.

The deposition of Edward S. Dyer shows that there was a meeting of the inhabitants of plantation No. 9, range 3, and of "Lombert's Lake" in No. 11, called by warrant of one or more of the County Commissioners, for the purpose of organizing a plantation for election purposes, under the statute aforesaid, and that such proceedings were had as are contemplated by said Act.

The following notice seems to have been forwarded to the Secretary of State, a copy of which, from the Secretary's office, was put into the case.

"Plantation No. 9, Oct. 24, 1840.

"To the Secretary of State:—The following are the bounds of plantation number nine, as incorporated this day, including township No. 9, in the third range, north of the Bingham purchase, and settlement, at Lombert's Lake, (so called,) on township number eleven, on the river St. Croix.

"Edmund Webber,
"Richard Lombert, } Assessors.
"Aaron Scribner,

"Aaron Scribner, Plantation Clerk."

The defendants contend that this certificate is defective as a description of the limits of the plantation, and therefore such a faliure to comply with the provisions of the statute as rendered the whole proceedings nugatory. It was undoubtedly the intention of the Legislature, to require of these anomalous corporations, such a description of their limits as would give them a definite location, as well as a name. Reference to an existing division of territory, which has established and well known boundaries, as have townships which have been surveyed by authority of the State, is as distinct a description as it would be to recite the boundaries of such tract in detail. But where a tract of land or division of territory is referred to by name, which has no established boundaries, the description is, of course, indefinite and uncertain. "Lombert's Lake" settlement, is

described as being *in* township number eleven, *on* the river St. Croix. But *in* what part of that township, or what portion of the area thereof is included in that "settlement," does not appear.

But there are other difficulties to be encountered in maintaining this organization. The plaintiffs have introduced certain papers which they claim to be records, to show their continued existence as a corporation. These records, if admitted for one purpose, which may be supposed to favor the position of the plaintiffs, must be considered for other purposes, for which they afford proof equally satisfactory, though the tendency of such proof be adverse to the plaintiffs. These records show that meetings of the inhabitants of "No. 9 and 11" were called Aug. 25, 1842, March 11, 1843, and Aug. 29, 1843. Warrants also appear to have been issued to warn the inhabitants of "Jackson Brook Plantation," Jan. 10, 1844, and March 19, 1844. There is no record of any meeting of the inhabitants of plantation No. 9.

On the 22d day of June, 1844, the County Commissioners for Washington county, issued their warrant, directing the inhabitants of No. 9, 3d range, qualified to vote for representatives and senators, to meet at the house of Francis Butterfield, in said township, on Saturday the 29th day of June, inst., at 4 o'clock, P. M., to organize themselves into a plantation for the purpose of voting, by the name of "Jackson Brook Plantation." The record shows that a meeting was held pursuant to this warrant, and that the inhabitants of "Jackson Brook Plantation" continued to hold meetings for election purposes, until the year 1851. No description of the limits of "Jackson Brook Plantation," as organized in 1844, appears to have been forwarded to the Secretary of State, as required by the Act of Oct. 2, 1840.

In January, 1851, as appears from the records introduced by the plaintiffs, a warrant was issued by one of the County Commissioners of Washington county, to notify the inhabi-

tants of township No. 9, 3d range, to meet at the house of James L. Dudley in said township, on Friday, the tenth day of January, at ten o'clock, A. M., A. D. 1851, to choose a moderator and clerk, and for the purpose of organizing themselves into a plantation, according to the provisions of an Act passed at the extra session of the Maine Legislature in 1840.

The inhabitants met under this warrant and organized themselves, and duly forwarded a description of the limits of their plantation to the Secretary of State; and since that time this organization appears to have been maintained.

In view of these facts, we are of opinion that the organization of 1840 was defective, inasmuch as the limits of the plantation were not described by the assessors and forwarded to the Secretary of State, as required by the Act of Oct. 2, 1840. We are also satisfied from the records introduced by the plaintiffs, that that organization was not maintained, but was wholly abandoned by the inhabitants. The organization attempted in 1844, was never perfected, no description of its limits ever having been forwarded to the Secretary of State.

The result is, that no legal organization of "plantation No. 9, 3d range," existed prior to 1851. Of the organization in 1851, under which the present assessors appear to have been elected, it is not necessary to express an opinion. By the provisions of c. 196, laws of 1850, the Land Agent was authorized and directed to sell the right to cut and carry away the timber and grass from off the reserved lands which have been located in all the townships and tracts of land unincorporated or not organized for election purposes.

No. 9 being unincorporated, and not having been legally organized for election purposes, and the public lots therein having been located, the timber and grass thereon passed by the deed of the Land Agent to Prentiss, and the defendants, justifying under Prentiss, are protected.

Plaintiffs nonsuit.

† WHITNEY & *als. versus* SLAYTON.

Parol evidence, to change or vary the meaning of a contract set forth in the condition of a bond, is inadmissible.

No consideration is required to be stated in a contract under *seal.*

A bond binding the obligor not to exercise a trade is void, but where the inhibition is for a limited time, and within certain limits, it may be obligatory.

And the *exceptions* to the common law rule should receive a *liberal* construction.

Thus, where the defendant sold plaintiffs an iron foundry, in Calais, and agreed not to engage in the business of iron casting within sixty miles of that place for ten years, it not being a part of the State densely inhabited, and containing but few places of much business; *it was held,* that the agreement was binding.

And such bond is broken, if the obligor become a stockholder in an incorporated company, carrying on that business within those limits, or an employee of such corporation.

In a suit on such a bond, damages are recoverable, sustained even after the date of the writ up to the time of *trial.*

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

DEBT, on a bond.

On the 21st day of Feb. 1852, defendant executed a bond to plaintiff of $5000, with this condition: — "that whereas the above named Slayton has this day sold out his foundry establishment in Calais, to the parties above named, and has agreed not to engage in the business of iron casting within sixty miles of Calais for the term of ten years from this date; now if the said Slayton shall well and truly fulfil his said agreement, and not engage in said business within said space in said time, then the above bond to be void, otherwise to remain in full force."

The plaintiff's writ, dated April 16, 1853, alleged that defendant had engaged in said business at said Calais on the first day of April, and from that time to the date of the writ, and had erected a large establishment for carrying on the foundry business at Calais, in which he was engaged in violation of said agreement.

The general issue was pleaded, and a brief statement

filed, alleging that no consideration was paid for said agreement, and denying that defendant had been engaged in the business of iron casting, and that plaintiffs had suffered any damage by reason of any such business being carried on.

This action was tried at the Oct. term, 1854, and evidence was received tending to show damages from the alleged breach of the bond, after the date of the writ, against the objection of defendant.

There was evidence introduced by plaintiffs tending to show that defendant, in the fall following the making of his bond, erected a foundry and machine shop and some other buildings in Calais, and in March, 1853, sold the same to an incorporated company — and that he held stock in that company, and that he was employed as a foreman in carrying on the business; and that plaintiffs' business was lessened in consequence of the rival establishment; but on the latter point the testimony was contradictory.

The defendant offered to prove that the bond in suit was not given, or agreed to be given, until after the completion of the trade, and sale of the works, and the signing of the contract, and was given without any consideration, for the purpose of influencing the amount of the damages; but the Court rejected the same.

The following instructions were requested by defendant:

1. That the jury should not take into consideration any evidence, after the date of the writ, of any injury, real or supposed, suffered after the commencement of the action.

2. That the bond was void, and contrary to law, upon the ground that it covered too large a space of the territory of the State.

3. That defendant, being in the employ of an incorporated company, was not "engaging in the iron casting business," within the true sense and intention of the parties as expressed in the bond.

These requests were refused, and the presiding Judge instructed the jury that the bond was valid and binding upon the parties; — *that*, if defendant took any portion of

the stock of the corporation, and was interested in the same from the first day of April to the time of trial, or any part of that time, it was engaging in the iron casting business, within the meaning of the bond; — *that*, if he engaged in the service and employ of said incorporated company, and continued therein, it was engaging in the iron casting business within the meaning of the bond; — *that*, if they found defendant had engaged in the iron casting business, they might assess damages severally, up to the date of the writ, and up to the time of trial.

That in assessing damages, they should consider how far the plaintiffs' profits had been diminished by defendant's skill or business capacity and capital, either as principal or servant; — *that* they should not hold him responsible for the capital of others, but only so far as plaintiffs' profits had been diminished by the competition of defendant's capital in the particular business of iron casting.

The jury returned a verdict for plaintiffs, and assessed damages up to the date of the writ, of one dollar, and for damages to the day of trial at $350,00. Defendant excepted.

It was agreed that if the instructions were erroneous, a new trial is to be granted, or judgment to be rendered for such sum as the legal rights of the parties may require.

Pike and T. J. D. Fuller, for defendant.

1. The parol evidence, offered and excluded, ought to have been received. Contracts of this description form an exception to the general rule, and it makes no difference whether under seal or not. 6 Pick. 206; 21 Wend. 158. It was admissible to show the inadequacy of the consideration and to affect the matter of damages.

2. The bond is void, upon the ground that its conditions are in restraint of trade. 8 Mass. 228; 3 Pick. 159; 19 Pick. 54; 7 Bing. 330; 1 Smith's Lead. Cases, 446; 21 Wend. 158.

3. An incorporated company, employing the defendant as

a mere laborer, was not engaging him im the casting business within the sense and meaning of the bond.

4. Damages can only be assessed to the date of the writ. 4 Pick. 106; 6 Pick. 236.

Granger, for plaintiffs.

1. The bond was valid. Mere extent of territory embraced in a contract of this description is of little consequence. The reasonableness of the contract depends, mainly, upon other elements, the principal one being the amount of business. There is not and never has been any iron foundry out of Calais within the inhibited limits. Calais being at the extreme border of the State, the inhibited limits give only a radius of thirty miles.

There is no evidence that defendant was prejudiced by the extent of territory in the contract.

A restraint of this kind is not prejudicial to the public interest. The public suffer oftener from excess than lack of competition.

2. The contract precludes the defendant from being a servant of a corporation engaged in this business. The language used is comprehensive, and excludes him either as principal, servant or agent. *Turner* v. *Evans*, 75 Com. Law, 512.

3. Nor does it allow defendant to own the stock of a corporation engaged in the business. If he might own any, he could the whole. The stipulation was not to engage in that business.

4. The plaintiffs were entitled to recover the damages to the time of trial. R. S., c. 115, § 78; *Gardner* v. *Niles*, 16 Maine, 279; *Gennings* v. *Norton*, 35 Maine, 308; *Lewey* v. *Walker*, 5 Verm. 181; *Waldo* v. *Fobes*, 1 Mass. 10. This provision is for the benefit of defendant, to prevent a multiplicity of suits. 1 Smith's Lead. Cases, 288; 1 Story's Eq. 289; *Perkins* v. *Lyman*, 9 Mass. 522; *Pierce* v. *Fuller*, 8 Mass. 223; *Burne* v. *Gray*, 4 East, 190; Chitty on Cont. 666; 2 Kent's Com. 590; *Noble* v. *Bates*, 7 Cowen,

307; *Smith* v. *Smith*, 4 Wend. 468; *Turner* v. *Evans*, 75 Com. Law, 512.

TENNEY, J. — The contract mentioned in the condition of the bond declared on is, that the defendant having sold out his foundry established in Calais, to the plaintiffs, had agreed not to engage in the business of iron casting, within sixty miles of Calais, for the term of ten years from the date of the bond. For the alleged breach of this contract, damages are claimed. Evidence was introduced, which satisfied the jury under the rulings and instructions of the Court, that the bond had been broken before the commencement of the action; and by the direction of the Court, damages to the time of the trial, as well as to the time of the institution of the suit, were severally assessed. The case is now brought before the Court on exceptions to the ruling and the instructions of the presiding Judge, and the omission to instruct agreeably to the request of the defendant.

The defendant offered to prove, that the bond in suit was not given, or agreed to be given, until after the completion of the trade and sale of the works, and the signing of the same. The language in the condition of the bond is, "that whereas the above named Slayton has this day sold out his foundry establishment in Calais to the parties above named, and has agreed not to engage in the business of iron casting within sixty miles of Calais, for the term of ten years from this date, now," &c. This shows that the sale, and the agreement not to engage in the same business, were parts of the same transaction, and the evidence thereof was intended to be the written contract in the bond, which being under seal, is proof itself of a consideration. The evidence offered would alter and control, in its tendency, the effect of the written contract, and on every principle was inadmissible.

The Judge instructed the jury, that the bond was valid and binding on the parties. It is insisted, that the contract covering so large an extent of territory as that within sixty

miles of Calais, is in restraint of trade, and therefore void.

It was an ancient rule of the common law, which was regarded as entirely settled, that all bonds in restraint of trade were void. The rigor of the rule as first established, has been materially relaxed, but by no means abolished. A distinction between a general and a limited restraint of trade, was early introduced, and has continued. A contract not to use a certain trade in a particular place, was held in *Broad* v. *Jollyfe*, Cro. Jac. 596, to be an exception to the general rule. And the case of *Mitchel* v. *Reynolds*, 1 P. Wms. 181, treats the distinction between limited and general trades, as the well settled doctrine. The reasons given by PARKER, C. J., in *Mitchel* v. *Reynolds*, why restraints of trade are not allowed, are the mischief which may arise to the party, by the loss of his livelihood; to the public, by depriving it of a useful member; the great abuses to which these voluntary restraints are liable; because in a great many instances, they can be of no use to the obligee, for what does it signify to a tradesman in London, what another does at Newcastle. Another reason given by the same Judge, was in favor of these contracts, that there may happen instances, wherein they may be useful and beneficial, as to prevent a town from being overstocked with a particular trade.

In *Homer* v. *Ashford*, 3 Bing. 322, it is said by BEST, J., "The first object of the law is to promote the public interest; and the second to preserve the rights of individuals. The law will not permit any one to restrain himself from doing what the public welfare, and his own interest, require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry or his capital, in any useful undertaking, in the *kingdom*, would be void, because no good reason can be imagined, for any person's imposing such a restraint on himself. But it may often happen, that individual interest and general convenience render engagements not to carry on trade, or to act

in a profession, in a particular place, proper." And an instance is mentioned. "Manufactures or dealings cannot be carried on to any great extent, without the assistance of agents and servants. A merchant or manufacturer would soon find a rival, in every one of his servants, if he could not prevent them from using, to his prejudice, the knowledge acquired in his employ."

In *Nobles* v. *Bates*, 7 Cowen, 307, SUTHERLAND, J., in the opinion of the Court, where he refers to the decisions of English cases on the subject, says, "a bond or promise, upon good consideration, not to exercise a trade for a limited time, at a particular place, or within a particular parish, is good. But when it is general, not to exercise a trade *throughout the kingdom*, it is bad."

"Agreements to restrain trade in particular places, founded on a reasonable consideration, are valid in law, and may be enforced." *Stearns* v. *Barrett*, 1 Pick. 443.

The application of the principles of the distinction recognized between a general and a limited restraint of trade, to particular cases, may be difficult. It seems to be well established in England, that a contract, by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking *in the kingdom*, would be void. And the same doctrine has been held in this country. *Alger* v. *Thacher*, 19 Pick. 51. In this case, it is said by MORTON, J., in the opinion of the Court, "as to what shall be deemed a reasonable limitation, there is, and from the nature of the case, can be, no definite rule. It must depend on the circumstances of each particular case, and the good sense and sound discretion of the tribunal which may have the case to settle. In *Palmer & al.* v. *Stebbins*, 3 Pick. 188, WILDE, J., says, "it must, therefore, be decided on general principles, rather than by express authority. Whether competition in trade be useful to the public or otherwise, will depend on circumstances. I am rather inclined to believe, that in this country at least, more evil than good is to be apprehended from encouraging competition among rival tradesmen, or

men engaged in commercial concerns. There is a tendency, I think, to overdo trade, and such is the enterprise and activity of our citizens, that small discouragements will have no injurious effect, in checking in some degree, a spirit of competition."

In this country, particularly, such is the facility with which persons are enabled, without capital, to embark in various enterprises, and such the desire to try experiments therein, that it often turns out, when these experiments have been successful, in some of these undertakings, others will enter into them in such numbers that ruin to most of them so engaged is the consequence. Hence those who retire, and for a proper consideration contract with others not to engage in any particular business for a limited time, and in a particular place, have often, if not generally, been the successful party. This, then, is not the country, or the time, when it is expedient to enforce rigorously the ancient common law rule, and restrict the exceptions to narrow limits, but rather to give the latter a liberal construction.

The plaintiffs were the purchasers from the defendant, of an iron foundry in Calais, according to the evidence in the case, of a capacity to carry on a very considerable business. The wants of that community might ordinarily be expected to be supplied by one such establishment at that place; and when the plaintiffs entered into the business undertaken, their prospects would probably be much obscured by a rival establishment, having in its service, the defendant, with his knowledge of the business, and acquaintance with those who would otherwise be patrons of the foundry which they had purchased. And when it is considered, that much of the country, within the extent of sixty miles of Calais, is not densely inhabited, and but few places of considerable business therein, the contract cannot be regarded as one, so in restraint of trade during its continuance, as to be void.

The defendant agreed with the plaintiffs not to engage in the business of *iron casting* within sixty miles of Calais, for the term of ten years. "The business of iron casting"

would embrace that which should be done, by an incorporated company, as well as by individuals; and if the defendant was interested as a stockholder in such corporation, it cannot be doubted, that he was engaged in the business of iron casting within the meaning of the contract. This would put him most emphatically in a position to carry out extensively, the very objects, which it must have been the intention of the parties to prevent; and his being in the service of the corporation, carrying on the business, was alike a violation of the contract.

Other instructions were given to the jury, which do not seem to be relied upon in the argument, as being erroneous, and not being perceived to be so, have not been here discussed.

The verdict under the instructions, showing a breach of the bond, before the commencement of the suit, judgment must be rendered for the penal sum, and execution will issue for the damages sustained up to the time of the trial. This the jury have found according to the statute of 1842, c. 31, § 9. *Hathaway* v. *Crosby*, 5 Shepl. 448: *Burbank* v. *Berry*, 22 Maine, 483. *Judgment on the verdict.*

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† MERRILL, *plaintiff in error, versus* GARDNER, *defendant in error.*

A rule of Court submitting to an arbitrator an action of replevin and all suits, claims and demands of the parties, with an agreement that the referee shall treat the action, as if it were assumpsit, and award accordingly, will authorize him to award a specific sum in damages.

And a judgment on such an award may be entered and upheld, although the arbitrator also award a *lien* upon the property replevied to secure the payment of the damages and costs.

WRIT OF ERROR, to set aside a judgment rendered upon the award of an arbitrator.

The defendant in error was plaintiff in the original suit, which was replevin for 6000 mill logs.

While that suit was pending, it was agreed between the parties to refer the action and all suits, claims and demands to the determination of Geo. Downes, Esq.

To the rule of Court was affixed also this agreement:—

"It is agreed that the referee shall treat the action as if it were assumpsit, and may award accordingly, and no objection shall be made to the award."

A part of the award was in these words:—

"That said John L. Gardner recover the sum of five hundred dollars of the said Aaron W. Merrill, and I further award and determine that the said Gardner shall continue to saw and manufacture the logs cut by said Merrill, marked as follows:—XXX, and dispose of the lumber sawed therefrom, as provided in contract made by said Merrill and said Gardner, dated 21st July, 1848, until he shall have fully realized the said five hundred dollars, and the costs of Court in this action, and also the costs of reference, or until the said Merrill shall pay the said sum and costs of Court and reference as aforesaid to said Gardner; and upon payment in either of the ways mentioned as above, of the sums aforesaid, the logs then remaining unsawed, together with the lumber sawed from said logs, shall become the property of said Merrill, relieved from the contract as aforesaid, and to be appropriated to his own use and benefit, as he may see fit; the said sum of five hundred dollars to be in full of all accounts, debts, dues and demands, between the said Gardner and the said Merrill, except, &c. * * * * The costs of Court to be taxed by the Court, and the costs of reference taxed at $51,12."

On this award, judgment was entered and execution issued.

The plaintiff in error assigned the following:—

1. The action referred being replevin, the said referee by his award never determined that said Merrill took said logs, or any logs of said Gardner, and therefore could not legally award damages for such taking.

2. That said referee did not by his said award find any

sum as damages for said alleged taking, no damages having been claimed by said Gardner, but awarded that he should recover of said Merrill, five hundred dollars, costs of Court and costs of reference, and that said sum of $500, should be in full of all accounts, debts, dues and demands betwixt said parties, which by law he was not authorized to do.

3. That said award is contradictory and oppressive in this, that although it finds that the said Gardner shall have and appropriate to his use the property originally of said Merrill, out of which to satisfy said amount of five hundred dollars and said costs; it also finds that said Gardner shall have and recover of the said Merrill the full sum of $500 and said costs, which stands as a judgment of record against said Merrill, and on which an execution hath issued, by force of which other goods of said Merrill are liable to be distrained and his body arrested.

The defendant in error pleaded, that there was no error, either in the record and proceedings, or in giving judgment aforesaid, and prayed that the Court might examine the same, and the matters assigned therein as error, and that the judgment aforesaid, in form aforesaid given, might be in all things affirmed, and for his costs.

Granger, for defendant in error.

1. It does not appear that the taking of the logs was controverted. The presumption is, that it was admitted. The damages found were for the balance due the plaintiff in the original action from Merrill, for security of which he held the logs.

2. The submission was of all demands between the parties, and it authorized the referee to find the sum due.

3. The third error respects only the mode of payment of the $500 awarded, and preserves the plaintiff's lien on the logs, according to the contract of the parties. The difficulty suggested is wholly imaginary. *Weston* v. *Stuart*, 2 Fairf. 326.

4. The contradiction supposed can be obviated by defendant's paying the amount awarded. The defendant in

error can only obtain his pay once, for by the terms of the award, payment in any mode discharges the lien on the property.

G. F. Talbot, for plaintiff in error, that the first was well assigned, cited *Brown* v. *Chase*, 4 Mass. 436; *Holmes* v. *Wood*, 6 Mass. 1; *Holmes* v. *Kingsbury*, 4 N. H. 104; *Whittemore* v. *Whittemore*, 2 N. H. 26; *Stone* v. *Phillips*, 33 Com. Law Rep. 274.

In support of the second error, he cited *Tudor* v. *Peck*, 4 Mass. 242; *Commonwealth* v. *Pejepscot Proprietors*, 7 Mass. 399; 4 Dallas, 285; *Bean* v. *Farnam*, 6 Pick. 269; *Bullitt* v. *Musgrave*, 3 Gill. 31; *Shearer* v. *Handy*, 22 Pick. 417.

RICE, J. — The original action was replevin for a quantity of mill logs, and, by agreement of parties, was referred to George Downes, Esq., under a rule of Court, which, however, is not among the papers in the case. By the copy of the judgment, it appears, that not only this action, but all suits, claims and demands, between the parties, were referred. From the argument of the counsel for the plaintiff in error, we infer that an agreement in writing was entered into by the parties, containing the following stipulations: — "It is agreed, that the referee shall treat this action as if it were *assumpsit*, and may award accordingly, and no objection shall be made to the award."

Under this rule, as modified and enlarged by the above agreement, a hearing of the parties was had and an award made by the arbitrator, which was accepted by the Court without objection, and judgment entered thereon.

This judgment the plaintiff in error now seeks to reverse, for the reasons alleged in his application. Without inquiring whether the errors assigned, are errors of fact or of law, it is proposed to consider whether the record discloses error of any description.

It will be perceived, that the authority conferred upon the arbitrator was very general.

He was not restricted by the technical form of the action referred, and was authorized to consider all suits, claims and demands between the parties. It was manifestly the intention of the parties that all existing controversies between them should be adjusted.

What demands, or how many actions existed between the parties, the record does not disclose, nor does it disclose the *claims*, which were made by one party or the other. So far as appears, all matters in controversy were presented to, and adjudicated by, the arbitrator. A specific sum in damages was awarded the original plaintiff, for which judgment has been entered. A lien was also provided on property in the hands of the original plaintiff, for the satisfaction of that judgment. It is contended that the arbitrator erred in not determining, specifically, who was entitled to the possession of the logs replevied. If the action of *replevin* alone had been referred, such would have been his duty. But his powers were enlarged, and he was expressly required to take into consideration other matters, and authorized to make his award in a different form.

Then it is further contended that he exceeded his authority, in providing the lien upon the logs. Whether the right to such lien was not one of the *claims* of the original plaintiff, does not distinctly appear. From the character of his suit, we think it may be legitimately inferred that such was the fact, and that the arbitrator found that he had a special property in the logs replevied, to secure the indebtedness of the original defendant, (plaintiff in error,) to him.

But even if the arbitrator, in this, exceeded his authority, and without reference to the stipulation, that "no objection shall be made to the award," the judgment may be maintained. It is well settled, that an award, good in part and bad in part, may be sustained as to that part which is good, unless so connected, that they cannot be separated. In this case, if the lien is not maintained, it is not perceived how the judgment for the specific sum awarded, can be affected. Certainly the plaintiff in error cannot be injuriously affect-

ed by such a result. But we do not intimate that any portion of the award is bad. On the contrary, we are of the opinion that it may all be maintained. By paying the sum awarded against him, the plaintiff in error may entitle himself to the possession of the property referred to in the award, and if it should be withheld, it would be restored to him by a decree of this Court. Or if he does not elect to pay, he will then be entitled to a restoration of the residue, after the amount of the award has been realized from the proceeds thereof. We are unable to perceive any uncertainty in the award, or any difficulty in entering judgment thereon, or in carrying it into effect. Nor do we perceive, that the arbitrator omitted to act upon and dispose of all matters submitted to him, nor that he has exceeded his authority in the premises. The original judgment must therefore be affirmed.

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† NUTT *versus* MERRILL.

For damages recovered against a sheriff and counsel fees by him incurred, on account of the misdoings of his deputy, he can only obtain indemnity by a suit upon the latter's bond.

And in a suit by such *deputy* against a party who directed him to attach certain property, for which acts the sheriff was sued and held responsible, *he* may recover the damages assessed against the sheriff, and the counsel fees incurred, although they are outstanding against him.

Where the writ alleges the indebtment of defendant to be according to the *account annexed*, and for services performed for defendant, at his request, and the account annexed is "for your proportion of costs and expenses of suit W. *v.* N." the plaintiff may recover under that count, for the *service* of the writ.

And, although the plaintiff omitted to state such a claim in the opening of his case, it is within the *discretionary* power of the Court to allow him to claim it, where the writ and return have been used in the trial, even after the evidence is all out, and the counsel for defendant is about adressing the jury.

Where a question of fact is left to the jury, whether the instructions of a client authorized his counsel to indemnify an officer in the client's name, the indemnity made by the counsel, may be read to the jury.

Nutt *v.* Merrill.

A motion to set aside the verdict as against evidence, without a full report of the evidence, certified by the Judge presiding at the trial, cannot be considered.

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

Assumpsit.

The writ contained this count alone. "For that said defendant, at said Perry, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of $55, according to the account annexed, and for so much money before that time by the plaintiff paid, laid out and expended for the said Merrill, at his request, and for a like sum for services performed by plaintiff for the said defendant, at his like request, in consideration," &c.

This account was annexed: —

"To your proportion of costs and expenses of suit, *Wheeler & als.* v. *Nichols*, and interest to this date, $55,10."

No bill of particulars was furnished, though the defendant called for it before the trial.

When plaintiff stated his case to the jury, he claimed that defendant was bound to pay his proportion of $156, being the balance of a certain execution, *Wheeler & als* v. *Nichols*, also his proportion of $90 as counsel fees, for defending the suit against Nichols, and that his proportion of the whole was $48,50, with interest from the time of demand, amounting to the sum named in the writ.

The plaintiff, a deputy of the sheriff Nichols, attached a stock of goods as the property of Cornelius Bedloe & al., upon sundry writs against them, the last attachment being in favor of defendant. This stock was mortgaged to Wheeler & als., and the mortgagees sued the sheriff, and recovered their value. The sum recovered was $156 above the net proceeds of the goods. In the defence of that suit the counsel fees amounted to $90,00; and when the proportions of the several attaching creditors of the Bedloes was ascertained, $48,50 belonged to defendant.

Six creditors of the Bedloes, caused their goods to be attached, and on Sept. 11, 1847, their attorneys gave plain-

tiff, who was a deputy and performed that service, an indemnity for so doing.

This paper was read to the jury against the objections of defendant.

Plaintiff offered in evidence, the writ in which defendant sued the Bedloes, on which was a return of plaintiff that he had attached the stock subject to five previous attachments.

He also introduced the other writs and judgments against them.

The plaintiff also called Geo. Walker, Esq. as a witness, who testified that defendant brought to the law firm, of which he was a member, a writ he had made against the Bedloes and wanted it secured if it could be done, and that we were to go on with the suit, if there was a reasonable probability of success.

They advised him to attach and summon the mortgagees as trustees, which he said he would have done. He never informed defendant that there must be an indemnity to the officer, or that one had been given until after the termination of the sheriff suit. The officer required no indemnity at the time of the attachment and none was given.

It was also proved, that the judgment against the sheriff had been satisfied mostly by Nichols, but some small sums had been paid by plaintiff.

The defendant proved, that one Clapp had been put in keeper of the goods, under an attachment made prior to any of those above named, and that before the attachments herein named, he was in charge of them in behalf of the mortgagees.

He also showed by the dockets of the Court, that at the term his action was entered, it was not continued, nor was any judgment entered up in the case. At the succeeding term, under this action was written, "misentry."

After the evidence was closed, and the defendant's counsel was about to address the jury, the plaintiff's counsel

stated to him, that he should claim to recover the fees of plaintiff in serving the defendant's writ v. *Bedloe & al.*

The counsel for defendant requested the following instructions: —

1. That the officer having in July, 1847, made his return on attachments on these writs, the rights of the parties were fixed, and that the sheriff would be liable to plaintiffs in said actions, if the officer should, in the following September, give up the attachments, when he had a right to hold them.

2. That Bradbury & Walker could not bind the defendant by entering into such a stipulation, as that given to plaintiff Sept. 11, 1847.

3. That there was no necessity of giving any such stipulation, for the returns held the officer, in case the mortgagees had not a paramount title.

4. That if the jury believe from the evidence, that the instructions to Messrs. B. & W. by defendant were, that they should not go on with the suit, unless there was a good prospect, or a reasonable prospect of success, in securing the debt, and if it became manifest before and on the 11th day of September, 1847, that the proceeds of the attached property could not pay the claims in the suits, when there were preceding attachments, and that they would absorb the proceeds thereof, they, said B. & W., had no right to go on, and subject the defendant to costs, in this manner.

5. That unless defendant had authorized his said attorneys to bind him by such stipulations, or had assented to it afterwards, he was not bound thereby.

6. That before the plaintiff could have a right to recover in this suit, he must prove by satisfactory evidence that he had paid the sum of $156, the balance of the execution, *Wheeler* v. *Nichols,* over the net proceeds of the attached property; and also the sum of $90 for counsel fees, said to be incurred in the defence of that suit.

7. That the plaintiff cannot recover for any thing, but what is included in the account annexed to the writ; that

he has no right, in this action, to recover fees for serving the writ, *Merrill* v. *Bedloes*.

8. That there was nothing in the case from which the jury would have a right to infer, that the claim of the Frontier Bank was to be thrown out, or overlooked, in ascertaining whether there would be funds out of the proceeds of the attached property to pay any thing on Merrill's claim.

9. That plaintiff is not entitled to recover, unless defendant is bound by the contract purporting to be signed in his behalf by Bradbury & Walker.

The Court declined to give either of the desired instructions, except so far as they are contained in the following instructions to the jury:—*that* the plaintiff might recover the sum of $6, his fees for the service of the writ against Bedloe, provided, the evidence satisfied them that he performed that service; *that* attorneys could only bind their clients to the extent and within the scope of their instructions, that beyond that they might bind themselves, but not their clients; *that* if the jury believed from the evidence, that Merrill's instructions to Bradbury & Walker were, that they should not persevere in the attachment of the Bedloe goods on his writ, and in the prosecution of the suit, unless there was a good prospect of success, and if upon the eleventh day of September, the day the writing given to Nutt, the plaintiff, was signed, the attorneys of Merrill knew, or might have known, that the sales of the attached property would not, or probably would not, be sufficient to pay the judgments to be recovered in the suits, where the attachments preceded Merrill's, they were not authorized to bind the said Merrill by that writing; *that* from the position in which they stood to the suits, except that of the Canal Bank, being attorneys for plaintiffs, and from the fact that the sale of the goods took place in Calais, where they lived, the jury would consider whether they might not have known the facts touching the sale of goods and the net proceeds; *that* in regard to the suit of the Frontier Bank, the jury would judge whether there was any reason to apprehend that that

suit could be successfully resisted; *that* in connection with this, they would consider the fact that the demand sued in this action, was included in the suits named in the writing given to Nutt, and that the witness, Walker, had not stated, that it was apprehended that suit might not be successfully prosecuted; *that*, as the declaration was upon the money counts, they should infer nothing against the maintenance of this action, from the suggestion that the draft filed with the writ, did not appear to be due when that suit was commenced.

The Court also instructed the jury that if defendant instructed the officer to attach the goods upon his writ, he would be responsible to the officer making the attachment, without any writing, the writing would specify the extent of his liability and the mode of apportioning it; but if the mortgagees, on 11 Sept. 1847, offered to take the goods or the net proceeds, that defendant would be liable to plaintiff for damages only, up to that period, provided, that the instructions did not authorize them to proceed further with the action and attachment.

The jury returned a verdict for $58,05.

Defendant excepted to the instructions and the refusal to give those requested. He also filed a motion to set aside the verdict as against evidence, but no copy of such motion was found among the papers.

Thacher, in support of the exceptions.

Granger, contra.

TENNEY, J. — The defendant's counsel, in their argument, insist that the fourth, fifth, sixth and eighth instructions, as requested, should have been given to the jury. The first two, and the last of these instructions, were not given in the language employed by the counsel, but the general instructions given, embraced substantially those requested in all respects, and were quite as favorable to the defendant, as he was entitled to demand; and he was not aggrieved in this particular.

The sixth instruction requested was, "that before the plaintiff could have a right to recover in this suit, he must prove, by satisfactory evidence, that he had paid the sum of $156, the balance of the execution, *Wheeler* v. *Nichols*, over the net proceeds of the attached property; and also the sum of $90, for counsel fees, said to be incurred in the defence of that suit."

It is understood from the case, that the plaintiff defended the suit against the sheriff, it being for the alleged misdoings of his deputy; and the plaintiff also incurred an expense, in so doing, of the sum of $90, as counsel fees; and the excess of the execution, in favor of *Wheeler & als.* v. *Nichols*, recovered in the same suit, over and above the avails of the goods sold, was the sum of $156. No evidence was introduced, or suggestion made at the argument, that the defendant had entered into any agreement with the sheriff, for his indemnity, or the counsel, who defended the action against him, to pay for his services. And no privity existed in any manner, between the sheriff or counsel, and the defendant, so that the latter would be liable to either. And as the plaintiff, the deputy of the sheriff, and his bondsmen, were the only persons on whom Nichols could call for payment of the balance of the execution, and that by the contract in the bond of the deputy, and the plaintiff was alone responsible for the counsel fees, under an express or implied contract, it must have been to the defendant a matter of indifference, whether these contracts, in these respects, had been discharged or not. The breach of them could cause, in no event, any injury to him; and the plaintiff would be entitled to recover, notwithstanding the claims of Nichols and his counsel were still outstanding. *Levet* v. *Hawes*, Cro. Eliz. 619, 652; *Rippon* v. *Norton*, Ibid. 849; *Smith* v. *Berry*, 37 Maine, 298.

It is insisted, on the part of the defendant, that the charge of the plaintiff for the service of his writ, v. *Bedloe & al.*, cannot be recovered, because the declaration does not include it, and because the plaintiff's counsel, in his opening to

the jury, did not expressly claim it. The declaration in the writ, among other things, contains a claim for services performed for the defendant, at his request; and this will embrace the service of the writ. The case finds, that before the argument of the defendant's counsel to the jury, he was informed, on the part of the plaintiff, that this claim would be insisted on. And it was within the discretionary power of the Court, to allow this to be presented, notwithstanding it had before been announced, that the case had closed.

The objection, that the declaration in the writ is insufficient to cover the claim for the defendant's proportion of the unpaid balance of the execution against Nichols, because the same was neither "costs nor expenses of suit, *Wheeler* v. *Nichols*," has no foundation. If not costs or expenses in the suit, it could be allowed under the head of "money paid, laid out and expended for the said Merrill, at his request."

The contract entered into by the defendant's counsel with the plaintiff, on Sept. 11, 1847, was received in evidence, against the objection of the defendant. At the trial, a question of fact was presented, whether the instructions, which were given by the defendant to his attorneys, who afterwards executed this contract, within their legitimate scope, would authorize them to defend the suit against Nichols. Evidence was introduced upon this question, which being properly submitted to the jury, and without objection, it was not improper, that the writing should be read in connexion therewith; and as the Judge instructed the jury, in his charge, that if Merrill's instructions to his attorneys were, that they should not persevere in the attachment of Bedloe's goods on his writ, and in the prosecution of the suit, unless there was a good prospect of success, and if, upon Sept. 11, 1847, the day of the date of the writing, they knew, or might have known, that the sales of the attached property would not, or probably would not, be sufficient to pay the judgments in the suits where the attachments preceded Merrill's, they were not authorized to bind him by that writing, this writing could not have been consid-

ered by the jury, as being before them for any purpose, not legally authorized.

It appears from the exceptions, that the motion to set aside the verdict, may be copied, and made a part of the case. No copy of the motion is found among the papers; neither is there a report of all the evidence of the case, certified by the Judge who presided at the trial, according to the provision of the statute of 1852, c. 246, § 8, and the motion cannot be considered. *Exceptions overruled.*

Judgment on the verdict.

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† HAYFORD *& al., in Equity, versus* DYER.

The equity powers of the Court are defined and limited by express statute provisions.

A case presented, not falling within those provisions, must be dismissed.

IN EQUITY.

ON BILL, ANSWER AND PROOF.

The substance of the bill is stated in the opinion of the Court, drawn up by—

RICE, J. — From the bill and proofs, it appears that Ebenezer Dyer, by deed dated Nov. 29, 1834, conveyed certain lands situate in Steuben and Harrington, to his sons, Henry Dyer and Eben S. Dyer, and at the same time transferred to Henry Dyer his personal property, with the understanding that the sons were to pay the debts of the grantor, and to support him and his wife during their natural lives. At that time Eben S. Dyer, the defendant, was a minor. Henry at the same time gave his father a bond for the faithful performance of this agreement, which bond has been lost. The debts of the father were paid by Henry, and the father and mother supported during their lives. Both Henry and Eben S. continued to labor upon the homestead, until after the decease of their parents, since which time the homestead has been divided between them.

On the 29th of August, 1835, Henry conveyed by deed of warranty to Lyman Morse, of Newmarket, N. H., a portion of the land in Harrington, which had been conveyed to him and the defendant, for the sum of fifteen hundred dollars. Eben S. still being a minor, did not join in this deed, nor does it appear that he in any way participated in the contract with Morse, though the evidence shows that Henry conferred with him about the sale, and that he then verbally assented to it, and at different times, after he came of age, he declared that he was satisfied with the transaction. It is alleged in the bill, and some of the evidence tends to support the allegations, that the money received from the sale of this land, was appropriated by Henry in payment of the debts of his father. This point, however, is controverted, and is not clearly established.

The defendant has recently instituted proceedings to recover possession of one undivided half of the land conveyed by the deed of Henry to Morse, above referred to. The plaintiffs, who claim under mesne conveyances and assignments from Morse, now pray this Court to compel the defendant to execute a deed of release to them, or some other person for their benefit, of the lands conveyed by Henry Dyer to said Morse.

This Court has not general chancery powers. It has the power, however, under the statute, to compel the specific performance of contracts in writing, made since February 10th, 1818. But there was no contract in this case between the defendant and any party under whom the plaintiffs claim, either in writing or by parol.

There is in the bill no allegation of fraud, trust, accident or mistake, which would give this Court jurisdiction, nor does the evidence disclose any ground for such obligations.

Besides, Morse had a plain and adequate remedy at law, on his covenants of warranty, in his deed from Henry Dyer. Those covenants run with the land, and, before they were released, were available to the plaintiffs.

On a careful examination of this case, and full considera-

tion of the very elaborate argument of the counsel for the plaintiffs, we have been unable to perceive any ground on which this bill can be sustained. *Bill dismissed.*

W. Freeman & W. Fessenden, for plaintiffs.

Walker, for defendant.

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† WHIDDEN *versus* SEELYE.

A plea in abatement, *defective* in not being verified by *affidavit*, when of facts *not* apparent of record, or for not being *seasonably* filed, or for not being *entitled* of the term when the writ was entered, may be objected to on *general* demurrer.

The *effect* of deeds and contracts made in a foreign country, without any evidence before the Court of what it may be, is presumed to be the same as if made within our own jurisdiction.

A mortgagee in possession may maintain *trover* against a stranger who cuts trees upon his premises and *takes them away*. When severed from the freehold, they become personal property, and for the *asportation* trover will lie.

Trover being a transitory action may be maintained in *this State* for a conversion of personal property in a *foreign jurisdiction*.

The instructions of the Court, upon a matter wholly immaterial to the issue, if wrong, cannot avail the party excepting.

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

TROVER. The writ in this case, returnable at Sept. term of the District Court for Washington County, 1850, described the defendant as belonging to the parish of St. George, in the county of Charlotte, and Province of New Brunswick. It alleged a conversion at Calais of certain described property of the plaintiff, such as mill logs, lumber, potatoes, mill chain, mill and circular saws, mill bars, mill dogs, &c.

A plea in abatement at a term of the District Court was filed which was in these words:—

"*Rendol Whidden* v. *Stewart Seelye*. And now the said Seelye comes and defends, &c., and says that the wrongs and injuries in the plaintiff's writ and declaration mentioned, relate to the real estate situate in the county of Charlotte, in the Province of New Brunswick, and that he at the time

of suing out said writ, was, and ever since has been resident in said county of Charlotte, where there are competent courts established for the trial of all causes of action arising therein, and that the cause of action mentioned in the plaintiff's writ (if any there be) arose in said county of Charlotte. Wherefore he prays judgment if this Honorable Court here will, or ought, to take cognizance of the plea aforesaid, and for his costs. "Stewart Seelye."

To this plea there was a general demurrer and joinder.

At the Feb. term of the District Court, 1851, HATHAWAY, J., certified, that the defendant appeared in person and pleaded the above plea, and in support of it presented the affidavit of one Nichols, by whom it appeared that defendant resided in the Province of New Brunswick, and that all the property in controversy was, and had been in that Province, a part of it being in a mill in St. George, and the logs and potatoes taken from lands there situated; that he overruled this plea and ordered the defendant to answer further.

To this order exceptions were taken and allowed.

When this action came on for trial, the defendant pleaded the general issue, and filed a brief statement that he ought not to be held to answer, because the subject matters of the suit were never within this State, but belonged to the realty, and brought in issue the title to real estate in the Province of New Brunswick; also denying any conversion, and alleging that the hay and potatoes mentioned, grew upon land of defendant's father, to which land plaintiff never had any title, and if he ever had any, he had parted with it before the potatoes were dug — that the saws, &c., were part of the same real estate.

The property alleged to be converted was in the Province of New Brunswick, and the evidence tended to show that the lumber was cut upon and taken from a tract of 2800 acres, in the parish of Pennfield, and the other property was upon the same tract.

Plaintiff introduced in evidence a location ticket of those premises from the Crown Land Office in Fredericton, issued

in 1835, to one Henry Seelye; also a mortgage deed of warranty from said Seelye to plaintiff, of the same, together with the bond it was made to secure.

No evidence was produced as to the laws of New Brunswick.

A portion of the evidence presented by defendant, was a memorandum made and signed by the plaintiff and Henry Seelye, on Dec. 26, 1840, of the following tenor:—

"Memorandum of an agreement by, and between Rendol Whidden on the one part, and Henry Seelye on the other. Said Seelye agrees to attend to the lumbering business on the east side of Lake Utopia, at the Lake mill, on the property belonging to Rendol Whidden at any services his business may require, for the sum of fifty dollars per month, to be allowed on settlement by said Whidden. The said Seelye further agrees to furnish four horses, for thirty dollars per month, and one yoke of oxen, for twelve dollars per month, equipped with all necessary geers, such as harnesses, sleds, chains, &c., for the woods;—also to furnish ten tons of English hay, for ten dollars per ton, the horses and oxen to be under pay as long as the hauling and sledding is good. And it is further understood that the said Seelye shall have one third of the profits arising from the lumbering operations, after all the expenses are paid, said Seelye paying one third the expenses, and a reasonable rent for the property. It is further understood that said Whidden shall have all the control of all the property and lumber to dispose of, for the benefit of all concerned. It is understood that the said Seelye boards himself at his own expense."

There was evidence in the case tending to show, that at some time there had been a grant of the greater part of the land described in the location ticket, to Henry Seelye, that this grant was in the possession of defendant; and on notice during the progress of the trial, it was not produced, and parol evidence of its contents was given, against the objections of defendant.

It appeared also that plaintiff, in Sept. 1849, had conveyed his interest in these lands to the St. Stephens Bank.

Evidence was introduced tending to show, that defendant cut and took away lumber from these premises in 1845–6, also in 1849–50; and that he took possession of certain personal property on the premises which his father Henry had previously delivered plaintiff.

As to the contract between Henry Seelye and plaintiff, the defendant requested the Judge to instruct the jury that it constituted a partnership which continued until notice of a dissolution was given, or one of the parties had given evidence that it was dissolved;—*that*, if a grant was found to have been made of the land, they would not be authorized to find for plaintiff for any logs cut by defendant prior to the date of the grant.

The Judge declined this request, but instructed the jury that the contract was one of hire, and did not constitute a co-partnership;—*that*, as plaintiff claimed no ownership to the lumber or logs sued for, except by a title to the land whence the property was taken, it was incumbent on him to satisfy them he was the owner of the land.

The defendant's counsel contended, that as the liability of defendant to this action must be settled by the laws of the British Province of New Brunswick, it was incumbent on plaintiff to show, as matter of fact, that by the laws of New Brunswick he was the legal owner of the land from which the property was severed, and had the right to the possession of the property, at the time it was severed, and that the instruments offered by him as evidence of title were such in form and substance, as by the laws of New Brunswick, would pass the title to the land;—*that* all the legal requisites to pass the title by the laws of that Province had been complied with;—*that*, as there was no evidence before the Court or jury upon this subject, the fact could not be presumed to exist.

On this part of the case the instructions were:—

The plaintiff has attempted to show his title by deeds

here exhibited. A mortgage and a bond secured by it. Instruments apparently in form convey real estate, and if you are satisfied that this deed does convey the real estate in question, under the laws of New Brunswick, you will so find. The mortgage deed, is one of warranty, and it is a principle of law here, which probably exists in all countries where the common law prevails, (which is understood to be the case in New Brunswick,) that if the grantor make a conveyance by deed of warranty, without any title, and afterwards acquires one, it enures to the benefit of the grantee. Whether this is so in the Province of New Brunswick, you will determine from the evidence in the case, and whether it does not warrant such a conclusion. The plaintiff would have a right to the possession of the tract covered by the location ticket, from the time it was indorsed to him, and a right to protect the property against all strangers to the title, and all persons except those who have authority to enter upon the land by the government, and in case his title was subsequently perfected by a grant of the fee, recover for any logs which were cut by defendant on said land without authority, after the transfer to him of the location ticket, and while he was in possession as mortgagee, but not after he had parted with his title, or when he was not in possession of the land.

The jury returned a verdict for plaintiff.

The defendant excepted and also filed a motion to set aside the verdict as against the evidence and law of the case.

J. Granger, in support of the motion and exceptions.

1. The plea was sufficient in all matters of form, and should have been held good. Besides, a general demurrer does not reach any defects in matters of form. 2 Sup. U. S. Dig., 554, 769. Ibid, 556, pl. 824.

If a sufficient answer appears in the facts stated in the pleas, every thing else is matter of form. Story's Plead. 342.

The demurrer admits the facts stated, and they are suffi-

cient to show that the Court ought not to entertain jurisdiction of the action. In such an action, the title of real estate in a foreign country ought not to be tried. The right of property in a chattel that has become such by severance from the freehold, where the title to the land is in contest, cannot be tried in a transitory action. *Powell* v. *Smith*, 2 Watts, 127; *Baker* v. *Howell*, 6 S. & R., 509; *Miller* v. *Miller*, 7 Pick. 133; 1 Chit. Plead., 362; *Bigelow* v. *Jones*, 10 Pick. 161.

2. But if the Court had jurisdiction, the verdict is against law. The facts in controversy were to be established by the law of New Brunswick. No evidence was given of them and plaintiff did not present a *prima facia* case. Story's Conflict of Laws, § § 370, 424, 550.

3. The verdict was not authorized by the evidence. The location ticket was null and void when indorsed — it was not assignable — it passed no rights to the plaintiff. The mortgage was not shown to be made according to the form required in that Province to convey real estate.

4. The instructions given were erroneous — as to the effect of the mortgage deed, whether it conveyed the estate in question — and whether by the laws of that Province any title acquired after the mortgage, by Henry Seelye, enured to the benefit of plaintiff.

These and kindred matters were all left to the jury. And the question, whether plaintiff was in possession, was left to them, when it was not even pretended that he had any but a constructive one by his deed. That was a question of law to be proved as a fact. And then again the instruction that the instruments offered in evidence by plaintiff were *apparently* sufficient to pass title to real estate, was wrong, for there was nothing to measure this sufficiency by. Their sufficiency was matter of proof, and no proof was offered. U. S. An. Dig., 1850, Tit. Evidence, 111.

When there is no proof to establish a fact, the jury should be so instructed. 13 U. S. An. Dig. Trial, 58.

The law of a foreign state must be proved as a fact. *Haven* v. *Foster*, 9 Pick. 112; 2 Stark. Ev. 568.

There was error in the instruction that it is a principle of law, probably in all countries, &c. that when the grantor in a deed of warranty of land has no title, an after acquired title enures to the benefit of his grantee. *Owen* v. *Boyle*, 15 Maine, 147. Such is not the law of England, except in case of a feoffment. 2 Smith's Leading Cases, 454, note; *Doe, Ex dem., Oliver* v. *Powell*, 1 Ad. & Ellis, 531. Such is not the law of New Brunswick, as is decided in *Ker* v. *Wetmore*, a case in relation to this identical land.

Whether the location ticket was in force at the time it was indorsed, was an issuable fact, but the Court assumed it, and so were all the facts connected with it.

So there was error in relation to the contract. When taken in connection with the acts of the parties and the testimony, it should have been left to the jury to say whether a partnership existed or not.

B. Bradbury & C. R. Whidden, contra.

APPLETON, J. — The plea in abatement is fatally defective. It is of facts not apparent of record, and should be verified by affidavit. It does not appear to have been seasonably filed. *Nickerson* v. *Nickerson*, 36 Maine, 417. Nor does it appear to be entitled of the term to which the writ was returnable. Nothing is better settled than that advantage may be taken of these defects on general demurrer.

The law of a foreign country is a fact to be proved. Certain deeds and contracts, executed in the Province of New Brunswick, were received in evidence. The rights of the parties to this suit depended upon the construction of, and the effect to be given to these deeds and contracts. Neither party saw fit to introduce any evidence as to what, under the facts proved, would be their legal effect in the place in which they were executed. But when the law of the place where they were executed, is not shown, they must receive the same construction and have the same effect as if they

were executed in the State in which the trial is had. No evidence is furnished by the parties. The *lex loci* not being shown, the Court cannot assume it variant from the *lex fori*. In *Legg* v. *Legg*, 8 Mass. 99, the Court declare that they cannot judicially take notice of the laws of another State, and that they would presume its laws similar to their own. This doctrine received the sanction of the Supreme Court of New York, in *Holmes* v. *Broughton*, 10 Wend. 75, and in *Leavenworth* v. *Brockeway*, 2 Hill, 201. In *Allen* v. *Watson*, 2 Hill, (S. C.) 319, the plaintiff sought to recover a sum of money, as belonging to him, which the defendants had won at a faro table, in Georgia. The defendants insisted, that before the plaintiff could recover, he must show playing at faro to be unlawful by the law of Georgia. The Court, however, said, "it is true the legality or the illegality of any transaction must depend on the law of the State where it transpires, but it is incumbent on those who would avail themselves of it, to show what that law is. In this State, (South Carolina,) playing at faro is unlawful and punished by fine; and if we are obliged to determine that question, in utter ignorance of what the law of Georgia is, we must resolve it by our own rule, for the obvious reason that we have no other." In *Crozier* v. *Hodge*, 3 Mill. (Lou.) 357, PORTER, J., says, "we have repeatedly decided that the laws of other States must be proved by evidence, to enable us to take judicial notice of them. When they are not so proved, we must decide the case by our own law." In *Brown* v. *Gracey*, 2 D. & R. 41, ABBOTT, C. J., said, "that if the law of Scotland differed from the law of England, as to the liability of the defendants, it was for the defendant to show it."

The Court instructed the jury that the plaintiff "could not recover for any logs that had been taken from the land after he had parted with his title, or when he was not in possession of the land." We must presume that the verdict was rendered in accordance with this instruction, and that the logs, for the value of which the verdict was rendered, were cut and carried away, and converted by the defendant

to his own use, while the plaintiff had the title and possession of the land upon which they were cut.

The case, as disclosed in the evidence and as found by the jury, is of a mortgager in possession against a trespasser upon the mortgaged premises, who has carried away the logs, the cutting of which constituted his trespass. The trees on the plaintiff's land, when severed from the freehold and carried away, became personal property, and his title thereto was not divested by the wrongful acts of the defendant. In *Nelson* v. *Burt*, 15 Mass. 204, it was held that trover would lie for cutting and carrying away corn standing and growing. "If," say the Court, "the defendant was in fact a trespasser in entering the close and cutting down the corn, the property of the corn when cut was in the plaintiff; and the taking it away was a wrong for which trover will lie." In *Mather* v. *Trinity Church*, 3 S. & R. 509, DUNCAN, J., says, "it, (trover,) does not lie for injuries to land or other real property, even by a severance from the freehold, unless there be also an *asportation;* that if, after the severance from the freehold, as in the case of trees cut down, the property severed be taken away, or of coals dug from a pit, be afterwards thrown out, this action will lie, by the person having the right and being in the possession, against a mere intruder and trespasser."

When there has been a severance of what belongs to the freehold and an *asportation*, the action of trover may be maintained. 3 Stephen's N. P. 2665. The title to the property severed remains unchanged and the owner may regard it as personal property and maintain replevin. *Richardson* v. *York*, 14 Maine, 216. So, the tort being waived, if the property severed has been sold, the action of assumpsit may be maintained. As between mortgager and mortgagee, the property in timber cut on the mortgaged premises is in the latter, and a purchaser from the mortgager takes it subject to the paramount rights of the mortgagee. *Gore* v. *Jenness*, 19 Maine, 53. Much more then may the mortgager maintain trover against a mere intruder or wrongdoer.

The jury have found that the plaintiff was in possession of the mortgaged premises and that the defendant cut thereon the logs in controversy. The logs having been severed from the freehold, and after such severance being personal property, and having been carried away and converted by the defendant to his own use, trover is the fitting and appropriate form of action in which to recover the damages resulting from their conversion. It is a transitory action and may be maintained in this State for a conversion of personal property in a foreign jurisdiction.

The instruction of the Court, that the contract of Dec. 26, 1840, between the plaintiff and Henry Seelye, did not constitute a co-partnership, is made the subject of exception. It is immaterial whether the ruling of the Court on this point was or was not correct, inasmuch as if erroneous, it is not perceived that it could have operated injuriously to the defendant.

This suit is for logs cut on the land of the plaintiff and which the defendant is proved to have converted to his own use. He claims no rights through, and derives none under, the alleged co-partnership. The existence thereof is not a material fact, to be proved on the part of the plaintiff, to enable him to maintain, nor on the part of the defendant, to defeat, the present action.

Exceptions and motion overruled.
Judgment on the verdict.

† SAWYER *versus* LAWRENCE.

In *scire facias* against a *trustee*, the plaintiff cannot recover judgment for more than *appears* to be due on the execution issued on the original judgment.

And where such execution appears to be satisfied in *part*, by a levy upon the property of the debtor, evidence is inadmissible to show that such property did not, in fact, belong to the debtor, and that the value of it had been refunded by the plaintiff to the real owner.

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

SCIRE FACIAS.

The plaintiff had sued one Williams, and summoned defendant as his trustee. On that suit defendant made a disclosure and was charged. A judgment by plaintiff was obtained, and execution issued and returned satisfied in part, by the sheriff.

The plaintiff offered to prove that the property taken and sold on the execution was not the property of Williams, but of one Wilder & als., who subsequently sued the sheriff for taking it, and recovered judgment for the whole thus taken on the execution, and that he, the plaintiff, had satisfied the same.

The documentary evidence was all before the Court, and the presiding Judge ruled that plaintiff was entitled only to the balance appearing unsatisfied on the original execution.

To this ruling plaintiff excepted.

Fuller, in support of the exceptions.

The plaintiff, in this mode, seeks to obtain judgment against the trustee "for the sum remaining due on the judgment against the principal defendant." R. S., c. 119, § 73, 77.

The question is, if the trustee, on *scire facias*, can avail himself of an indorsement on the execution against the principal, made by mistake, and which is no satisfaction of the judgment.

The language of the Statute is, "the sum remaining due." The judgment against the principal is in full force, and in truth, no part satisfied. *Pillsbury* v. *Smith*, 25 Maine, 432.

The whole amount of the execution is due. The Court have, by the record, *prima facia* evidence of part payment, and they have also *conclusive evidence* that it is not paid.

By the 7th §, c. 119, where the principal is out of the State, and does not appear by himself or attorney, "the trustee, having been charged, may appear in behalf of the principal, and in his name plead and defend the cause."

Here the trustee was charged upon his disclosure, in the original suit.

He was a party to the original suit. It is not a new suit, but a continuation of the old one. Will it be denied, that he may not, in defence, on *scire facias*, show the principal had paid and satisfied the debt? If so, and he offers *prima facia* evidence of it, may not the plaintiff rebut that *prima facia* evidence without reviving his judgment against the principal defendant? *Arnold* v. *Pond*, 16 Maine, 249.

It may be said, that the judgment should be revived against the principal. Our answer is, the judgment is not affected by the indorsement, it is matter subsequent to it, but not entering into it.

It is the goods of the defendant seized on execution, which satisfies it. The goods of another, seized upon it, can have no such operation, no more than if an officer, having two executions against different persons, receives satisfaction on one, and, by mistake, indorses it on another. *Scire facias* may be sued, as matter of right. 19 Pick. 433.

Pike, contra.

The remedy of *scire facias* against a trustee is created entirely by statute. R. S., c. 219, § 74.

But that section provides for *scire facias* in case the "execution is returned unsatisfied," and in no other. The issuing the writ depends entirely upon the return.

Of course, if an improper or erroneous return is made there are appropriate remedies; but until these are applied *scire facias* cannot issue.

Again, the trustee process is literally one of "foreign attachment." It is attaching personal property in the hands of another party. It stands on the same footing, so far as lien upon the property by virtue of the attachment is concerned, as common attachment. *Franklin Bank* v. *Bachelder*, 23 Maine, 60, and *Ex parte Foster*, 5 Law Rep. 56, there cited.

The trustee process is simply a statute assignment of property in the hands of the trustee. *Wheeler* v. *Bowen*, 20 Pick. 567.

Suppose attachment had been made on personal property

of Williams, aside from that levied on; the levy on the execution would have been an abandonment of property, except so far as was necessary to satisfy the remainder of the execution.

In this case, as in the one supposed, Sawyer had his election. He might have relied upon the trustee or upon the property. He chose the property and must abide by it.

The trustee process is ancillary to the principal one. It is not a *new* process to issue *scire facias* on an execution. It is subordinate to the principal one. *Adams* v. *Rowe*, 11 Maine, 89.

But the record shows the principal process to have been satisfied, and this is an attempt to revive the adjunct while the principal is dormant. It is acquitting the principal and convicting the accessary.

APPLETON, J. — The judgment recovered by the plaintiff against the principal debtor in the action in which the defendant on his disclosure was adjudged trustee, was satisfied in part by the sale of goods on execution, for the value of which, the officer levying the same was compelled to respond in damages to their owner. The amount which the officer was thus obliged to pay has been refunded by the plaintiff.

The judgment against the debtor in the original trustee process has never been revived on *scire facias*, but still remains satisfied in part, that is, to the amount of the goods sold by the officer on execution.

The plaintiff then commenced the present action of *scire facias* against the defendant, as the trustee of the judgment debtor, claiming to recover against him the entire amount of the original judgment.

It seems to be well settled, that *scire facias* may be issued to revive a judgment, when the execution thereon has been satisfied in whole or in part, by a sale of goods, or a levy on real estate not belonging to the judgment debtor. *Flagg* v. *Dryden*, 7 Pick. 52; *Pillsbury* v. *Smyth*, 25

Maine, 427; *Wilson* v. *Greene*, 19 Pick. 433. But in such case the debtor is a party to the proceeding and entitled to be heard.

But in *scire facias* against the trustee, the creditor revives no judgment against the debtor. The defendant in the trustee process is no party in the process to obtain judgment against the trustee. The amount of the judgment against the debtor is of no moment to the trustee. Before it is revived against the debtor it would be an anomaly to revive it against the trustee.

But this question seems to be settled by the very statute which authorizes the process. It is provided by Revised Statutes, c. 119, § 74, in cases like the present, that "the plaintiff may sue out a writ of *scire facias* against such trustee from the same Court or before the justice that rendered the judgment, to show cause why judgment and execution should not be awarded against him, and his own goods and estate, for the *sum remaining due* on the judgment against the principal defendant." The sum remaining due is to be ascertained by the judgment, or if the same has been in part satisfied, by that and the officer's return on the execution issued thereon. The sum remaining due from the principal defendant, and that for which the trustee is to be charged, is one and the same. The judgment against the debtor is satisfied in part, and has not been revived by *scire facias* against him. It cannot be revived *indirectly* in a suit against the trustee to which he is not a party.

Exceptions overruled.

† CHADBOURNE *versus* SWAN.

To acquire a *title* by *disseizin*, the possession of the tenant or of those under whom he claims, must be proved to have been open, notorious, exclusive, and *adverse* to the true owner for twenty years.

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

WRIT OF ENTRY to recover possession of lot No. 7, in

the 6th range, in the town of Charlotte. This action was commenced on Sept. 10, 1853.

The general issue was pleaded, and a claim to betterments set up; also a title in the tenant, by possession in himself and those under whom he claims, for more than twenty years.

A verdict was returned for defendant.

The nature of the testimony and the instructions excepted to, are stated in the opinion of the Court, drawn up by

APPLETON, J. — From the proof in the case, it appears that Eben Swan, in 1818 or 1821, entered on the lot in dispute; that after such entry he continued in possession up to Sept. 30 1830, when he conveyed the same to E. F. Newell; that after such conveyance he still remained upon the demanded premises, until March 1, 1847, when Newell conveyed the same to the tenant, who has continued to occupy the same to the commencement of this action. The question for the determination of the jury, was whether the tenant and those under whom he claims, acquired title by disseizin.

The jury were instructed, "that if they should find the entry of Swan on the demanded premises, in 1818 or 1821, as they should find the fact to be, was under claim to own the land, and the possession was open, notorious and exclusive up to the time of his deed to Eben F. Newell, and his possession subsequently was under Newell, as his servant, occupying and making improvements for Newell's benefit, and not adversely to him, up to the time of his deed to the defendant, and he has since occupied the land as his own, claiming it *adversely*, acknowledging no other title, to the time of the commencement of this action, this would constitute a perfect title in the defendant, and they need make no other inquiry," &c.

"To constitute a disseizin," says MELLEN, C. J., in *Little* v. *Libby*, 2 Greenl. 247, "the person claiming to have gained a title by disseizin, must prove that his possession must

not only have continued a sufficient length of time, but must also have been *open, notorious, exclusive and adverse.*" *Kensell* v. *Daggett,* 11 Maine, 309. The possession of a tenant may be open, notorious and exclusive, and yet not adverse to the rights of the legal owner of the premises.

The instruction given does not require the jury to find the possession to be adverse, until after the deed of Newell to the tenant. It should have required the possession of those under whom the tenant claims, equally with his own possession, to have been adverse, to constitute a title by disseizin. *Exceptions sustained.*

New trial granted.

Granger, for plaintiff.

J. A. Lowell, for defendant.

† INHABITANTS OF EASTPORT *versus* THE CITY OF BELFAST.

In adjudicating by the selectmen upon the question of insanity, when applied to for a warrant to send a person to the insane hospital, they act judicially, and, of a case within their jurisdiction, a copy of their record is the legal evidence of their judgment.

Such judgment cannot be impeached by parol evidence. If erroneous it may be reversed.

And where a pauper, whose settlement is in another town, is thus adjudged insane and sent to the hospital, notice given of the expenses of commitment and payment thereof, will render the town where he has his settlement, liable to reimburse them as for any other supplies.

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

ASSUMPSIT, to recover the expenses of sending one Robert Hendrie to the Insane Hospital.

The settlement of the pauper was in the City of Belfast. On May 17, 1853, he and his family lived in Eastport, and on that day his wife complained to the selectmen of that town that he was insane, and that his comfort and safety, and that of his friends, would be promoted by sending him to the Insane Hospital.

Upon this complaint and the evidence before them, on the same day, the selectmen were of opinion that it was true, and ordered him to be conveyed to the hospital, and there detained until he became of sound mind or was otherwise legally discharged.

The record of the complaint and their adjudication was produced, and admitted against the objections of defendants.

The defendants proved, against the objection of plaintiffs, that they had no notice of these proceedings before the selectmen, but on May 20th, of that year they were notified of what had been done, and that Hendrie had been sent to the Insane ospital, and that the expense of his commitment and of his support there would be charged to the city of Belfast, he having his legal settlement therein.

On July 20, 1853, the defendants were again notified that plaintiffs had paid the sum sued for in this action, and of the previous action of the selectmen of Eastport in regard to Hendrie, and calling on them to refund the same, and that plaintiffs would look to them for payment of his support at the hospital.

No reply was made to those notices.

If the action be maintainable upon the legal evidence before the Court, a default to be entered and judgment for the sum sued for; otherwise, a nonsuit to be entered.

G. F. Talbot, for defendants.

The proceedings of the selectmen of Eastport were fatally defective, in that no notice was given to defendants where Hendrie had his settlement. Such notice was incidental to the very nature of the tribunal and of the proceedings. The selectmen were acting in a judicial capacity. There can be no valid judgment against persons having no notice of the suit. *Corliss* v. *Corliss*, 8 Verm. 387; *Kinderhook* v. *Clew & al.*, 15 John., 537; *Brown* v. *Wheeler*, 2 Ala. 373.

After this commitment by the selectmen of a town where the pauper has not his settlement, the pauper must remain a heavy charge upon the place of his settlement, and there

appears to be no relief, if it can be done without notice. The town committing him, may after six months investigate the matter of insanity, but the town ultimately liable has no such power by the statute. § 12, Acts of 1847, c. 33. If the selectmen of all our towns are invested with such powers to mulct a distant town or city without notice, it is not possessed by any other tribunal.

But the statute itself of 1847, impliedly requires notice to the town interested in the examination. It is incidental to the right of appeal, as granted in § 9 of that chapter. There was no one to appeal unless the defendants. His wife was the moving party, and Eastport was interested to get rid of a present annoyance. The defendants were denied that privilege for want of notice, and this takes away the basis of plaintiffs' charge against them.

The cases in 35 Maine, against Belgrade and East Machias, do not in any way conflict with the position here taken — the former was the town where the pauper's settlement was in fact, the latter only asserted the sufficiency of a copy of the record of selectmen as evidence.

Hayden, for plaintiffs.

1. A certified copy of the record of selectmen is evidence. *Eastport* v. *East Machias*, 35 Maine, 402.

2. Notification three months after payment is sufficient. *Worcester* v. *Milford*, 18 Pick. 379; *Cooper* v. *Alexander*, 33 Maine, 453.

3. No notice to defendants before adjudication by selectmen is necessary. Stat. 1847, § 8; *Insane Hospital* v. *Belgrade*, 35 Maine, 497.

TENNEY, J. — The only objection insisted upon in the defence of this action is, that the adjudication of the selectmen of the town of Eastport, in the case of Robert Hendrie, that he was insane, was made without any notice to the town of Belfast, where his settlement in the report of the case is admitted to have been.

Selectmen of towns are constituted a board of examiners,

whose duty shall be, upon complaint in writing of any relative of an insane person, &c., to inquire into the condition of such person, &c., and they are authorized and required to call before them such testimony, as shall be necessary for a full understanding of the case; and if it shall appear to them that the person is insane, and they shall be of the opinion, that the comfort and safety of the patient or others interested, will be promoted by a residence in the insane hospital, it shall be their duty, to send such person forthwith to that institution. Stat. of 1847, c. 33, § 8.

The selectmen are required to keep a record of their doings, and furnish a copy to any person interested, who may call and pay for the same. § 17, of the same chapter.

The record of the selectmen, who are thus made a judicial tribunal for this purpose, and have jurisdiction over the person named in a proper complaint, and the subject matter of the same, is the evidence of their proceedings and judgment, and this record is admissible as other judicial records. *Eastport* v. *East Machias*, 35 Maine, 402. It cannot be impeached by parol evidence. If it is erroneous as a record, it may be reversed. But if the selectmen have jurisdiction of the case, it is competent proof of the judgment.

As the record stands in the present case, it was sufficient authority for sending Robert Hendric, the person found to be insane, to the insane hospital.

In the Act referred to, in § 11, it is enacted, that no provision of the Act shall prevent any city or town, which has been made chargeable, and shall have paid for committing any insane person to the hospital, from recovering the same from any city or town, in the same manner as if incurred for the ordinary expense of any pauper.

Seasonable notice was given in behalf of the plaintiffs, to the overseers of the poor of the defendants, by the proper officers and in proper form, to which there was no reply, to enable the former to recover for the supplies furnished to this pauper, if he had fallen into distress in Eastport, and had been relieved at the expense of that

town, and the defendants are brought within the section last referred to, which by implication makes them liable for the sum agreed upon as damages.

Defendants defaulted.

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† DREW *versus* LIVERMORE.

A mortgagee of a vessel who gives an accountable receipt therefor, to an officer attaching it as the property of the mortgager, cannot avoid his liability, by showing that his claims exceeded the value of the vessel.

And in an action on such receipt he is precluded from showing any informality or invalidity in the attachment or judgment, while the latter is in force.

ON FACTS AGREED.

ASSUMPSIT, on an accountable receipt to deliver the vessel, "A. Houghton," within thirty days, &c.

One Cleland, built a barque at Robbinston, towards which the defendant made advances and became mortgagee.

The plaintiff, being a constable of Eastport, and having a writ Ross against Cleland, attached the barque as his property, when defendant gave this receipt, to the amount of $500.

In making the attachment, the plaintiff performed none of the things prescribed in c. 78, of Statutes of 1848, nor was he a sheriff or deputy.

Judgment was recovered in the suit against Cleland; execution issued, and the property demanded of defendant within thirty days after judgment.

The defendant, with the consent of Cleland, sold the vessel, but it did not bring enough to satisfy his claims.

The defendant also offered to prove, if such proof is admissible, that at the time the receipt was given, he denied the validity of the attachment, to the attorney causing it to be made, and signed it under the advice of counsel, that he would not thereby admit the validity of the attachment, but might contest it in this suit.

The Court were to render a judgment according to the

legal rights of the parties, upon the facts and the testimony offered, if admissible.

Hayden, for defendant.

1. The attachment might have been avoided by Livermore, or the officer sued in trespass, therefore he cannot recover on this receipt. The officer was not bound to make the attachment, and would not have been liable if he had not made it. The liability of the officer limits the liability of the receipter. *Fisher* v. *Bartlett*, 8 Maine, 122; 13 Mass. 224; *Sawyer* v. *Mason*, 19 Maine, 49; *Lathrop* v. *Cook*, 14 Maine, 414; *Robinson* v. *Mansfield*, 13 Pick. 144; *Webster* v. *Hooper*, 7 N. H. 596; *Whitney* v. *Farrell*, 10 N. H. 9.

2. There was no property in Cleland to attach, or if he had a right of redemption, the officer did not attach it. It was worthless as the event showed. R. S., 125, § § 32, 33; Laws of U. S. 28 July, 1850.

3. There was no lien on which Ross could attach. R. S., 125, § 35.

4. No lien attachment was made. Laws of 1848, c. 78, § § 1 & 2.

Granger, for plaintiff.

1. The defendant's contract was binding, as settled by these cases. *Sawyer* v. *Mason*, 19 Maine, 49; *Johns* v. *Church*, 12 Pick. 557; *Robinson* v. *Mansfield*, 13 Pick. 144; *Burseley* v. *Hamilton*, 15 Pick. 40; R. S., c. 117, § 40.

2. The evidence offered is inadmissible, either on the ground that it is immaterial, or that it is an attempt to vary or qualify a written contract by parol evidence. 3 Stark. Ev. 1007; *Whitney* v. *Lowell*, 23 Maine, 318; *Penobscot Boom Cor.* v. *Wilkins*, 27 Maine, 345; *Fisher* v. *Bartlett*, 8 Greenl. 122.

RICE, J. — This is assumpsit on an accountable receipt. The property described in the receipt was a vessel of which the defendant was mortgagee. It was attached as the property of the mortgager. The mortgage was of a date anterior to the attachment and receipt. The debt secured by

the mortgage to the defendant exceeded the sum for which the vessel was sold.

The defence to this action is, that the defendant was the owner of the property attached and receipted for by virtue of his mortgage.

It has been repeatedly decided that when property has been receipted for, as attached on a writ against a particular person, the receipter cannot defend an action brought against him for a refusal to deliver the property according to the terms of his receipt, on the ground that he was the owner of the property. He is estopped by the admissions in his receipt from setting up that defence in an action upon the receipt. *Johns* v. *Church*, 12 Pick. 557; *Robinson* v. *Mansfield*, 13 Pick. 144; *Burseley* v. *Hamilton*, 15 Pick. 40; *Sawyer* v. *Mason*, 19 Maine, 49; *Penobscot Boom Cor.* v. *Wilkins*, 27 Maine, 345.

The reason given for this rule, by WESTON, C. J., was, "for if he will suffer his own goods to be attached as the property of another in his presence, without interposing his claim, and will thereupon recognize the title of the debtor thereto, by an instrument under his hand, he should not be permitted afterwards, to avoid his liability as receipter, any more than he would be permitted to defeat a sale of his goods, which he sees made as the property of another, without notifying the purchaser of his own title."

But it is competent for a receipter, who does not claim to be the owner of the property, to show in defence, that it belonged to some person other than the one as whose it was attached. *Fisher* v. *Bartlett*, 8 Maine, 122.

In the case of *Lathrop* v. *Cook*, 14 Maine, 414, the receipter was permitted to set up his own title to the property receipted for, but it was on the ground, that the receipt in that case contained no admission that the property belonged to the original debtor.

The offer of the defendant to prove, that at the time this receipt was given he denied the validity of the attachment, could only be admitted to affect the question of damages;

not to qualify the terms of the receipt. *Burseley* v. *Hamilton*, 15 Pick. 40. He entered into a written contract, the terms of which are clear and explicit. There is no suggestion that any fraud was practiced upon the defendant, nor that he acted under mistake of fact in relation to this matter. By that contract he must be bound. He voluntarily became the bailee of the officer, and cannot avoid his contract by showing informality or invalidity in the attachment or judgment, so long at least, as that judgment stands. *Brown* v. *Atwell*, 31 Maine, 351.

The suit of *Ross* v. *Cleland*, does not appear to have been prosecuted as a lien claim; that fact, however, does not affect the rights of the parties in this case.

A default must be entered and judgment for the amount agreed by the parties. *Defendant defaulted.*

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† PRATT *& al. versus* CHASE.

A sale of personal property and a receipt acknowledging payment, with delivery of a *portion*, do not necessarily transfer to the vendee title in the *whole* property sold. The intention of the parties in the delivery is to govern, and the jury must find what that was.

Whether the delivery of a part, was for the whole, is a *fact* to be determined by the jury.

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

REPLEVIN, for 8000 box shooks.

Defendant justified the taking of them, as a coroner, there being no sheriff of the county at that time, on several writs of attachment, against Daniel O. Wight, and also as holding them under direction of mortgagees of the same property.

Plaintiffs claimed title under a contract of sale with one Wainwright, a bill of sale of 10,000 shooks, and receipt by him of payment by note, which papers appear in the opinion.

Plaintiffs lived in Boston, and at the time of the sale the shooks were not manufactured. Wainwright seemed to be acting in the business for Wight, and the latter was to man-

ufacture them at his place of business in Calais. The plaintiffs had the order of Wainwright upon Wight, and sent down the same by the captain of a vessel they had chartered, to take away the shooks.

A part of the shooks contracted for was delivered on board of plaintiffs' vessel. They were then being manufactured at the mill, and a large part of them piled up there.

While the vessel was loading, Wainwright failed. Wight mortgaged his manufactured lumber to his creditors, and an attachment was made of the sugar box shooks which had not been taken from the mill. No count of them had been made.

In the progress of the trial many questions arose, which were argued in the lower Court, that were not considered by this Court. The requested instructions by the defendant also became immaterial.

The presiding Judge instructed the jury, in part, as follows:—

While the articles were in process of manufacture, and until they were delivered to plaintiffs, they would be and remain the property of Wight, subject to his disposal, and liable to attachment for his debts; and that the question would then be whether or not the plaintiffs obtained delivery of the shooks before they were mortgaged to, or attached by, the persons under whom defendant justifies; *that* a sale of the whole and receipt of payment, and a delivery of part, as between the vendor and vendee, would be a delivery of the whole which were then manufactured towards the contract; *that,* if the shooks were delivered towards the contract of sale, on board a vessel, which plaintiffs had sent for them, that would be a good delivery to plaintiffs; *that* a delivery of the pile, not exceeding the amount sold, would be as good a delivery to pass the property before they were counted as after; *that,* if Wight had delivered to plaintiffs the shooks piled out on the Iron Company's wharf, or near the box machine, and when one of plaintiffs left

Calais, he left men there in his employment, engaged in hauling them to the wharf for shipment, that any shooks subsequently manufactured by Wight, and by him delivered to the servant, agent or person in the employment of plaintiffs, with the intention of fulfilling the contract of sale, or piled out to him for that purpose, would pass to plaintiffs by such delivery.

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

Downs & Cooper and *F. A. Pike*, in support of the exceptions, contended that the instruction, as to the effect of a delivery of a part of the shooks, was wrong. It should have been a delivery of part *for the whole* was good.

Whether the delivery of part was with the intention of separating it, or was a symbolical delivery of the whole, was a question of fact for the jury. The intention of the parties should govern. *Simmons* v. *Swift*, 5 Barn. & Cr., 857; (11 C. & R. 712;) *Bunney* v. *Poyntz*, 4 Barn. & Ald. 568; (24 C. & R. 250;) *Stuky* v. *Howard*, 2 H. Bl. 504; *Hanson* v. *Meyer*, 6 East, 614; *Damon* v. *Osborne*, 1 Pick. 476; *Parks* v. *Hall*, 2 Pick. 286; *Legg* v. *Williams*, 17 Pick. 140; *Shurtleff* v. *Willard*, 19 Pick. 202; *Pettis* v. *Kellogg*, 7 Cush. 461; Long on Sales, Rhoad's Ed. 259; *Boynton* v. *Veazie*, 24 Maine, 286; *Phillips* v. *Hunnewell*, 4 Maine, 376; *Williams* v. *Morse*, 5 N. H. 235; *DeRidder* v. *McKnight*, 13 Johns. 294; *Riddle* v. *Varnum*, 20 Pick. 280; *Dixon* v. *Yates*, 5 Barn. & Ad. 339; 27 E. C. L. 92.

D. Granger, and *B. Bradbury, contra.*

APPLETON, J. — On Sept. 6, 1853, Henry C. Wainwright gave the plaintiffs the following contract of sale: —

"Sold Pratt & Townsend ten thousand full inch shooks of usual dimensions and regular thickness, to be bright and newly made, at 50cts., 6 mo's, with interest added. Shooks to be delivered at Calais, Maine. "Henry C. Wainwright.

"Boston, Sept. 6, 1853."

At the same time, he gave the plaintiff a bill of the shooks, as follows:—

"Boston, September 6, 1853.

"Messrs. Pratt & Townsend,

"Bought of H. C. Wainwright,

10,000 sugar box shooks, first quality, equal to cash, at 50cts., $5000

"Received of Pratt & Townsend, their note at six months, from November 7th, 1853, for five thousand dollars, being on account of the above bill, the interest to be settled on the delivery of the shooks, and shooks to remain at my risk during the month of November, 1853.

"Henry C. Wainwright."

At the time when these papers were executed, Wainwright was not the owner of any shooks.

Nothing is better settled by the authorities, than that no personal property can pass by a grant, save that which belongs to the grantor at the time of the execution of the conveyance purporting to pass the title. *Lunn* v. *Thornton*, 1 Man. Gran. & Scott, 380; 50 E. C. L. 379. The doctrine of this case was recognized as unquestioned by the Supreme Court of Massachusetts, in *Jones* v. *Richardson*, 10 Met. 481, and by this Court, in *Head* v. *Goodwin*, 37 Maine, 181.

There were no particular shooks which could pass to the plaintiffs on the sixth of September, for there were none to which Wainwright, or Wight, if he was acting for him, had any title, or upon which the contracts between the parties could in any way operate. It would not be enough that the vendor should subsequently acquire a valid title to an amount of shooks greater or less than the quantity stipulated in the conveyance as sold, but some new act must be done, indicating that they were to pass under the previous bill of sale. *Lunn* v. *Thornton*, 50 E. C. L. 379. The plaintiffs rely upon a delivery as the act by which the title to the shooks, which were manufactured after the date of their bill of sale, became vested in them.

It was for the jury to determine whether there was a delivery or not. It was equally for them to decide whether the delivery made, was of part or of all the shooks which had been manufactured, or was symbolical, as of a part for all. If of part, no more than those thus delivered to the plaintiff, would pass. If of part, for the whole, then, as between the parties, all might vest in the plaintiffs. These distinctions are fully recognized in the cases cited by the counsel for the defendant. "It is said," remarks Mr. Justice LITTERDALE, in *Dixon* v. *Yates*, 5 Barn. & Ad. 313, "there was a part delivery here, and that that, in point of law, operated as a constructive delivery of the whole. But that rule is confined to cases where the delivery of part is *intended* to be a delivery of the whole." *Bunney* v. *Poyntz*, 4 Barn. & Ad. 568; *Simmons* v. *Swift*, 5 B. & C. 857. In *Shurtleff* v. *Willard*, 19 Pick. 202, Mr. Justice MORTON says, "a part only was delivered; but this the jury have found was delivered *for the whole*. That a contract of sale of numerous and various chattels may be executed without an actual transmission of the whole into the occupation of the purchaser, is familiar and unquestioned law. This may be done by a mere symbolical delivery, or by a delivery of a part for the whole." A raft of lumber may be used to make a delivery of the whole lumber having the same mark. *Boynton* v. *Veazie*, 24 Maine, 286.

The Court instructed the jury "that a sale of the whole and receipt of payment and delivery of part, as between the vendor and vendee, would be a delivery of the whole, which were then manufactured, towards the contract," &c.

By this instruction a delivery of part would convey the title to all the shooks sold, irrespective of the intention of the parties. Whether the delivery was of a part for all, was a fact for the jury. The purpose and character of the delivery proved was withdrawn from their consideration, and was determined by the Court.

Exceptions sustained. — New trial granted.

† SMALL *versus* SACRAMENTO NAVIGATION AND MINING CO.

In an action upon an order drawn upon a company and purporting to be accepted by the directors thereof, where its execution is denied, without proof of the handwriting of the acceptors, and that they were directors, a nonsuit may properly be ordered.

A party excepting to the rulings of the presiding Judge, in excluding evidence by him offered, must present such evidence for the consideration of the Court of law, or the presumption arises that he has no just ground of complaint.

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

ASSUMPSIT, on the following order:—

"$53 58. "Cherryfield, Nov. 7, 1849.

"To the Directors of the Sacramento Navigation and Mining Company.

"Please pay to the order of Calvin L. Small, from the first proceeds of said Company, that shall be payable to me, the sum of $53,58, and interest therefor from date, it being the balance due upon an execution said Small holds against me, on which I have given a bond with sureties, which bond is to be discharged upon your acceptance hereof.

"E. F. Jacobs."

On this order was written:—"Accepted, Sacramento Navigation and Mining Company, by their directors, Samuel Burbank, Horatio N. Plummer, B. W. Farrar, J. D. Pulsifer, Daniel P. Lake, Jared C. Nash."

The execution of this paper was denied, and proof of the handwriting of all the parties thereto was offered, with the exception of Daniel P. Lake.

No other evidence as to this order, or who were directors of the company, was in the case.

The plaintiff offered evidence that this company had an office in Cherryfield; that the witness had there seen a paper resembling the one he then held, but could not say it was the same paper.

This paper was offered and excluded by the Judge.

He also read a deposition and papers attached to it, and also a paper signed by the defendants' attorney.

What these papers were, or the character of the deposition, does not appear, as they were not presented to the Court.

The plaintiff also offered the deposition of one Adams, which was objected to for a defect in the caption, and excluded.

No evidence was offered by defendants, and they moved a nonsuit, which was ordered.

If, on the case presented by plaintiff, this order was right, and the rulings as to the admissibility of the evidence rejected were correct, the nonsuit was to stand; otherwise a new trial to be ordered.

B. Bradbury, for defendants.

W. Freeman, for plaintiff.

RICE, J. — This action is based upon an order purporting to be drawn by one E. F. Jacobs, upon the directors of the Sacramento Navigation and Mining Company, in favor of the plaintiff, and accepted by six persons, whose names appear upon said order, as directors of said company. The execution of this paper was denied by the defendants. Proof was offered of the handwriting of the drawer and of five of the persons by whom it was accepted. As to the handwriting of the other acceptor there was no proof; nor was there any proof, that any of the persons, by whom said order was accepted, were directors of said company. This paper was properly excluded by the Court. The paper testified to by Mr. Freeman, was also properly excluded. It was not identified as a paper belonging to the defendants.

As to the depositions referred to in this case, which were excluded, we cannot speak as no copies have been furnished. It is the duty of the party who complains that evidence offered by him has been erroneously excluded, to present such evidence for the consideration of the Court. If he fails to do so, the presumption arises, that he has no just cause for complaint.

So far as appears from the case, or the papers which have

come to our hands, the rulings of the Judge before whom it was heard were entirely correct.

The exceptions are therefore overruled.

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† SIMS *& al. versus* HOWARD *& al.*

Where the master sails a vessel on shares, but it does not appear that he had *control* over her, the owners may recover for her freight.

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

ASSUMPSIT, to recover freight of ninety barrels of vinegar from Philadelphia to Bangor; but the bill of lading provided, that if the river is closed with ice, then the cargo is to be received at Frankfort, or as near as ice will permit.

This freight was shipped on board schooner *Tomah* of which Thomas Parsons was master, and plaintiffs were owners.

The captain victualled and sailed the vessel, paying the owners one-half the gross earnings for the use of her. The owners were to pay one-half of pilotage and all extra expenses.

When the vessel arrived at Frankfort, the navigation beyond was impeded by ice, but the owners of a portion of the cargo took the vessel to Bangor on their own risk, where after discharging a portion of the barrels of vinegar, and the greater part of the other freight, the vessel was taken back to Frankfort to prevent being frozen in, and there the remainder of the cargo was discharged and notice given to the owners and freight demanded.

If the action was maintainable upon the evidence submitted, the cause was to stand for trial; otherwise a nonsuit to be entered.

B. Bradbury, for defendants.

Pike, for plaintiffs.

1. The master was not owner *pro hac vice*, on the evidence adduced. *Lyman* v. *Redman*, 23 Maine, 289; *Ship*

Nath'l Hooper, 3 Sum. 543. To be so, he must have absolute control of the vessel. *Taggard* v. *Loring*, 16 Mass. 336; *Emery* v. *Hersey*, 4 Greenl. 407; *Cutler* v. *Thurlo*, 20 Maine, 213; *Skolfield* v. *Potter*, Davies, 395; *Webb* v. *Pierce*, 1 Curtis, 104.

2. The owners must sue for the freight money unless the master is owner *pro hac vice*. The master cannot maintain such action. *Robinson* v. *Cushing*, 11 Maine, 480; *Barnard* v. *Wheeler*, 24 Maine, 415; *Ingersoll* v. *VanBokkelin*, 7 Cowen, 670.

The master has a lien on freight money only for necessary disbursements. *Drinkwater* v. *Sparton*, Ware, 149; *Newhall* v. *Dunlap*, 2 Shep. 180.

TENNEY, J. — The claim is for the freight of ninety barrels of vinegar, from Philadelphia to Bangor and Frankfort, by the plaintiffs, as owners of the vessel. The right to recover is denied, on the ground, that the master, having taken the vessel on shares, the action for freight can be sustained in his name alone.

It was proved, that the plaintiffs were the general owners of the vessel, at the time the vinegar was shipped and brought to Frankfort and Bangor. The master had taken her on shares, at the halves; he victualled and sailed the vessel, and paid the owners one-half of the gross earnings for the use of her, and the owners were to pay half pilotage, extra help, and all extra expenses. No direct evidence shows the master to have had control of the vessel, and from the proof on this point, it cannot be inferred. If he was to pay one-half of the gross earnings of the vessel to the owners, he was entitled, under the agreement, to receive the other half for his services and disbursements. This is substantially the same as the right to one-half of the gross earnings for his services and expenses in sailing the vessel; and confers no authority to control her. The master was still the servant of the owners, and his right to a part of the earnings of the vessel, was no more than a mode of com-

pensation agreed upon with them. In the case of *Emery* v. *Hersey*, 4 Greenl. 407, "it was proved, that the vessel was let to the master on shares, the master to victual, man and sail the vessel, and to receive one-half the freight money, and five dollars for each trip she might perform." This agreement is not substantially unlike the one now under consideration, so far as the control of the vessel is concerned, and it was held to give the master no control over her.

The master has a right to receive or collect the freight from third persons, yet he receives it as the agent, and for the benefit of the owner. *Ingersoll* v. *VanBokkelin*, 7 Cowen, 670. And having no lien thereon for his wages, has no right as against his owners, to receive it, but only as their servant; and the payment of the freight to the owners on their demand, will be a discharge against a claim by the master. Abbott on Shipping, p. 509, 5th Am. ed. by Perkins; *Atkinson* v. *Cotesworth*, 3 Barn. & Cress. 647. It follows from these principles, that an action for freight, against third persons in the name of the owners of the vessel, having possession and control thereof, may be maintained. *Robinson* v. *Cushing*, 2 Fairf. 480.

The owners and the master, in this case, have treated, in their settlement, the freight as belonging to the former, by the allowance of one half of the amount claimed, to the latter, and this certainly does not diminish their right to prevail against the defendant..

By the bill of lading, the vinegar was to be delivered at Bangor; but if the river should be closed with ice, then the cargo was to be received at Frankfort, or as near as the ice would permit. On the arrival at Frankfort, on the last of November, the master found the river full of ice, and he refused to proceed any further on the risk of the vessel and owners. But the owners of six thousand, six hundred and forty-six bushels of corn, agreed to bear all risks, if the vessel should proceed to Bangor, and obtained a steamboat to tow her up the river, the master protesting against the attempt to proceed, till the risk was assumed by the owners

of the corn, who undertook the whole management. A part of the corn was taken out, after arriving at Bangor, by the aid of forty men, beside the crew of the vessel, and a part of the vinegar. But they were obliged to return to Frankfort the same day with the vessel, with a portion of the corn and of the vinegar, by direction of the master of the steamboat, that they must leave Bangor immediately after discharging the part of the corn and vinegar left at Bangor, the master of the vessel not interfering, because she was not then at the risk of the owners.

The vessel was towed back by the steamboat. The river was full of drift ice, and two miles above Frankfort the vessel came into ice, which extended across the river, and the steamboat cut her way through it, in towing up to Bangor, and also in towing down to Frankfort. One of the defendants came to the wharf, where the vessel lay when she was at Bangor, and was informed, that he could have the vinegar as soon as it could be landed. The defendants were notified, that the vinegar not landed at Bangor was stored with Mr. Rich, who usually stored goods for the Bangor people, and request made of them to pay the freight. As much of the vinegar was discharged at Bangor as could be done, considering the state of the tide. The river continued closed, while the vessel was at Frankfort, and was the last vessel which left Bangor that year.

From the evidence before us, we are satisfied, that the contingency happened, which authorized the discharge of that portion of the vinegar, which was stored at Frankfort, at that place. *Action to stand for trial.*

† INHAB'TS OF EASTPORT *versus* INHAB'TS OF EAST MACHIAS.

Where a lunatic taken up in a town in which he has no legal settlement, is committed to the hospital according to the requirements of the statute, for the expenses of his support, the town are responsible to the hospital.

But such expenses, on due notice given, may be collected of the town where such lunatic has a legal settlement.

In such cases the cause of action originates at the time *payment* is made to the hospital; and the limitation bar then begins to run.

ON FACTS AGREED.

ASSUMPSIT, to recover expenses paid to the Insane Hospital for the support of Elizabeth Howard, whose legal settlement is in East Machias.

This suit was commenced on Nov. 13, 1854, and the expenses were paid to the hospital on July 1st and 24th, 1854, for her support from May 23, 1850 to June 1, 1854, according to the account furnished.

In November, 1849, Mrs. Howard was duly committed to the hospital by the selectmen of Eastport, under the Act of 1847 relating to the Insane Hospital, and under that process has remained there ever since.

In August, 1850, the plaintiffs commenced a suit against the defendants for the expense of her removal to the hospital, and for her support there until May, 1850. That action was defended both as to the legality of the proceedings in committing the woman to the hospital and as to her settlement.

That action was not decided until the April term, 1854, when plaintiffs recovered the amount claimed and costs of suit.

The regulations of the Insane Hospital require that the expenses of its patients be paid every six months, but in this case they were delayed at the request of plaintiffs, on account of the pendency of that suit.

On July 1st and Aug. 1st, 1854, the overseers of the poor of Eastport notified the overseers of East Machias that they had been made chargeable for the support of Mrs. Howard

by the Insane Hospital, and had paid them the sum sued for, setting forth the proceedings in relation to her, and that she remained at the hospital and requesting payment, and notifying them that they should look to them for any future payments they might be compelled to make.

No other notice had been sent to the defendants excepting that anterior to the commencement of the former action against them.

If, on these facts, the plaintiffs are not entitled to recover, a nonsuit is to be entered; if otherwise, a default is to be entered, and judgment for such sum as plaintiffs are entitled to.

J. A Lowell, for defendants.

1. The plaintiffs in any event can only recover the expenses incurred within three months next before the written notice given to defendants; and the action must be brought within two years after the cause of action has arisen. R. S., c. 32, § 29. And this provision for notice applies to cases for the support of the insane, under § 11 of c. 33 of Acts of 1847.

2. The notice given prior to the commencement of the first suit had had its full effect and operation, and no action can be maintained for subsequent expenses without a new notice. And the notice must be within three months after the expenses are *incurred*, and not within three months after the expenses are *paid*. *Greene* v. *Taunton*, 1 Greenl. 228; *Sidney* v. *Augusta*, 12 Mass. 316; *Hallowell* v. *Harwich*, 14 Mass. 188; *Walpole* v. *Hopkinton*, 4 Pick. 357; *Palmer* v. *Dana*, 9 Met. 587.

3. But if no new notice was necessary, then the recovery can only reach back two years before suit. The statute and cases cited confirm this position.

Hayden, for plaintiffs, cited R. S., § 11, c. 33 of Acts of 1847; *Worcester* v. *Milford*, 18 Pick. 379; R. S. of Mass. c. 48, § 10; *Cooper* v. *Alexander*, 33 Maine, 453; *Insane Hospital* v. *Belgrade*, 35 Maine, 497; *Eastport* v. *East Machias*, 35 Maine, 402.

RICE, J. — The legal settlement of the pauper had been determined by previous litigation between the parties. It is not controverted, that the plaintiffs have paid the amount which they now claim to recover for the support of the pauper. But the defendants deny, that the plaintiffs are entitled to recover for any thing more than two dollars per week, (that being the sum per week paid by them to the Insane Hospital, for the board of the pauper,) for the three months next preceding the notice of July 1, 1854; or at the extent, that they are only entitled to the amount paid for board, &c., furnished the pauper during the two years next preceding the date of the writ.

In the former action between these parties, 35 Maine, 402, all expenses which had been paid by the plaintiffs for the support of the pauper, before May 23, 1850, were adjusted by the defendants. No notice in writing was given by the plaintiffs to the defendants between May 23, 1850, and July 1, 1854.

It was decided in *Hallowell* v. *Harwich*, 14 Mass. 188, that in a suit for maintaining a pauper, a notice given to the overseers of the defendant town, previously to the commencement of a former suit between the same parties, for supporting the same pauper, could not be recurred to as sufficient to support the second action; but that every new cause of action must be prosecuted according to the requisitions of the statute, without the aid of the notice given previously to the former suit. The same doctrine was affirmed in *Walpole* v. *Hopkinton*, 4 Pick. 357, and in many other cases cited in the argument. It has also been settled, that expenses incurred more than two years before action brought for the support of paupers, were barred by the limitation applicable to this class of actions.

This class of cases was based upon statute provisions similar to those found in § 29, c. 32, R. S., which required the notice to be given within three months, and the action to be brought within two years, after the expenses for the relief of the pauper had been *incurred.*

This case is based upon the provisions of § 11, c. 33 of the laws of 1847. By that section, towns in which insane persons reside, or are commorant, at the time they are committed to the Insane Hospital, are liable for the expense of committing to, and supporting in the Insane Hospital such insane person, in the first instance. But the same section also provides, that "no provision of this Act shall prevent any city or town, which has been made chargeable, *and shall have paid* for committing and supporting any insane person in the hospital, from recovering the same of the patient, if able, or of his or her friends liable for his or her support."

Under § 29 of c. 32, R. S., the right of action accrues when the expenses are *incurred.* Under the statute of 1847, c. 33, § 11, the right only accrues when the town which is made liable in the first instance has *paid* the expenses which have been incurred. This is a material change, and was undoubtedly designed to modify the general law for the relief of paupers, when applied to those who had been committed to the Insane Hospital.

Nor is there any thing perceived in the provision, that "such expense is to be recovered from any city or town in the same manner as if incurred for the ordinary expense of any pauper," which conflicts with this construction. The notice required by the statute, in both cases, must be in writing. The action is also barred in two years from the time the right of action accrues in both cases. The modes of proceeding are in all respects alike in both. The only distinction is, that in one the right of action accrues at the time the expense is *incurred,* in the other, at the time the expense is *paid.*

In the case at bar, the right of action originated when the expenses incurred by the plaintiffs for the support of the pauper at the hospital were paid to the hospital. The notice was therefore seasonably given, and the action seasonably brought, to entitle the plaintiffs to recover the whole sum sued for.

A default must be entered, and judgment for four hundred

and fifty dollars and ninety three cents, and interest thereon, from the date of the writ.

McLarren *versus* Thompson.

By c. 125, § 33, R. S., town clerks are required to record all mortgages of personal property delivered to them, "noting in the book and on the mortgage, the time when the same was received; and it shall be considered as recorded, when left, as aforesaid, with the clerk."

Although the *time* of the reception of such mortgage is *not noted* upon the records, the title of the mortgagee is protected after it has been actually recorded.

Where property is mortgaged to secure a debt, the intention of the mortgager to prevent the property from being attached by other creditors, as well as to secure this debt, will not vitiate the mortgage, unless the mortgagee is connusant of, and participant in such design.

Of costs in replevin actions, where there is judgment for a return of a part of the property replevied.

On Facts Agreed.

Replevin, for a quantity of wood, staves, boots, shoes and sundry other articles.

The defendant was a constable of the town of Eastport, and authorized to serve precepts in civil actions where the *ad damnum* did not exceed $500. He attached the property replevied on a writ against William W. Bucknam.

The plaintiff claimed title to the property by a mortgage from said Bucknam, to secure a debt of $3,000.

This mortgage was made seven days before the attachment, and carried to the town clerk's office, on which he entered the time of its reception and immediately recorded the same in his book of records, for that purpose. But in his book he only certified that it was a true copy, and did not note at what time it was received.

The wood and staves replevied did not appear to be embraced in the mortgage.

By the deposition of the mortgager, which was made a part of the case, it appeared that *he* designed to secure the

plaintiff, and also to keep the property from being attached on debts he was liable for as an indorser.

It also appeared from the deposition, that the plaintiff had security on the real property of said Bucknam, which was estimated to be of greater value than the debt secured, and that, after the mortgage was executed, Bucknam continued the business as before, excepting that the avails went to discharge the liabilities of plaintiff; and that plaintiff solicited this mortgage of personal property several times before it was made.

Hayden, for defendant.

1. No question arises but that defendant has a right to a return of the wood and staves.

2. The other goods were liable to attachment as the property of Bucknam, notwithstanding the pretended mortgage to plaintiff, because —

1st. It was not recorded according to law. R. S., c. 125, § § 32, 33; *Hatch* v. *Haskins*, 17 Maine, 396; *Handly* v. *Howe*, 22 Maine, 560; *Smith* v. *Smith*, 24 Maine, 555; *Wheeler & al.* v. *Nichols*, 34 Maine, 233.

2d. Because it is void as against creditors. *James* v. *Bryant*, 2 Pick. 411; *Twyne's case*, 3 Coke; *Shumway* v. *Rutter*, 7 Pick. 56; *Jones* v. *Huggerford*, 3 Met. 515; *Brinley* v. *Spring*, 7 Maine, 241; *Welcome* v. *Batchelder*, 23 Maine, 85; *Clark* v. *French*, 23 Maine, 221; 2 Kent's Com. 515.

B. Bradbury, for plaintiff.

APPLETON, J. — There is an interval of time, longer or shorter, as the case may be, between the delivery of a mortgage to be recorded and the recording the same. The design of the provision of R. S., c. 125, § 33, which requires "noting on the book and on the mortgage, the time when the same was received," was to protect the mortgagee during the time between such noting and recording. Upon compliance with this provision, the statute provides, that the mortgage shall be considered as recorded when left as

aforesaid with the clerk." Whether there be a noting or not when the mortgage is delivered for the purpose of being recorded, after it has been duly recorded, the public are bound to take notice of its existence. In *Handley* v. *Howe*, 32 Maine, 560, the time when the mortgage was left for the purpose of recordation was not noted, nor was the mortgage recorded at the time of the attachment of the mortgaged goods. It was, therefore, rightly held, that the attachment had the precedence.

In the case at bar, it is conceded that the mortgage was duly recorded some days before the attachment of the defendant. The title of the mortgagee is to prevail, unless upon other grounds the mortgage can be successfully impeached.

The mortgager, being indebted to the mortgagee, executed the mortgage to secure him for such indebtedness and against liabilities incurred by indorsing. It appears, that beside intending to secure the plaintiff, that the mortgager had the further design of placing the property mortgaged in such a situation, that it could not be readily attached by his creditors. A fraudulent design on the part of the mortgager is conceded. But his fraud should not defeat the mortgage, unless the mortgagee was conusant of and participant in such fraudulent design. Such is not proved to be the case, and upon this point the burthen of proof is upon the party alleging fraud. The liabilities the plaintiff had incurred, as well as the amount due him, afford a valid and sufficient reason, why he should be desirous of obtaining security upon personal property. There is no such necessary inference of fraud arising either from taking a mortgage for security, or from the amount of property included in the mortgage, or from the course subsequently pursued by the parties, as to justify us in considering the mortgage in this case as successfully impeached.

The plaintiff has acquired no title to the wood and staves attached, as they were not in the store referred to in the

mortgage at the time of its execution, and the defendant is entitled to an order for their return.

Judgment for defendant for the wood and staves attached and replevied and for costs.

Judgment for plaintiff for remaining goods replevied and costs.

INHABITANTS OF ROBBINSTON *versus* INHABITANTS OF LISBON.

Towns furnishing necessary supplies to persons falling into distress, who have their legal settlement in another town, may recover for such supplies, in an action commenced within two years after the expiration of two months, from the giving of said notice, where no answer is returned.

But if an answer, denying their liability, is returned by the overseers of the town called upon, within the time prescribed by statute, then the action must be commenced within two years from the return of the answer, or it is barred.

ON FACTS AGREED.

ASSUMPSIT, to recover for supplies to paupers, alleged to have their legal settlement in Lisbon.

The plaintiffs paid for support of the paupers $134,60 for board from April 1, 1851, to April 1, 1852, and for board and other necessaries from April 5, to Aug. 23, 1852.

This action was commenced on October 6, 1853.

The overseers of Robbinston, on Sept. 18, 1851, notified the overseers of Lisbon, that the paupers had fallen into distress in their town, &c. To this notice the overseers of Lisbon *immediately* replied, denying that the paupers had any settlement in Lisbon or that that town was in any way liable for their expenses.

Other facts were admitted which it is unnecessary to state.

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

P. Thacher, for defendants, contended that the action could not be maintained as more than two years elapsed, after the delivery of the notice, before the suit, and cited

Uxbridge v. *Seekonk*, 10 Pick. 150; *Belfast* v. *Leominster*, 1 Pick. 126; *Harwich* v. *Hallowell*, 14 Mass. 184; *Camden* v. *Lincolnville*, 16 Maine, 384.

The defendants gave an *immediate* answer, and the rule in *Belmont* v. *Pittston*, 3 Greenl. 453, does not apply. *Sanford* v. *Lebanon*, 26 Maine, 461.

B. Bradbury, for plaintiffs, relied in support of the action, on *Belmont* v. *Pittston*, 3 Maine, 453; *Camden* v. *Lincolnville*, 16 Maine, 384.

APPLETON, J. — It is held by this Court, in *Belmont* v. *Pittston*, 3 Greenl. 453, that an action cannot be maintained against the town in which the pauper has his settlement, by the town affording him relief, until the expiration of two months after notice given pursuant to statute 1821, c. 122. This decision has been somewhat modified by the opinion of the Court in *Sanford* v. *Lebanon*, 26 Maine, 461, where it was held, if the answer of the defendant town is returned within the two months, that the suit may be forthwith commenced, notwithstanding that time has not expired. It follows from this, that the liability of the defendant town must then accrue. If, then, a liability to a suit arises upon the return of an answer, denying the settlement of the pauper, it is difficult to perceive why the limitation of two years, which is given by the statute, does not attach at the same time and by the same act.

This action was commenced Oct. 6, 1853. The defendants were notified on Sept. 18, 1851, that the paupers for whose relief this action is brought, had fallen into distress in the plaintiff town, and they looked to them for their support. To this notice the defendants replied *immediately*, denying their liability. The word immediately, strictly construed, excludes all intermediate time. In *Thompson* v. *Gibson*, 8 Mees. & Wels. 281, the word immediately was held to mean "within such convenient time as is required for doing the thing." If the notice was returned immediately, as the case finds it to have been, more than two years

must have elapsed since its return, and if so, the action cannot be maintained. *Plaintiffs nonsuit.*

† WASS, *Administrator, versus* BUCKNAM, *Executor.*

For a creditor's proportion of a sum of money found due from an executor on the settlement of his account with the Judge of Probate, under the decree of that Court, *assumpsit* will not lie.

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

ASSUMPSIT, to recover of defendant $31,21, that sum being plaintiff's proportion of the amount in defendant's hands, as executor, &c., and due to the creditors of the testator on the settlement of his account of administration, as appeared from a decree of the Probate Court. A larger sum was allowed plaintiff's intestate by the commissioners.

The defendant demurred to the declaration, and alleged that the cause of action, if any, should be set forth under the plea of *debt* and not under the plea of *assumpsit.* Issue was joined thereon.

It was agreed, that if the declaration is adjudged good a default is to be entered, otherwise a nonsuit.

P. Thacher, in support of the demurrer, cited *Storer* v. *Storer*, 6 Mass. 390. *Dubois* v. *Dubois*, 6 Cowen, 494; *McKeen* v. *Odom*, 12 Maine, 94; *Rice* v. *Barre Turnpike Corporation*, 4 Pick. 130; *Howard* v. *Howard*, 15 Mass. 196.

G. F. Talbot, contra.

The general principle is, that the law implies a promise to pay whenever there is a legal or equitable obligation to pay. *Hawkes* v. *Saunders*, Cow. 290. Here the defendant had assets in his hands which he was required to distribute.

Besides, the plaintiff's claim is due by installments, and where a sum is payable in that way assumpsit lies, though the whole sum may be recovered in debt.

An ordinary distribution lacks several essentials of a

judgment. It results from a settlement of the administrator's account alone, and not from an adjustment and proof of claims; it is a mere computation of the register, and not by a discretion of the Court.

APPLETON, J. — The mode provided by statute for the recovery of the dividend on an insolvent estate, when the administrator or executor, upon demand, neglects or refuses to pay, is by suit upon the administration bond, for the benefit of all who may be interested. R. S., c. 113, § 10.

It has likewise been decided that debt may be maintained upon the decree of distribution, of the Judge of Probate, and that a judgment upon the administration bond is no bar to this remedy, it being merely a cumulative remedy, by the stipulation of sureties. *Storer* v. *Storer*, 6 Mass. 390. So it was held in New York, that debt might be maintained on the decree of a surrogate for the payment of money. *Dubois* v. *Dubois*, 6 Cow. 494. It likewise lies upon the order of a Court of Sessions. *Rice* v. *Barre Turnpike Co.* 4 Pick. 130.

The action of assumpsit lies when a party claims damages for breach of simple contract; that is, a promise not under seal. "It is a remedy by which a compensation in damages may be recovered commensurate with the injury sustained by the breach or violation of any contract, not under seal or of record, whether express or implied, written or verbal, for the payment of money, or for the performance or omission of any other act." 2 Petersd. Abr. 414. The question here presented came before the Supreme Court of Vermont, in *Woods* v. *Pettes*, 4 Verm. 556, in which case it was held that assumpsit would not lie to recover a sum found due by the commissioners appointed to examine and adjust the claims against an insolvent estate, but that debt was the proper form of action.

This suit is not maintainable and a nonsuit must be entered. *Plaintiff nonsuit.*

† SCUDDER *& al. versus* BALKAM.

By § 35, c. 125, R. S., it is provided that "any ship carpenter, caulker, blacksmith, joiner or other person who shall perform labor or furnish materials for or on account of any vessel, building or standing on the stocks, or under repairs after having been launched, shall have a lien on such vessel for his wages or materials, until four days after such vessel is launched, or such repairs have been completed; and may secure the same by attachment on said vessel within that period, which shall have precedence of all other attachments."

But, for materials so furnished when sold on time, which has not elapsed when the four days after the vessel is launched, have expired, no lien can be secured. In such cases the lien is waived.

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

ASSUMPSIT, for materials furnished for and on account of a vessel building and standing on the stocks in defendant's ship-yard, on which plaintiffs claimed a lien for the amount of said materials.

An attachment of the vessel on the stocks was made in the manner provided by law for attachments to secure liens for materials furnished.

The account annexed to the writ was not disputed, but the defendant offered evidence tending to prove that the materials were sold on credit, which had not expired when this suit was commenced.

Upon the evidence before the jury, several requests for specific instructions were made which became immaterial.

Upon the principal point in controversy, the Judge instructed the jury, that upon the admissions made, plaintiffs were entitled to recover, unless the defendant had proved to their satisfaction that the goods were purchased on a credit, which had not expired at the time this action was commenced.

A verdict was returned for defendant, and exceptions were filed by plaintiffs.

Hayden, in support of the exceptions.

1. The statute gives a lien to be enforced by attachment, and this lien is not affected by giving credit. Effect must

be given to the statute. R. S., c. 125, § 35; 12 Pick. 313; *Sawyer* v. *Fisher*, 32 Maine, 28.

2. As the statute provides for attaching without taking possession till after launching, no injury is done to defendant, and if he wishes to avoid the attachment, he must show a tender after the launching, or an offer to pay or secure the claim.

Pike, contra.

The only question here is, whether the plaintiffs had a right of action against the defendant at the time of suit, according to the contract. The fact that the demand was secured by lien was of no more consequence in determining the issue than if it had been secured by mortgage. The lien is but part of the remedy for collecting the debt.

For all that appears, this claim may be partly lien and partly non-lien claim, and so invalid. *Johnson* v. *Pike*, 35 Maine, 291; *Pearsons* v. *Tincker*, 36 Maine, 384.

On the question if the term of credit had expired, the jury here found that it had not.

Upon exceptions the Court cannot consider the correctness of the verdict. *Burnham* v. *Toothaker*, 19 Maine, 371.

RICE, J. — The question presented by the exceptions, on which reliance was had at the argument, was, whether a party who had furnished materials for the construction of a vessel, on credit for a given period, can avail himself of the lien given by § 35, c. 125, R. S., by an attachment, before the term of credit had expired.

The intention of the statute was to give to those persons who performed labor, or furnished materials for the construction or repair of vessels, additional facilities for securing payment for such labor or materials. The statute in no way modifies or changes the obligation of the contract; it applies to the remedy only. The peculiar advantages which it affords to a lien claimant are, that he may resort to the vessel upon which the labor was performed, or for which

the materials were furnished, without regard to the question of ownership, and his attachment, when made, shall have precedence of all other attachments.

To avail himself of these advantages, however, he must be in a situation to make a valid attachment. But before he can make such an attachment, he must have an existing right of action. His right of action must of course depend upon the terms of his contract. If his action be not maintained, his attachment is forthwith dissolved, under the general law.

The law has dispensed with none of the elements, in this class of cases, which are ordinarily necessary to give a right of action. If therefore the plaintiffs chose to give so extended a credit that no action could be maintained until after the time, during which a lien could be secured, had elapsed, they must be deemed to have voluntarily waived their lien, and relied upon the personal security of the parties to whom credit was given.

The case being before us on exceptions, the question whether the verdict of the jury was sustained by the evidence, cannot be considered. *Exceptions overruled.*

Judgment on verdict.

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† PAUL *versus* FROST *& al.*

Where the parties to a suit claim title to the premises from the same grantor, the demandant by a mortgage and the tenant by a later quitclaim deed earliest on record, on proof that the latter, prior to the delivery of his deed, had notice of the existence of the former title, the demandant will be entitled to recover.

And the common grantor of the parties is a competent witness by whom to prove such notice, without being released on his covenants.

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

WRIT OF ENTRY.

Both parties claimed title from one J. B. Wing. The demandant, as assignee of a mortgage, dated Jan. 28, 1846, and recorded June 25, 1846, who produced some of the

notes described in it. The tenants, by a quitclaim deed, dated May 13, 1846, and recorded the day succeeding.

The demandant, against the objection of tenants, on account of interest, read the deposition of said Wing, tending to show that before delivering the tenants' deed, they were notified of the mortgage held by demandant.

It was agreed, that if upon the evidence admissible, the demandant was entitled to recover, a default should be entered, but if the deposition of Wing was necessary, and was not admissible without a release, and a release could make him a competent witness, the action to stand for trial, otherwise a nonsuit to be entered.

T. J. D. Fuller, for tenants.

B. Bradbury, for demandant.

TENNEY, J. — The demandant claims under a mortgage given by John B. Wing to Albion P. Hayford, to secure three notes described in the condition of the same, dated January 28, 1846, and recorded June 25, 1846, which mortgage was assigned to him on August 13, 1849, and recorded September 4, 1849, and two of the notes secured by the mortgage, indorsed by the payee, are produced by the demandant, as being outstanding and unpaid.

The tenants introduced, in support of their claim to the land, a deed of quitclaim to them from the said John B. Wing, dated May 13, 1846, recorded on May 14, 1846, in which there is no covenant, but the following, "so that neither I, the said Wing, nor his heirs, or any other person or persons, claiming from or under him or them, or in the name, right or stead of him or them, shall or will, by any way or means, have, claim or demand, any right or title to the aforesaid premises, or their appurtenances, or to any part or parcel thereof, forever."

By the titles exhibited by the records in the registry of deeds, and the deeds themselves, the demandant cannot prevail, as the deed to the tenants, though executed after the mortgage to Hayford, was recorded at an earlier date, and

so became effectual, if no other evidence had been adduced. R. S., c. 91, § 1.

But the demandant introduced in evidence the deposition of John B. Wing, his mortgager, and the tenants' grantor, for the purpose of showing, that the latter had actual notice of the existence of the mortgage to Hayford, prior to the time when the deed to them was delivered. This deposition was objected to, on the ground of interest in the deponent; and a question presented for decision is, whether at the time the testimony was taken, Wing had a disqualifying interest.

If the demandant should prevail in this action, by means of other evidence than that which exhibits the record title alone, it must be by proof of actual notice to the tenants of the existence of the mortgage, at the time they took the deed from Wing. And when the land shall be taken by the demandant, the tenants will be entitled to recover on the covenant of non-claim, which was broken by the grantor, on the delivery of the deed to them.

If the suit should result in favor of the tenants, it must be upon the ground that the title is in them, and the demandant being deprived of the land, as security of the outstanding notes, or absolutely, if the mortgage has been foreclosed, is entitled to recover the amount due on the notes, or for a breach of the covenant of warranty contained in the mortgage deed. This view presents a liability of John B. Wing, the deponent, to one party or the other; and it does not appear, that this liability to the tenants would be for a less amount, if the demandant should recover, than that to the demandant, if the title should be in the tenants. He was therefore a competent witness.

According to the testimony of Wing, before and at the time of the execution and delivery of his deed to the tenants, one of them had actual notice of the conveyance in mortgage to Hayford, and this conveyance took precedence of that to them. R. S., c. 91, § 26. According to the agreement of the parties, *Tenants defaulted.*

COUNTY OF PISCATAQUIS.

† INHABITANTS OF GUILFORD, *Petitioners for certiorari, versus* THE COUNTY COMMISSIONERS OF PISCATAQUIS.

In exercising their *appellate* jurisdiction by County Commissioners, it must *appear* that the town had the opportunity of knowing fully what it was called upon to do, in its corporate capacity in regard to the way in question, and with that knowledge, unreasonably refused to approve and allow the way laid out by their selectmen.

And the proceedings of Commissioners in approving and allowing such town way will be void, unless the petition on which they act or their record shows that the laying out of the town way, with the boundaries and admeasurements of the same, was reported to the town.

Under § 29, c. 25, R. S., the filing with the town clerk of the laying out of the town or private way, with its boundaries and admeasurements, is not alone sufficient to authorize the action of the town thereon.

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

PETITION, for a writ of *certiorari*, to quash the proceedings of the County Commissioners in their approval and allowance of a town way.

The selectmen of Guilford laid out a town way on application of some of their citizens, after posting up the notices required by law, and, describing the courses and admeasurements, and lodged such description with the town clerk seven days before the meeting of Sept. 13, 1852, as was offered to be proved by one Joseph Kelsey, if such testimony was admissible.

A town meeting was held by the inhabitants of Guilford on Sept. 13, 1852, and article third in the warrant was, "to see if the town will accept of a road leading from the Grover school-house to the county road near William Eells."

The town "voted to pass the third article in the warrant."

A petition was presented the Commissioners representing that the selectmen of Guilford had laid out the road, (des-

cribing it by courses and admeasurements) which concluded thus:—"And the inhabitants of said town of Guilford, at a legal town meeting, held at Guilford on the 13th day of September, 1852, with an article in the warrant for that purpose, did unreasonably refuse and delay to approve and allow said town way as above described. We therefore pray your honors to approve and allow said town way as laid out by said selectmen and direct said laying out to be recorded by the clerk of said town."

After reciting the petition, order of notice, &c., the records of the Commissioners state, "after which view a hearing of the parties and their testimony was had, &c., and after a full hearing had and mature consideration, we adjudged and do hereby adjudge and determine, to approve and allow of the way in said petition described, as laid out by the selectmen of said town of Guilford, and we, the said Commissioners, do hereby direct, that the laying out of said road, as named in said petition, and the acceptance of the same, be duly recorded by the clerk of said Guilford."

The petitioners for the writ of *certiorari* allege several errors in the proceedings, two of which need only to be stated.

1st. That no legal proceedings had taken place by the town of Guilford, or by the selectmen thereof, to give the County Commissioners jurisdiction in the premises.

11th. That it does not appear by any record of said town of Guilford, that said way was ever offered to said town for approval and allowance.

The Court were to make such decision and render such judgment as the legal rights of the parties may require.

W. G. Clark, for the petitioners.

As to the 1st and 11th errors assigned, it does not appear of record, that any laying out of the road in question, had been filed with the town clerk as provided by R. S., c. 25, § 29. The Commissioners were not authorized to proceed until such laying out and filing was established by legal evidence before them; it was not even alleged in the applica-

tion on which they acted, they therefore had no jurisdiction, and their proceedings were erroneous.

There is no evidence that the road, with its boundaries and admeasurements, was ever offered to the town for acceptance and allowance. This is essential to give the Commissioners jurisdiction. The records of the town, at most, state that a road having the same *termini*, with the road in question, was offered to the town for acceptance, and that the town voted to pass the article in the warrant, but no records of the town show, that the road "with the boundaries and admeasurements" were ever reported or offered to the town for acceptance and allowance. Indeed, the article in the warrant does not state that the road was laid out by the selectmen. Until all this was done and proved, and the town had refused to accept and allow the way so reported, the Commissioners could not act. R. S., c. 25, § 29; *Lewiston* v. *County Commissioners*, 30 Maine, 19; *Small* v. *Pennell*, 31 Maine, 267.

But the fact whether the County Commissioners had jurisdiction, must appear from *their* records; and they show no sufficient preliminary proceedings, nor do they allege the refusal of the town to accept and allow any way legally offered to the town for their acceptance. *Plummer* v. *Waterville*, 32 Maine, 566.

Rice, County Att'y, for respondents.

Was the requirement of § 29, c. 25, R. S., in relation to this road, complied with? The objection is, that the matter there required, does not appear of record. Why should it? No such record is required, but simply, that the laying out should be "filed." What was the object of that requirement? Merely that it should be left or deposited with an officer of the town that it might be examined by persons interested therein, and not *recorded*, for at the time of filing it could not be known what the action of the town or County Commissioners might be.

The laying out of the road being duly filed, according to the testimony of Kelsey offered in the case, we say the arti-

cle in the warrant for the meeting, when it was acted upon, contained a sufficient description of the road to bring the matter properly before the town. It gave the *termini*, and that was enough. There could be no mistake as to what road was meant. The objection is, that it was not reported to the town with the *boundaries and admeasurements*. But the answer is, these were definitely set forth in the *selectmen's report*, and *filed* with the clerk, and to all intents and purposes was *so reported* on the day of the meeting, because it was in the *custody* of the proper officer, whose duty it was to present it on that occasion.

The first error alleged is contrary to the fact, as the *petition* to the Commissioners does allege it, and the record shows that the Commissioners, after a "full *hearing* and mature *deliberation* approved the way, as laid out by the selectmen, which they could not have done without proof of the fact.

There are but two cases in which the County Commissioners have jurisdiction in the location, alteration or allowance of town ways: one by § 32, part 2, c. 25, R. S., when the selectmen unreasonably refuse and neglect, &c., they may cause them to be "laid out or altered," in which case the Court records must of necessity contain a perfect description of the road, for there has been no prior laying out, and because there has not, an appeal is provided. The other case is by § 34, when the town shall in like manner "refuse or delay to approve and allow any town way or private way laid out or altered by the selectmen thereof," &c., the Commissioners may "approve and allow, (not lay out or alter,) of the way as laid out or altered by the selectmen, and direct the said laying out (that by the selectmen) to be recorded; which shall have the like effect as if accepted by the town and recorded. The report or laying out by the selectmen is the basis and description of the way with its boundaries and admeasurements, and if that is perfect, (as in this case,) then the order of the Commissioners and the Selectmen's report recorded with the records of the town

(which it is the town clerk's duty to do,) makes a perfect location of the town way. There is no necessity that the Commissioners' records shall contain a full and minute description of the road, as in case of location of a highway or laying out of a town way, for the reason that it will so appear in the selectmen's report and the town records. The action of the Court does not change the character of the road from that of a town way to a county way, and hence no reason exists for the county records showing the location, and the statute does not require it, but that the town record shall, as required by the statute.

We further contend, that the provisions of § 29, are independent of, and have nothing to do with the question of jurisdiction of the County Commissioners; they have reference alone to the action of the town. All the requisites to jurisdiction of the County Commissioners are fully enumerated in § 34, none of which are contained in § 29. The case of *Lewiston* v. *County Commissioners*, 30 Maine, 19, is not authority for the positions taken on the other side. It turned upon a different point.

The granting or withholding of the writ of *certiorari*, is a matter entirely within the discretion of the Court; and according to the uniform practice in this State, it will not be granted if sufficient appears upon the records of the inferior Court to show that it had jurisdiction in the premises, though their proceedings may not have been in all respects technically correct, and in the absence of proof that injustice has been done.

Bath B. & T. Co., Petitioners, 8 Maine, 292; *Lisbon* v. *Merrill*, 12 Maine, 210; *Cushing* v. *Gray & als.*, 23 Maine, 9; *West Bath, Petitioners*, 36 Maine, 74; *Plummer* v. *Waterville*, 32 Maine, 566.

TENNEY, J. — The petition is for a writ to quash the record of the proceedings of the County Commissioners, in the attempt to exercise their appellate power, in the approval and allowance of the way, particularly described in

the petition, as laid out by the selectmen of the town of Guilford, on the ground, that the record discloses no jurisdiction in the Commissioners, to commence proceedings in the matter; and hence, that they are void. *Small* v. *Pennell*, 31 Maine, 267.

By R. S., c. 25, § 29, no town or private way shall be established as laid out or altered, until such laying out or alteration, with the boundaries and admeasurements of the same, shall have been reported to the town, and accepted and allowed, at some meeting of the inhabitants, regularly named and notified therefor; nor unless such laying out or alteration, with the boundaries and admeasurements aforesaid, shall have been filed with the town clerk, seven days at least before such meeting.

It cannot be supposed that it was designed, the filing of the laying out or alteration, as described in the section quoted, is alone sufficient to authorize the establishment of such town or private way, if the way in general terms should be accepted, unless the laying out, or alteration with the boundaries and admeasurements of the same, had been, previous to the acceptance, reported to the town. Such a construction would render the requirement in the former clause perfectly redundant. Upon a proper construction of this section, in addition to the filing with the town clerk, seven days at least before the meeting, of the laying out, &c., the same must be read, or particularly made known to the town, at or before the time, that its inhabitants are called upon in their corporate capacity to act thereon.

By § 34, of the same chapter, if any town shall unreasonably refuse or delay, to approve and allow any town way or private way, laid out or altered by the selectmen thereof, and to put the same on record, any person aggrieved by such refusal or delay, &c., may, within one year thereafter, apply by petition in writing to the County Commissioners. The Commissioners may, unless sufficient cause shall be shown against such application, approve and allow of the way, as laid out or altered by the selectmen, and direct the

said laying out, or alteration, and acceptance, to be recorded by the clerk of the town.

To entitle the County Commissioners to the appellate jurisdiction exercised by them, it must appear, that the town had the opportunity of knowing fully upon what it was called upon to act, in its corporate capacity, touching the acceptance of the way in question; and that with such knowledge, they unreasonably refused to approve and allow the town way or private way laid out by the selectmen.

When it is alleged in a petition to the County Commissioners, under which they acted, that the refusal of the town to confirm the doings of the selectmen, was unreasonable, after final judgment, such allegations duly and necessarily made, are understood to be satisfactorily proved. *North Berwick* v. *County Commissioners of York,* 25 Maine, 69. But the general allegation in the petition, that the inhabitants of the town of Guilford, at a legal town meeting, &c., with an article in the warrant for that purpose, did unreasonably refuse and delay to approve and allow said town way *as above described,* cannot be sufficient evidence that the town acted upon the laying out or alteration with the boundaries and admeasurements of the same, contained in a report, made to the town for its acceptance by the selectmen thereof. It is not stated in the petition for the approval and allowance of the road, to the Commissioners, that the selectmen's report of the laying out of the way, &c., was made to the town. And the allegation in the petition, that the town refused to approve and allow said town way, *as above described,* is not understood that the report was made known to the town at the time of their action upon the question or before, but that the way, which the town refused to approve and allow, was the way which had been described in the previous part of the petition.

The Commissioners' record, after stating the notice given to parties interested, continues, "we therefore proceeded with the parties, and viewed the route in said petition named and described, after which view, &c., a hearing of the

parties and their testimony was had, &c., and after a full hearing and mature consideration, we adjudged and do hereby adjudge and determine, to approve and allow the way, in said petition described as laid out by the selectmen, &c., and we the said Commissioners do hereby direct, that the laying out of said road, as named in said petition and the acceptance of the same be duly recorded by the town clerk of said Guilford."

As neither the petition nor the record contains any direct statement, that the laying out of the town way in question, with the boundaries and admeasurements of the same, was reported to the town; nor any thing from which it can be inferred, that such was the case, they do not exhibit such affirmative facts, as show that a case was presented to the Commissioners, over which they had the appellate jurisdiction, which they assumed to exercise.

The records of the town of Guilford, upon the subject of the road, are not incorporated into the records of the County Commissioners, and cannot, therefore, supply any defect in the latter. The statement, which it is agreed by the parties, that Jos. Kelsey, Esq., would make, that the report signed by the selectmen, containing the laying out of the way, with the boundaries and admeasurements, was filed with the town clerk seven days before the meeting of the town on Sept. 13, 1852, is foreign to the question, which has reference to the record of the County Commissioners alone, and can have no influence in the case.

But if the record of the town and the fact that the selectmen's report was filed with the town clerk seven days before the meeting of the town, had appeared in the records of the Commissioners, their jurisdiction would not then be apparent, inasmuch as they do not show, that the report had been made to the town according to the requirements of the statute.

The first and the eleventh errors in the Commissioners' records are well assigned, and the

Writ prayed for is granted.

† WOODBURY, *Petitioner for Mandamus, versus* COUNTY COMMISSIONERS OF PISCATAQUIS.

Petitions for writs of *mandamus* are addressed to the judicial discretion of the Court.

And where a person applies for this process to be placed in an office, filled by an *annual* election, to which he alleges he was duly chosen, but illegally counted *out*, the writ will be denied.

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

PETITION, for a writ of *mandamus* to the Commissioners of Piscataquis County, to require them to declare C. H. B. Woodbury, County Treasurer for 1855.

The defendants appeared at the Feb. term, 1855, and filed a motion that the petition and rule might be dismissed for these reasons: —

1. That the office of County Treasurer is filled by annual election, and that this Court will not issue the writ of *mandamus* in such case.

2. That the incumbent of said office should have been summoned in, to be heard in this proceeding.

3. That before the writ can be made effective, the next annual election will have passed by, and the present incumbent be out of office or in, by virtue of a new election.

4. That it has become impracticable for the respondents to declare the petitioner County Treasurer, as one of the board has ceased to be a County Commissioner.

The petitioner presented the several records of the towns of the county showing their vote for County Treasurer at the previous election, as returned to the clerk's office. The whole number of votes appeared to be 2488, of which the petitioner had 1373, and Abijah B. Chase had 1115.

The Commissioners of Piscataquis, consisting of Leonard Howard, Leonara Robinson and John A. Dunning, at a court when the votes for this office were to be counted, adjudged that the whole number of votes, as appeared by the copies of the lists thereof *legally* returned, was 511, of which Abijah B. Chase received 258, and the petitioner 253,

and that Chase was elected, who gave a bond which was accepted.

The petitioner appeared before the Commissioners, claimed to be elected and tendered his bond.

The votes of the towns of Brownville, Sebec, Shirley and Guilford were the only ones allowed.

The returns of votes of twelve of the towns rejected, contained some *omissions* in the blank forms for directions to the Commissioners, such as omitting the time or month when their court was to be held.

The votes from one town appeared to be rejected, for not being sealed up at the time of counting, though there was visible a small piece of wafer in the usual place of sealing; from another, because the return was not signed on the inside by the clerk; from another, because the whole number of ballots was not given, and the name of the town at the *bottom* was omitted. It also appeared by the return, that one of them which was counted had a defect similar to many of those rejected, but was said not to have been discovered at the time of the count.

Upon the petition, motion and facts in the case, the Court were to determine the legal rights of the parties.

Blake with *Brown*, for defendants, contended, that the judiciary department had no control, or right to interfere with the Commissioners in the performance of their duty in this respect; that this was not a ministerial, but discretionary and *quasi* judicial act, like that of justices under the poor debtor laws.

He further contended that if the writ should issue here, it would be ineffectual, as it was only an annual office. Besides, the one now in office is not made a party to these proceedings, and if this process was finished before another election came round, there would be two treasurers exercising their office at the same time.

In cases of this kind, judicial discretion forbids the granting of the writ. *Howard* v. *Gage*, 6 Mass. 462; 4 Maine, 59.

J. H. Rice, for petitioner.

1. The Commissioners wrongfully rejected the returns from seventeen towns, which, if received, would have given the petitioner a majority of 174 votes. R. S., c. 12, § § 2, 3; c. 11, § 3; Const. of Maine, Art. 4, § § 1, 5; *Strong, Pet'r*, 20 Pick. 484.

2. But if not wrongfully rejected, the return from Sebec, which was counted, should have been rejected for the same reasons, which would give the petitioner a majority of 36 votes.

3. The respondents' motion ought not to prevail, as this is a proceeding addressed to the discretion of the Court, and depends on the facts in each case, and not upon preliminary questions alone.

RICE, J. — Petitions for writs of mandamus are addressed to the judicial discretion of the Court. *Proprietors of St. Luke's Church* v. *Slack & als.*, 7 Cush. 227. Such writs will be denied when, if granted, they would be wholly unavailing. *Williams, Pet.*, v. *County Commissioners*, 35 Maine, 345.

County treasurers are elected for one year only. Before any effectual action could be had in this case, if the writ should be granted, the term for which the petitioner claims to have been elected, will have expired. Under similar circumstances, and for this reason, a writ was denied in the case of *Howard* v. *Gage*, 6 Mass. 462.

There were many other reasons presented at the argument, for the consideration of the Court, against granting the writ, but deeming this decisive it becomes unnecessary to examine them. *Writ denied and*

Petition dismissed.

SNELL *versus* SNELL *& al.*

By a rule of Court, pleas in abatement, and motions to dismiss for defects in service, must be filed within the first two days of the term the writ is entered.

And it forms no exception to this rule, that at the first term no appearance was entered for defendant, except by his counsel "specially."

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

ASSUMPSIT, for use and occupation.

The writ was entered at the Feb. term, 1854, at which term, under defendant's name, was entered upon the docket "Abbott, specially," and the action was continued that and the succeeding term.

At the Feb. term, 1855, another counsellor entered his name upon the docket under defendants' name, "specially," and on the first day of the term filed a motion to dismiss the suit for defects in the service, which was overruled. A trial was had, a verdict for plaintiff, and defendants excepted.

W. G. Clark, in support of the exceptions, argued that the causes set forth in his motion were sufficient to abate the writ, that the docket shows that no general appearance was or had been entered by or for defendants at the term the motion in abatement was made. There was a special appearance only for the purpose of taking advantage of defects, that the motion was therefore seasonable, in due form, and should have been allowed. *Singley* v. *Bateman*, 10 Mass. 343; *Gardner* v. *Baker*, 12 Mass. 36; *Lawrence* v. *Smith*, 5 Mass. 362.

This view was sustained also by *Trafton* v. *Rogers*, 13 Maine, 315; *Bank* v. *Hervey*, 21 Maine, 38, in which cases a *general* appearance had been entered, which was the reason of disallowing the pleas.

A. M. Robinson, contra.

APPLETON, J. — By the 18th rule of this Court, pleas in abatement must be filed by the second day of the term, at which the actions are entered, and if not so filed, the de-

fendant must be regarded as having waived the particular defect, on account of which, he might by a plea have abated the writ. *Maine Bank* v. *Hervey*, 21 Maine, 38. A motion to dismiss a suit for an alleged insufficiency of service must be made within the time which the rules of Court prescribe for filing pleas in abatement. *Pattee* v. *Low*, 35 Maine, 121; *Nickerson* v. *Nickerson*, 36 Maine, 417. The motion, in this case, was made at the third term, and was too late.

Exceptions overruled. — Judgment on the verdict.

† INHABITANTS OF FOXCROFT *versus* CROOKER.

Chap. 211 of statutes of 1851, authorized the selectmen of towns to appoint an agent to sell intoxicating liquors, for medicinal and mechanical purposes only, who was to have a certificate of his appointment upon his giving the bond required by that Act.

Where a town, under this Act, institutes a suit to recover the value of liquors sold by such agent, it is essential that they show by legal evidence, that he was in fact, the agent alleged.

Without proof that the bond required by law was given and the certificate delivered, that relation is not established.

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

ASSUMPSIT, to recover $600, for liquors alleged to be sold by defendant, as the agent of plaintiffs. The writ also contained a count for money had and received, and was dated in July, 1854.

The general issue was pleaded.

Plaintiffs to support their action introduced extracts from the records of the selectmen of Foxcroft, as follows: —

"May 28, 1853.

"The selectmen appointed Wm. Paine the agent to sell intoxicating liquors for medicinal and mechanical purposes in said town. Attest, C. P. Chandler, Chairman."

"August 13, 1853.

"Wm. Paine having resigned the liquor agency, the selectmen appointed O. B. Crooker in his place, who gave bonds according to law. Attest, C. P. Chandler, Chairman."

The plaintiffs called C. P. Chandler, who testified, subject to objections from defendant, that the selectmen appointed defendant as agent, gave him a written appointment, and he gave a bond — that under their direction he was furnished with liquors, and the amount unaccounted for was $218,00, and that the selectmen had demanded all the funds in his hands.

There was evidence as to direction for what prices the liquors should be sold. Mr. Hazelton, another of the selectmen, testified to instructions given defendant, that he received the liquors as property of the town; that they had attempted to settle with him, and defendant offered a smaller sum than was due. He also testified, that defendant was appointed agent.

All the evidence was subject to legal objections, and the Court were authorized to render judgment by nonsuit or default, drawing inferences as a jury might.

S. H. Blake and *A. M. Robinson*, for defendant, maintained, that plaintiffs' remedy was upon the bond and not in this form of action, and if in this form of action, then they had not proved that defendant was an agent. The testimony on this point was clearly inadmissible.

J. H. Rice, for plaintiffs, argued, that the facts testified to, showed that defendant had plaintiffs' money, and under the count for money had and received, they were legally entitled to recover in this action.

It was an equitable action and lies in cases to recover money which ought not in justice to be retained. Chitty on Cont., 601, 605, 620; *Ford, Treasurer*, v. *Clough & al.*, 8 Greenl. 334; *John, Treas.*, v. *Goodridge*, 15 Maine, 29.

It was not necessary to prove defendant's agency. 1 Greenl. Ev. § 92. Nor was it necessary to prove payments in money to defendant. Chitty on Cont. 109; *Hathaway* v. *Burr*, 21 Maine, 567.

APPLETON, J. — To sustain this action, it must appear that the defendant was the agent of the plaintiffs, duly ap-

pointed in accordance with the provision of the Act of June 2, 1851, c. 211, § 2, 3. The plaintiffs claiming this relation to exist, the burthen is on them to establish its existence. To constitute the defendant an agent, it must be shown, that the requisite bonds have been given, and that the defendant has received a certificate of his appointment from the proper authorities.

The original certificate is not in the case, nor was the defendant notified to produce it. The copy of the record of the proceedings of the selectmen is attested by the chairman, who is not a recording officer, and his attestation is not the proper verification of a record. There is no legal evidence that the defendant has ever received the certificate which the statute directs to be given to the agent.

The bond given to the plaintiffs was not produced, and no reason was offered to excuse its non-production. Without its production, we cannot know whether it is such as the statute requires, as a prerequisite to the giving of the certificate.

The plaintiffs failing to prove the defendant to have been their agent, cannot, upon the proof before us, maintain this action. *Plaintiffs nonsuit.*

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† BLETHEN *versus* TOWLE.

Certain things, personal in their nature, under some conditions partake of the realty, and the title to them passes by virtue of a levy on the house where they are used; such as a wooden cistern standing on blocks in the cellar, and in use; portable cupboards, when fastened to the walls, and air tight stoves standing in the place where they are used for warming the house.

But such stoves not standing in the place where they are used, but stowed away like other moveable property, at the time of the levy, do not pass under it.

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

TROVER, to recover the value of four air tight stoves, one

cupboard, one cistern, one door bell, three sets of fire brasses and one door knob.

The plaintiff claimed title to this property by a levy on the house in which they were alleged to belong, as the property of defendant.

As to the door knob and fire brasses, the evidence failed to show that defendant took them away. One of the stoves belonged to a boarder in the house at the time of the levy. The other property embraced in the writ was removed by defendant.

At the time of the levy, one of the stoves was in its place in the parlor; the fire place was bricked up after the levy, leaving a place for a thimble, through which the pipe connected with the chimney, but how it was at the time, the evidence did not clearly show. The other stoves had been used in other rooms in the house, where the fire places had been closed up, but at that time, they were packed away in the chamber.

The cupboard was made and fitted into a recess, and fastened there by nails or screws.

The cistern was made of staves, fastened by iron hoops, setting upon blocks in the cellar, and filled by conductors from the outside of the house.

The Court were athorized to render judgment by nonsuit or default as the legal right of the parties might require, and if a default should be entered, to assess the damages upon the evidence.

Blake, for defendant, contended that as to the stoves packed away, there could be no pretence that they passed by the levy. As to the one in the parlor, it was in no way attached, it stood on legs, the pipe running through a thimble, removable at pleasure, like the others which had been taken away. The hearth and fire place were the fixtures intended in the building of the house.

As to the cistern, it stood on blocks, and in no way connected with the house; it was moveable as a washtub placed under the water spouts.

The cupboard was small and portable, and fastened with nails or screws like some timepieces, or pictures upon the walls, or a mirror put up with screws.

None of these things were real estate; all could be removed without injury to themselves or to the house. They were not essential to the beneficial use of the house, within the principle of *Farrar & al.* v. *Stackpole*, 6 Maine, 154.

He also distinguished this case from that of *Goddard* v. *Chase*, 7 Mass. 432, and of *Folsom* v. *Moore*, 19 Maine, 252.

The principle contended for in this case was sustained by *Gale* v. *Ward*, 14 Mass. 352; *Taffe* v. *Warwick*, 3 Blackf. 111; *Cresson* v. *Sterrit*, 17 Johns. 116; *Hovey* v. *Smith*, 1 Barb. 372; *Hunt* v. *Mullanphy*, 1 Miss. 508, & 3, p. 207; *Cross* v. *Marston*, 17 Verm. 533; *Wiltshear* v. *Cottrell*, 18 Eng. Law & Eq. 148.

A. M. Robinson, for plaintiff, maintained, there was no difference between a conveyance by extent and by deed as to the rules of construction. *Waterhouse* v. *Gibson*, 4 Greenl. 230. In the conveyance of a house, all that is incident or appurtenant goes with it. 4 Kent's Com. 467. A conduit conveying water to the lands sold, from another part of the lands of the grantor, will pass as being necessary or *quasi* appurtenant thereto. See same authority.

It is not the mere fixing or fastening which is regarded, but the use, nature and intention, which makes things personal pass as fixtures.

This principle has been often re-affirmed in this State. *Stockwell* v. *Marks*, 17 Maine, 455; *Snell* v. *Snell*, 28 Maine, 545; *Smith* v. *Goodwin*, 2 Maine, 173. And this case seems to fall within the principle laid down in *Farrar & al.* v. *Stackpole*, commented on by the other side.

Goodenow, J. — This is an action of trover, to recover damages for the alleged conversion of four stoves, one cupboard, one cistern, one door bell, three sets of fire brasses and one door knob, in July, 1853. The plaintiff proved

that in June, 1853, he leased the house, in which the above named articles had been placed and used, to one Amsden, who paid rent therefor; and that in the same month the defendant took down the cistern in the front part of the house, and put it in the L part.

It appeared in evidence that the defendant occupied the same house, prior to the occupation of it by the plaintiff, as his tenant.

The deposition of Josiah C. Towle was put into the case by the defendant. From this deposition, with the evidence as to occupation by the parties, we are authorized to infer that a levy was made upon this house or a part of it, by the plaintiff, as the property of the defendant, sometime previous to June, 1853. And the main question for our decision is, whether the articles above named became the property of the plaintiff by virtue of said levy.

As to the three sets of fire brasses, the door knob and door bell, we do not find sufficient evidence to justify us in coming to the conclusion, that they were converted by the defendant to his use. As to the stoves, one was owned by a boarder, and did not become the property of the plaintiff by the levy; two of the other stoves were not standing in their places for warming the rooms, at the time of the levy, but had been taken down and stowed away for the summer. We are of opinion that they should be regarded as personal property, belonging to the defendant. The other stove was standing in its place. The fireplace had been closed up by bricks, and the pipe went through a thimble. The witness Towle says, "I don't recollect whether the fireplace was bricked up in 1849, at the time of the levy, but it was bricked up at the time we left the house, about a year and a half *after* the levy." We are of opinion that this stove should be regarded as a part of the real estate, and by the levy became the property of the plaintiff, and that he is entitled to recover the value of the same in this action.

We are of opinion that the cistern, as described, was a part of the realty, and became the property of the plaintiff

by the levy, and that the cupboard was personal estate, and remained the property of the defendant.

Upon the whole evidence, we are of opinion that a default should be entered, and that the plaintiff should have judgment for *nine dollars damages* and legal costs.

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† PULLEN, *Administrator, versus* BELL.

If, under a parol agreement to purchase a parcel of land, one goes on to it and erects a dwellinghouse, but leaves it unfinished and not underpinned, such house is personal estate, and liable to attachment and sale as the property of the builder.

And when the owner of the land refuses to deliver it to the purchaser, and by his acts, shows an appropriation of it to his own use, he is liable in trover.

ON FACTS AGREED.

TROVER, for a house.

One Henry Hill agreed with defendant to purchase a parcel of land, of which the latter engaged to give a bond, but never did. Hill entered upon the land, cleared a part of it, and built the house in controversy. It was unfinished and not underpinned, and in that state he left it, and went to another State.

The plaintiff's intestate sued Hill, attached and sold the house as his, and was the purchaser at the auction sale, by the sheriff, on the execution.

On Dec. 15, 1849, he demanded the same of defendant, who refused to deliver it.

On Jan. 21, 1850, the defendant contracted to sell the land and house to John Doughty and James Wells, giving them a bond and receiving their notes.

This suit was subsequently commenced.

The Court were authorized to render judgment by nonsuit or default.

Bell, pro se.

J. H. Rice, for plaintiff, cited *Osgood* v. *Howard,* 6

Greenl. 452; *Russell* v. *Richards*, 1 Fairf. 429, and *same* v. *same*, 2 Fairf. 371; *Wilton* v. *Harwood*, 23 Maine, 131.

TENNEY, J. — So far as it regards the right of the plaintiff's intestate to the property in the house, the principles of the cases of *Russell* v. *Richards & al.*, 1 Fairf. 429, and 2 Fairf. 371, are applicable to the facts of this case, and he became the proprietor of the house, by the purchase at the officer's sale on Dec. 15, 1849.

After the purchase, and a demand made therefor upon the defendant, the latter refused to make the delivery; but subsequently entered into a valid contract with John Doughty and James Wells, to sell the same to them. This is sufficient evidence of a conversion by the defendant, and the action is maintained. *Defendant defaulted.*

† FOGG *versus* CUSHING.

It is no ground for abating a writ, brought before a magistrate, for *trespass quare clausum fregit*, that in the declaration matters of aggravation in the destruction of plaintiff's property are alleged, and three times the value are claimed; or that it omits to state that the trespass was committed wilfully and maliciously, and contrary to the form of the statute.

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

TRESPASS *quare clausum.*

This action was originally brought before a justice of the peace. The declaration was in form *quare clausum*, and alleged sundry matters of aggravation, in damaging, spoiling and carrying away certain personal property belonging to plaintiff. The conclusion of the declaration was: — "whereby an action hath accrued to the plaintiff to sue for and recover the said sums or damage as aforesaid, and three times the value of the property so destroyed and injured."

At the return day, before the justice, the defendant filed a motion in writing "that this action may be dismissed and the writ abated, because being brought to recover a penalty alleged to be incurred under § 13 of c. 162, R. S., the writ

does not allege that said trespass was committed wilfully or maliciously, as is required by the provisions of said statute, and also because said declaration does not allege said trespass to have been contrary to the form of said statute, or to have been in any breach of its provisions."

The justice ordered the writ to abate, and allowed costs for defendant. From this judgment plaintiff appealed.

A motion was made in the appellate court to strike out that part of the declaration as to the recovery of "three times the value of the property so destroyed or injured." The decision of the case was submitted to the full Court, and it was agreed that if the action is properly in the appellate court, and is maintainable with or without the amendment, it is to stand for trial; otherwise, a nonsuit to be entered.

A. M. Robinson, for plaintiff.

W. G. Clarke, for defendant.

GOODENOW, J. — This is an action of trespass *quare clausum*. On the return day of the writ, before a justice of the peace, the defendant moved "the said court that this action may be dismissed and the writ abated," for reasons therein stated. And the justice rendered judgment that said writ abate, and that the defendant recover his costs. From this judgment plaintiff appealed, and the action was duly entered in this Court.

The reasons assigned by the defendant in his motion in abatement are, "because, being brought to recover a penalty alleged to be incurred under the provision of § 13, c. 162, R. S., the writ does not allege that said trespass was committed wilfully and maliciously, as is required by the provisions of said statute, and also because said declaration does not allege said trespass to have been contrary to the form of the statute."

The breaking and entering the close is the *gist* of the action; and whatever sufficiently answers this, is a sufficient answer to the whole complaint or declaration including all

matters of aggravation, such as are set forth in the plaintiff's motion. Motion of defendant in abatement overruled.

Judgment that the defendant answer over.

COUNTY OF HANCOCK.

† JORDAN *& al. versus* WOODWARD *& al.*

By the Constitution of the State, it is provided that *private* property shall not be taken for *public uses* without just compensation; nor unless the *public exigencies* require it.

The authority to flow lands by maintaining a water-mill, under c. 126 of the Revised Statutes, if it were a new question, might well be doubted, as coming in conflict with the rights secured under this constitutional provision.

Even the reasons for the policy which occasioned such legislation, have ceased to be potential, and although from the long and uninterrupted exercise of the rights of mill-owners under this Act, it must be considered constitutional, yet no extension of their rights over private property can be allowed by *implication.*

Thus, the riparian proprietor of lands overflowed by means of a dam for the working of a water-mill, may occupy the land so overflowed, by erecting piers thereon and constructing booms, and thereby exclude the mill-owner from making it a depository of lumber for his mills.

BILL IN EQUITY, praying that defendants might be enjoined from completing piers upon their land overflowed by a mill-dam, and from constructing booms upon the mill-pond where the complainants had been accustomed to boom the logs for supplying their mills.

There was a hearing of the case at *Nisi Prius*, before HATHAWAY, J., when a temporary injunction was granted.

The respondents subsequently filed a demurrer to the bill, and the case came up for argument before the full Court.

All the essential facts in the case are stated in the opinion of the Court.

The question was as to the rights of the riparian proprietor to the use of his land *overflowed* by a dam for a water-mill, for his own exclusive benefit, but not inconsistent with the raising and using the water for the operation of the mill.

Rowe & Bartlett, for complainants.

The plaintiffs as owners of two mills upon this dam, under the deeds set forth in the bill, had a right to the use of two-fifths of the mill-pond created by the erection of the dam. The riparian proprietors, as such, had no right to the use of the water thus flowed back by the dam and retained for the use of the mill. The owners of the mills are the lessees, by force of the statute, or otherwise, of so much of the land of the riparian proprietor, as is covered by the pond. The accumulated waters are for the mill.

If the riparian proprietor grant to a mill owner the right to raise a head of water for his mill, by flowing back on the grantor's land, such grant carries with it, the exclusive right to the use of the pond thus raised, so far as the same may be necessary for the purposes of the mill. Broom's Legal Maxims, 198; Shep. Touchst. 89; *U. S.* v. *Appleton*, 1 Sum. 491.

The express or implied grant of an easement is accompanied by certain secondary easements, necessary for the enjoyment of the principal one. Gale & Whately on Easements, 231.

A pond of water is as necessary to a saw-mill, for the keeping of the logs and floating them to the slip, as for the turning of the wheels.

The bill alleges the necessity of the pond for these purposes, and the demurrer admits it.

Our statute, c. 126, R. S., operates as such grant from a riparian proprietor, and has the same force and effect. It gives a right to raise water for working a mill, and that word "working" should receive a liberal construction, and cover any use of the water essential to the profitable employment of the mill.

This is a proper case for the interposition of a court of equity, the facts being admitted by the demurrer. The nuisance is not completed, but threatened. The injury is prospective. The case calls for a prevention and not a remedy, and is similar in principle to that of *Moor* v. *Veazie*, 31 Maine, 380.

But if owners of mills cannot exclude riparian proprietors from the use of their mill-ponds, still this injunction should be continued.

The riparian has no right to sink piers into a mill-pond, for that would diminish its capacity. The demurrer admits the sinking of four already, two of which are on the plaintiffs' booming ground. Without these piers the booms cannot be swung. By enjoining them from completing their piers, most of the damage feared by plaintiffs will be prevented. The piers are one step towards doing the plaintiffs irreparable injury.

Peters, for respondents.

All the rights of complainants as mill owners are to use the head of water at the dam, with the right of keeping the water back until they want it, while all the other use and profit of the stream remain in the owner of the land overflowed.

Sect. 1 of the mill Act specifies the purpose for which the dam may be erected, and necessarily limits it to what is expressed. Every right of the owner of the land not taken away expressly, remains in him.

The provision for damages contemplates nothing more than the injury to the land. This view of the statute is sustained by the case of *Palmer Co.* v. *Ferrill*, 17 Pick. 66.

If the construction contended for is correct, the land owner ought not to have yearly damages, but pay for his land.

The defendants' view is also sustained in *Monson* v. *Brimfield Man. Co.*, 17 Pick. 77.

But if the defendants' view is erroneous, the plaintiffs are

limited under their deed to one-fifth of the water power, as a *power*.

The claim here is not to run logs in the stream, but the right of making the pond over defendants' land a place for their deposit.

Even if the objections named are not tenable, the bill ought not to be maintained, as here is a dispute as to legal rights which ought first to be settled at law. This is shown by a previous suit between these parties.

Until the legal right is settled, there is no reason why defendants should be enjoined from using their booming ground as claimed.

RICE, J. — From the bill and accompanying documents, including the plan referred to at the argument, it appears that, in 1840, Seth Tisdale and his associates were possessed of a mill privilege on Union river, in the town of Ellsworth, upon which they erected what is now known as the "Five Saw Dam," and constructed thereon three single and one double saw-mill. The single saw-mill now owned by the defendant Woodward, is located on that dam, upon the west side of the river; the two remaining single mills, owned by the plaintiffs, and the double mill, are on the same dam, but on the east side of the river. The title to those several mills have passed through sundry mesne conveyances to the present proprietors, each saw being entitled, according to the terms of the several deeds, to one-fifth of the water power created by the dam.

On the west side of the river, and immediately above the dam, the land was owned by the defendant Melvin, and constitutes a considerable portion of the basin for the mill-pond.

This pond has heretofore been used by the owners of the several mills on this dam for booming logs, and has been apportioned among the different proprietors of the mills in such way as was supposed would accommodate the different

mills, without particular reference to the proprietorship of the soil under the water.

One of the defendants owning the mill on the west side of the river and the other being the riparian proprietor of the land on the west side of the pond, claim the right to occupy, for the purpose of booming logs, the whole of this part of the mill-pond, except certain projecting points which overlies the land of the defendant Melvin, and have commenced sinking piers for the purpose of erecting a boom which will include such part of the pond. This boom, if completed, as intended by the defendants, will include a portion of the pond, now, and heretofore, occupied by the boom of the plaintiffs, used to hold logs to be manufactured at their mills.

The question presented for decision is, whether the riparian proprietor can use his lands, when overflowed by water raised by a mill-dam, for the purpose of booming logs, and may, by constructing a boom with piers thereon, exclude the general owner of the dam, by which the water is raised, and also fill up a portion of such pond, with his piers or otherwise.

Section 1 of c. 126, R. S., provides 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 expressed in that chapter. The fourth section provides that the height to which the water may be raised, and the length of time during which it may be kept up in each year, shall be liable to be restricted and regulated by the verdict of a jury or report of commissioners. The fifth, and following sections, provide the mode by which any person sustaining damages in his lands by their being overflowed by a mill-dam, may obtain compensation.

The plaintiffs contend that as an incident to the right given them by the statute to raise the water for working their mills, is the right to use the water thus raised, and the land under it, for all purposes which will contribute to the con-

venient and profitable operation of their mills; and that thus they have acquired the right to erect and maintain booms in which to secure logs designed for manufacture at such mills, in any part of the pond thus raised, irrespective of the ownership of the lands overflowed, and upon which such booms are erected.

In direct terms the power is conferred upon the mill owner, by the statute, to erect and maintain a dam to raise water for working his mills, and incidental to this power is the right to overflow the lands of other persons, or to speak more accurately, this power of building dams may be exercised, though incident thereto, the lands of other persons be overflowed and injured. This right is in derogation of the common law, and the natural right of the citizen, and should not therefore be extended by implication. The liability of the mill owner, in case he exercises the power conferred by the statute, is the payment of damages, occasioned by *overflowing* the lands of the riparian proprietor. *Palmer Co.* v. *Ferrill*, 17 Pick. 58.

The right of the riparian proprietor is to obtain compensation in damages, for the injuries sustained in his lands, by their being *overflowed*, and nothing more. Thus the liability to pay damages by one party, and the right of compensation by the other, are commensurate, one being the counterpart of the other.

The plaintiffs further contend, that under the mill Act, they have acquired the right to the use of the basin which contains the water raised by their dam, and that no person can lawfully place any obstruction therein by which its capacity to contain water will be in any degree diminished. There are expressions in the opinion of PUTNAM, J., in the case of the *Boston & Roxbury Mill Co.* v. *Newman*, 12 Pick. 467, which appear to sustain this position. The peculiar facts and circumstances in that case, may, and probably did authorize the conclusions to which the Court arrived. But some expressions of the learned Judge in that opinion, introduced by way of argument and illustration, if relied

upon as principles of general application, may well challenge consideration.

Private property shall not be taken for public uses, without just compensation; nor unless the public exigencies require. Const., Art. 1, § 21.

The private property of one citizen cannot be taken and given to another citizen, for private uses. Except for public uses, private property may not be taken by the dominant power of the State; nor for public uses without just compensation; nor even then, unless the public exigencies require. That is to say, there must be a pressing public necessity, to justify the invasion of private right by the superior power of the State, and this exercise of power over private property, when justified by the public necessities, cannot be extended beyond what the public exigencies require.

The mill Act, as it has existed in this State, pushes the power of eminent domain to the very verge of constitutional inhibition. If it were a new question, it might well be doubted whether it would not be deemed to be in conflict with that provision of the constitution cited above.

In the early history of this country, the erection of mills was deemed matter of great public convenience and necessity, and as such deserving the special protection of the legislative power. There were then few mills in the country, and little capital with which to construct them, while land was abundant, and to a great extent unoccupied, and comparatively of little value. Hence the origin of the policy, and the grounds of its justification or excuse.

But the reasons in which this policy originated have long since ceased to exist. Private capital has largely accumulated, and now seeks investment in mills of various descriptions, or in other enterprises for private gain. That the existence of water-mills is matter of public convenience at this day, is undeniable; so too is the existence of the shop of the smith, the store of the grocer, the house of the inn-holder, and a great variety of business enterprises in which our

citizens employ their labor and capital. In fact there is no branch of lawful business which may not contribute to the public good, and for which there may not, to a certain extent, exist a public necessity. Yet to authorize the appropriation of private property for all these various purposes, would be destructive to private rights, and unsettle the tenure by which property is holden.

Strictly speaking, private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain and well defined rights to that use secured, as the right to use the public highway, the turnpike, the public ferry, the railroad, and the like. But when it is so appropriated that the public have no rights to its use secured, it is difficult to perceive how such an appropriation can be denominated a public use.

We do not intend to question the authority of the existing mill Act of this State. From its great antiquity, and the long acquiescence of our citizens in its provisions, it must be deemed to be the settled law of the State. Nor are we inclined to extend its peculiar provisions by implication. It is not believed that there is any existing public exigency which requires this Court to determine, that the proprietors of the many thousands of acres of land, in this State, now overflowed by the operation of mill-dams, should be prohibited from all beneficial use of such lands by which the capacity of mill-ponds may be diminished; nor that the sinking of a pier, or the driving of a pile in a mill-pond, by the owner of the land overflowed, is an unlawful act.

Should it be said, that under this construction the capacity of the basins of mill-ponds may be materially diminished, the answer is, that from the nature of the case there is little danger to be apprehended from that source; that it does not restrict the right of the mill-owner to raise his head of water; and if by the exclusion of the water from the land of the riparian proprietor his damages should be diminished, the mill-owner may be relieved to that extent, under the provisions of c. 126, R. S.

It not appearing from the allegation in the plaintiff's bill, that the several acts of the defendants, of which complaint is made, were not all done and performed upon their own land, nor that any of said acts are in contravention of any law of this State, no sufficient cause is shown for the intervention of this Court, as a court of equity, by injunction or otherwise. *Bill dismissed.*

TENNEY, J., concurred in the result.

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† WETHERELL *& als. versus* JOY.

When a creditor receives a partial payment of a debt not due, he is bound to apply it according to the wishes of his debtor.

ON FACTS AGREED.

ASSUMPSIT, upon a guarantee.

One Walter C. Douglass wishing to purchase, on credit, some millinery goods in Boston, the defendant wrote and gave him a letter in which was the following:—

"Any one who may think proper to furnish Mr. Douglass with goods suitable for that trade and on the usual terms of credit, I hereby agree to guarantee the payments for such goods to the amount of four hundred dollars. Whoever may furnish him with goods, if they wish to avail themselves of this security, will please to notify me of the amount of their bill, time of payment, &c., and also acknowledge the receipt and possession of this letter."

The plaintiffs, on April 24, 1852, notified the defendant that they had received and retained this letter, and had delivered to Douglass, on account of this guarantee, goods to the amount of $450,13, on six months; and if he had any objection to the amount over the $400 that he would answer them by return of mail.

No answer was returned.

This bill of goods was made on April 22, and during the

following four days, the plaintiffs also furnished Douglass goods to the amount of $15,63, and on June 4, following, to the amount of $81,11. In the whole $546,86.

The credits upon their bill, as rendered, were thus:—

1852, June 4,	Cash,	$100
Aug. 20,	"	100
Dec. 31,	"	200
		400

By the bookkeeper of plaintiffs, it appeared that the excess of the first bill over $400, and the other goods delivered Douglass in April, were furnished upon his promise to pay for them within one month.

On the 29th of May, of that year, Douglass and defendant both being together, requested one Wood to take $100 to Boston to pay to plaintiffs on their account; and he did so, telling them who sent the money and for what purpose, for which money plaintiffs gave the witness a receipt, dated June 4, (which was a receipt purporting to be for Douglass) which he gave to defendant.

The other three hundred dollars were receipted as being paid by defendant.

The letter containing the money sent by Wood, was signed by Douglass only, and ordered more goods which were charged on June 4.

Douglass, in July of that year, died insolvent.

If, on this evidence, the action was maintainable, the Court were authorized to render judgment for the sum due; otherwise, a nonsuit to be entered.

Drinkwater, for defendant, contended that plaintiffs and the law appropriated the payments made in the first instance, and they could not afterwards be appropriated in a different manner. *Bank of North America* v. *Meredith*, 2 Wash. C. C. 47.

That even if Douglass promised to pay for a certain part of his goods in one month, the amount then sent up could not be applied in the way desired by plaintiffs—for the

debtors had then the right of making their payment to any part of their account they saw fit, and they exercised that right; the first payment was sent by the debtor and guarantor to be applied for their benefit.

Dean, for plaintiffs, maintained that at the time the first payment was made, nothing was due that was guaranteed by defendant — that another part of the account was due according to promise of Douglass, and that $100 was now due from defendant, according to his contract.

APPLETON, J. — The defendant, on April 18, 1853, gave Walter E. Douglass a letter of credit, in which he "agreed to guarantee the payments of such goods to the amount of four hundred dollars" as he might purchase. In this he further required, that the person accepting his guarantee should notify him of the amount sold, the time when the same should be payable, and of the receipt and possession of the letter creating the guarantee.

Walter E. Douglass purchased goods, to the amount of $450,13, of the plaintiffs, who, on April 24, advised the defendant of the receipt and possession of his letter, of the amount sold Douglass, and that the sale was on credit of six months, and then add, "we shall look to you for payment; if you have any objections to the amount that exceeds four hundred dollars, please answer per return mail."

The defendant returned no answer to this letter, but it is not contended such neglect to answer rendered him liable for the amount exceeding the sum specified in his letter of April 18.

The receipts of the plaintiffs show, that three hundred dollars have been paid in discharge of the debt guaranteed.

The contest between the parties arises as to the payment of one hundred dollars, which was sent May 29, and to which Douglass, in his letter containing the money, refers as "our first installment of one hundred dollars, which place to our credit." The evidence shows, that the defendant and Douglass united in directing the money to be applied

to the debt guaranteed. The plaintiffs were informed of the appropriation desired by the party making the payment. It was their duty to apply the payment in conformity with such desire. They had no legal nor equitable right to apply it differently. It is a familiar principle, that the party making the payment, has the right in the first instance, of directing the appropriation of his payment.

If the payment was made upon an account not then due, the creditors were under no obligation to receive it. But receiving it, they were bound to apply in accordance with the directions of the debtor.

The plaintiffs could not legally, if they would, make a different appropriation. Their account as rendered shows no distinction between the several payments made by Douglass or the defendant. From that account they would all seem equally to have been applied to the debt of Douglass. The guarantee was not continuous. The amount guaranteed has been paid and the defendant is discharged.

Plaintiffs nonsuit.

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† BUCK *versus* SPOFFORD *& al., Executors.*

If one tenant in common, by his agreement with a *party* having a claim against the owners of the common property, assumes the sole liability, and thereby his co-tenants are discharged by the *party*, on the principle of novation, his right to recover their proportion from his co-tenants is limited to six years from the time they were discharged from the original claim, although he did not in fact *pay* it at that time.

But if such arrangement between the tenant and claimant did not operate to discharge his co-tenants from liability to the *party* holding the claim, the payment of such claim by *one* tenant in common, *after* the statute bar has attached, will not authorize *him* to recover any part of it from his co-tenants.

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

ASSUMPSIT, to recover for money paid for the use of Daniel Spofford.

This suit was commenced against Daniel Spofford, who has deceased, and his executors now defend.

The writ was dated Jan. 8, 1851, to which was pleaded the general issue and the statute of limitations.

Plaintiff and Spofford were tenants in common of two-thirds of a grist-mill and appurtenances, with other owners of the remaining third.

In 1838, one Chase repaired the mill to the amount of $63,18, which he charged to "owners of grist-mill."

In September, 1843, Chase told plaintiff he would wait no longer, as his demand was getting outlawed, and threatened a suit. The plaintiff told him to charge the same to him, which he did, balancing the account against the "owners of grist-mill, on his book thus: — Sept. 19, 1843, by charged to M. G. Buck, $63,18."

This account, with the interest thereon, the plaintiff settled and paid on Feb. 28, 1846, and claims one-third of defendant.

If the action is maintainable and not barred by the statute of limitations, the plaintiff to have judgment; otherwise, to become nonsuit.

Woodman, for defendants.

Hinckley, for plaintiff, contended that no liabilities were changed by the book transaction — *that* all the parties were liable afterwards as before — *that* the promise prevented the statute bar from attaching at the time of that arrangement, and the payment being made before the statute attached, the defendants were liable, being called upon within six years from such payment, and that the case fell within the principle of *Crosby* v. *Wyatt*, 23 Maine, 156, and *Odell* v. *Dana*, 33 Maine, 182.

APPLETON, J. — The plaintiff and the original defendant were tenants in common of a grist-mill, toward the repairing of which, one William G. Chase had, during the year 1838, performed labor and furnished materials, which he had charged the owners of the grist-mill. In 1843, Chase made and presented his bill to the plaintiff, telling him it would soon be outlawed and requesting a settlement, which was made

by balancing the account against "the owners of the mill" thus:—"September 19, 1843, by charged to M. G. Buck, $63,18," which amount the plaintiff settled and paid on Feb. 28, 1846, and on Jan. 8, 1851, brought this action to recover of the defendant's testator his proportion of the sum thus paid. To the maintenance of this suit the defendants interpose the statute of limitations.

The debt was credited the mill owners and charged the plaintiff on Sept. 19, 1843. It was held in *Lyeth* v. *Ault*, 7 Exch. 669, that the acceptance by a creditor of the sole and separate liability of one of two or more *joint* debtors, is a good consideration for an agreement to discharge all the other debtors from liability. If this is regarded as an extinguishment of the debt then existing against the owners of the mill and the substitution instead thereof, of the sole liability of the defendant, like the novation of the civil law, the right of action on the part of the plaintiff must be regarded as then accruing, and the statute of limitations would constitute a perfect bar. *Thompson* v. *Percival*, 5 Barn. & Ald. 925; *Hart* v. *Alexander*, 2 Mees. & Wels. 484.

If no settlement took place on Sept. 19, and the debt still remained subsisting against the owners of the mill, then the debt was barred by the statute when payment was made on Feb. 28, 1846. If the debt was at that time barred, the plaintiff could not revive the debt against his co-tenant and impose upon him obligations from which by the provisions of the statute he had been exonerated. Such a position would be alike against the express language of the statute and its well settled construction. R. S., c. 146, § 24; *True* v. *Andrews*, 35 Maine, 183; *Pierce* v. *Tobey*, 5 Met. 168.

It is immaterial at which time the plaintiff is to be regarded as having paid the debt, the defendant's proportion of which he seeks to recover in this action, as in either event he must fail in his suit. *Plaintiff nonsuit.*

DODGE, *plaintiff in review, versus* REED.

If, in replevin, the defendant reviews the action and *reduces* the *damages* recovered against him, he is the prevailing party and entitled to costs of review.

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

WRIT OF REVIEW.

The defendant sued out a writ of replevin against the plaintiff in review, for lumber, before a justice of the peace, in which the plaintiff in review was defaulted and judgment was rendered for $20 damages, with the costs of suit, and execution issued therefor.

A review was granted, and on trial, the original plaintiff recovered the lumber and one cent damages. The plaintiff in review claimed costs as the prevailing party.

It was agreed to submit that matter to the decision of the full Court.

C. Lowell, for defendant in review.

1. The jury having found that the original defendant took and carried away the lumber, he ought to pay the costs on every principle of law and morals. c. 124, § § 7 to 10 inclusive, R. S., and § 15 of c. 130, R. S.

2. This is not one of the cases embraced in § § 12, 13 and 14 of c. 124. Those contemplate a case where there has been a jury trial and verdict, and not where there has been a default.

3. Throughout this case it has been a question of property, not of damages, as shown by all the papers and pleadings. The petition for review set forth a good defence to the action, and on that ground alone the review was granted. The verdict shows that the plaintiff in review failed in his defence.

4. But if there was error or excess of damages on default, where there was no trial or issue, the nominal damages by the verdict is not such a reduction as contemplated in § § 12 and 13 of c. 124, R. S., and this Court has ample power to order the proper entry that shall do justice be-

tween the parties. *Swett* v. *Sullivan*, 7 Mass. 342; Minot's Digest, 630; Howe's Practice, 264.

5. It would be manifest injustice and wrong to make the injured, successful party lose his own costs, and pay those of the convicted wrongdoer.

Robinson, for plaintiff in review.

The present plaintiff, on a review of a justice judgment, obtained a verdict reducing the damages from twenty dollars to one cent, and claims to be allowed his costs, as the prevailing party. The review was granted, generally, and without the imposition of any terms, and the statute regulating the action of review and the allowing of costs therein, being c. 124 of R. S., seems to determine the question as does also the decision in *Kavanagh* v. *Atkins*, 2 Greenl. 397.

TENNEY, J. — The question in this case is, whether the plaintiff in review is the prevailing party, and so entitled to his costs by R. S., c. 124, § 10.

In the case of *Bruce* v. *Learned*, 4 Mass. 614, the Court say, "it has been the immemorial usage in reviews of actions, in which debts, or damages, or lands, have been demanded, if the plaintiff has failed in recovering his just demand, or has recovered more in the original suit, to consider the party, in whose favor the error has been corrected, the prevailing party, and entitled to his costs." In the cases of *Erving, plaintiff in error*, v. *Pray*, 1 Greenl. 255, and *Kavanagh & al., plaintiffs in review*, v. *Askins*, 2 Greenl. 397, the former being a writ of entry, and the latter an action of assumpsit, the same principle was applied.

The case from 4 Mass. was replevin, and in the trial of the original action, and on the review, the defendant obtained verdicts; but in the latter the damages for the taking of the goods by the replevin were reduced. Costs were allowed the defendant, on the ground, that the damages recovered were occasioned by the replevin, and the costs were in defence. The Court made a distinction between the dam-

ages for the *caption* and *detention*, which were in part the causes of the replevin suit, and the damages to the defendant, arising in consequence of the unlawful replevin, and which had no existence before the writ. If the objects of the suit wholly fail, the plaintiff cannot be the prevailing party, merely by reason of being holden for less damages on the review than in the original action. The Court say, in their opinion, "the demand of the defendant is founded on the legal process, sued and prosecuted by the plaintiff. Therefore, in the other actions, if the plaintiff reviews, he cannot have costs, unless he supports his demand to more money or land, than the former jury gave him. So if he review in replevin, he cannot have his costs, unless the jury increase his former damages, or find his property in the chattels."

The action of replevin being a remedy as well for the loss arising from the caption and detention of the goods, as to obtain possession of them, if the defendant, against whom judgment was rendered in the original action, shall review, and a less sum in damages be recovered, he is equally the prevailing party, as he would be, if the reduction in the amount was in an action of assumpsit.

Judgment for the plaintiff in review for his costs of the review.

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† WATERHOUSE, *Administrator, versus* COUSINS *& al.*

The decision of the magistrates, hearing the disclosure of a poor debtor, as to the *notification and return*, is conclusive.

Yet their proceedings may be invalid on account of *fraud*. But evidence that they knew that the judgment creditor was dead, is not sufficient to show that they acted fraudulently.

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

DEBT, on a poor debtor's relief bond.

The defence was, that one of the conditions therein named had been fulfilled.

Waterhouse *v.* Cousins.

Defendants applied to a magistrate in August, 1853, to issue notice to the creditor in the execution, which was served on Aug. 23, 1853, by the sheriff, "by leaving a copy at the last and usual place of abode of the creditor."

The justices administered and certified the oath required by law on Sept. 10, 1853.

At the trial, plaintiff offered evidence, which was objected to, to show that the judgment creditor deceased on May 4, previous to the disclosure, and that this fact was known to the debtors and to the magistrates before whom the disclosure was had.

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

Hinckley, for defendants.

The proceedings in this case appear to have been regular, the justices examined the notification and return and adjudged them correct. That adjudication is conclusive, according to a series of decisions in this State. 12 Maine, 415; 17 Maine, 411; 18 Maine, 150; 19 Maine, 452; 20 Maine, 435; 27 Maine, 153 and 32 Maine, 27.

It is said that the creditor was dead and the notice could not be directed to him, but the judgment of the justices is equally conclusive upon the notification as the return. There is no one but the creditor in the execution, who can be notified by law. R. S., c. 148, § 22.

There is no proof of any fraud. If the justices knew of the death of the creditor that would not vitiate their proceedings. They were governed by the return, and could not rightfully set aside the evidence before them on any rumors in the community.

Waterhouse, for plaintiff, relied upon the fraudulent acts of defendants as vitiating the certificate.

RICE, J.—Debt on a poor debtor's bond. Defence, discharge under provisions of c. 148, R. S.

The papers show that notice, in regular form, was issued

to the judgment creditor, and that all the subsequent proceedings were in form prescribed by law. The sheriff returns a service by leaving a true and attested copy of the notice, at the last and usual place of abode of Samuel Patterson, the judgment creditor.

The magistrates, in their record, state, that "having examined the notification and return aforesaid, and found the same correct, we examined the said debtors," &c. This examination was on the 10th day of September, 1853.

On the trial of this action, the plaintiff, who is administrator of the judgment creditor, offered to show that the judgment creditor deceased on the fourth of May previous to the disclosure, and that this fact was known to the debtors and to the magistrates before whom the disclosure was had.

There does not appear to have been any suggestion, at the trial, that the sheriff or magistrates acted fraudulently, nor does the plaintiff, in his offer, distinctly affirm that those parties, at the time of the disclosure, had knowledge of the decease of the judgment creditor.

It has often been held by this Court, that the decision of the magistrates, before whom a poor debtor's disclosure is made, as to the correctness of the notification and return, is conclusive, and cannot be examined here. *Low* v. *Dore & al.* 32 Maine, 27; *Baker* v. *Howes*, 27 Maine, 153.

There is not sufficient evidence to authorize us to disregard the proceedings of the magistrates on the ground of fraud.

If the return of the sheriff was false, and the plaintiff has been damnified thereby, he is not without remedy.

Judgment for the defendants.

† BONZEY *versus* REDMAN *& als.*

A party cannot plead a matter in abatement of the writ, which affects only *one of his co-defendants.*

Thus, where the writ is served by the sheriff on defendants, one of whom is his deputy, and one *not* the deputy pleaded this fact in abatement, such plea cannot prevail. The *deputy* may well plead it in abatement, but when pleaded by *another*, it neither avails *him* nor the deputy, and the objection is considered as waived.

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

TRESPASS *quare clausum*, against seven defendants.

The writ was served by the *sheriff* of the county.

Erastus Redman, one of the defendants, was his deputy.

At the term the writ was returned, Jesse Dutton, another of the defendants, pleaded in abatement of the writ that it was served by the sheriff, not being either a coroner or constable, and Erastus Redman, one of the parties, being his deputy.

To this plea there was a demurrer and joinder.

The presiding Judge ordered that the writ abate, and plaintiff excepted.

Knowles & Briggs, in support of the exceptions, contended that the defendant Redman, in the act complained of, was not acting as an officer, but a mere trespasser. And that if the writ abates it cannot affect any besides Redman.

Herbert, contra.

The service must be by a coroner. R. S., c. 104, § 60; *Brown* v. *Gorden*, 1 Greenl. 165, 166; *Gage* v. *Graffam*, 11 Mass. 181; *Adams* v. *Wiscasset Bank*, 1 Greenl. 361; *Thayer* v. *Ray*, 17 Pick. 166, 167; *Walker* v. *Hill*, 21 Maine, 481; *Merchants' Bank* v. *Cook*, 4 Pick. 405.

GOODENOW, J. — This is an action of trespass, *quare clausum*. The writ was returnable to the District Court, April term, 1852. At that term, Jesse Dutton, one of the defendants, pleaded in abatement the fact, that Erastus Red-

man, one other of the defendants, sued in this action, was a deputy sheriff at the time of the service of the writ, under John R. Redman, sheriff of the county of Hancock, and that the writ was served by the said John R. Redman, as sheriff, he not being a coroner or constable duly qualified to serve said writ.

To this plea there was a demurrer and joinder. At the S. J. Court, April term, 1853, the plea was adjudged good by the presiding Judge, and the writ abated. To this decision exceptions were duly taken and allowed.

We do not think it is competent for Jesse Dutton to plead this matter in abatement. The writ was duly served on him. It is not permitted to a party to allege as error that which does not injure him. Erastus Redman might have pleaded this matter in abatement, and if he had done so in season the writ might have been abated as to him, and have remained good as to the other defendants. As he did not plead it, he must be considered as having waived his right to except to the service of the writ. *Thayer* v. *Ray & trustees,* 17 Pick. 166; *Maine Bank* v. *Hervey,* 21 Maine, 38. *Exceptions sustained.*

Plea in abatement adjudged insufficient.

Judgment that the defendants answer over.

CLOSSON *& al. versus* MEANS.

The action of *account* is a form recognized by our statutes, and maintainable in our Courts, where the relations of the parties authorize the one to demand of the other to render an account.

In such action two judgments are rendered, one *interlocutory*, determining that defendant shall account; the other *final*, as to the amount found due by the auditors.

Pleas in *bar* of the action must be filed *before* the interlocutory judgment.

Where no issues of fact are made before the auditors, and no charge of misconduct or partiality, their report is conclusive.

Auditors appointed under § 49 of c. 115, R. S., are the proper tribunal in all actions of *account*.

And although they refuse or neglect to report the facts by them found, when requested by one of the parties, no exceptions lie. The law requires of them no such action.

Where no issues are made up before the auditors, none can afterwards be made on the presentation of their report for acceptance by the Court.

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

ACCOUNT.

The defendant was alleged to have been the bailiff of the plaintiffs from Dec. 1849 to June, 1852, having the care and management of seven-eighths of schooner Quadratus and divers goods and merchandize belonging to plaintiffs, of the value of $5000, to make profit thereof for plaintiffs, and thereof to render his reasonable account on demand.

At the second term of the Court after entry of this action, judgment was rendered that defendant should account, and auditors were appointed, who at a subsequent term made their report. This report was re-committed, and at the following term the report of the auditors was presented as follows: —

"Pursuant to the foregoing order of Court, the undersigned having duly notified the parties, met them at Bluehill, on April 17, 1855, and having examined their accounts and vouchers and fully heard their proofs, pleas and allegations, do find that the defendant did agree to sail the schooner Quadratus, after her arrival at California, at the halves, and state the accounts between them accordingly, herewith presented, marked A & B. We also report the evidence herewith presented. We are unable more fully to comply with the sundry requests of the defendant; besides, the plaintiffs requested, that if we replied to defendant's special requests, that we should answer certain inquiries by him made. The paper containing them we do not find."

The defendant motioned, in the first place, to file pleadings to form an issue to the jury, which was denied.

Second, that the report be re-committed, for sundry reasons set forth, which was also denied, and the report was accepted.

Defendant excepted to the rulings and orders of the Judge.

Kent, in support of the exceptions, contended that the case ought to have gone to a jury. The auditors were appointed under § 49, c. 115, R. S. A report of such auditors was not final, but might be used by either party, according to § 54 of same chapter.

That no judgment could be rendered on this report as of auditors at common law in an action of account. Their commission was solely under the statute. Besides they did not follow their commission; it required them to state only the accounts, but they have found that defendant sailed the vessel at the halves.

That the real matter in dispute was on what principle defendant was to account, whether as master sailing the vessel for the owners or on shares. They undertake to settle that fact and state the account on that basis. That they ought to have granted defendant's request and stated the accounts on both grounds. That even if the fact was as found by auditors, it was an agreement made under a mutual mistake of essential facts. That the sailing of vessels on shares was a mere coasting custom, and that none were or could be so sailed in California at that time.

Hinckley, contra.

1. The rejection of the motions was a matter of discretion on the part of the presiding Judge, and not liable to revision. *Walker* v. *Sanborn*, 8 Greenl. 288; *Cutler* v. *Grover*, 15 Maine, 159.

2. The motion to file pleadings for an issue to the jury was properly denied. In the first stage of the action in Court, issues might be tendered. But when the judgment to account has been rendered, the jury questions are passed. R. S., c. 115, § 57, unless where there is a refusal to account, where, on the facts being certified to the Court, a jury *may be employed* to assess the damages. In this action there is no general issue. 1 Chit. Plead. 483.

3. Issues may be made before the auditors, who may

certify them to the Court. Story's Plead. 126, Account. But in this case none were made before the auditors, and they could not afterwards be taken.

4. There being no imputation of fraud, partiality, corruption or mismanagement on the part of the auditors, the motion of defendant was properly rejected.

APPLETON, J. — The action of account, though regarded as an antique remedy, seems to have been occasionally adopted in most of the States. *Gratz* v. *Phillips*, 3 Bin. 474; *Wilson* v. *Wilson*, 2 South. 791; *Smith* v. *Woods*, 3 Verm. 485; *Green* v. *Johnson*, 3 Gill. & Johns. 388; *McPherson* v. *McPherson*, 11 Iredell, 391; *Hale* v. *Hale*, 3 Day, 377; *Kelley* v. *Kelley*, 3 Barb. 419. It was resolved, in *Fowle* v. *Kirkland*, 18 Pick. 299, that this form of action was maintainable in Massachusetts, before its abolition by R. S., c. 118, § 43. In this State, it is expressly sanctioned by R. S., c. 115, § 57, and there have been occasional instances of its use.

In England, this form of action became almost obsolete, but in *Scott* v. *McIntosh*, 2 Camp. 239, which was an action of assumpsit, brought to recover the balance of a running account of many years standing, and consisting of over a thousand items, Lord ELLENBOROUGH held, when the cause came on for trial, that "the action of account was the proper remedy," and nonsuited the plaintiff because "those who wisely framed our jurisdiction did not contemplate a long account between merchants being referred to a jury." "Let the plaintiff bring his action of account," he added, "and auditors will be appointed who will do justice to the parties, without producing any inconvenience to the public." So the plaintiff was not to recover in consequence of the number of unpaid items due from the defendant. But in *Tompkins* v. *Wilshear*, 5 Taunt. 431, it was held, that assumpsit would lie for the balance of an account, notwithstanding the items might be numerous, it being difficult to perceive why, if this form of action might be maintained for

one item, it might not for more. *Arnold* v. *Webb*, 5 Taunt. 431, n. In England, this form of action appears to have been occasionally adopted in their different courts. *Stanton* v. *Richardson*, 13 Mees. & Wels. 17; *Archer* v. *Prichard*, 3 Dowl. & Ry. 596.

In the action of account there are two judgments; the first interlocutory, that the defendant do account; and the second, that the plaintiff do recover such amount as, upon accounting before auditors appointed by the Court, the defendant may be found in arrear.

The first judgment determines whether the relations between the parties exist, which give the plaintiff a right to an account. Upon this no damages can be awarded, for it may be, the defendant, after he has accounted, may not be found in arrear. "Whatever matter," says WILMOT, C. J., in *Godfrey* v. *Saunders*, 3 Wils. 94, "can be pleaded in bar to the action, must be so pleaded; and that whatever may be pleaded in bar, cannot afterwards be pleaded before the auditors, the reason is plain, given in Styl. 411, and in a Ms. note of Rolle, which I have, it must be so pleaded, *to avoid trouble and charge to the parties.*"

Before the auditors no plea can be filed which would have constituted a bar to the action, "because it would introduce either contrary verdicts, or two verdicts of the same, which would be absurd." But there are a variety of pleas, which not being in bar of the action, may be filed before the auditors. 1 Com. Dig., Accompt, E, 11. "The proper manner of proceeding in account rendered," says TILGHMAN, C. J., in *Crousillat* v. *McCall*, 5 Binney, 433, "is to take issues before the auditors, of all matters alleged by one party and denied by the other, either of fact or of law, which are then decided by the Court and jury. The auditors then finally settled and adjusted the account. If either party desire to join issue, and the auditors refuse permission, the Court will set the matter to rights. Exceptions to the report of auditors, after the same has been returned, are irregular and of no effect." If no issue in fact is raised, the

report of the auditors is final, unless some reason is shown for setting it aside by reason of misconduct on their part. When the report of the auditors is accepted, the judgment then is, that the plaintiff do recover against the defendant the sum found due by the auditors.

In this case the defendant insists, 1st, that the appointment of the auditor was erroneous, and that the whole matter must on that account be again referred. By recurring to *Godfrey* v. *Saunders*, 3 Wils. 72, where the whole record in an action of account is fully set forth, the proceedings here are correct. The plaintiff, according to the record in the case just referred to, comes into Court by his attorney, and the defendant in his proper person, and the defendant "fairly offers himself to account with the plaintiff," &c., whereupon auditors are assigned by the Court "to take and declare the said account" between the parties. The statute, R. S., 115, § 49, authorizes the appointment of "one or more auditors to hear the parties, and examine the vouchers and proof, and state the accounts and make a report thereof to the Court."

The authority thus given, and the duty thus imposed upon auditors, is substantially the same as that conferred upon them by the common law in this form of action. Indeed, it has been decided, that when auditors are appointed to audit accounts in actions of debt, book debt, &c., the same proceeding shall be had as in the proper action of account. *Manley* v. *Collins*, 4 Har. & McHen. 65. As this form of action is recognized in § 57 of the statute giving the Court authority to appoint auditors, it cannot be doubted, that the powers and the duties of auditors would be the same in all cases in which their appointment should be required. The commission, therefore, under which the auditors proceeded, whether it be regarded as at common law or under the provisions of the statute, must be regarded as substantially correct.

2. It is next objected, that the auditors have not, though requested, reported specifically the facts for the considera-

tion of the Court. This they were under no obligation to do. It is not required of them at common law, and is made no part of their duty by statute. The neglect or refusal to do what could not lawfully be required of them, furnishes no just ground for exception.

3. The defendant insists, that he may now be permitted to form an issue and try his rights before a jury. But this cannot be. No such claim appears to have been made before the auditors. No plea was then filed, and no issue joined and certified. The parties submitted to the jurisdiction of the auditors. In *Wilson* v. *Wilson*, 2 South. 791, after judgment that defendant account had been rendered, auditors were appointed, who reported in favor of the plaintiff. The objections to the report were, that they had determined certain disputed questions and had acted as arbitrators. In giving the opinion of the Court, KIRKPATRICK, C. J., said, the auditors have stated the account, they have delivered it into Court, there have been no denials made, no issues taken upon it; the balance is declared and judgment entered; there can, therefore, be no errors assigned, but such as are apparent upon the face of the record itself."

No error is perceived in the proceedings. The exceptions must be overruled. *Exceptions overruled.*

Judgment for plaintiff.

LAKE *versus* INHABITANTS OF ELLSWORTH.

By c. 38 of R. S., it is provided that every town and plantation clerk shall record all births and deaths, which shall occur in the town or plantation of which he is clerk, and come to his knowledge.

Parents and others are required to give the information of such events; and a neglect of the duty for the space of six months creates a forfeiture, prescribed by that statute.

The duties of a town clerk, in recording births and deaths, are not limited to the time he has exercised the office, nor to the record of those only which have occurred within six months from the time he received notice.

But when the record is *once* made, the loss or destruction of it will not authorize the clerk to demand remuneration for making a *new* one, without authority from the town.

For recording all births and deaths in the town, *which have come to his knowledge*, and which had not been previously recorded, the clerk is entitled to the statute remuneration from the town.

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

ASSUMPSIT, on account annexed, for recording births and deaths in the town of Ellsworth.

The plaintiff was chosen and qualified as clerk of that town for the years of 1852 and 1853.

The town clerk's books having been destroyed by fire in 1850, the plaintiff proceeded to gather information of births and deaths prior to his election, and recorded them to the number of 3035.

The defendants offered to be defaulted for the statute charge for those recorded which occurred while plaintiff was clerk.

If the plaintiff can recover for recording those which took place before he was clerk, the action was to stand for trial; otherwise, a default to be entered and judgment for the amount of the offer.

Wiswall, for plaintiff. The clerk is bound to record all births and deaths in his town, which may come to his knowledge, and many might occur in a town, during the official term of one clerk, and no notice be given until his successor was elected.

This construction was evidently contemplated by the framers of the statute. By the 3rd section of c. 38, parents, householders, &c., mentioned in the second section, are allowed the period of six months, within which to give notice of births and deaths to the town clerks, and if they give such notice within that time, no fine is imposed upon them, but if they neglect it, they forfeit and pay one dollar for each offence. If parents, &c., are permitted to give notice within six months without being liable to a penalty, it is very clearly the duty of the clerk, when such notice is given, to receive and record it, and no less clear that he is entitled

to his legal fees for so doing. Should the clerk neglect to make such record for the space of six months, he would also be liable to a fine. It would be most unjust and a most unreasonable construction of the statute to compel a clerk, under a penalty, to perform a duty, and then, without any fault of his own, give him no claim for his services.

Should the persons named in the second section of said 38th chapter neglect to give the notice required for more than six months, or should they neglect it for years, they are only liable to a penalty, and the clerk is under the same legal obligation to record such birth or death whenever notice is given or whenever the fact comes to his knowledge.

In this case there was no record of births and deaths as required by law, and the clerk, in good faith, recorded all of which he had notice and which came to his knowledge while he was clerk, and also those which occurred for years previously, believing that he was under a legal obligation to do so.

Drinkwater, for defendants.

The words "shall occur" and "of which he is clerk," in § 1, c. 38, R. S., plainly indicate that the person holding the office of clerk shall record only those births and deaths which occur during his term. Any other construction would destroy the validity of a public registry. They are to be made up by a person whose duty it is to make them, and if not so made are not receivable in evidence. *Doe* v. *Bray*, 8 B. & C. 813.

If then this record is valueless, as we contend, the defendants ought not to be held to pay for it without they authorize it.

The case finds that plaintiff "proceeded to gather information," &c. This was not required of him by law. He was required to record those only "which shall occur and come to his knowledge." The 2d section points out what persons are to give notice of those events, and no where is it required of clerks to seek for this information.

The forfeiture named in § 3, of same chapter, plainly refers to the persons named in § 2, and not to the clerk.

TENNEY, J. — It is made the duty of every town and plantation clerk, to record all births and deaths which shall occur in the town or plantation of which he is clerk, and come to his knowledge. R. S., c. 38, § 1. And parents and other persons specified, are required to give notice to the clerk of the towns where they respectively reside of the births and deaths, which take place in their families, &c., and for each neglect of this duty, a penalty of one dollar is incurred. Sect. 2.

Clerks are not precluded from obtaining information of births and deaths from other persons besides those, who are bound by law, to communicate it. Neither are they restricted in making the records of the births and deaths, which occur during their continuance in office. Parents and others upon whom the duty is imposed, have six months in which to give the notice, without being liable to the penalty for neglect; and it must have been the intention of the authors of the statute, that all such should be recorded, notwithstanding the births and deaths may have taken place before the official terms of the clerks. And they are not forbidden to record births and deaths, even a longer time, than six months after their occurrence.

Books of records of births and deaths, made by town clerks, are of themselves, evidence of the facts recorded. 1 Greenl. Ev. § 484. And it is, undoubtedly, contemplated by Legislatures, which provide for such, that the clerks of towns, acting in the discharge of official trusts, and under oath, will be careful to place upon the records, only such facts as are shown to them to be true; and to exclude every thing, which is represented as having happened so long before they are notified that the correctness of the information may be doubtful or uncertain. Every thing reported to clerks, which cannot be treated as reasonably satisfactory, touching births and deaths, must fail to be that,

which, in the language of the statute, "comes to their knowledge."

If a clerk should in good faith, and in the exercise of a sound discretion, record upon the town books, births and deaths, which are supposed to have occurred in the town, of which he is clerk, a longer time than six months before they came to his knowledge, he would be entitled to the compensation allowed by the statute for such services.

Where, however, a birth or a death has been recorded as required by the statute, the provision therein has been fulfilled, and no duty devolves upon the clerk, by virtue of his office to supply those records, if they should be lost or destroyed; or after such accidents, to form a new record, without reference to the contents of that which has been lost or destroyed. If he should do so, the town would not, without some corporate action, or direction of its officers, be bound to compensate the clerk for such services.

The official duties of the plaintiff, in recording births and deaths, were not increased by the destruction of the records; and if he performed any labor upon the records beyond these, he cannot properly call upon the town for payment. But for recording births and deaths, which took place in the town, before he was clerk, *and which have come to his knowledge*, and which were not before made, he is entitled to remuneration.

By the agreement of parties, the action must stand for trial.

COUNTY OF WALDO.

† TITUS *versus* MORSE *& al.*

Where an administrator sells at public auction his intestate's right to two contiguous *lots* of land, and a third person, at his request, points out the line *between* them, to which *boundary* no objection is made by the purchasers; one of them is not estopped thereby from claiming to the *true line* of his *lot*, beyond the one thus pointed out, unless at the time of the sale he *knew* where the true line between the lots was, and the other purchaser was induced and did purchase in consequence of his *silence* or some *acts* by him done.

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

TRESPASS *quare clausum.*

Both parties claimed title to the *locus in quo*, and the question in dispute was as to the division line between the owners of contiguous lots in the town of Appleton.

The strip in dispute was about sixteen rods wide at one end and eleven rods at the other.

The lots on either side were formerly known as the John Newbit on the north, and Christopher Newbit on the south.

Plaintiff claimed title by mesne conveyances from one Jacob Newbit, but he also purchased a claim to the same, sold by the administrator of Walter Blake.

The defendant claimed title through Walter Blake.

Blake's administrator sold all his title to both lots, under a license from the Judge of Probate; and at this sale, the evidence tended to show, that the parties to this suit were present and purchased the rights of said Blake, the plaintiff to the north lot of John Newbit and defendants to south lot of Christopher Newbit.

The evidence also tended to show that, the line between those lots being inquired for before the sale, the administrator, not knowing where it was, called on one Charles F. Blake to point it out, which he did, and that the line then

pointed out, would exclude the *locus in quo* from the plaintiff's lot.

There was much evidence adduced in the case, which called for appropriate instructions, that is unnecessary to rehearse.

As to the effect of the doings at the sale, the presiding Judge instructed the jury, that if, at the time of the sale by Blake's administrator, Charles F., at his request, pointed out the line between the John and Christopher Newbit lots; and if both parties were present and heard and understood his description, and assented to its correctness, or expressed no dissent therefrom; and the different fields were thereupon sold in conformity with the boundaries thus pointed out, the plaintiff would be estopped from claiming title to the land thus purchased by defendants, south of the line thus pointed out by Blake.

A verdict was returned for defendants.

The plaintiff excepted to this and other instructions, and also filed a motion to set the verdict aside as against the evidence.

Ruggles & Gould, supported the exceptions. On that part of the case relating to estoppels, especially in reference to title to real estate, they cited *Gore* v. *Richardson*, 4 Greenl. 327; *Hamlin* v. *Hamlin*, 19 Maine, 141; *Whitney* v. *Holmes*, 15 Mass. 153; *B. & W. R. R. Co.* v. *Sparhawk*, 5 Met. 469, as being in conflict with the instruction given.

In *Parker* v. *Barker*, 2 Met. 423, it was doubted whether in any case there could be an estoppel *in pais* as to real estate. The case of *Brewer* v. *B. & W. R. R. Co.*, 5 Met. 478, was also opposed to this instruction.

They contended there was no case where, in a court of law, a party had been held to be estopped by any admission or declaration, unless where there had been fraud, designedly secreting title and intentionally misleading, and where one is thereby misled and deceived and sustains injury

thereby, confiding in such declarations. Without such fraud, they maintained there was no estoppel *in pais.*

The jury were not required to find either fraud or knowledge of the former occupation.

Here was no ground for *estoppel.*

Lowell & Foster, contra.

To establish an estoppel *in pais* it should appear, (1,) that the party has made admissions in express language, or legitimately implied from his conduct or silence inconsistent with the claim or title which he now proposes to set up. (2,) That the other party has been influenced thereby and acted thereon, and (3,) that such other party will be injured by allowing the same to be disproved. These elements combining in any given case, the estoppel is complete. It is then immaterial whether the admission expressed or inferred, be true or false, or whether the party making it was to gain or lose, or neither, by the transaction, it being the controlling fact that it has been acted upon by another, and could not now be repudiated without injury to such party, that renders it conclusive. When the facts fall short of this definition of an estoppel *in pais,* they fail to be conclusive, and are then to be weighed as evidence with all the evidence in the cause with more or less effect, as they shall be found to conform to the truth and justice of the case. 1 Greenl. Ev. § 207, and notes, also § § 208, 212, and notes; *Dewey* v. *Field,* 4 Met. 381; Story on Bills, § 262; *Foster* v. *Newland,* 21 Wend. 94; *Wakefield* v. *Ross,* 5 Mason, 16; *Thompson* v. *Sanborn,* 11 N. H. 201; *Carpenter* v. *Stillwell,* 12 Barb. 128; *Hatch* v. *Kimball,* 16 Maine, 146; 2 Smith's L. C., title Estoppel.

The application of these principles to the facts of this case fully justifies the instructions.

The counsel for the defence also examined particularly the cases cited by plaintiff, and contended that they were all to be distinguished from the case at bar, and so not analogous.

The counsel for the defence maintained, that the doctrine

clearly deducible from all the most respectable authorities, is, that the conduct of the parties when acted upon, and when it cannot be repudiated without injustice to the other party, is conclusive by way of mutual estoppel, excepting only where the party, seeking to relieve himself therefrom, shall allege and make it clearly appear, (1,) that such line is in fact wrong; (2,) that it was agreed to and recognized under a fatal mistake of material facts as to the essential identity, locality and extent of the subject matter to which it is applied; and (3,) that irreparable injustice would follow to him by upholding the estoppel. In the absence of such exceptions, the estoppel is complete and inflexible. *Hatch* v. *Kimball*, 16 Maine, 146; *Colby* v. *Norton*, 19 Maine, 413; *Gore* v. *Richardson*, 4 Greenl. 332; *Dewey* v. *Field*, 4 Met. 381; *Cincinnati* v. *White*, 6 Peters. 431; *Larned* v. *Larned*, 11 Met. 421; *Carpenter* v. *Stillwell*, 12 Barb. 128; *Morris* v. *Moore*, 11 Kemp. 433.

Rice, J. — This case is presented on exceptions, and on a motion for a new trial, on the ground, that the verdict was against the evidence, and the weight of the evidence. Both the exceptions and motion have been elaborately argued in writing. There was a large amount of testimony adduced at the trial, all of which has been reported. The report is in the main, a transcript of the minutes of testimony taken by the presiding Judge, made by the counsel for the defendant.

The action is trespass *quare clausum*. The parties are proprietors of contiguous lots, formerly know as the John Newbit and Christopher Newbit lots. The plaintiff claimed title by sundry mesne conveyances from John Newbit. Walter Blake, deceased, claimed title to both lots. His administrator, Blunt, by order of the Judge of Probate, sold at public auction, Blake's title to both lots. There was evidence tending to prove, that at the sale, Charles Blake, a son of the intestate, in the presence of both parties, pointed out the dividing line between the two lots, before

they were sold, and that no objection was made to the line thus indicated. That line would exclude the *locus in quo* from the lot of the plaintiff. There was much testimony touching the occupation, by the owners of the different lots, of the *locus in quo*.

As to the effect of pointing out the dividing line between the lots by Blake, the presiding Judge instructed the jury, "that if at the time of the sale by Blunt, Blake's administrator, Charles Blake, at the request of said administrator, pointed out the line between the John and Christopher Newbit lots, and if both parties were present and heard and understood the description, and assented to its correctness, or expressed no dissent therefrom, and the different fields were thereupon sold in conformity with the boundaries thus pointed out, the plaintiff would be estopped from claiming title to the land then purchased by the defendants south of the line thus pointed out by Blake."

Estoppels were not favored at common law, because it is said they tended to exclude the truth.

Every estoppel, says Lord COKE, 2 Inst. 352, f, because it concludeth a man to allege the truth, must be certain to every intent, and not be taken by argument or inference.

Estoppels *in pais*, seem in their common law origin, to have arisen only in the case of those solemn and peculiar acts, to which the law gave the power of creating a right, or passing an estate, and attached as much efficacy and importance as to matters appearing by deed or of record. 2 Smith's L. C. 561.

The doctrine of estoppels *in pais*, has however, by recent decisions, both in courts of law and equity, been subject to very material modifications, and its principles given a much broader application. Instead of being deemed *odious* as formerly, it is found conducive to honesty and fair dealing.

Admissions which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. It is of no importance whether they were made

in express language to the person himself, or implied from the open and general conduct of the party. For, in the latter case, the implied declaration may be considered as addressed to every one in particular, who may have occasion to act upon it. In such cases the party is estopped, on grounds of public policy and good faith, from repudiating his own representations. 1 Greenl. Ev. § 207.

In *Gregg* v. *Wells*, 10 Ad. & El. Lord DENMAN lays down the rule thus: — "A party, who negligently or culpably stands by, and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact, in an action against a person whom he has himself assisted in deceiving."

It is believed that the doctrine above cited, must be received with some modification and limitation.

In *Storrs* v. *Booker*, 6 Johns. 167, the rule of equity is thus stated; "where one having title, acquiesces knowingly and freely in the disposition of his property, for a valuable consideration, by a person pretending to title, and having color of title, he should be bound by that disposition of the property; and especially if he encouraged the parties to deal with each other in such sale and purchase. It is deemed an act of fraud for a party, cognizant all the time of his own right, to suffer another party to go on under that ignorance, and purchase the property, or expend money in making improvements upon it."

To justify the application of this principle, it is material that the party should be fully apprised of his rights, and should, by his conduct, or gross negligence, encourage or influence the purchase; for if he is wholly ignorant of his rights, or the purchaser knows them; or if his act, or negligence, or silence, do not mislead nor in any manner affect the transaction, there can be no just inference of actual or constructive fraud on his part. 1 Story's Eq. § 386.

To maintain this equitable estoppel, the party setting it up must be able to show, by averment and proof, that he has

been injured by the deception and fraudulent conduct of the other party. *Morris* v. *Moore & al.* 11 Humph. 433.

In the *Welland Canal Co.* v. *Hathaway*, 8 Wend. 483, NELSON, J., thus states the rule; "as a general rule, a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence, and when such denial will operate to the injury of the latter."

Before the party is concluded it must *appear*, 1st, that he has made an admission which is clearly inconsistent with the evidence he proposes to give, or the title or claim he proposes to set up; 2d, that the party has acted upon the admissions; 3d, that he will be injured by allowing the truth of the admissions to be disproved. Per BRONSON, J., in *Dessell* v. *Odell*, 3 Hill, 216. The same doctrine is affirmed in *Carpenter* v. *Stillwell*, 12 Barb. 128.

In *Whittaker* v. *Williams*, 20 Con. 98, STORRS, J., remarks, "the doctrine that one shall not be permitted to retract representations, in which is included conduct, by which he has induced another to adopt a particular course of action, supposes, and it is to be understood with the qualification, which is indeed a part of the principle itself, that the one by whom such representations were made, had a knowledge of his rights. The principle which constitutes such representations an estoppel *in pais*, also requires that the action of the other party took place on the strength of them.

In *Copeland* v. *Copeland*, 28 Maine, 525, it was held to be well settled at law, as well as in equity, that when one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded, from averring against the latter, a different state of things as existing at the same time.

This doctrine was affirmed in *Stevens* v. *McNamara*, 36 Maine, 176. A rule, substantially the same, prevails in Massachusetts. *Parker* v. *Barker*, 2 Met. 423; *Brewer* v. *Boston & Worcester R. R. Co.* 5 Met. 478. In the latter case,

WILDE, J., says, "a party is not estopped to prove a legal title to his estate, by any misrepresentation of its locality, made by mistake, without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot, the title to which may prove defective; for he may require a warranty; and it would be most unjust that a party should forfeit his estate by mistake."

It will be perceived, that the rule by which a party is estopped *in pais*, is by no means uniform. There are certain elements in which all the cases concur; in others they are variant. Thus some require full knowledge of his rights, on the part of the party sought to be estopped, while others omit that element; some requiring that the party who seeks to enforce the estoppel, has been injured by the fraudulent acts or concealment of the other party; others do not. Probably no technical rule will be found applicable to all cases. Much must be left to the discretion of the Judge in applying the principle to the facts in particular cases.

When a party, with a full knowledge of his own rights, by his silence, intentionally permits others to be deceived and misled in relation to them, he will not afterwards be authorized to interpose his claim to the prejudice of the parties thus deceived and misled. Silence, under such circumstances, is assent. By that assent, good faith and fair dealing require that he should be bound.

But the silence of a party who is ignorant of his rights, ought not to operate to his prejudice. He, then, cannot be expected to speak. If, however, a party, when ignorant of his rights, induce others, equally ignorant, by his active interference, to pursue a particular course, he ought not, afterwards, to be permitted to allege facts inconsistent with, and injurious to, the rights acquired at his instigation and by his procurement. He is estopped in that case, not on the ground of fraud, but on the ground, that when one of the innocent persons must suffer, the loss should fall upon the one by whom it was occasioned.

In the case at bar, there is no evidence that the plaintiff

made any affirmative representations as to his title to the *locus in quo.* At most he was silent when the divisional line was pointed out. The rule laid down by the Court was, therefore, defective in this, that it did not require the jury to find that he had knowledge, at the time, where the true line was in fact located; and also, that it did not require the jury to find that the defendants were induced to purchase, and did purchase, in consequence of the silence or acts of the plaintiff. In view of the evidence before the jury, we think these considerations might have had an influence on their minds and we cannot say, would not have controlled their verdict.

For this cause there must be a new trial.

As to the other instructions given, or those withheld, no error is perceived. No question as to the form of the pleadings seems to have been raised at the trial. Such questions cannot, therefore, properly be considered here. If the brief statements of the defendants are defective, they may be amended before proceeding to trial, without prejudice to either party.

It becomes unnecessary to consider the motion.

Exceptions sustained.
Verdict set aside and
New trial granted.

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† WEED *versus* SIBLEY.

When the defendant justifies his acts as being done in the performance of his duty in removing *obstructions* in the *highway*, which acts would otherwise be a trespass on the rights of the plaintiff, the burden of proof is on him to show that the highway, where the acts were done, was built upon its location.

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

TRESPASS *quare clausum.*

A road leading from Knox corner to Freedom village had been made and traveled by the public for many years. As

part of this road the town of Freedom had built a bridge over Sandy stream.

After the bridge had been so built, kept in repair, and used as a public highway for eighteen years, the plaintiff fenced it up and obstructed the public travel. This obstruction was removed by defendant, as a selectman of Freedom. For that act, this suit was commenced.

The defendant justified on the ground of his duty to keep open one of the highways.

The question involved was, whether the bridge was constructed within the limits of the location of the County Commissioners.

Upon all the evidence in the case, which was voluminous, the Court were authorized to draw inferences as a jury might, and render such judgment as the law governing the case required.

N. Abbot, for plaintiff.

Heath, for defendant.

TENNEY, J. — As early as 1831, the late Court of Sessions for the county of Waldo, as appears by its records, laid out a highway from a place in the town of Knox, called Sawyer's or Knox corner, to a point in Freedom, near the dwellinghouse of the late Dr. Bellows, deceased, crossing Sandy stream, near the village in the town of Freedom; the last portion of this highway, on the western side of the stream, was through a ravine bounded each side by high bluffs. This way on the eastern side of the stream, was partially staked out; and the butment for the bridge across the stream was in part or wholly built; but the road was never completed. On the petition of Jeremiah Curtis and others, at the April term, 1833, of the County Commissioners, who had then succeeded the Court of Sessions, a part of the highway referred to, was discontinued, and one described as follows, substituted therefor, as appears by the records of that Court: — Beginning at a stake marked 'R' on the easterly side of the road as formerly established, on

the line between James Clement's and Henry Dodge's land, thence running south 62¼ degrees east forty-one rods, to a white maple bush marked 'R,' on the easterly side of the road leading from Freedom to Unity, over lands belonging to Henry Dodge and Thomas Pickard, to be four rods wide, and to be on the westerly side of said line." The way thus laid out by the County Commissioners, and that part of the road from Freedom to Unity referred to, leads southerly by the store of Jeremiah Curtis, at Freedom village, instead of passing through the ravine, which is several rods northerly thereof, as did the road, which was discontinued.

The defendant admits the acts, which are the cause of this action, but justifies them under the authority of the town of Freedom, as one of its selectmen, insisting, that they were done to remove obstructions placed upon the bridge across the stream, which was upon the way as located by the County Commissioners. And it is understood, that the town of Freedom, in their corporate capacity, take the defence of this suit.

Juries having failed to agree upon a verdict in this case, on two trials, the parties agreed to submit the evidence adduced at the last trial to the Court, who are to apply the law thereto, and decide the whole as the law and the facts require.

The plaintiff introduced deeds, which show beyond controversy, that the road in question was established over land of which he was the owner at the time of the trespass complained of, and continued to be the owner up to the time of the last trial. The bridge upon which the alleged acts were done, was commenced in the year 1833, and completed in the year following, according to the testimony of James Lamson, called by the defendant.

It appearing, that the general title to the land, on which the bridge was constructed was in the plaintiff, the burden, to show that it was upon the location of the highway, as established by the County Commissioners, was upon the defendant. In taking this burden, he undertook to show by a

survey, that the bridge was upon the ground covered by the highway. And to repel the effect of this evidence, the plaintiff also introduced on his part, proof of a survey. Both surveys were *ex parte*, and each, in this attempt succeeded in his survey, in finding the location of the road, precisely in the place where he had contended that it was. The survey of each party was commenced at the east and proceeded to the west, to the junction of the Unity road.

In the original location of the highway, before any alteration was made, the course from Knox corner was north forty-five degrees west, eighty rods, thence west one hundred and eighty rods to the north line of Knox, to the stake and stones, thence on James Clement's land in Montville, north eighty-four degrees west, fifty-six rods to a hemlock tree, thence in Freedom on Robert Thompson's land, north seventy degrees west sixty rods to the stream. (It is conceded, that the last course was intended to be south seventy degrees west,) same course on James Pickard's land fifty rods to a stake and stones.

Upon the location just described, the defendant's surveyor attempted to find the point, from which the County Commissioners diverged, in making the change. To do this, he commenced at Knox corner and proceeded to trace the lines of the location adopted by the Court of Sessions; but few monuments were found, and the distance in some of the respective lines, on the different courses, was greater than that laid down in the record, the excess in some being from eight to ten rods; and in some, he had nothing but distance by which to correct the survey. And, sighting through the ravine, on the opposite side of the stream, was one mode resorted to, to correct the running, and to determine the point of divergence for the new road.

The surveyor of the plaintiff, endeavored to ascertain from the statements of persons, who had lived in the vicinity at the time the County Commissioners located the new road, and in other modes, the point at which he should commence, as the stake "R" on the line between James Clem-

ents and Henry Dodge, and by following the course therefrom, with little or no variation, he came to the county road at the point claimed by the plaintiff as the termination of the line established as the southerly or easterly line of the highway; whereas by making the proper variation the line would have been still more unfavorable to the defendant.

Neither of these surveys can be regarded as conclusive, or, in fact, entitled to much confidence. The modes adopted by both surveyors to ascertain the eastern extremity of the line of the road established by the County Commissioners, is very unsatisfactory. It is difficult to perceive, in what manner a mathematical line can be ascertained, when it is sought wholly by sighting through a ravine, whose boundaries must be, from the nature thereof, very irregular, being at some points more distant from each other than at others, and the ravine itself probably varying materially in its course.

The starting point of the plaintiff's surveyor was dependent upon very uncertain evidence, of a character quite as well suited to mislead as otherwise, and that it was erroneous is very fully established by the fact, that it came out on the west side of the stream, as it did, without any variation being made in the line to meet the proved variation of the compass.

The defendant also introduced evidence to show, that at the time the bridge was built, the maple bush marked as a monument, at the southern and western extremity of the line run for the road was standing, and that the bridge was made upon the location thereby indicated. Other natural and permanent objects were relied upon by the witnesses, existing near, as confirmatory of the opinion expressed, touching the point, where this monument stood. One of these objects was a high bluff ledge on the southerly side of the Unity road, opposite the marked maple bush, and there were appearances upon the ground in the vicinity of a more general character, pointed out by the witnesses, leading in their judgment to the same conclusion.

The effect of the evidence, just referred to, is in some

measure neutralized by the fact, that a maple tree, standing on the bank of the stream, and not far from the one marked as the monument of the location of the road, was also marked as the termination of a line run by a committee of the Court of Sessions, a year or two previous, that proved abortive, with which the monument in question might have been confounded; and also by the testimony of several witnesses, who knew of the maple bush, marked by the County Commissioners, at the time of the location of the road by them, and that it was near a ledge on the bank of the stream, some of the witnesses to these facts, stating that they were present at the time the tree was marked and knew the object intended, one of whom was Small, the only survivor of the County Commissioners, who laid out the road, and who testified expressly, that a maple bush was so marked by him, or his order, for a monument, and the place where it stood was selected as the termination of the line of the road, in order, that the ledge should be taken as a permanent foundation for the abutment of the bridge; and the ledge was recognized by him, in his testimony, and was so far below the bridge as built, that the bridge must have been entirely off the location of the road. It was also in evidence, that when the plaintiff moved his upper mill, which was afterwards destroyed by fire, from a spot above the bridge, to one below, a maple tree, marked, and in all respects corresponding with that made for a monument, was found, situated, in relation to the ledge, on the bank of the stream, as was that described by the witnesses who were present, when it was marked as a monument, or soon afterwards.

Several witnesses for the defendant, who lived near the bridge, testify generally, that they have no doubt it was placed on the highway as laid out; one of these witnesses is John True, who was appointed by the County Commissioners to superintend the opening of this road after its location. Witnesses, called by the plaintiff, express with equal strength of conviction a different opinion. It is proper to

state, that it appears by the testimony of the defendant's witnesses, that the true location of the road on the eastern side of the stream is quite as far to the south of that which was constructed as the road, as the true location of the road on the western side of the stream, contended for by the plaintiff, is north of the bridge; and that several dwellinghouses on the east side of the stream, and not far therefrom, erected since the location of the road, are upon the land which the defendant insists is covered by the highway.

The counsel for the defendant founds an argument of much apparent force and ingenuity upon the fact, not in dispute, that the plaintiff, on his own hypothesis, placed his upper mill in a permanent manner, upon the identical spot, which is a part of the public highway, and that he acquiesced in the location of the bridge without complaint for many years.

This conduct of the plaintiff, unexplained, would seem to indicate his opinion, that the bridge was located upon the highway. But it is shown, that the title to the land, over which it passed, was not in him, till after the bridge was completed, his deeds bearing date Jan. 9, 1835, and July 27, 1841. After he became interested, he may not have known, that the bridge was not on the highway, if such was the fact, or if he had such knowledge, his interest might not have induced him to disturb the state of things then existing. But after the controversy between him and the officers of the town commenced, he might have been influenced by other and less laudable motives; and it is quite manifest that under the litigation between the parties, each has been disposed to exact his extreme rights.

A question of fact raised by the evidence is in controversy. On the part of the plaintiff, it is insisted that by an arrangement among the citizens, residing within the surveyor's district, which embraced the bridge, and others, the bridge was actually built wholly at least on the easterly side of the line run by the County Commissioners, instead of the westerly side, as required by the record. Several

witnesses affirm this fact; and others, having apparently equal opportunity to know such a change, express an entire want of recollection of such arrangement. Among the former is the surveyor, who began the construction of the abutment for the bridge, on the west side of the stream, which abutment was completed the next year under the supervision of another surveyor. Of the latter, is the individual much interested, that the road should be changed from the ravine, so that the travel would pass his store. Both these witnesses have been gone a long time from the town of Freedom, and attempts were made to show, by statements made by them at different times, inconsistent with their testimony in the case, upon this point, that their recollection was obscured by time or other causes.

It is shown that a strong opposition was made to the change in the highway by the County Commissioners, who discontinued the road through the ravine, and it is insisted for the defendant, that the removal of the road as constructed the whole width of it at the bridge, would not have been attempted, in the face of the very men, who opposed the alteration in the highway itself. It is worthy of notice, that the opposition referred to, was to the change of the road, so that it should not pass up the ravine, and when that opposition had entirely failed, those who made it, would probably have the same interest with all others, to have the road made in the place which would be most convenient. But the testimony of John True, who testifies, that he was present at the location, and was one of the committee appointed by the Court afterwards, to open the road, and who, it is true, states, that he believes it was made on the location, is on the direct inquiry, "that the section of road and bridge, here referred to, was made by the Mills district, so called, and the surveyor by advice of citizens, and, I think, by parties concerned, made the travel and bridge up stream, or on the south side of the location, but I am quite confident, not over four rods, measuring at right angles, from the north line or monument, established by the Commissioners." And

in the cross-examination, he states, that the road and bridge, he believes, were at the request of citizens of Freedom, built a few rods up stream from the ledge on the west bank, but according to his best recollection, knowledge and belief, they were made within four rods of the stake or monument line, as run by the County Commissioners in fixing the location of the road. In a subsequent deposition, True adheres to his former statement, that the bridge and road were upon the up-stream side of the line run by the Commissioners. The testimony of this witness, called by the defendant, so interested in the location and construction of the road, admitted by all to be a man of intelligence and accuracy of recollection, and at the same time influenced by pure intentions, would seem to present an insurmountable obstacle to the establishment affirmatively of the defendant's proposition, that the bridge was built upon the highway as laid out by the Commissioners, unless shown to be given in a mistaken recollection of the facts. Such mistake is not proved to our satisfaction, though there is other evidence for the defendant, which if standing alone, might be sufficient, yet it is materially affected by evidence of the plaintiff, which is confirmed by that of True.

According to the agreement of the parties, —

Defendant defaulted, and judgment for plaintiff $1,00.

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† FLETCHER, *Administrator, versus* HOLMES *& al.*

An administrator of an insolvent estate is entitled to the aid of the equity powers of the Court, to obtain property belonging to the intestate, which creditors may lawfully claim in satisfaction of their debts when the same is held in fraud of their rights.

But *before* resorting to the Court in equity, his remedies at *law* must first be exhausted.

Thus, where such administrator attempts, through the equity side of the Court, to reach the avails of property belonging to the estate, fraudulently conveyed, it must appear: —

1st, That the suit is for the benefit of all the creditors whose claims are established.

2d. That the creditors have obtained judgment, *or* that their claims have been allowed by the commissioners of insolvency, and not objected to by the administrator.

3d. That the administrator has availed himself of the provisions of law for summoning before the Probate Court, the suspected parties.

4th. That he has brought a suit at law for the recovery of the property so conveyed.

5th. That he, or those he represents, have exhausted their remedy against the parties for aiding or assisting in fraudulently concealing the property of the estate.

This was a case in EQUITY which was heard by the Court on demurrer to the bill, answer and proof.

Plaintiff brings this bill as administrator of the estate of Greenleaf Kiff, and on behalf of *two creditors* of the estate, against one Geo. Holmes and the wife of said Kiff, who has intermarried with one William Smith.

The charge in the bill is, that they fraudulently confederated together and took possession of a large portion of the personal estate of said Kiff, and that said Holmes, a relative, held the avails of sundry notes and property in trust for Barbara, the other defendant.

The plaintiff alleged that the estate which he had found was wholly absorbed in the allowance made by the Judge of Probate to the widow, and expenses of administration; that he had represented the estate insolvent, but on account of its absorption, as above, no commissioners were appointed by the Judge, and the two creditors, whom he represented, had no opportunity of proving their claims against said estate. But the plaintiff had ascertained the legality and justice of their claims, amounting to four thousand dollars.

A large amount of property was enumerated in the bill as having been transferred to said Holmes in trust for Barbara, by the intestate, in fraud of his creditors.

The bill prayed for a true answer under oath, and for a decree that the property received by said Holmes of the intestate, or the avails thereof, might be delivered to plaintiff.

It did not appear that any other proceedings, than above mentioned, had been instituted in the Probate Court.

The answers and proofs became immaterial, as the cause was disposed of upon the demurrer.

N. Abbot, in support of the demurrer, maintained that plaintiff had an adequate remedy both at common and statute law.

A. T. Palmer, contra.

RICE, J. — This case comes before us for hearing on bill and demurrers with answers by defendants under protest. The first question is, whether there is sufficient appearing upon the face of the bill, to give this Court jurisdiction, as a Court of equity.

By the provisions in § 10, c. 96, R. S., this Court has jurisdiction in equity, of all cases of fraud, trust, accident or mistake, when the parties have not a plain and adequate remedy at law.

The plaintiff claims to sustain this bill on the ground of fraud.

In *Holland* v. *Cruft*, 20 Pick. 321, the Court sustained a bill brought by the administratrix, for the benefit of the general creditors of her intestate, under the statute of Massachusetts, c. 87, stat. of 1817, on the ground, that as to the defendant Cruft, it was a trust arising under a will, and as to the other defendants, it was a trust arising in the settlement of an estate, and the question of fraud was tried as an incidental question, which it became necessary to settle in determining the question of trust.

In *Gibbens, Adm'r*, v. *Peeler*, 8 Pick. 254, the Court sustained the bill under statute of 1823, c. 140, on the ground that certain notes were, by the defendant, so secreted and withheld that they could not be found or come at to be replevied.

In *Caswell* v. *Caswell*, 28 Maine, 232, the Court held, on the authority of *Holland* v. *Cruft*, that an administrator of an insolvent estate, as trustee for the creditor, is en-

titled, in proper cases, to the aid of this Court, as a Court of equity, to obtain property belonging to the intestate, which creditors may lawfully claim to apply in satisfaction of their debts, when the same is held by others in fraud of their just rights; but that an individual creditor cannot maintain such bill.

Before the administrator can resort to a Court of equity, he must do all which the law will enable him to do, to obtain the object of his pursuit, and until he has exhausted his legal remedies, he is not entitled to the aid of a court of equity. Ib. 236.

Where it is attempted to reach the avails of property fraudulently conveyed, by process in equity, it should appear, that a judgment has been obtained of some description, which cannot be impeached by the party to be affected by the relief sought; and that every thing has been done therewith which the law requires to obtain satisfaction of the same. A judgment of a court of common law, would not be required, however, to lay the foundation for such a process, by the administrator for the benefit of the creditor of an insolvent estate. The commission of insolvency, the report thereon allowing certain claims, and the acceptance thereof, without appeal, on judicial proceedings, are in the nature of a judgment. Ib.

In the case at bar, though the bill is in the name of the administrator, it was instituted and is now prosecuted, at the request, and for the especial benefit of particular creditors of Greenleaf Kiff, and not for the benefit of his creditors generally.

The administrator is the trustee and representative of creditors, and as such, may stand upon their rights and assert claims which the intestate himself could not have asserted. It was his duty to have returned into the Probate Court, a true inventory of all the real estate, and all the goods, *chattels, rights* and *credits* of the deceased; and such of the credits of the deceased, and rights to personal property, not in possession, as the appraisers might judge to

be in whole or in part available as assets, should have been appraised. R. S., c. 106, § § 3 and 10.

Provision is also made in the same chapter, § § 30 & 32, for summoning before the Judge of Probate, on complaint of any executor, administrator, heir, legatee, creditor or other person interested in the estate of any deceased person, any one suspected of having concealed, embezzled or conveyed away any of the money, goods, or effects of the deceased, to be examined upon oath, upon the matter of such complaint. And if such person refuse to appear and answer, he may be committed to the common jail of the county by such Judge.

This power of the Judge of Probate is analogous, in its extent and object, to the power exercised by courts of chancery upon bills of discovery. *Selectmen of Boston* v. *Boylston*, 4 Mass. 318.

The administrator may also maintain an action at law for the recovery of the property in the hands of the defendants. *Martin* v. *Root*, 17 Mass. 222.

These provisions, none of which have been resorted to in this case, furnish, it is believed, plain and adequate remedies at law, in this class of cases. Having been established for the express purpose of settling the estates of deceased persons, they should be pursued and exhausted before resort is had to a court of equity. Otherwise, all the provisions of law, designed for the settlement of estates may be disregarded and courts of equity resorted to in the first instance, against the manifest intention of the Legislature, and to the great inconvenience of courts, as well as parties.

Further still, in this case, the plaintiff, or those he represents, if they have just claims against the estate of Kiff, have most ample remedy at law against Holmes, under the provisions of § 49 of c. 148, in case he aided or assisted Kiff in the fraudulent concealment and transfer of his property to delay or defraud his creditors.

Without discussing the answers or the proofs in the case, the bill must be dismissed for the reasons above stated.

Bill dismissed. — Costs for respondents.

† ALLARD *versus* CITY OF BELFAST.

The plaintiff gave defendants a bond, in which was recited a contract, wherein plaintiff agreed to keep amended and repaired, agreeably to c. 25, R. S., certain roads, &c., as laid out on a plan in the city of Belfast, for the term of four years, together with all new highways which might, within the time, be built by defendants, at and for the sum of $2250, for each and every year, to be paid in equal quarterly payments; and the bond further stipulated that if plaintiff should perform said contract as defendants were bound to do by law for the time specified, and to the acceptance of the road commissioners for the time being, and to their satisfaction and approval, and should save the defendants harmless from and against all claims for damages and costs arising from any obstruction or want of repair of any of the roads or bridges therein, then the bond to be void; otherwise, to remain in full force: — the bond further provided that if plaintiff should at any time fail to perform his contract to the satisfaction, approval and accceptance of the commissioners, it should be in their power and at their option to put an end to said contract by giving plaintiff written notice of their decision, and allowing him *pro rata* pay, as above, to the time of said notice, and saving to defendants all rights and remedies by virtue of the condition of the bond: —

The commissioners would not approve of the plaintiff's alleged performance of his contract for one year of its continuance, and defendants refused to pay him for that time. In an action to recover for such quarterly payments, and for extra repairs on new *roads*, not properly completed, *it was held*: —

1. That the mutual stipulations in this contract were *independent*; —
2. That for any failure on the part of plaintiff to comply with his contract the defendants' remedy was upon his bond; —
3. That for new roads not properly constructed, but which *were accepted* by the selectmen, the plaintiff was entitled to no extra allowance.

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

ASSUMPSIT.

The writ contained three counts. First, on an account annexed for a balance of $2469,67. Second, upon a contract for the same sum. Third, upon a *quantum meruit*.

The road commissioners of Belfast contracted with plaintiff, on May 1, 1849, to keep in repair all the highways of that town for the term of five years, excepting the village district, and he gave a bond with surety for the faithful performance of his contract. On May 1, 1850, the plaintiff's surety having moved away, a new bond was given, in the sum of $5000, containing these conditions: —

"That whereas the said inhabitants did, on the first day

of May, now last past, by their road commissioners duly chosen, make a contract with said Isaac Allard to keep open, in repair and amended, as required in and by c. 25, of R. S., for the term of five years from said first day of May, all the highways, town ways, causeways and bridges as laid down in a plan of said roads and made by B. P. Hazeltine, and deposited with said commissioners, to which reference may be had in explanation of the highways, &c., referred to in said contract, together with all the new highways, town ways, causeways and bridges which may hereafter be made within said five years by said inhabitants, at and for the sum of two thousand two hundred and fifty dollars for each and every year, to be paid in equal quarterly payments of five hundred and sixty-two dollars and fifty cents each, it being agreed that said Allard is not to build anew any bridge which, within said five years, may be accidentally destroyed by flood or fire, and it being also agreed that the village district be excluded from the operation of said contract, (village district defined.) Now if the said Allard shall well and truly perform his said contract, and faithfully keep open, repaired and amended all the highways, town ways and causeways and bridges, except as aforesaid, which said inhabitants are by law bound to do within the bounds of said town for the term of four years, from the first day of May next, according to the true intent and meaning of the law aforesaid, and the contract made as aforesaid by and between the parties aforesaid, and to the acceptance of the road commissioners for the time being, and to their satisfaction and approval, and shall save and hold harmless said inhabitants and indemnified from and against all claims of every name and description for damages and for costs arising from any defect, obstruction or want of repair of any of the roads or bridges as before described, or for the omission of any duty required or enjoined by the law of or upon surveyors of highways, all powers of which said Allard may exercise in the execution of said contract, then

this obligation shall be void; otherwise, to remain in full force."

"It being moreover understood and agreed that if said Allard shall at any time fail to perform his aforesaid contract to the satisfaction, approval and acceptance of the commissioners as aforesaid, it shall be in their power and at their option to put an end to said contract by giving said Allard written notice of such their decision, and allowing him *pro rata* pay as above, to the time of said notice, and saving to the said inhabitants all rights and remedies which may have accrued or which may hereafter accrue to them by virtue of the condition of this obligation."

Copies of the records of the town meeting when the commissioners were chosen were in the case, but all the evidence on either side was admitted subject to all legal objections.

For the first three years of the contract, the plaintiff received his contract price on the approval of the commissioners.

For the fourth year, the commissioners refused to certify their approval, and at the end of each quarter the plaintiff demanded his pay without effect.

The last year's contract price was paid.

At the Oct. term, 1852, an indictment was found against the town of Belfast for the bad condition of its roads. A default was entered at the succeeding May term, and a fine assessed.

The roads were subsequently repaired by plaintiff.

The report of the commissioners, at the March meeting, 1853, alleged that the plaintiff had expended but a very small sum on the roads for the year previous, and justified their withholding his pay for a non-fulfilment of his contract.

Upon the condition of the town ways, between May, 1852, and May, 1853, much evidence was introduced, by both plaintiff and defendants; the plaintiff's evidence tending to show that the ways were well enough until his supplies were

stopped, and the evidence of defendants tending to show the contrary.

It appeared, that the town had not been subjected to any expense on account of any defects in their ways, since this contract was made, and that the subsequent contractor to take charge of them, had taken them at $250 less than the sum given to plaintiff.

During the continuance of this contract, two new roads were made, called the "Job White" road and the "Blackstone" road.

The plaintiff claimed, that these roads were not properly made, and that in consequence thereof, the expenses of repairs upon them were much enhanced, and evidence was by him submitted to support his claim; but it appeared they were accepted by the selectmen.

Upon the evidence admissible, the Court were authorized to draw inferences as a jury might, and render judgment by nonsuit or default as the law of the case required. If a default should be entered, the Court to make up judgment upon the evidence reported.

Dickerson, for defendants, objected to the sufficiency of the evidence to show that the commissioners were legally chosen; but if they were and the contract was valid, then, that the repairs were to be made to the acceptance of that board. Both parties made them the judges; and before plaintiff can recover, he must have their approval of his doings. Having failed to do this, he cannot recover. *Johnson* v. *Reed*, 9 Mass. 78; *Drury* v. *Fay*, 14 Pick. 326; *North Yarmouth* v. *Cumberland*, 6 Maine, 21; *Deane* v. *Coffin*, 17 Maine, 52.

Nor can he recover on the count, *quantum meruit*, for his services were rendered under a specific contract, and failing to perform that, there can be no implied promise to pay what his services are worth.

The plaintiff is not entitled to recover any thing on the "Job White" and "Blackstone" roads. These roads were

duly accepted by the authorities of the town, without any fraud on their part.

But if the plaintiff's case may go on without the approval of the commissioners, he ought not to recover for the year 1853, on the evidence before the Court, because he utterly failed to keep the roads in repair, and there were indictments upon them, and he laid out but little during that year. The fact that his contract was not fulfilled for that year, does not depend at all upon the non-approval of the commissioners.

In case of a failure to fulfil on the part of plaintiff, a fair interpretation of the contract gives the commissioners the right to withhold payment, sue the bond, or put an end to the contract, as they should judge most desirable. They chose to stop the supplies, as best for the town and most likely to bring the contractor to terms and compel him to fulfil.

And now, because in the year after he repaired the highways under an indictment, he claims for the time in which it was not done, a claim which is manifestly against law, as it is certainly against equity and fair dealing.

Palmer, for plaintiff.

1. The necessary steps were taken by the town in choosing their commissioners, and the contract was valid.

2. The contract was by parol, but is recited in the bond.

3. In the construction of this contract, the new roads were to be made with reasonable perfection as to convenience and durability. The "White and Blackstone" roads were not so made, and plaintiff, for repairs of them, should receive a fair compensation outside of the contract.

The contract was a continuing one unless determined as provided, and the stipulation of the quarterly payments was an independent one, and defendants were bound to pay it even if plaintiff failed in a strict performance in making the road safe and convenient, unless defendants determined the contract in the mode provided. Plaintiff was not bound to indemnify at all events. Defendants could rely upon his

bond. The commissioners' certificate was required only to inform the authorities that the contract was still in force and undetermined.

As well might defendants refuse to pay at the end of a quarter, because a suit was pending against the town, on the ground that plaintiff had not indemnified them. The answer is, they must rely upon the bond. *Lord* v. *Belknap*, 1 Cush. 282; *Knight* v. *New England Worsted Co.* 2 Cush. 286; *Badger* v. *Titcomb*, 15 Pick. 413.

Even if it were not so, and there was a failure as to strict time, the course adopted by defendants *amounted to a waiver*. The indictment and subsequent satisfaction; the payment of the last year, &c. *Snow* v. *Inhabitants of Ware*, 13 Met. 42.

Nor was a corporate vote required to make a legal waiver. Towns are bound by the legal conduct of their constituted authorities, affecting the mode in which contracts may be performed for their benefit. *Freetown* v. *County Commissioners*, 9 Pick. 46; *Drury* v. *Worcester*, 21 Pick. 50. Most certainly a jury would be authorized to infer a waiver from all the circumstances, if one was at all necessary to plaintiff's case. But it is not.

But plaintiff claims and proves that *he did fulfil his contract*. And it is for the commissioners to account, if they can, for their own conduct, upon some hypothesis of honesty and fair dealing. Perhaps, charity may possibly excuse them on the ground of misapprehension of their duty.

It is incontestable, that the ground of their complaint was not that the roads were not "safe and convenient," in view of the legal construction of that phrase given in *Church* v. *Cherryfield*, 33 Maine, 460.

The commissioners seem to have got the idea that they were the umpire to say exactly how the roads should be made, with reference to the time they should last and the expense that plaintiff should put upon them. The *contract* says no such thing. He was to perform the duty imposed upon the town, and gave a *bond* to save the town harmless

and to perform the contract; that is, "keep the ways in repair according to the true intent and meaning of the law," &c. binding the town.

RICE, J.—Section 82 of c. 25, R. S., provides, that any town, at its annual meeting, may, if they see cause, elect by ballot, one or more road commissioners, not exceeding five, in lieu of surveyors of highways.

By § 83, such commissioners, except as hereinafter provided, shall have all the rights and powers, conferred upon, and be subject to the duties enjoined upon the surveyors of highways in this chapter. And by § 77, of the same chapter, every town may authorize their surveyors, or other persons, to enter into contracts, for making or repairing the highways or town ways within the same.

No illegality is perceived in the manner of electing the commissioners, nor want of authority on their part, to contract with the plaintiff.

The only evidence we have of the terms of the contract, is found in the recitations of the plaintiff's bond, which is in the case. From this it appears, that the plaintiff, at and for the sum of two thousand two hundred and fifty dollars, for each and every year, to be paid in equal quarterly payments of five hundred and sixty-two dollars and fifty cents each, agreed to keep open, repaired, and amended, all the highways, town ways, causeways and bridges, within certain limits in Belfast, for the term of four years from the first day of May, 1849, according to the true intent and meaning of the law, and to the acceptance of the board of commissioners for the time being, and to their satisfaction and approval, and to save and hold harmless said inhabitants, and indemnified from and against all claims of every name and description, for damages and for costs, arising from any defect, obstruction or want of repair of any of the roads or bridges as before described, or for the omission of any duty required or enjoined by law of, or upon surveyors of highways. There was also a stipulation in the contract,

that if the plaintiff should fail to perform his contract to the satisfaction and approval and acceptance of the commissioners it shall be in their power, and at their option, to put an end to said contract, by giving said Allard written notice of such their decision, and allowing him *pro rata* pay as above, to the time of said notice, saving the defendants any rights or remedies which may have accrued under plaintiff's bond.

To secure a performance of the conditions of this contract on his part, the plaintiff executed and delivered to the defendants a bond in the penal sum of five thousand dollars.

The commissioners did not exercise their power to rescind the contract. But the defendants contend that the plaintiff failed to perform its conditions during a portion of the time covered by it, and for this reason they withhold a portion of the money which they have stipulated to pay. The plaintiff, not admitting any failure on his part, contends that he has a right to recover in this action; and in case there has been a failure of performance on his part, that the remedy of the defendants is upon the bond.

Whether this action can be maintained upon the contract will depend upon the question, whether the mutual stipulations therein, are independent, or conditional and dependent. This is often a difficult question to determine.

The rule laid down by Sergeant WILLIAMS, in a note to *Pordge* v. *Cole*, 1 Saund. 320, is perspicuous, and has received general concurrence from judicial writers. "If a day be appointed for payment of money, or a part of it, or for doing any other act, and the day *is* to happen, or *may* happen, before the thing which is the consideration of the money or other act, is to be performed, an action may be brought for the money or for not doing such other act, before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent."

To the same effect is the language of SHAW, C. J., in *Lord*

v. *Belknap*, 1 Cush. 279. "Where time is given for the performance on one side, and payments are to be made by the other within such time, it is certain, that the making of the payments cannot depend upon a full and complete performance." Tested by this rule, the rights of the parties under this contract, are very clear. The plaintiff stipulated not only to keep the ways in Belfast open, repaired and amended, during a period of four years, but also to save the town harmless from damages and costs, arising from any omission or neglect on his part, for an indefinite period of time, while the defendants stipluated to pay him a given amount of money each year in fixed quarterly payments. There is no provision in this contract making these quarterly payments depend upon performance on the part of the plaintiff. Nor indeed could there have been, because his duties did not all arise, and his liabilities might not accrue, until long after payments stipulated in the contract became due. The stipulations, are therefore, obviously independent.

There is no provision either in the contract or bond for withholding the quarterly payments while the contract was in force. On the other hand it is expressly provided, "that if the said Allard shall at any time fail to perform his aforesaid contract, to the satisfaction, approval and acceptance of the commissioners as aforesaid, it shall be in their power and at their option to put an end to said contract by giving said Allard written notice of such their decision, *and allowing him pro rata pay, as above, to the time of such notice.*"

The defendants manifestly intended to rely upon the bond to indemnify themselves for any failure on the part of the plaintiff. If they have sustained loss through any default on his part, their remedy is upon the bond.

The plaintiff's writ also contains a count upon *quantum meruit*, under this count he claims to recover for extraordinary expenses incurred in keeping the "Job White road" and the "Blackstone road" in repair, in consequence of the imperfect manner in which they were originally constructed.

These were new roads, built by contract, and accepted by the selectmen of Belfast. It was the duty of the selectmen to determine whether these roads were properly made; and by their determination the plaintiff is bound, unless it can be shown, that they acted fraudulently, of which there is neither proof nor suggestion.

According to the agreement of the parties a default must be entered for the balance due on the contract, with interest from the time the same became due and payable.

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† THURLOW *& al. versus* GILMORE.

Partial payments by the debtor on a running account, without special appropriation, are to be applied in discharge of the earliest items.

And this rule is applicable where such payments are made by one of *full age*, upon an account commencing *before* and terminating *after* the debtor's majority.

For goods sold to a minor, no action can be maintained without a ratification in writing signed by him after he shall arrive at the age of twenty-one years, or by some person thereto by him lawfully authorized.

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

ASSUMPSIT. The writ was dated May 13, 1853, and contained one count on an account annexed, and another on an *insimul computassent*. Plea, infancy.

It appeared that Robert W. Gilmore, the defendant, purchased sundry goods of plaintiffs, and kept a store in another town where he sold the same. His dealings commenced in July, 1851, and terminated Feb. 5, 1853.

The plaintiffs sold him, between these dates, to the amount of $2198,54, and he paid them at sundry times $1210,33 on the account.

Subsequently to September 15, 1852, the sales to him amounted to $187,00; and after that date he paid plaintiffs $346,00.

In March, 1853, it appeared that defendant examined the account against him on plaintiff's books, and admitted its

correctness, and promised to obtain a good note therefor and pay the same, being the same balance sued for.

The defendant failed to get the note, but soon after caused several suits to be commenced against himself, in the names of several of his creditors, among which was one in the name of plaintiffs, dated March 30, 1853, on an account annexed, which read as follows: —

"Robert W. Gilmore to S. G. Thurlow & Co., Dr.

"1853, March 30. To balance of account, as per books of said S. G. Thurlow & Co. $1015,12."

On this writ was a return of an attachment of defendant's goods in his store, but the return was not signed by the officer. This writ was not entered in Court.

The defendant proved that he was born September 15, 1831.

The Court were authorized to draw inferences as a jury might, and render judgment by nonsuit or default.

N. Abbot, for defendant, cited c. 166, of the laws of 1845, as furnishing a bar to this action. There had been no ratification of the contract under the hand of defendant or by his authority.

He was of age Sept. 15, 1852, and the payments made by him after that time, the law will appropriate to the discharge of his legal debt, and not to that which was not binding upon him.

A. T. Palmer, for plaintiffs. — That the law would apply the payments made, as they were here, upon an open account, to the first which accrued, he cited *U. S.* v. *Kirkpatrick*, 9 Wheat. 720; *Fairchild* v. *Holley*, 10 Conn. 175; *Upham* v. *Lefavour*, 11 Met. 174.

This arrangement was assented to by defendant when he agreed to the balance, and especially when he caused himself to be sued on it. *Starrett* v. *Barber*, 20 Maine, 457; *Peters* v. *Anderson*, 1 Eng. Com. Law R. 202; *Simpson* v. *Ingham*, 9 Eng. Com. Law R. 28.

The balance, which he admits he had and which is now sought to be avoided on account of infancy, is $801,21.

This amount he retained after he became of age, and appropriated by the use and sale of it.

In answer to the statute, he contended, that the retention of the property after Sept. 15, 1852, was a renewal of the sale, the goods being in his hands, no new delivery was necessary; and that he was estopped to deny it to be a sale after that date; that his attempt to dispose of the property makes it evident that he affirmed the sale. *Boody* v. *McKenney*, 23 Maine, 517.

That the statute cited did not apply; the action was not upon a contract while defendant was a minor; the settlement was a new contract.

That if the statute did apply, the writ and account made by defendant's own order, is a fulfilment of the statute requirement.

APPLETON, J. — Where there is a single open account, as in the present case, the law seems well settled by the unvarying current of authorities, that a payment generally on account is to be deemed as made in satisfaction of the earliest items. *Clayton's case*, 1 Mer. 585; *Mills* v. *Fawkes*, 5 Bing. N. C., 455. In *Pennell* v. *Deffell*, 4 DeG., Mc. & G., 372, the L. J. TURNER, in his judgment, says, "I take it to be now well settled, that all moneys are to be applied to the earlier items in the opposite side of the account. By every payment which he makes, the banker discharges so much of the debt which he first contracted." This principle is by no means limited to bankers, but is applicable to all accounts. In this case there is no pretence, that any payment was made in discharge of any particular item of the account in suit. The payments, from the facts as developed in the testimony, must be regarded as having been made upon the account, and to be appropriated towards the discharge of its earliest items.

Applying the payments in this way, there is still a large sum to the recovery of which infancy is relied upon as a bar.

It is enacted by the statute of 1845, c. 166, that "no ac-

tion that may be brought after the passage of this Act, shall be maintained against any person upon a contract made with a minor, unless the same is ratified *in writing signed by the party to be charged by said contract*, after arriving at the age of twenty-one years, or by some person thereto by him lawfully authorized," &c. No promise in writing signed by the defendant has been made.

To avoid this defence, it is alleged, that the defendant retained the goods till after he became of age, and then disposed of them for his own benefit. Such may have been the case, but it does not appear in the evidence reported, upon which alone we can act.

It is likewise urged upon our consideration that the defendant has made a new contract since he became of age. The evidence discloses no such new contract. It does indeed show a most clear and distinct recognition of existing indebtedness and of the amount due. But that is not enough. The statute in most unequivocal terms prohibits the maintenance of the suit, so far as it regards the goods sold when the defendant was infant. For those sold after the 15th Sept. 1852, the plaintiffs are entitled to recover.

Defendant defaulted for $187.

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† JACKSON *versus* FORD.

An obligation under seal given by the grantee of real estate at the time of his deed, to re-convey the same to the grantor on the payment of a certain sum of money, operates as a deed of defeazance between the parties, although it is not recorded; and in an action by such grantee to recover the premises after the obligation is forfeited, he will be entitled to a conditional judgment only, but for no rents.

ON FACTS AGREED.

WRIT OF ENTRY to recover a farm occupied by tenant, and for rents and profits of the same for six years prior to the date of the writ.

The action was commenced on July 20, 1853.

On Oct. 27, 1841, the tenant being owner of the premises, conveyed the same to demandant by deed of that date.

The consideration expressed in the deed was $1314,63, and the farm was worth $2500. At the same time demandant gave tenant an obligation to re-deed to him the same, on payment of the consideration and interest in one year.

The tenant did not pay the same within one year, but at different times between the date of said obligation and the year 1847, paid demandant $750, towards the same. On Feb. 7, 1847, demandant requested tenant to pay up and take his deed.

The tenant was in possession at the time of giving his deed and remained in ever since. If rent was recoverable, it was agreed to be $75, per annum.

The Court to render such judgment as the law requires.

S. Heath and *N. Libbey*, for tenant.

N. Abbott, for demandant.

RICE, J. — Whether the obligation to re-deed, given by the demandant to the tenant, was an instrument under seal, does not distinctly appear. But from the conduct of the parties, as disclosed in the case, we think the legitimate inference is, that such was its character, and that it was intended to operate as a defeazance to the deed from the tenant to the demandant. This obligation does not appear to have been recorded, nor is it necessary that it should be to give it validity as a defeazance between the parties in this case. R. S., c. 91, § 27.

The tenant must be defaulted and a conditional judgment entered up according to the provisions of c. 104, of statute of 1844.

† INHABITANTS OF FREEDOM *versus* WEED.

A town can maintain no action against an individual for destroying a bridge, being part of one of their highways, which they were bound to keep in repair, until they have repaired it, or incurred some expense in consequence of the wrongful act.

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

CASE against the defendant for taking up and destroying a bridge built by plaintiffs over a stream in said Freedom, being a part of one of the public highways in that town, and which the inhabitants were bound to keep in repair.

Evidence was introduced by plaintiffs in support of the allegations in their writ showing that defendant had broken up the bridge and fenced up the road, and that it would cost $250 or $300 to put the bridge and road in repair, as it was before the wrongful acts of the defendant.

There was no allegation in the writ that any repairs of the damages had been made by the town, or any money expended since, in consequence of the acts of defendant.

The presiding Judge, thinking it important to determine if plaintiffs could maintain an action upon the facts alleged and proved, on motion of defendant, ordered a nonsuit.

To this order plaintiffs excepted.

Heath and *A. T. Palmer*, for plaintiffs.

N. Abbot, for defendant, maintained that the nonsuit was rightly ordered. It was only where the town was put to expense in repairing the way or in removing the obstructions, or had paid damages to a traveler who had received an injury from the obstructions, that they could maintain an action for damages. 35 Maine, 247; 3 Fairf. 238; 12 Met. 182.

That the injury in this case was not to Freedom, in its corporate capacity, but the *whole* traveling public, and if any action could be maintained, it should be in the name of the public, and not in the name of a part of the public.

That there was no rule by which the damages could be assessed. There was no certainty the town would ever repair.

That plaintiffs were not the *owners* of the land over which the road passed, nor as a corporation did they own the easement. It was a *public* way.

Upon any recognized principle of law, the action could not be supported.

TENNEY, J. — The action is case for an alleged injury to a bridge, upon a county road, in the town of Freedom, no attempts having been made to repair the injury, and consequently no expense having been incurred by the town by reason thereof.

In the case of *Calais* v. *Dyer*, 7 Greenl. 155, which was a complaint under the statute, for flowing a road, and thereby doing an injury thereto by the defendant, the Court held the remedy sought to be inappropriate, and say, "the town is not seized of the land, covered by the road, and then by the water; the land belongs to the original owner, his heirs and assigns, subject to the public easement, which has been impaired and damaged," "the easement is a public one, and it cannot be considered in a legal point of view, the town's easement or property," and though the easement belongs to the public, it is the duty of the town to preserve and continue it. The town, therefore, seems entitled to damages, by way of *reimbursement.*

In *Andover* v. *Sutton & als.*, 12 Met. 182, which was trespass on the case to recover expenses which the plaintiffs had incurred in repairing a highway, injured by being flowed by the defendants; the Court said in the opinion, "it is a public highway, in which every citizen has an easement, and no one to the exclusion of another. The town, in the distribution of the public burdens, is bound to maintain that portion of the highway, which is within its territorial limits; but in its corporate capacity, it neither owns the soil nor the easement." "But the town has sustained a damage in being compelled to repair the defect, caused in the road by the act of the defendants, in erecting their dam, and raising their head of water and overflowing the road." "By doing

the damage complained of, at the expense of the plaintiffs, who were compelled by law to repair the road, they are by force of the same law, liable to make good the damage, which the plaintiffs have sustained by their act."

In these cases, it is upon the ground that the towns had expended means in making repairs, which they were bound to make, that the cause of action against those, who caused the injury, arises. The actions are sustainable for the purpose of obtaining reimbursement.

The case of *Monmouth* v. *Gardiner*, 35 Maine 247, was an action at common law, for overflowing a public road, which the plaintiffs were bound to keep in repair. This case may at first seem to favor the proposition, that a right of action exists in such a case, by the mere fact, that the highway was injured by the acts of the defendant. But on examination, it will be found, that no such question was presented at the trial, and nothing appears, which shows, that the town had not repaired the injury before the institution of the suit. The legal questions raised in that action were upon other and very distinct facts from those presented in this case.

The question involved in this case is, whether a town can maintain an action for an injury to a highway therein, caused by an individual, without having been put to expense in any manner in consequence thereof. Roads are sometimes so little used, that they are suffered without complaint to remain for a long time, much out of repair, and no money has been appropriated by the town for their improvement. For a trifling injury on such a road, can the town maintain an action for damages, against the one who did it, when it has done nothing to restore it to the condition in which it was before the injury? If an obstruction was wrongfully or negligently placed in a highway by an individual, which caused a serious injury to another, and was then removed without the agency of the officers of the town, where it was placed, by making out the necessary proof in an action against the town, the injured party would be entitled to

damage. But if no claim were made by him against the town, it certainly could not maintain a suit against the individual, who caused the injury by the obstruction. The exposure of the town to expense is insufficient for the maintenance of an action in such a case. And it is apprehended that the exposure to pay a fine for the repair of a road, which has been damaged by an individual, can give no greater right to the town to sustain an action on account of such exposure. The town may neglect to repair the way, and it may not be called upon in any mode to incur the expense of restoring it to its former state. Being under no obligation by a contract to make repairs, it is not in a situation to call for the payment, until there has been something in the nature of a disbursement. *Exceptions overruled.*

RICE, J., concurred in the result only.

LEATHERS *versus* SHIPBUILDERS' BANK.

No action can be maintained by a creditor against a bank, after its effects have been placed in the hands of receivers.

Section 8, c. 164, of Acts of 1855, is constitutional.

ON FACTS AGREED.

ASSUMPSIT, to recover the amount, with statute interest, of sundry bank bills issued by defendants.

This writ was made on March 16, and served March 31, 1855.

The bills declared on were duly presented for redemption, and protested for non-payment.

In December, 1854, defendants, having failed to redeem their bills, on the twenty-ninth of that month receivers were appointed, who immediately entered upon their duties, and the time had not elapsed for the discharge of their trust.

If the action is maintainable, judgment to be entered for the amount of the bills and statute interest; otherwise, a nonsuit.

Thacher, for defendants.

This action can only be sustained upon the ground that the 8th § of Act of March 16, 1855, respecting banks, is in conflict with the constitution.

Although that Act is retroactive, it impairs the obligation of no contract. It affects only the remedy. *Thayer & al.* v. *Sevey*, 11 Maine, 284; *Oriental Bank* v. *Freeze*, 18 Maine, 109; *Colby* v. *Dennis & al.*, 36 Maine, 13.

Williamson, for plaintiff, maintained the unconstitutionality of the Act additional respecting banks, and cited *Sturges* v. *Crowningshield*, 4 Wheat. 197; *Blanchard* v. *Russell*, 13 Mass. 1; *Call* v. *Haggan*, 8 Mass. 429; *Bronson* v. *Kinzie*, 1 Howard, 311; *McCracken* v. *Hayward*, 2 Howard, S. C.; *Dash* v. *Van Cleek*, 2 Johns. 477; *Green* v. *Biddle*, 8 Wheat. 75, 84; 2 Parson's on Cont. 533, note; 5 Hall's Am. Law Journal, 520; 10 Georgia, 190.

He also maintained that the Legislature by passing any particular law contracted and agreed that every citizen had a right to the benefit of that law; that if it was a remedial statute, and a party had commenced proceedings by virtue of it, he obtained a vested right to the remedy allowed by the law, and such a right the Legislature could not take away. *Couch* v. *Jefferies*, 4 Barrows, 2460; *Bedlestone* v. *Sprague*, 6 Johns. 101; *Bigelow* v. *Pritchard*, 21 Pick. 175.

This action was commenced before this Act went into effect. *Gardner* v. *Webber*, 17 Mass. 407; *Johnson* v. *Farewell*, 7 Greenl. 370.

SHEPLEY, C. J. — The bank having failed to redeem its bills, receivers were appointed on Dec. 29, 1854, by virtue of the provisions of the statute, c. 77.

Receivers are by the statute authorized to take possession and to dispose of all its property; to collect debts due to it, and to pay the demands against it. Such proceedings would seem to be inconsistent with the right of a creditor to preserve a lien, and incumber the title by an

attachment. All doubt respecting it is removed by the provisions of the Act, approved on March 16, 1855, which authorizes an equal distribution of the property to the creditors, and declares, "no action shall be maintained against any bank after the appointment of receivers thereof, but all the creditors shall have their remedy under the provisions of this bill."

This suit appears to have been commenced on the day of the approval of the Act, but no lien upon the estate of the bank was created until the thirty-first day of the same month.

It is insisted, that the provision of the Act named, is not constitutional.

The well established rule, that the legislative department may rightfully change the remedy, appears to be denied, when that remedy may be more favorable to the creditor than the one substituted. And it is insisted, that "the Legislature by passing any particular law, contracts and agrees, that every citizen shall have a right to the benefit of that law." This doctrine would deprive the legislative department of the power to correct its own errors, to vary the laws to meet the necessities of the people, or the exigencies of the time; and it would deprive subsequent Legislatures of the right to determine what enactments were required for the welfare of the people.

There neither is, nor can be any breach of faith in the repeal or alteration of a law by a Legislature, which has been enacted by a former one, unless such enactment has granted some right to one or more of its citizens, as a private right, in which all are not allowed to participate.

Plaintiff nonsuit.

† Inhabitants of Frankfort, *Petitioners for certiorari, versus* County Commissioners of Waldo.

By § 11, c. 33, R. S., it is provided that when a fire breaks out in any town, and the firewards are not present, a major part of the selectmen present, shall have the power to direct any building, to be pulled down or demolished, as they may judge necessary, to prevent the spreading of the fire.

And when, in the absence of any firewards, *one* only of the selectmen is *present* at such fire, *he* is vested with the authority contemplated by this statute provision.

Petition for a writ of *certiorari*.

A fire broke out in the village of Frankfort, on which occasion a building, belonging to one Daniel Tobey, was torn down to prevent the progress of the fire.

But the fire was subdued before it reached the place occupied by this building.

At that time there were no firewards in Frankfort; and but two selectmen. One of them only was present at the fire.

The owner of the demolished building alleged that it was destroyed by order of Amos Sproule, the selectman, which was denied; and he claimed reasonable compensation from the town, which was also denied at a meeting of the qualified voters thereof.

Daniel Tobey, thereupon, petitioned, at the succeeding term of the Commissioners of that county, that they would award him a reasonable compensation for his loss.

On the question whether Sproule directed the demolition of the building, there was much evidence on both sides.

The Commissioners held, that it was competent for one selectman, when there were no firewards, and only one selectman present, to direct the pulling down or demolition of a building, under the circumstances of the case at bar, and bind the town thereby; and a majority of the board held, that Sproule gave such directions.

They also held, that the petitioner was entitled to a reasonable compensation by § 15, c. 33, R. S., though no

directions were given by any officer, selectmen or firewards, as is contemplated by 10th, 11th, or 12th sections of the same chapter, and rendered judgment for the petitioner in the sum of $366.

To quash these proceedings for the errors of the Commissioners, the writ of *certiorari* was prayed for by the inhabitants of Frankfort.

Dickerson, for petitioners.

The judgment of the Commissioners was erroneous, because there being but one selectman present, he had no authority to give any binding order for the destruction of a building. In the absence of the firewards, a "major part of the selectmen present shall have the same power" as firewards. R. S., c. 33, § 11.

No *selectmen* were present, and there can be no "major part of undivided unity." The 10th § requires the concurrence of three firewards for such a purpose. So the 11th § requires, at least the concurrence of two minds.

It is a high prerogative the statute devolves upon selectmen to destroy one man's property to save that of another, and to deplete the town treasury at will. It is against the policy of the law, that such power should be vested in one man.

The 11th § is to be construed in connexion with the 12th, and the latter provides, that if no selectman be present, two or three civil officers, or in their absence military officers, shall have the same power as firewards. No selectmen were present, and the authority devolved upon the others mentioned.

This construction is in harmony with rule 2, § 3, c. 1. R. S.

The judgment of the Commissioners is also erroneous, because they adjudged that the petitioner before them was entitled to relief under § 15 of c. 33, thus making the town liable at the caprice of persons present at such fire.

If their judgment is correct, then the statute provides, that town officers may under certain circumstances bind the

town; and in the same chapter, that the town is bound, whether the officers perform the duty assigned them or not.

On both grounds assumed by the Commissioners, their judgment is erroneous.

Hubbard, for the original petitioner, maintained the correctness of the judgment of the Commissioners on both the grounds taken by them.

RICE, J. — The office of a writ of *certiorari* is to bring up the records of inferior tribunals for examination. If those records disclose a want of jurisdiction, or error in point of law, they may be quashed. But if the question presented is whether a subordinate tribunal has erred in the matter of fact submitted to its judgment, we cannot revise its decision. *Hayward, petitioner*, 10 Pick. 359.

Whether Sproule did or did not give directions for the demolition of the building which is the subject of controversy, is a question of fact. That question was contested before the County Commissioners, and by them decided upon such evidence as the parties produced for their consideration. On that point the decision of the Commissioners is final.

But whether Sproule had authority to act in the premises, is a question of law, arising upon the facts disclosed. It appears that there were no firewards, and but two selectmen in the town of Frankfort, at the time the fire occurred.

Section 10 of c. 33, R. S., provides, that when any fire shall break out in any town, the firewards shall immediately attend at the place, with their badges of office; and when there, any three of them shall have power to direct any building to be pulled down or demolished, as they may judge necessary to prevent the spreading of the fire.

Section 11 provides that if such firewards be not present, a major part of the selectmen present, shall have the same power.

Sproule was one of the selectmen; he was the only one of the selectmen who was present; he, therefore, not only

constituted the major part, but all of that class of officials who were present. His authority to act in that contingency is clearly conferred by the provision of the section last cited.

But it is contended that the language of the section next succeeding, is inconsistent with such a construction. There may be a grammatical incongruity between the sections. But that would be a forced construction, which should divest citizens of powers expressly conferred, because the section of the statute conferring such powers is referred to in another section, in a manner not consistent with the most approved rules of grammar. The Legislature has provided rules by which such results will be obviated. R. S., c. 1, § 3, clause II.

The decision of the County Commissioners being correct on this point of law, it becomes unnecessary to examine the other question presented. *Writ denied.*

BIRD *versus* BIRD.

In an action pertaining to the realty, an office copy of the plaintiff's title deed is not admissible in evidence on proof that the original was in the hands of the attorney for the defendant. To authorize the use of such copy the original must be proved to have been lost.

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

TRESPASS, *quare clausum.*

The suit was first brought before a magistrate, and on a plea of title, was transferred to the higher Court.

The plaintiff offered an office copy of a deed of the *locus in quo*, from one Samuel Bird to himself, dated May 20, 1819, and recorded June 21, 1831.

The grantor, one of the subscribing witnesses, and the magistrate, before whom it was acknowledged, were dead. The other subscribing witness lived out of the State.

The copy was objected to; plaintiff made affidavit, that he deposited the original in the registry of deeds at the time

it was recorded. That it was lost, and that by diligent search he had been unable to find it, and from circumstances had reason to believe and did believe, that it had gone into possession of one Lewis, who was defendant's attorney in this case.

Plaintiff then contended, that he might use the copy, unless defendants produced the original, or introduced some evidence that it was not in their possession; and further, that a deed in all things in due form, being on the public records for more than twenty years, a presumption of its genuineness arose sufficient to authorize the use of the copy after proof of its loss, without any other evidence of its genuineness, unless evidence was offered against it, sufficient to rebut that presumption.

The Judge refused to admit the copy.

If the ruling was erroneous the cause to stand for trial, otherwise the nonsuit, which was submitted to, was to stand.

Dickerson, for defendants.

N. Abbott, for plaintiff.

APPLETON, J. — When an original deed made to the party, is in existence and can be produced, there can be no reason for resorting to secondary and inferior proof of its contents. The original should always be forthcoming. The plaintiff claims exemption from the obligation of producing the original, because the deed under which he claims has, as he alleges, been lost. In his affidavit he states it to have been left in the office of the registry of deeds, and after remaining there some time, to have been withdrawn therefrom by F. A. Lewis, Esq., the attorney of the defendants, in whose hands he supposes it now to be. The attorney has not been called, and no reason has been given for not calling him. If called, and the deed is in his possession, we are bound to presume that he would truly disclose the fact. The plaintiff has indicated where the deed may be found, and has failed to exhaust the means of information, the ex-

istence of which he has disclosed. The copy of the deed was rightly excluded. *Nonsuit confirmed.*

Exceptions overruled.

MATHEWS *versus* LIGHT.

Three notes of hand, payable at different times, were secured by mortgage, and the two having the longest pay day, were sued and collected soon after they were due. In an action upon the mortgage, the note first due was not produced, nor any evidence given of its loss, or that it remained unpaid; *held*, that after the lapse of thirty years, it may be presumed to have been paid.

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

WRIT OF ENTRY.

Plaintiff claimed title to the premises as assignee of a mortgage given by defendant to one Joseph Pierce on Oct. 20, 1819, to secure the payment of three promissory notes of $84,16 each, one payable in June following, and the other two in one and two years from the same June.

Joseph Pierce died prior to July, 1828, when Joseph H. Pierce was authorized to act as his executor.

Joseph H. Pierce was lost at sea the last of the year 1832.

Administration *de bonis non*, of Joseph Pierce, was granted to Henry A. Pierce, in the county of Waldo, in 1853, and he assigned the copy of the mortgage and note to plaintiff, the original not being found.

It appeared by the testimony of Henry A. Pierce that he had searched among the papers of Joseph Pierce, but could not find the mortgage or notes. Sundry evidence was objected to for want of evidence of the loss of the papers.

To rebut the presumption of payment of the notes, the plaintiff introduced the deposition of one Overlock, tending to show a conversation between Joseph Pierce and defendant, in 1829, when the defendant proposed to buy the premises; also the answers of defendant in an equity proceeding

between these parties as to this land, tending to show that he claimed to hold the premises by possession.

The defendant showed by the records of Lincoln county that the last two notes described in the mortgage were sued soon after they became due, and judgment obtained, and the executions issued thereon satisfied.

The case was submitted to the full Court, whether the plaintiff could maintain this action, and if the evidence on the part of defendant would warrant the presumption of payment of *all* the notes; and that such judgment should be entered as the admissible testimony required.

Bulfinch, for defendant, cited Stark. on Ev. part 4, page 1091.

Palmer, for plaintiff, cited *Joy* v. *Adams*, 26 Maine, 330; and *Sweetser* v. *Lowell*, 33 Maine, 446.

APPLETON, J. — It appears that the defendant, on Oct. 20, 1819, gave one Joseph Pierce a mortgage of the demanded premises and three several notes, each for the sum of $84,16\frac{2}{3}$, payable in one, two and three years from the 20th day of the June preceding. Joseph Pierce deceased sometime prior to July 7, 1828, when a copy of his will, with the probate thereof in the county of Suffolk and Commonwealth of Massachusetts, was duly filed and recorded in the probate office for the county of Waldo. The death of Joseph H. Pierce, who had been appointed executor by the will of his father, Joseph Pierce, took place in the last of 1832 or the first of 1833. No further proceedings appear to have been had in relation to the estate of Joseph Pierce, until Jan. 4, 1853, when at a Probate Court for the county of Waldo, Henry A. Pierce was appointed administrator on the estate of said Joseph. By virtue of this appointment, not having the original mortgage or the notes thereby secured, but having a copy of the mortgage, he assigned the same with the mortgage debt to the present plaintiff.

The general rule of law is, that a mortgage is presumed to have been paid when the mortgagee is shown to have re-

mained in the undisturbed possession of the mortgaged premises for more than twenty years without having paid interest upon the mortgage debt, or having in any other mode recognized its existence. *Blethen* v. *Dwinal*, 35 Maine, 561; *Cholmondely* v. *Clinton*, 2 Jac. & Walk. 186; *Dexter* v. *Arnold*, 1 Sum. 109.

As the plaintiff claims to recover as the assignee of a mortgage in full force, he must show the amount for which the conditional judgment should be rendered. He should therefore produce the mortgage notes, or if he claim they remain unpaid, satisfactorily account for their non-production. He is not entitled to judgment without showing a present indebtedness. *Gray* v. *Jenks*, 3 Mason, 523; *Edgell* v. *Stamford*, 3 Verm. 526; *Blethen* v. *Dwinal*, 35 Maine, 556.

The plaintiff does not produce the original mortgage or the notes thereby secured. To rebut the inference naturally arising after the lapse of more than thirty years, from their non-production, he proves by Henry A. Pierce, the recently appointed administrator upon the estate of his grandfather, that he has since his appointment made search among the papers of his father, Joseph H. Pierce, and has been unable to find either the mortgage or the notes. If the notes had been paid, there would be no reason to anticipate their discovery among the papers of Joseph H. Pierce or of any one else. It is not shown that they were outstanding against the defendant at the death of Joseph Pierce, or were included in the inventory of his estate. The notes were not given to Joseph H. Pierce and are not shown to have ever been in his possession. If they were never in his possession, the result of a search, however diligent, could not have been expected to have resulted in finding what was never there. The loss of a paper is not proved by the mere inability to find it. If the notes secured by the mortgage had been paid, the search for them, however vigilant, would not have led to their discovery, yet they would not have been lost, nor would the inability to find them have been deemed satisfactory proof of loss.

Every presumption is in truth founded on the natural connexion which exists between a known truth, and the truth sought for, and as this connexion is more or less necessary and uniform, the presumption is regarded as stronger or weaker. Gabriel Traite des Preuves, 569. A receipt for rent due at one time affords a presumption that rent due at an earlier time has been paid. 3 Stark. Ev. 1091. "The presumption arising from repeated payments of an annual debt, that prior sums for which no receipt can be shown were likewise paid, affords a good example of this species of presumption. For it is a natural presumption even in the case of a single discharge for a later year, and its force increases with the number and repetition of payments." Glassford on Ev. 591. This presumption arises from the natural and ordinary course of business, according to which debts first due will be first demanded, and may be expected to be first paid. 1 Ev. Poth. § 812.

In the present case, the first note was not produced, nor was there any proof tending to show that it had been lost or remained unpaid. Its non-production is not sufficiently accounted for. Suits were commenced on the last two notes secured by the mortgage shortly after their maturity, and over thirty years ago, and they are proved to have been paid. From such circumstances, the inference is unavoidable that the first has been paid, in the entire absence of any opposing proof.

The evidence of Overlock cannot be regarded as tending in any degree to disprove the presumption of payment. He testifies with great particularity to a conversation with Joseph Pierce in 1829, in which the defendant was desirous of purchasing the land in dispute. But as this conversation was more than a year after the probate of the will of Joseph Pierce, he must have been mistaken as to the time. Nor is it very probable he would be desirous of purchasing this land, of which, if his notes were paid, he was the owner in fee, and if they were in part unpaid, he had the equity of redemption. He had, therefore, nothing to purchase. It is obvi-

ous, therefore, that little or no regard should be paid to this testimony, as it must have been either intentionally false, or what is more probable, the result of a mistake or misrecollection. *Plaintiff nonsuit.*

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† BIRD *versus* BIRD.

A deed purporting to convey all the grantors' real estate in a certain *town* by name, and particularly all that belongs to them as the representatives of a certain person named, deceased, is effectual to pass their title to any lands there situated.

And where several heirs join in a conveyance, by signing, sealing and delivering the same to the grantee, a *subsequent* addition in the body of the deed, of the names of two who had signed and sealed it, but which were not there at the time of its delivery, without the knowledge and consent of the parties to the deed, will not affect its validity as to those whose names were in the body of the deed as grantors.

But whether any title in the premises described in a deed, is passed, by merely signing, sealing and delivering it, without the insertion of the name as *grantor*, *quere*.

No question of law can be raised upon a point made by the counsel to the jury, where no instructions upon it were requested of the presiding Judge.

The *possession* of the common property by one of the tenants, will not prevent his co-tenants from making an effectual transfer to another, of their rights therein.

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

TRESPASS *quare clausum.*

The plaintiff's title by deed was through several mesne conveyances; the first from John Hunter in 1801, the last being from Andrew Bird to him, dated Oct. 2, 1843.

He also proved that he had been in possession of the premises since 1829; but there was no evidence whatever to show an ouster of others who had title to any portion.

The defence was, that defendant was tenant in common. He exhibited an office copy of a deed of part of the premises from Samuel Bird to Andrew Bird, of Jan. 14, 1802, also an office copy of a deed from the heirs of said Andrew to David Bird, dated June 10, 1830, which was recorded May 15, 1852; and a deed from David to himself, of April 13, 1852.

After the case was thus presented, the plaintiff introduced the original deed from said heirs of Andrew Bird to David Bird.

The description of the premises therein was as follows: "All our right, title and interest, and all real estate which we own or have claim to, situated in Belfast, in said county of Waldo, and particularly all that belongs to us as the heirs or legal representatives of Andrew Bird, formerly of Belfast, deceased."

The heirs who signed and sealed this deed were "John Lermond and Nancy, his wife, in her right, John Bogs and Jane, his wife, in her right, C. H. Wetherbee and Lucetta, his wife, in her right, James Bird, Mary T. Bird and Sally Bird, Zenas Mero and Nancy Mero."

The names of Zenas and Nancy Mero were not in the body of the deed when executed.

Plaintiff introduced testimony tending to show, and the fact was subsequently admitted, that F. A. Lewis, an attorney of defendant, inserted in the body of the deed, just before the execution of the deed of *David* to defendant, the following words: — "and Zenas Mero and Nancy, both of Hope, in the county of Waldo, in their right."

The plaintiff also offered testimony tending to show, that the name "David," which occurs three times in the deed, had been fraudulently inserted, and the name "Andrew" erased, since the execution and delivery of said deed.

The defendant offered testimony tending to show, that the alteration was before the execution and delivery.

Plaintiff's counsel contended to the jury, 1st, that this deed was void for uncertainty in the description of the premises.

2. That the insertion of the words therein after it was executed and delivered, by Lewis, as admitted, made it void.

3. That if plaintiff was in possession of the premises at the time said deed from the heirs was made, claiming it as his own, that nothing passed by the deed.

4. And that if the name of the grantee had been fraudulently erased, and another substituted, it would be void.

The presiding Judge instructed the jury, that this deed was not void from uncertainty in the description of the premises therein; — *that* the insertion of the words, as admitted by Lewis, did not render the deed void, so as to preclude defendant from defending successfully against this suit, provided he could have done so, if those words had not been inserted; and if the plaintiff had shown no ouster of those who had title in the premises, and had been tenants in common with him, the deed did pass the rights in the premises of the grantor in that deed; *that* if they should find the word "Andrew," as a christian name of the grantee in the deed, had been fraudulently erased, and the word "David" substituted therefor, after the execution and delivery thereof, the deed would be void.

A verdict was returned for defendant.

N. Abbott, in support of the exceptions, maintained the positions taken at the trial. The deed was void for uncertainty.

The words admitted to have been inserted by Lewis were material and destroyed the validity of the deed. This alteration was *fraudulent,* and defendant by making use of the deed in defence of this suit adopts his attorney's doings. He ratified his fraud and it is presumed, that he consented to the fraud at the time it was committed. The fact of the alteration is *prima facie* evidence, that it was made with fraudulent intent. 3 Met. 103. No evidence is offered to rebut that presumption.

The jury should have been instructed, that nothing passed by the deed, if the plaintiff was in possession claiming the land as his own, at the time of its execution. That constituted a disseizin of the owner, and the disseizee must reënter before he can convey. 36 Maine, 491.

The plaintiff was in possession of the premises under his deeds. The defendant is liable for all trespasses committed before the date of his deed from David. He had no

right there until he got his deed from him, even if David had a good title.

Dickerson, contra.

There is no difficulty in finding the estate embraced in the deed. The intentions of the parties are to be carried out and effect is to be given to the deed if possible. *Hale* v. *Rust*, 1 Greenl. 334; *Marshall* v. *Fisk*, 6 Mass. 24; *Litchfield* v. *Cudworth*, 15 Pick. 22; Hilliard's Abr. 336.

The insertion of the words admitted was not done by the grantee, nor do they change the character or legal effect of the instrument. The grantee cannot be affected in his title by such a proceeding of a third party. 1 Greenl. Ev. § 566; *Powers* v. *Ware*, 2 Pick. 451; *U. S.* v. *Spaulding*, 2 Mason, 478; *Hunt* v. *Adams*, 6 Mass. 519; *Brown* v. *Pinkham*, 18 Pick. 172.

The questions of fraud and ouster were settled by the jury in favor of defendant.

TENNEY, J. — It is not denied by the defendant, that the plaintiff has exhibited evidence of title to an undivided portion of the premises described in his writ; but he claims title of another undivided portion of the same; and insists that he has rights therein, as a tenant in common with the plaintiff, which will defeat the maintenance of this action.

For the purpose of sustaining the defence, a deed dated June 12, 1830, to David Bird, from certain persons, representing themselves as the heirs, and children of heirs of Andrew Bird, deceased, was introduced; also evidence to show, that they held such relation to Andrew Bird. A deed from said David Bird to the defendant, dated April 13, 1852, was also in evidence. From these deeds and other deeds in the case, concerning which there is no controversy, it appears, that the defendant had title in an undivided part of the premises, unless the deed to David Bird of June 12, 1830, was inoperative. And the plaintiff contended, that it was inoperative on several grounds. The first of which was, that it had been changed after its execution,

without any authority, by the erasure of the name of Andrew Bird as grantee, and the insertion of the name of David Bird, as it now appears. This alteration the jury have negatived, under instructions, which were not a subject of complaint in the exceptions.

Another objection to the validity of the deed to David Bird was, that the names of Zenas Mero and Nancy Mero, two of the grantors, were inserted in the body of the deed, just before the date of the deed from David Bird to Jonathan E. Bird, by F. A. Lewis, attorney for the defendants, though it was not denied, that it was executed and acknowledged by those persons, as grantees, at the time it purports to have been executed by them. It was admitted, that the names were inserted in the body of the deed as above stated.

The canceling of a deed will not divest property, which has once vested by a transmutation of possession. A man's title to his estate is not destroyed by the destruction of his deeds. *Hatch & al.* v. *Hatch & al.*, 9 Mass. 307. This doctrine is affirmed by this Court in the case of *Barrett* v. *Thorndike*, 1 Greenl. 73, and in *Lewis* v. *Payn*, 8 Cowen, 71; *Jackson* v. *Gould*, 7 Wend. 264.

The deed to David Bird from the heirs of Andrew Bird, deceased, conveyed to the grantee, the interest of the grantors, so far as it was sufficient to do so, at the time of its execution and delivery. No question is made, that the estate of all, excepting that of Zenas Mero and his wife, at that time passed by the deed, unless the grantors were disseized. And having vested a title in the grantee, by the authorities referred to, it was not divested afterwards by the insertion of the words in the body of the deed. Whether any thing passed from Mero and his wife, at the time they executed the deed, is a question, which the final disposition of this cause does not require to be settled.

Again, the deed is denied to be effectual to pass the estate, because of the uncertainty of the description of the land. The property is described as being "all our right, title and

interest, and all real estate, which we own or have claim to, situated in Belfast in said county of Waldo, and particularly all that belongs to us as the heirs or legal representatives of Andrew Bird, formerly of Belfast, deceased." If it could be shown, that Andrew Bird, deceased, was the owner of real estate in the town of Belfast, in the county of Waldo, at the time of his decease, the right of these grantors therein would not fail to pass, by any uncertainty in the description. An officer's return of an attachment of all the debtor's right, title and interest in and to any real estate, in a given county, is valid and sufficient to hold all his real estate therein, subject to attachment, in the suit, in which it was made. *Roberts* v. *Bourne*, 23 Maine, 165. No good reason is perceived to exist against the effect of a similar description in a deed.

It was contended to the jury at the trial, that if the plaintiff was in possession of the premises, at the date of the deed from the heirs of Andrew Bird, deceased, claiming it as his own, that nothing passed by said deed. The case contains no report of evidence, like the facts supposed in this proposition; but it does find, that there was no evidence whatever to show an ouster of others, who had title with the plaintiff in the premises; and the Judge was not requested to give any instruction upon such a state of facts, as was stated hypothetically to the jury by the plaintiff's counsel; consequently no such question of law can arise on the exceptions.

"The possession or entry of one tenant in common, or joint tenant, is always presumed to be in maintenance of the rights of all." "If there are several tenants in common, who are co-heirs, the entry of one will not be deemed adverse to the title of the others, without the *strongest evidence* of exclusive claim of title to the whole estate." *Ricard* v. *Williams*, 7 Wheat. 120; Stearns on Real Actions, 40. No ouster of the heirs of Andrew Bird having been shown, the plaintiff cannot be treated as having made a claim of exclusive possession or right, and the instruction

given, that the deed of those, who had title in the premises, and had been tenants in common with him, passed the estate, which fell to them as heirs, to their grantee, was correct. *Exceptions overruled.*

PATTERSON *versus* PROPRIETORS OF EAST BRIDGE IN BELFAST.

The charter authorizing defendants to build a bridge over tide waters, required them to build it of suitable materials, at least twenty-two feet wide, *with a draw of sufficient width for vessels to pass through,* and sufficient rails on each side, with boarding or planking three feet high from the floor of said bridge, for the safety of passengers, *and the whole should be kept in good and safe repair.*

Under this section it was *held*:—

1st. That the corporators were bound to provide all necessary apparatus for raising the draw;—

2d. That they were bound to raise the draw for the passage of vessels through it;—

3d. That for any neglect or unnecessary delay in so doing, they were liable to pay the damages sustained.

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

This was an action of the CASE for neglecting and refusing to raise the draw of the bridge, when plaintiff wished to pass with his vessel.

Defendants are proprietors of a bridge built over tide waters in Belfast, under a charter, while this State was a part of Massachusetts.

The second section was as follows:—

"And be it further enacted, that the said bridge shall be well built of suitable materials, at least twenty-two feet wide, with a draw of sufficient width for vessels to pass through, and sufficient rails on each side, with boarding or planking three feet high from the floor of said bridge, for the safety of passengers, and the whole shall be kept in good and safe repair."

The charter contained no other requirement as to the draw. It was agreed that the charters of other bridges, granted about the same time, did specially require the cor-

porators to raise the draws when necessary; but that the charter of the Belfast bridge over this same stream, contained no such express requirement.

It appeared in evidence, that plaintiff wished to pass the draw with the schooner Elizabeth, laden with wood, in the winter of 1853; that he made known his desire to the person having charge of the bridge; that there were no ropes to raise the draw with, those formerly used being worn off; that two of the directors were notified of the deficiency, and no ropes were furnished until the plaintiff had been detained three days. The estimated damage for detention was fifteen dollars per day.

The Court were authorized to render judgment by nonsuit or default as the law required, and if a default was entered, the Court to make up the damages from the facts reported.

Dickerson, for defendants.

It was manifestly the intention of the Legislature granting this charter to exempt the corporators from raising the draw. The charters of other like corporations, about the time this was granted, contained a special provision that they should raise the draw. The omission here was evidently designed.

Corporations derive their powers from their charter, and are under no obligations not imposed by them. The language of the charter is plain, and its requirements have been complied with.

By leaving out the clause "to raise said draw as occasion may require," it seems to have been the intention of the Legislature that masters of vessels should themselves raise the draw. However this may be, it is not imposed on defendants.

The objection that the Legislature has no right to authorize a corporation to prevent the passage of vessels through navigable tide waters, does not lie in this case.

1. Because the plaintiff has sued for "not raising the draw."

2. Because, on the supposition that defendants are not bound to raise the draw, this is no such obstruction as conflicts with the general freedom of navigable waters. The argument drawn from a want of legislative authority to erect a bridge with a draw, to be raised by those wishing to pass the same, proves too much. It proves that no *obstruction* or *impediment* can be legally interposed, contrary to a series of judicial decisions. Even if the corporators were obliged to raise the draw, it would still be an impediment and hindrance. Here was the impediment to be removed by those desiring to pass through.

N. Abbot, for plaintiff.

The charter is silent upon the question of raising the draw, and upon the apparatus with which it is to be raised; yet the duty imposed by the charter, to build and keep a draw, necessarily imposes, by implication, the duty to furnish the necessary apparatus with which to raise the draw and to raise it when necessary.

Statutes and charters are to be construed so that they may have a reasonable effect. 3 Mass. 523; 5 Mass. 380; 7 Mass. 458; 15 Mass. 205; 23 Pick. 93.

It is presumed the Legislature intended the most reasonable and beneficial construction of their Acts, when the design is not apparent. 4 Mass. 534; 12 Mass. 383.

When their Acts are obscure, Courts will give to them a sensible and reasonable interpretation. 13 Mass. 324.

The construction of this chartér contended for by defendants, would not only be insensible and unreasonable but absurd.

Private statutes, made for the accommodation of particular citizens or corporations, ought to be so construed as to preserve the rights and privileges of the public. 4 Mass. 140; 2 Mass. 143; 3 Mass. 263; 7 Mass. 393; 18 Pick. 501.

By the express provisions of the charter, the defendants were to build a draw; it was without ropes, a necessary part of it, and defendants are liable, even if not bound to *raise* the draw.

APPLETON, J. — The defendants are a corporation created by legislative Act, upon whom is conferred the right of erecting a bridge over the navigable waters of the State. This erection is an interference with and a limitation of the general rights of the public and would be liable to an indictment as a public nuisance, were it not for the protection afforded by the charter, under the authority of which it was built.

By the second section of the defendants' charter, it is provided, "that the said bridge shall be well built of suitable materials, at least twenty-two feet wide, *with a draw of sufficient width for vessels to pass through*, and sufficient rails on each side, &c., &c., and *the whole shall be kept in good and safe repair*." This being a private statute, passed for the benefit of a particular corporation, it ought not to be construed to affect the rights and privileges of others, unless such construction result from express words or necessary implication. *Coolidge* v. *Williams*, 4 Mass. 140.

It was the obvious design of the Legislature, that the bridge to be erected, should be so built as not to interfere with or unnecessarily impede the navigable rights of the public. The corporators, by their acceptance of the charter, have acceded to the terms imposed upon the corporation, and must be held to their strict performance.

One of the duties required of the corporation was, there should be "*a draw of sufficient width for vessels to pass through.*" The draw is for the passage of vessels. Without it vessels could not pass. That means should be provided to afford a passage for vessels, was the evident design of the Legislature. The case finds, that there were no ropes with which to raise the draw, those formerly used having been worn off. But a draw without the necessary and fitting apparatus, would be useless. The masters of vessels cannot be expected to foreknow what tackle may be needed, nor can it be regarded as a part of the fitting out of a vessel, that it should have the apparatus necessary for passing through the draw. The draw cannot be considered

as completed, until it is in a condition for present and immediate use.

The statute requires, that the "whole shall be kept in good and safe repair." This includes the draw as well as the bridge. The keeping the bridge and the draw in repair is to be done by the corporation and not by the public.

But the bridge having been built with a draw ready and fitted for instant use, by whom is it to be raised "for vessels to pass through?" The draw is made for use. The title to it is in the corporation. Nothing in the charter confers upon the public the right to use or control, without the consent of the owners, that which is private property. The management of the draw must be in the defendants or in the public. The interest of the defendants requires, that it should at all times be under the control of those who erected it, and by the terms of their charter, are bound to see that it should be "in good and safe repair." In *New Haven & East Haven Toll Bridge Corporation* v. *Bunnel*, 4 Conn. 54, the charter of the corporation required, that they should have a draw in some convenient place in the channel to admit the passage of vessels. In that case, which was an action brought by Bunnel against the corporation for their neglect to open the draw of their bridge upon reasonable notice and request, and which was brought before the Supreme Court of Errors by the defendants, HOSMER, C. J., in delivering the opinion of the Court, says, "first it is the indispensable duty of the company to erect and keep in repair, a good and sufficient draw for the general accommodation. Secondly, it was equally their duty on due notice and request to open the draw for the passage of vessels and that promptly, without unnecessary delay. This proposition has been denied; but in my opinion, on no reasonable ground. On what principle could a stranger to the company assume on himself the management of the draw? Over their property he has no right; and his entry upon it, except in the usual manner, for the purpose of passage, would be wholly unwarrantable. To have the management

of the draw, is not only the exclusive right, but the unquestionable interest of the company to preserve this essential part of the bridge, from the maltreatment of men unaccustomed to handle it and to prevent the unnecessary and unreasonable obstruction of the public travel. It is unreasonable, even to absurdity, to hold that strangers, at their pleasure, may intermeddle with the property of the company and subject them to the hazard of serious injury to the draw, and a diminution of their profits." The conclusion is, that upon the language of the defendants' charter, they have been guilty of corporate neglect and are liable to the plaintiff for such damages as he may have sustained.

Defendants defaulted.

† ATWOOD *versus* WILLIAMS.

By § 35, c. 125, R. S., it is provided that any person, who shall perform labor or furnish materials for or on account of any vessel, building or standing on the stocks, or under repairs after having been launched, shall have a lien on such vessel for his wages or materials, until four days after such vessel is launched, or such repairs afterwards have been completed; and may secure the same by attachment on said vessel within that period.

This right of lien extends to the employee of a contractor with the owner of the vessel, although the contractor has received his pay in full from the owner.

And such lien may be secured by the employee by attachment of the vessel in a suit against his employer.

ON FACTS AGREED.

ASSUMPSIT, on a receipt given by defendant to the plaintiff, to keep and re-deliver the brig "John Hathaway," &c., "which property the said officer has taken by virtue of a writ against Daniel Millett, and to enforce a lien provided for in c. 125, R. S., in favor of Samuel Carter," &c.

Defendant was owner and builder of the brig, and contracted with one David Millett to perform a certain part of the work. This job was performed and Millett paid.

Millett hired one Samuel Carter to assist him, but failed to pay him the entire sum due him.

To secure the balance due him, Carter commenced an action against Millett and attached the brig within four days after she was launched.

The receipt in suit was given to release that attachment. Carter obtained a judgment for his debt, and on his execution demands were duly made upon the officer, upon the plaintiff, who attached the brig, and the defendant.

If the action is maintainable, a default to be entered and judgment for debt, costs and interest of the action *Carter* v. *Millett*; otherwise a nonsuit to be entered.

A. L. Kelly, for defendant, maintained, that as the lien provided for by statute, could only be enforced by attachment, it was limited to those cases only where the claim was against the owner of the property. Any other construction would authorize the Legislature to confiscate any man's property. Bill of Rights, § § 20, 21.

The defendant here had no right to appear in the action against Millett, and his property cannot rightfully be taken away by force of a judgment to which he was not a party, and could not defend it.

That the lien lies only against the owner of the property was apparent from § 37 of c. 125, R. S.

Besides, the law prescribes no course by which the lien may be enforced, and in that respect was clearly defective, and was repealed by § 1, c. 159, of Acts of 1850.

The credit here was given to Millett, not for or on account of defendant or his vessel.

Furthermore, if plaintiff had a lien, it was lost by negligence in not recording the attachment.

Hubbard, for plaintiff, maintained, that the language of the statute provision, and the object to be accomplished, include such a case as this.

That the same question had recently been before the U. S. District Court, and decided according to the plaintiff's construction, in *Purrington* v. *Hull of New Ship*.

That the lien must be secured by attachment of the vessel and the suit must be against the person contracted with. *Ames* v. *Swett*, 33 Maine, 479.

A decision sustaining this construction in an analogous matter was found in *Spofford* v. *True*, 33 Maine, 283.

The presumption was, that the officer did all that was required of him, and no question on that matter was allowable to defendant.

TENNEY, J. — The R. S., c. 125, § 35, gives to any ship-carpenter, caulker, blacksmith, joiner, or other person, who shall perform labor, or furnish materials for, or on account of any vessel building, &c., a lien on the same for his wages or materials. This provision is as comprehensive in securing those who perform labor and furnish materials about a vessel in the process of building, or of being repaired, as is the statute of 1848, c. 72, § 1, giving to persons, who shall labor at cutting, hauling and driving logs, masts, spars or other lumber, a lien thereon. The latter has received a construction from the Court, that it extends to persons, who shall perform such labor under a person, who contracts with the owner of the lumber, equally with those, who labor under a contract with the owner himself. *Spofford* v. *True*, 33 Maine, 283; *Doe* v. *Monson*, ibid., 430. The principle of these cases is applicable to that now under consideration.

The action must be against the person, who procured the services to be performed. No other can be liable for such a claim. *Ames* v. *Swett*, 33 Maine, 479.

The vessel was properly attached for the purpose of securing the lien. And if the attachment had continued, till judgment was recovered, she could have been disposed of to satisfy the execution, which issued upon that judgment. The attachment was relinquished, in consideration of the receipt given; and it differs in no essential particular from receipts taken for any other property attached on mesne process.

The defendant has failed to fulfil the promise made in the receipt, and according to the agreement he must be

Defaulted.

GUSHEE *versus* ROBINSON.

A note given by two persons as part payment for a mare, containing these words:—"said mare to be holden to J. S. G., (one of the signers,) for the amount he may pay for the same," is not a mortgage, and consequently need not be recorded.

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

TROVER, for a mare.

On the 17th of June, 1852, the plaintiff and William H. Haskell gave the following note:—"For value received, we jointly and severally promise to pay John Kiff, 2d., or order, the sum of forty-two dollars, in five months from date, with interest, it being part pay for a red mare, six years old, said mare to be holden to J. S. Gushee, (the plaintiff,) for the amount that he may pay for the same."

Defendant exchanged his horse for the mare bought of Kiff, with Haskell, and the question was as to his authority to sell it. On this point much evidence was before the jury.

The counsel for defendant contended, that the note or memorandum, was in effect a mortgage as between plaintiff and Haskell; and not being recorded could have no effect as against defendant, a *bona fide* purchaser, without notice.

The Court, for the purpose of settling the question whether plaintiff consented to the exchange, instructed the jury, that the paper referred to was not to be regarded as a mortgage, and that such was not its legal effect, and that if they should find that the sale of the mare was from the said John Kiff to the plaintiff alone, and not to the plaintiff and said Haskell jointly, and should find that the plaintiff did not authorize or consent to the exchange with the defendant, and did not ratify, sanction or acquiesce in

said exchange, then their verdict would be for the plaintiff. But if they should find, that the sale of said mare was to said Haskell alone, or to Haskell and the plaintiff jointly, or that the plaintiff authorized or consented to the trade with defendant, or after the trade with defendant, ratified, sanctioned or acquiesced in said trade, then their verdict would be for defendant. To which ruling, (the verdict being for plaintiff,) defendant excepted.

A. T. Palmer, for defendant.

N. Abbott, for plaintiff.

APPLETON, J. — The issue before the jury in this case was whether the horse, for the alleged conversion of which this action was brought, had been sold by John Kiff, 2d, to the plaintiff, or to one William H. Haskell, through whom the defendant derived his title.

In the course of the trial, the note given for the horse in dispute was read in evidence and was of the following tenor:

"Appleton, 1852, 5th month, 17.

"For value received, we jointly and severally promise to pay John Kiff, 2d, or order, the sum of forty-two dollars in five months from date, with interest, it being part pay for a red mare, six years old; *said mare to be holden to J. S. Gushee*, for the amount that he may pay for the same.

"J. S. Gushee.

"Attest, Marcus Kiff. "William H. Haskell."

The name of Gushee had lines drawn over it.

The counsel for the defendant contended that this note, or memorandum, constituted a mortgage; that being a mortgage, it should have been recorded, and that not having been recorded, the plaintiff, in consequence thereof, was not entitled to recover, and requested the presiding Judge so to instruct the jury, which he declined. In so doing, no error is perceived.

This note, or memorandum, belonged to the payee, who had the entire control over the same. It cannot be regard-

ed as a mortgage. It is not such by its terms. There is no mortgager or mortgagee. The plaintiff could not have controlled its possession for the purpose of having it recorded, had he desired it ever so much. It might be considered as indicating the relation between the signers to the note, and as such was an important article of evidence bearing upon the question as to whom the sale had been made. It was not a mortgage nor intended to be one, nor should it have been recorded as such. *Sawyer* v. *Fisher*, 32 Maine, 28.

The other instructions were sufficiently favorable to the defendant, and afford no just ground of exceptions.

No motion for a new trial has been filed, and upon exceptions, the correctness of the instructions given, can only be considered. *Exceptions overruled.*

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. RICHARD D. RICE, } JUSTICES.
HON. JOHN APPLETON, }

COUNTY OF CUMBERLAND.

† SMITH *versus* POOR *& als.*

For the official misconduct of the directors of an incorporated company, and fraud in the discharge of their duties, they are responsible to the corporation.

An individual corporator, who has suffered damage in a contract made with such company, through the fraudulent acts and votes of its directors, under color of their office, can maintain no action against *them* to recover compensation. His remedy is against the company.

TRESPASS ON THE CASE.

This action was commenced Nov. 22, 1852. After the writ was read to the jury and the plaintiff stated the grounds on which he proposed to support the action, the

counsel for defendants interposed objections to its maintenance, even if the facts set forth in the declaration could be proved; and SHEPLEY, C. J., presiding at the trial, deeming the objections valid, a nonsuit was entered, which was to be taken off and the action to stand for trial, if in the opinion of the Court, the action can be maintained upon proof of the facts alleged in the declaration.

The defendants were John A. Poor, James T. McCobb, Charles Jones, Thomas Cummings and Edwin Howe. The acts complained of, were alleged to be done under color of their office as directors of the Portland Gas Light Company. The writ contained but one count, wherein it was alleged, that a certain contract had been entered into between that company and plaintiff, and that he was to construct certain works for the company, for which he was to be paid $60,000, that he proceeded in good faith to fulfil and complete his contract, but that defendants, being such directors, wilfully and illegally combined to injure the plaintiff and fraudulently and willfully prevent his execution of the contract: — (1,) In not causing installments on stock to be paid in and paid over to plaintiff. (2,) In withholding payments due him. (3,) In not disposing of $15000, of stock directed by stockholders to be sold for aiding in the completion of the contract; — plaintiff averred that he had paid the installments as due on his own subscription for stock, completed the works and delivered them to defendants' acceptance as directors of the company; and through the wrongful, illegal and oppressive acts of said defendants he suffered great injury and damage.

The declaration also set forth that plaintiff was the owner of $39500 of the capital stock of the company, and that defendants, with a design to injure, oppress and defraud the plaintiff, both as contractor aforesaid and as stockholder in said company, and to prevent him from exercising his just rights and relative authority over the officers and elections of said company, illegally and fraudulently upon the stockholders of said company, including the plaintiff, to retain

themselves in office as directors, and to continue their fraud, &c., passed this vote. "Voted, that the treasurer be authorized to hire a sum of money not exceeding $5000, on one year's time, for the payment of debts now due, and to secure the payment by an absolute transfer of shares of stock in this company to double the amount so borrowed, at the par value of said stock, and to enter the same on the books of the company in the name of the persons to whom such transfer is made, and to credit said shares as fully paid up. And said person or persons shall be entitled to all the privileges appertaining to stock on which all assessments have been paid, until said notes become due and are paid," &c. and that defendants created certificates of stock, purporting to be certificates of stock, representing capital in said company, fraudulently, illegally and intentionally to defraud plaintiff thereby of his just rights in the premises, to the amount of $10,000, and transferred them to James T. McCobb, one of defendants, with the intent, that he should vote upon them at the next annual meeting and thereby to retain their offices; and did report said McCobb as a legal stockholder, and by means of such proceedings procured themselves to be elected as directors, when in truth and in fact, by the legal votes at the meeting, another and different board were chosen.

The declaration also alleged, that under color of raising funds to finish the company's works, they raised them and loaned them to each other without interest, and kept them for successive months, to the great loss of the plaintiff as a stockholder, &c.

The declaration also alleged that a reference had been entered into of a suit commenced by plaintiff against the company, and all demands and controversies between them, and an award was made which the defendants in their capacity as directors had fraudulently combined together to prevent the plaintiff from receiving.

There were also many other charges made against the defendants of acts by them designed to injure, harrass and op-

press the plaintiff, all under color of their office as directors of said company.

Shepley & Dana, for defendants.

1. No such action as this at law can be maintained by an individual stockholder against the officers, or agents of a corporation. They are responsible to the corporation alone for any injury to the corporate property, or diminution of the value of the stock or capital of the corporation, by any violation of their duties or obligations, whether by misconduct or neglect. *French* v. *Fuller*, 23 Pick. 108; *Robinson* v. *Smith*, 3 Paige, 222.

Nor can a bill in equity be brought by an individual corporator against the officers for misfeasance, until proper measures have been taken to induce the corporation to obtain redress, and they improperly refuse. *Hersey* v. *Veazie*, 11 Shep. 1.

This doctrine applies with equal force to that part of the declaration which claims damages for selling the stock to other parties than the stockholders. The remedy is against the corporation. *Gray* v. *Portland Bank*, 3 Mass. 363.

2. So far as damages are claimed for breach of his contract, set out in the declaration, the contract was with the corporation, and his remedy is against them. The declaration shows he has already resorted to that remedy, and had his reference and award.

This action has the merit of novelty, but no other.

Smith, pro se.

Upon the recognized principles of jurisprudence, the defendants are liable at law, or in equity, for offences such as set forth in the writ. *Charitable Corporation* v. *Sir Robert Sutton*, 2 Atk. 400; *Robinson* v. *Smith & als.*, 3 Paige's Ch. R., 232; Bac. Ab., title Corpor., 5; *Underhill* v. *Gibson*, 2 N. H., 232. Although corporations *may be* liable for torts, yet for such *tortious acts*, it has never been decided but that the agents and officers of the offending corporation, are not also liable *in their individual capacities.*

As to the breach of the plaintiff's contract, by the corporation, his remedy is said to be upon that contract. As between the plaintiff and the corporation, his remedy is limited to only the legal interest on the payments withheld.

But the defendants, having, as directors, control of the funds, are charged with having fraudulently and wickedly conspired to effect a breach of the corporation contract with plaintiff, and thereby, designedly, to inflict on plaintiff *injuries for which the corporation is not liable;* and for which he has no remedy against the corporation. Can it be said that for such a *premeditated, direct* and *personal* injury, no remedy exists?

The injury charged is an independent, distinct injury from any with which the corporation is chargeable, or which it is capable of perpetrating, except by unequivocal adoption. Angel & Ames on Cor., § 385, c. 11.

And when adopted, the individual liability of the trespassers is not merged or discharged. *N. Y. R. R. Co.*, v. *Wilts*, 4 Whart. 143; *Wright* v. *Wilcox*, 19 Wend. 343; *State* v. *Great Works Milling and Manf. Co.*, 20 Maine, 44; *Thayer* v. *Boston*, 19 Pick. 516.

The defendants are charged with illegally assuming powers, creating stock with a willful intent to injure the plaintiff, and thereby doing it. Why, for this, is the plaintiff without remedy?

Here the agents were outside of their duties, and made themselves personally responsible.

The certificates of stock, standing in McCobb's name, never represented capital paid in to the company, within the meaning of the charter. These defendants knew it.

The election, with the votes of these certificates, was invalid. *J. B. Disdoty & als.* 1 Wend. 98.

That these were not such shares as authorized a vote upon them, is supported by the case of *The Society for the Illustration of Practical Knowledge* v. *Abbott*, 2 Beavan, 559.

The corporation, as such, having no authority thus to

issue illegal stock, cannot be holden responsible for the uses thus made of it. The parties, acting under *color of office*, and doing it in the name of the corporation, are the suitable respondents for such illegal acts.

The several allegations in the writ, although of different acts of defendants under color of office, partake of the same wrongful character, and fall within the same principle of personal responsibility to the injured party.

The question then returns, can the plaintiff maintain a separate action against the wrong doer? If not, the wrong goes unredressed, and this is the true test of the question of remedy.

It is said the *corporation* must sue or be sued, in order to reach the remedy; that the proceeding must be by bill in equity, if against the corporation, or by an action at law, if in the name of the corporation.

Our answer to each of these suggestions is, that the wrongs charged were to the plaintiff *specially* and *exclusively*, and for which the corporation has no right of recovering, because not responsible over to the stockholders for them. Angel and Ames on Cor., § 297.

The plaintiff *being the sole party injured*, in the special manner charged, must be *the sole plaintiff in the remedial proceedings*.

A bill in equity would not lie, as there is a remedy at law.

If the acts were within the legal scope of defendants' authority, and an injury resulted to plaintiff in common with the other stockholders, then the remedy would be by the corporation; or if the corporation was under the control of guilty parties, (*Robinson* v. *Smith*, 3 Paige, N. Y. Ch. R., 233,) the remedy would be by bill, by some of the injured stockholders for the benefit of all.

But this is not an action brought for the purpose of compelling the ministerial officers of the Gas Light Co., to account for breach of official duty or misapplication of corporate funds, as in *Hersey* v. *Veazie*, 11 Shep. 12, and other cases cited to § 312 of Angel & Ames on Cor. But for

unofficial and illegal acts under color of office, contrived specially to injure the plaintiff *individually and separately from all other persons,* both as a contractor and a stockholder of the company, as well as in his individual character.

In *Smith* v. *Hurd,* 12 Met. 383, the whole doctrine applicable to this case, for and against, is reviewed, and the result is, that for an "indirect," "contingent," "subordinate," or "remote," injury, one of many stockholders of a corporation, or *quasi corporation,* cannot maintain a separate action against the wrong doers acting under *color of office.* But the same case decides that to the extent of his separate and peculiar interest, a stockholder, no doubt, might maintain his *separate* and *special* action according to the nature of the injury done him. And the Court sustains trespass on the case against directors, in favor of a single stockholder, for refusing to make a transfer of stock for a stockholder on a proper occasion.

This principle covers the whole ground of the case at bar.

Upon analyzing the declaration, it will be found to charge each and all the acts complained of as designed to injure plaintiff *specially,* and in a manner not common with any other stockholder. The law authorizes a *multiplicity of suits,* wherever the ends of justice are not attainable by a joinder. When the damages are special and there is not a privity between parties plaintiff in the injury suffered from a common source, then each party has his separate remedy and suit.

APPLETON, J. — The Portland Gas Light Company are responsible to the plaintiff on any and all contracts it may have made with him, to the extent of any damage he may have sustained in consequence of any violation of such contract or contracts on its own part.

The directors of a corporation are chosen by the votes of the corporators, are the agents of the corporation, and are responsible to it for official misconduct and fraud in the discharge of their duties. The amount which may be re-

covered by the corporation in a suit for official delinquency, will in each case constitute a portion of its assets in which each corporator will have an interest in proportion to his share of the whole stock. *Franklin Fire Ins. Company* v. *Jenkins,* 3 Wend. 130.

The plaintiff being a member of the corporation, and having made a contract therewith, claims compensation of the defendants, its directors, for certain alleged fraudulent acts and votes, by reason of which he has been damnified in his various relations with the corporation. It was held in *Smith* v. *Hurd,* 12 Met. 371, that a stockholder in a bank could not maintain an action against its directors for negligence in so conducting its affairs, that its whole capital was wasted and lost and the shares therein rendered worthless; nor for the malfeasance of the directors in delegating the whole control of its affairs to the president and cashier, who wasted and lost the whole capital. The decision in that case rests upon well established principles, and has a direct and important bearing adverse to the maintenance of the suit now before us.

The directors, who fraudulently abuse their trust, and misapply the funds of the corporation, are personally liable as trustees to make good that loss. But the stockholders cannot maintain a bill to compel them to account, unless it first appear, that the directors refuse to prosecute the suit, or the present directors are the parties, who made themselves answerable for the loss. In all cases the corporation is a necessary party either as complainants or defendants. *Robinson* v. *Smith,* 3 Paige, 222; *Hersey* v. *Veazie,* 24 Maine, 9; *Cunningham* v. *Pitt,* 5 Paige, 607.

The plaintiff, so far as he was entitled to his certificates of stock, might vindicate his rights by suit against the corporation, in case of the wrongful refusal of their officers. *Gray* v. *Portland Bank,* 3 Mass. 363. If a corporation refuse to permit a transfer of stock upon their books, they are liable in assumpsit. *Com.* v. *Bank of Buffalo,* 22 Wend. 348. If dividends are illegally withheld, the remedy of the party

aggrieved is by a suit against the corporation, and not against its officers. *French* v. *Foster*, 23 Pick. 108.

In case of a fraudulent abuse of trust on the part of the president and directors of an incorporated banking company in the election of directors, it seems that the new directors may be restrained from the exercise of their powers by injunction. *Ogden* v. *Kip*, 6 Johns. Ch. 160. In *Cone* v. *Arrison*, 15 Serg. & Rawle, 127, it was held, that in this country information may be freely used for trying the right to offices in public as well as in private corporations. A writ of mandamus will be granted to restore directors of a banking corporation, who were refused the exercise of their rights as directors by a majority of the board. Angel & Ames on Corporations, c. 20, § 702. So the writ will be granted where the member of a company was illegally removed. *Delacy* v. *Neuse River Navigation Co.*, 1 Hawk. 274. In *exparte Disdoty & als.*, 1 Wend. 98, illegal votes were cast at an election of directors, by which votes certain persons were elected, and without them certain other persons were elected, the Court, upon application, say, the election by the illegal votes was void, and that the other election without those votes was legal and binding. The authority to issue a mandamus to corporations and individuals when necessary for the furtherance of justice, is expressly given by R. S., c. 96, § 5. It likewise exists at common law. *Smyth* v. *Titcomb*, 31 Maine, 272. Assuming, therefore, the votes complained of to have been cast illegally, as is alleged, the rights of those directors chosen by legal votes, would upon proper process have been fully affirmed.

So far as the plaintiff may have sustained damages as a contractor with the Portland Gas Light Company, in consequence of any breach on its part of its contract with him, he has the ordinary legal remedies against the same, and in a proper suit may recover all to which he may be legally entitled. It seems by the declaration, that he has commenced such suit, and that the parties have referred "all demands and claims and controversies" between them, and

that he has obtained an award upon the same in his favor. By that award it would seem, that "all demands and claims and controversies between the parties" have been finally determined. In this writ he claims damages against the defendants, because the corporation have not complied with this award. If it has not been adjusted, the plaintiff is entitled to the ordinary process of law against the corporation, and in case of its insolvency, to the remedy provided by statute against the stockholders of the corporation. As a creditor of the corporation, the plaintiff is entitled to the same remedies as its other creditors. His claims are directly against the corporation and to be enforced against it.

The general propositions already discussed, embrace the various grounds of complaint set forth in the plaintiff's writ, and sufficiently indicate the reasons why, upon legal principles, this action is not maintainable.

The plaintiff's contract with the corporation was dated Oct. 29, 1849. The various acts of which complaint is made, are alleged to have been done by the defendants under color of their office, as directors, and cover a period of over three years. Most of the grounds of complaint, such as fraudulently preventing the plaintiff from performing his contract, neglecting to collect the instalments when due, and to pay over the moneys collected, and the fraudulently issuing stock and allowing the same to be voted upon, &c., occurred prior to July, 1851, when the defendant, McCobb, was chosen director. All the illegal acts before that time, done under color of office, were without his participation. The demurrer to the declaration is by all the defendants. The defendant, McCobb, cannot be held responsible for acts, to which it appears by the plaintiff's own showing he was not a party. If all the allegations in the declaration are omitted as to facts occurring before the election of McCobb, and for which he cannot be held answerable, the declaration would be fatally defective. There is no allegation in the writ so connecting the defendant, McCobb, with the proceedings before his election, as to show that he should be

held justly liable for those occurring subsequent thereto. As to the latter, there is no sufficient declaration. The writ contains but one count, and sets forth no legal cause of action. The declaration must be adjudged bad.

Declaration bad.

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† YORK & CUMBERLAND RAILROAD COMPANY *versus* RITCHIE.

To maintain an action under a special statute authority, its terms must have been strictly complied with.

Thus, where on failure of the shareholders in an incorporated company to pay the legal assessments upon them, the statute authorized a sale of the shares at auction, under an order from the *directors to the treasurer* upon his giving the notices required, and a right to recover of the corporators the balance of the assessment which may remain unpaid, a sale made by the treasurer, under the authority of a *committee* appointed by the directors, is illegal and void.

The directors cannot in such cases delegate their powers.

Nor can such a sale be upheld under an order from the directors in the *alternative*. It must be absolute.

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

ASSUMPSIT, to recover of defendant as an alleged subscriber for three shares of plaintiffs' stock, the balance due on such shares, after their sale at auction for non-payment of assessments thereon, with costs of sale.

A subscription book was offered in evidence, upon which was found the defendant's name, with the figure 3 set against it.

Upon the question whether the defendant signed this paper, there was much conflicting testimony.

The records of the directors as to the assessments made, being to the amount of $50, on each share, were presented, no part of which were paid by defendant.

The charter of the company provided, that in case of the failure of the subscribers to pay the assessments made upon their shares, after such notice is given, as shall be prescrib-

ed by the by-laws of the corporation, the directors may order the treasurer to sell such share or shares at public auction to the highest bidder, and the same shall be transferred to the purchaser, and such delinquent subscriber shall be held accountable to the corporation for the balance if sold for less than the assessments due thereon.

The by-law established under this section was as follows:

The president and directors may, from time to time, make such equal assessments on all the shares in said corporation, as they may deem expedient and necessary for the purposes of the company; and may direct the same to be paid to the treasurer, at such time and place as they shall deem proper, governing themselves as to the amount of assessments, the allowance of interest, and in all other respects, by the terms, conditions, and regulations prescribed by the persons having charge of the original subscription books for stock, before the opening of said books; and the treasurer shall give notice of the amount per share of every such assessment, and of the time and place, when and where the same will be due and payable, by advertisements, to be printed in one or more newspapers to be printed in Portland and Saco, at least thirty days before the day fixed for payment thereof. And if any stockholder shall neglect or refuse to pay any assessment or assessments on his share or shares in said company, for the space of thirty days after the first publication of such notice, the directors may order the treasurer, after giving notice (as hereinafter provided,) of the sale, to sell any or all such shares, by public auction, to be held in said Portland, to the highest bidder; and the same shall accordingly be transferred by the treasurer to the purchaser, who shall be entitled to receive a certificate thereof. And notice of every such sale shall be given by the treasurer, in one or more newspapers, printed in Portland, at least thirty days before the day of such sale, designating the time and place thereof, and the shares to be sold.

At a directors' meeting, in Sept. 1850, it was "voted that the president together with the treasurer, be a committee

to adopt such measures as shall promise to be most effective for collecting the arrearages of subscriptions due and enforce such collection by sales of stock or preliminary employment of an attorney, to collect said dues, or in both ways as said committee shall think proper: and that the report of the treasurer of the list of delinquent subscribers be referred to said committee."

It was in evidence that notice of the assessments was given by the treasurer, as required in the above by-law, and that in pursuance of and claiming authority from the above vote of Sept., 1850, and with the assent of the president, the treasurer advertised and sold at auction, in form as prescribed by the by-laws, the three shares subscribed for by defendant, and transferred them to the purchaser, at the sum of $20 per share, and the costs of sale were $1,25; and that the avails were accounted for to the company.

The case was withdrawn from the jury and submitted to the full Court to settle the facts and the law.

F. O. J. Smith, for defendant, after arguing from the evidence what the facts were in the case, raised several objections to the maintenance of the suit, among which was this. The sale is illegal because not ordered by the directors.

It is unnecessary to cite authorities to the principle, that powers derived from, and proceedings based upon *statute provisions* exclusively, must be exactly in conformity to those provisions, or they are wholly invalid.

The fifth section of plaintiffs' charter provides, that in case a subscriber or stockholder shall neglect to pay any assessment on his shares for thirty days after notice has been given of such assessment, *the directors* may order the treasurer to sell such shares at public auction, &c.

Now the sale by the treasurer must be made upon the order of the directors. An order of sale by any other organ or committee, *acting under discretionary powers,* would not conform to the requirements of the statute. The case of *P. S. & P. R. R. Co.* v. *Graham,* 11 Met., is in point

upon this objection. The power of the directors to order a sale by the treasurer, is not a power that can be delegated. The statute contemplates the individual management and decision of the directors, not that of a substitute, to order a sale. As well might all the powers of directors be delegated as any one, and the whole theory of administration contemplated by a charter, changed. The directors have not power to order the president to sell the stock of delinquent subscribers, as the charter gives no such authority. No more have they power to order the president *and* treasurer *jointly*, to sell it. Such is not the contemplation, or authority of the charter. And where two are thus ordered to do an act, neither is competent to perform it alone. Its performance by one, is invalid. As where by a resolution of a board of bank directors, the president and cashier were empowered to borrow money for the bank, the president alone is not competent to act. *Ridgeway* v. *Farmers' Bank*, 12 Serg. & Rawle, 256. In this case, if power could be delegated to the president and treasurer *jointly*, to sell a delinquent subscriber's stock, the sale ordered and advertisement of sale should have followed the authority. It not having done so, the sale made is void.

Shepley and Dana, for plaintiffs.

TENNEY, J. — The defendant denies having become a party to the contract, on which this action is attempted to be maintained. Upon the question of fact, whether he executed the contract or not, the testimony is conflicting, and not easily reconcilable. It is further insisted by the defendant, that if he did execute the agreement, that the company have failed to take the steps necessary to furnish a basis for this suit.

We have no occasion to decide this question of fact. Upon the assumption, that the defendant did become a party to the contract, as alleged in the writ, the company cannot prevail, upon the proof adduced.

The suit is to recover the difference between the aggre-

gate amount of assessments on three shares, which it is alleged the defendant agreed to take and fill, and the sum for which those shares were sold. The right to maintain such a suit upon a valid agreement to take the shares, and pay the assessments thereon, and a legal sale of the shares, after a neglect of the owner, to pay assessments properly made and advertised, is given by the statute, incorporating the company. In order to charge the defendant, however, upon this statute liability, there must be a strict compliance with the terms of the statute. And the proof introduced by the company fails to show such compliance.

The charter of the company, special laws of 1846, c. 369, § 5, after providing for the mode in which assessments upon shares may be made, and for directions to be given for payment thereof to the treasurer, requires, that he 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 the same shall be transferred to the purchaser, and such delinquent subscriber shall be held accountable to the corporation for the balance, if his share or shares shall sell for less than the assessments due thereon, &c.

At a meeting of the directors of the company on Sept. 11, 1850, it was "voted, that the president, together with the treasurer, be a committee to adopt such measures as shall promise to be most effective for collecting the arrearages of subscriptions due, and enforce such collection by sales of stock or preliminary employment of an attorney to collect said dues, or in both ways as said committee shall think proper; and that the report of the treasurer of the list of delinquent subscribers be referred to said committee."

The treasurer testified, that in pursuance of, and claim-

ing authority from said vote of Sept. 11, 1850, and with the consent of the president, he advertised and sold at auction, in the form as prescribed by the by-laws, the three shares subscribed for by Charles S. Ritchie, on Dec. 3, 1850, and transferred them, then and there to the purchaser, J. P. Rich, who was the highest bidder for the same.

No provision is made in the charter of the company for a sale of shares, to obtain unpaid assessments thereon, excepting under an order of the directors for that purpose. The directors cannot legally delegate the power to a committee, to order such a sale. And when the order is given by a vote of the directors, it should be absolute and not in the alternative, such as is shown by the vote given to the committee.

The case furnishes no proof, that an order of the directors was given; but on the contrary, it appears by the testimony of the treasurer, that his only authority for selling the defendant's shares, was the vote of the directors of Sept. 11, 1850, referred to in the case. *Plaintiffs nonsuit.*

ELMER *versus* PENNEL.

The power of determining the validity of a patent is *exclusively* confided to the Circuit Courts of the United States.

In a suit upon a note given for the conveyance of a patent right, proof that such patent was void for being an infringement of a prior one, is not admissible, without that fact has been determined by a Court of competent jurisdiction.

Nor, in defence of such suit, can a mere hypothetical proposition, containing no issuable fact, be allowed to be proved.

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

ASSUMPSIT, upon a promissory note of four hundred dollars.

It was admitted that the note was given in payment for a bond for the conveyance of a patent right in the Leavens' Sash and Blind Machine, (so called.)

The defendant contended, that the note was without consideration, and offered to prove: —

1st. That Leavens' patent is void by reason of its being an infringement on Woodworth's patent.

2d. That if the terms of the Leavens' patent and specifications, do not include a combination of yielding pressure to prevent the substance to be planed from being drawn up towards the axis of the planing cylinder while the knives are cutting from the planed to the unplaned surface, together with rotating planes, that the patent right is of no value, and does not embrace any new and useful invention or improvement.

If the facts offered to be proved would constitute a defence to the action, and it is competent for defendant in this action to go into the proposed defence, the cause was to stand for trial; otherwise a default to be entered.

Clifford and *J. M. Adams*, for plaintiff.

1. All actions, suits, controversies and cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, are originally cognizable, as well in equity as at law, in the Circuit Courts of the U. S., or in any District Court having the powers and jurisdiction of a Circuit Court. U. S. Statutes at large, vol. 5, c. 357, § 17; 1 Curtis' Com. § § 128, 131, 139.

2. The Courts of this State have no jurisdiction over the question whether the Leavens' patent is, or is not, an infringement of the Woodworth's patent, and in the absence of power to determine that question cannot entertain the defence under the first offer of proof. Law's U. S. Courts, p. 156; *Parsons* v. *Barnard*, 7 Johns. 144.

3. The jurisdiction conferred by the Acts respecting inventions, copyrights, &c., embraces all cases without regard to the character of the parties, or the amount in controversy. Conkling's Treatise, ed. 1842, p. 64.

This jurisdiction extends to all cases at law and equity, and it seems to be the better opinion that the jurisdiction is

exclusive, the State Courts having no authority over a suit for the infringement of a patent or to declare a patent void. Law's U. S. Courts, 156; Curtis on Patents, 452; 1 Kent's Com., 382; Story's Com. on the Constitution.

Before a defence of this kind can be available, the patent must be declared void. The bond is then a sufficient consideration for the note.

Our Courts cannot do indirectly what they have no authority to do directly.

4th. The second offer of proof is not to show that the Leavens' patent is worthless, but is hypothetical in form and substance, and cannot be entertained as a direct proposition. The utmost that can be made of it, is, that defendant offers to prove, that *if* the Leavens' patent does not include a certain mechanical combination, then it does not embrace any new and useful invention, but he does not allege or offer to prove, that it does not embrace the very combination which he says it must embrace to render it valuable, and for aught appears to the contrary, it does embrace it, and, therefore, is valuable according to the theory of the offer of proof.

5th. But it would not avail the defendant to amend this offer of proof and substitute for it a positive affirmation. The matter would then belong to the Circuit Court, under the rules prescribed by the Act of Congress. U. S. Statutes at large, vol. 5, c. 357, § § 15 and 17.

6th. But the first offer of proof is not sufficiently comprehensive to constitute a defence, even if the question of infringement is cognizable by a State Court. So far as appears, the proof may be for a partial infringement only, in which case, so much as is not an infringement is good and valid. U. S. Statutes at large, vol. 5, c. 46, § 9; *Peterson* v. *Wooden*, 3 McLane's C. C. R., 248; Statute of U. S., March 3, 1837.

Shepley & Dana, for defendant, maintained, that he only wished to show that the note was given for an article of no value, that the note was without consideration. That

if this defence was not open to him, he was remediless, he could not bring an issue in the U. S. Court. His only chance was here.

But if the fact that letters patent had issued, would prevent a jury from finding it an infringement on a prior one, then it was clearly competent for the defendant to show in defence the proposal under his second proposition.

The note was given for a *right*, and there could be no objection in a State Court to showing it was of *no value.*

It was competent for the defendant to show that a consideration appearing to be valuable and sufficient, in fact, turned out to be wholly false, and a mere nullity. 1 Pars. 385.

That the consideration of the note was *the right to sell a right*, and that defendant only wished to show this right was of no value. Here is no attack upon the patent, nor to show that it was an infringement; we only propose to show it to be worthless. In doing this, no exclusive jurisdiction of the federal courts is ousted, nor any exclusive rights granted by the U. S., denied or controverted.

RICE, J. — The execution of the note in suit was admitted, but the defendant contended that it is without consideration and void, and offered to prove —

1st. That the Leavens' patent is void by reason of its being an infringement on Woodworth's patent.

2d. That if the terms of the Leavens' patent and specifications do not include a combination of yielding pressure to prevent the substance to be planed from being drawn up towards the axis of the planing cylinder, while the knives are cutting from the planed to the unplaned surface, together with rotating planes, that the patent right is of no value, and does not embrace any new and useful invention or improvement.

It is not alleged, that the patent referred to, a bond to convey an interest in which is the consideration for the note in suit, has been declared void by any Court, nor that

it has been adjudged to be an infringement upon the Woodworth patent.

Section 17 of the Act of Congress, passed July 4, 1836, provides that all actions, suits, controversies and cases arising under any law of the United States, granting or confirming to inventors, the exclusive right to their inventions, or discoveries, shall be originally cognizable, as well in equity as at law, by the Circuit Courts of the United States, or by any District Court having the powers and jurisdiction of a Circuit Court.

This jurisdiction embraces all cases both at law and in equity arising under the patent laws and the Acts to protect copyrights, without regard to the character of the parties, or the amount in controversy. Conkling's Treat. p. 65.

As the judicial power of the United States extends to all cases in law and equity, arising under the laws of the United States, and as the Acts of Congress on the subject of patent rights, has declared, that the suits for the infringement of them shall be brought in the Circuit Courts of the United States, and gives those Courts power, in such cases, to declare the patent void, the State Courts, have, of course, no jurisdiction in the matter. *Parsons* v. *Barnard*, 7 Johns. 144.

It seems to be the better opinion, that the jurisdiction (of the United States Courts) is exclusive, and that the State Courts cannot entertain a suit for the infringement of a patent, or to declare a patent void. Law's U. S. Courts, p. 156; Curtis on Patents, 452. The same doctrine is declared in 1 Curtis' Com. § § 128, 131, 139.

The case of *Dickinson* v. *Hall*, 14 Pick. 217, was decided on the ground that the patent right, for which the note in suit was given, was not useful for any beneficial purpose.

There is no law in this State giving our Courts jurisdiction over cases arising under the patent laws of the United States.

If the issue presented by the first offer of the defendant were directly before the Court, it has no authority to decide it, and it would, therefore, not be entertained. Much less could the validity of a patent be tried and determined collaterally. The patent must be deemed to be valid until it has been adjudged to be void in whole or in part by a Court competent to try that issue. The evidence offered cannot avail the defendant.

The second offer was purely hypothetical. It does not contain a proposition to prove any material issuable fact, but only a collateral theory, which theory, if proved, would constitute no defence to this action. A default must be entered.

APPLETON, J., *dissenting.*

† STATE OF MAINE *versus* ANTHOINE.

County Commissioners have no power to locate highways over creeks or arms of the sea which are navigable, and construct bridges so as to impede their use for the purposes of navigation.

And bridges, constructed over such waters by their authority, may be removed by any person impeded thereby.

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

INDICTMENT, for obstructing an highway in Cape Elizabeth, by removing a bridge.

The County Commissioners of Cumberland, under their general powers, located a highway in Cape Elizabeth over what is called a creek, and the bridge was built ten feet above its bed. At the place of the bridge, the channel was twenty-three feet in width at ordinary flood tides; but at high water mark, is nearly twenty-four rods.

The depth of water in the channel, at the bridge, at ordinary flood tides, is from five to six feet; at some spring tides, from seven to ten feet.

The defendant owned land some sixteen rods above the bridge, and adjoining the creek.

Gondolas and canal boats loaded and sail boats have occasionally, but not frequently, been floated to his land. The bridge obstructed such craft.

After the defendant had taken away the bridge, he floated his schooner, of about forty tons burden, up between the abutments and about three hundred feet above, where she lay for the winter, generally afloat at high tide.

From the bridge across the flat to the channel of Fore river, was something over one-half mile.

Some of the evidence tended to show that vessels not drawing more than eight feet, might be built on defendant's land on this creek and launched and floated to the sea.

It was agreed to submit the case to the decision of the full Court. If the creek is navigable in such a sense that the County Commissioners could not legally locate a highway across it without authority from the Legislature, and if the facts reported would constitute a good defence, a *nolle pros.* is to be entered; otherwise, the case is to be remanded and defendant to plead "guilty."

S. & D. W. Fessenden, for defendant.

1. The highway, for the obstruction of which, by pulling down a bridge, the defendant was indicted, was constructed over tide and navigable waters, and the County Commissioners had therefore no power under their general authority so to construct said road. *Commonwealth* v. *Inhabitants of Charlestown,* 1 Pick. 180; *Rowe* v. *Granite Bridge Corporation,* 21 Pick. 344; *Commonwealth* v. *Coombs,* 2 Mass. 489; *Brown* v. *Chadbourn,* 31 Maine, 9; *Inhabitants of Arundel* v. *Hugh McCulloch,* 10 Mass. 70.

2. The defendant, owning land above the bridge and near to it, might lawfully remove said bridge in order to enjoy his right to navigate the water to his own land. *Inhabitants of Arundel* v. *Hugh McCulloch,* 10 Mass. 70.

3. If the stream or inlet over which said highway, for the obstruction of which the defendant is indicted, was built, was not strictly navigable, yet being inherently, and in its nature, capable of being used for the floating of vessels,

boats, rafts or logs, it is subject to the public use as a passage-way, and could not, therefore, lawfully be obstructed by the Commissioners under their general authority. *Brown* v. *Chadbourn*, 31 Maine, 9.

Abbott, Att'y. Gen. for the State.

APPLETON, J. — The bridge, for the removal of which the defendant was indicted, is part of a highway located by the County Commissioners over a creek navigable by canal boats and gondolas. The removal was made for the purpose of enabling the defendant to float down a small schooner which lay above.

The road in question was duly laid out, if the County Commissioners had jurisdiction. The question submitted for our determination is, whether they have authority to lay out roads and construct bridges over creeks or arms of the sea, where canal boats, gondolas and other small craft have been accustomed to be floated and where they may float.

In *Com.* v. *Charlestown*, 1 Pick. 180, the defendants were indicted for not repairing two bridges over Miller's river. When the lesser bridge was erected, the depth of water and its use for purposes of navigation was not materially different from that shown in the present case. The road was conceded to have been laid out in due form. The defence, which was sustained, rested on the ground that an inlet of the sea, which is navigable to any useful purpose, is public property; and that an order of the Court of Sessions for laying out a road across such inlet, was void; and that the inhabitants of the town in which the bridge was built were not bound to repair the same. "There can be no doubt, therefore," remarks PARKER, C. J., in his elaborate opinion in the case just cited, "that by the principles of the common law, as well as by the immemorial usage of this government, all navigable waters are public property for the use of all the citizens; and that there must be some act of the sovereign power direct or derivative, to authorize any interruption of them. The Legislature may, without doubt, delegate to the

magistrates of a county, or to any other body, the power of determining when public convenience requires that a bridge should be thrown over a creek or a cove, but until they have made such delegation in express terms, it is a branch of the sovereign power, to be exercised by the Legislature alone." It has accordingly repeatedly been held that the Court of Sessions had not power to lay out such a way over a navigable river, so that the river might be obstructed by the bridge. *Com.* v. *Coombs*, 2 Mass. 489; *Arundel* v. *McCulloch*, 10 Mass. 70. In *Henshaw* v. *Hunting*, 1 Gray, 203, MERRICK, J., says, that "navigable waters cannot lawfully be obstructed by highways, whether laid out by towns or by County Commissioners, without previous permission given by the government." No statute has been cited to show, nor are we aware, that an authority has been granted in this State to the County Commissioners to lay out roads over creeks or arms of the sea which are navigable, or to impede their use for the purposes of navigation by the erection of bridges.

In *Arundel* v. *McCulloch*, 10 Mass., it was held, that as the Court of Sessions had no authority to locate a road across a navigable river, a bridge erected in pursuance of such location, was an obstruction, which any citizen having occasion to use the river for the passage of his vessel, might lawfully remove.

In accordance with the agreement of the parties, a *nol. pros.* is to be entered.

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† STATE OF MAINE *versus* HOMER.

An indictment alleging that defendant, on a day certain and divers other days, &c., at &c., "kept a certain house of ill fame, then and there resorted to for the purpose of prostitution and lewdness, by the consent and with the knowledge of the said defendant," contains a sufficient description of the statute offence, on which judgment may be rendered.

Whether a plea in abatement for a misnomer, setting forth only the omission of the initial letter of the middle name, is sufficient? *quere.*

State *v.* Homer.

Upon an issue, whether the defendant is as well known by the *name* in the indictment as by *another*, a former indictment against her by the same name, to which she pleaded not guilty, is competent evidence for the consideration of the jury.

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

INDICTMENT.

It was alleged "that Mary Homer, in Portland, in the County of Cumberland, widow, on the first day of January, in the year of our Lord one thousand eight hundred and fifty-five, at Portland, in said County of Cumberland, and on divers other days and times between that day and the day of the finding of this bill, with force and arms at Portland, aforesaid, in the county aforesaid, did keep a certain house of ill fame, then and there resorted to for the purpose of prostitution and lewdness, by the consent and with the knowledge of said Mary Homer, against the peace of the State, and contrary to the form of the statute in such case made and provided."

The respondent pleaded that her true name was Mary Y. Homer, and not Mary Homer, by which latter name she was indicted.

Issue was joined on this plea, and evidence submitted thereon.

The government offered the records of an indictment against the defendant, of the Court of Common Pleas for Cumberland County for 1834, wherein she was called Mary Homer, and to which she pleaded not guilty, and on which she was convicted and sentenced.

To this evidence the defendant objected, but it was admitted only in reference to the name.

The jury found, that defendant was as well known by the name of Mary Homer as Mary Y. Homer, and was called and known by one name as the other.

After this verdict the defendant moved in arrest of judgment, because of the insufficiency of the indictment.

1st. Because it did not allege, that any person for crimi-

nal purposes ever entered said house with the knowledge or consent of defendant.

2d. Or that defendant occupied or used said house for fornication, or that any lewd acts took place therein.

3d. Or that defendant entertained the company mentioned in the indictment.

4th. Or that defendant kept a disorderly house, or in any manner detrimental to public morality.

5th. Or that she kept it for profit or lucre, or expected any therefrom.

6th. Or in what street or neighborhood said house was situated, or that it was inhabited by any one.

7th. Or that defendant owned, leased or occupied said house, or that she furnished lodgings or entertainment for any evil disposed persons by day or night.

8th. Or that any person resorted thereto for prostitution or lewdness, with knowledge of defendant.

9th. Or that the times, places and practices constituting the offence, were set forth so that defendant might meet the specific charges alleged against her.

10th. Because the verdict does not find the true christian name of defendant.

11th. Because, after verdict on the question of misnomer, the Court overruled the motion of defendant for a trial on the merits.

This motion was overruled, and defendant excepted.

O'Donnel, in support of the exceptions, contended that the record was improperly admitted, for in that indictment no question was raised as to a misnomer, and the plea was not guilty, which could not be taken as an admission that her name was right. *Bradley* v. *Bradley,* 2 Fairf. 367; 1 Greenl. Ev. § 527.

He also contended, that the reasons for arrest were valid. The allegation was general of "keeping a house of ill fame." There should be a statement of facts which constitute the offence. 1 Chitty's Cr. Law, 138; 1 D. & E., 63; 2 D. & E., 591.

That the purpose of an indictment is to allege and set forth the facts which make the crime. *Commonwealth* v. *Moore*, 6 Met. 244.

It was so in the offence of abortion. *Commonwealth* v. *Bangs*, 6 Mass. 386. So also in gaming, keeping disorderly houses, making lotteries, adulterating food or liquors, adultery, fornication, &c., the indictment must allege all the facts constituting such offences. *State* v. *McGrath*, 31 Maine, 469. So also in conspiracy. *State* v. *Hewett & al.*, 31 Maine, 396.

The established form of an indictment for keeping a house of ill fame, required an averment that defendant, for the sake of lucre and gain, men and women, by night and by day, did unlawfully and wickedly, receive and entertain, and that in the defendant's house the offence of fornication was committed and perpetrated to the great damage and common nuisance of the neighborhood, and against good morals and good manners. Davis' Cr. Precedents of Indictments, Mass. p. 198; *Commonwealth* v. *Stewart*, 1 S. & R., 342; Chitty's Cr. Law, vol. 2d., p. 15; 6 Dane's Abr. c. 190, art. 11; *Jennings, in error*, v. *The Commonwealth*, 17 Pick. 80.

Every indictment must charge the crime with such certainty and precision, that it may be understood by every one, alleging all the requisites that constitute the offence, &c. 1 Chitty's Cr. Law, p. 141–2.

There was not only no averment, that any offence was committed in the house of the defendant, but the indictment did not allege that she occupied the house at all. *Commonwealth* v. *Dean*, 1 Pick. 388.

Neither did the indictment allege where the house is situated. 1 Russell on Crimes, 325.

Abbott, Att'y Gen., for the State.

APPLETON, J. — The defendant was indicted for keeping a house of ill fame. The allegations in the indictment are clearly sufficient. They show the commission of an offence

prohibited by R. S., c. 160, § 15; *State* v. *Stevens,* (not yet reported); *Commonwealth* v. *Ashley,* 2 Gray, 356.

The defendant pleaded in abatement, that her name was Mary Y. Homer and not Mary Homer. If the letter Y is to be regarded merely as the initial letter of the middle name, it may well be questioned whether the plea is sufficient. The name of which, that is the initial letter, should have been set forth in the plea as in *Commonwealth* v. *Perkins,* 1 Pick. 388.

Upon the issue raised by the plea in abatement, much evidence was offered. Among other proof adduced, it appeared, that the defendant having been previously indicted by the name of Mary Homer, to that indictment pleaded not guilty. It is true, she was under no obligation, if indicted by a wrong name, to plead the misnomer in abatement. But the fact, that to an indictment by a particular name, she upon her arraignment answered thereto, and pleaded not guilty, was proper for the consideration of the jury.

Motion and exceptions overruled.

SMITH *versus* ABBOTT *& als.*

A person, against whom judgments have been obtained, can maintain no action of trespass on the case against the parties who obtained them, the attorney who prosecuted and the officer who served the writ, for fraudulently conspiring together to injure and defraud him in those proceedings, while the judgments remain unreversed.

Judgments cannot be reëxamined in this collateral way.

A declaration setting forth *no legal cause of action* should be taken advantage of by *demurrer.*

But when other pleadings are filed *to such defective declaration,* and upon its being read, a nonsuit is ordered, the plaintiff not being injured by the order, the nonsuit must stand.

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

TRESPASS ON THE CASE, against Peter S. Ellis, Ephraim Woodman, Oliver O. Woodman, John S. Abbott and Robert A. Bird.

The writ alleged in substance that, on Sept. 25, 1841, the plaintiff gave his negotiable note to Benj. H. Ellis, since deceased, for $1500, payable in one year, in satisfaction of a claim of W. Weston & Co., against him, also his bond for the same sum in four months. That on Nov. 1, 1841, Weston & Co., commenced a trustee process against Benj. H., Peter S., and Joseph Ellis, and plaintiff, trustee, on a note of hand given by them to Weston & Co., for $4096,81, dated July 9, 1839; that on April 29, 1842, plaintiff purchased of Weston & Co., and had transfered and indorsed to him enough of said note to offset his note and bond, and caused the trustee suit to be discharged; that on May 5, 1842, he filed his bill in equity, praying that said Benj., Joseph and Peter S., might be restrained from disposing of the note and bond, and that the same should be surrendered up and canceled; that other persons were made parties to the bill, and among them Ephraim Woodman and Oliver O. Woodman, two of these defendants; that the said defendants in this bill in equity, conspired with J. S. Abbott, to cheat plaintiff, and prevent the set off by making false answers in said bill, said Abbott knowingly aiding them and drawing the answers for them, all of them well knowing that they were false and fraudulent upon the plaintiff, pretending a transfer for a valuable consideration of said $1500 note to said Ephraim and afterwards to Oliver O. Woodman; and that by reason of said fraudulent representation and conspiracy, the plaintiff failed to obtain said set-off or payment. And the plaintiff further averred that to execute the aforesaid fraud and conspiracy, the defendants caused a suit upon the note to be commenced against him in the name of Oliver O. Woodman, and attached his property to the value of $3000, also a suit upon the bond in the name of Benj. H. Ellis, falsely pretending that it was for the benefit of Ellis' assignees, and fraudulently and wrongfully obtained judgments in said actions, to the amount of $4000, thereby depriving plaintiff of his set-off, when, in fact, those claims were the property of said Benj., Joseph and Peter S. Ellis.

It was further averred that while the execution, in the name of Benj. H. Ellis, was in full force and in the hands of Robert A. Bird, a deputy sheriff, for collection, the said Ellis died, and on Oct. 13, 1850, for the purpose of avoiding any further proceedings thereon, the plaintiff paid to said Bird, under directions of said Abbott, $87,37.

It was further averred that said defendants, in prosecution of said conspiracy, did, by said Abbott, in Oct. 1850, cause said other execution, in the name of Oliver O. Woodman, to be placed in the hands of said Bird, for collection, with this order on the back thereof:—"Mr. Officer,—No part of the within belongs to the within named Woodman, and I am the attorney for the owners; you will, therefore, follow only my orders, and pay over only to me. Please seize defendant's stock in the Gas Co., and collect forthwith. J. S. Abbott, Att'y." And further, that he notified plaintiff, in writing, to make payment of the said executions to said Bird and to himself only; that neither Oliver O., nor Ephraim Woodman had any interest in the execution in favor of Woodman, beyond four or five hundred dollars, and the rest of the money due on both executions must fall into his hands to pay sundry debts and demands due from Ellis.

It was also averred, that said Oliver Woodman notified plaintiff not to pay this execution until certain arrangements were made, and that plaintiff, to avoid further sacrifice of his rights and property, paid Bird his fees and $100, for attorney's lien on execution, gave Bird a check on Oct. 31, 1850, for $2318,66, payable Dec. 2, 1850, duly guaranteed, as collateral security for the Woodman execution, and unless it was paid or discharged before the time it became due, Bird was to dispose of the check towards payment of the same; that plaintiff was notified by Shepley and Dana, attorneys of Ephraim and Oliver O. Woodman, to pay the check given to Bird, to R. A. Bird, personally, or to Oliver O. Woodman, personally, or to them, his attorneys, and to no other persons.

The declaration also alleged that the defendants well

knew that the estates of Benj. H. and Joseph Ellis were represented insolvent, and although the administrator caused to be inventoried, as the property of said estates, the two judgments aforesaid against the plaintiff, and returned the same, under oath, to the probate office, yet the plaintiff's claims to the amount of $5653,37 were allowed by the commissioners against said estates, instead of the balance that was due him, exceeding the judgments aforesaid; and in pursuance of said conspiracy, the administrator procured license from the Judge of Probate to sell the personal effects and credits of said estates, including the two judgments aforesaid, at public auction, and did so sell them, at one dollar each, to said Abbott; and by their fraudulent conspiracy, &c., obtained another judgment against the plaintiff, on the check aforesaid, and compelled him to pay large sums of money, all of which he was ready to verify, &c.

The defendants pleaded separately, the said Abbott, Woodmans, Ellis and Bird, the general issue, with a brief statement of their several special matters of defence to said suit. The plaintiff joined the issue, and filed counter brief statements.

Abbott and Ellis separately pleaded in bar to the action, to which plaintiff demurred, and they joined in demurrer.

On the reading of the writ and pleadings, the counsel for defendants moved for a nonsuit, which was ordered.

The plaintiff filed exceptions.

J. S. Abbott, for defendants.

Smith, pro se.

RICE, J. — The plaintiff in this case, appears to have been engaged in a series of law suits with a part of the defendants, in which several judgments, both in law and in equity, have been obtained against him. Those judgments all remain upon the records of the Courts in which they were rendered, unreversed, and their validity unimpaired. A history of the origin of this protracted litigation may be found in the case of *Smith, in equity,* v. *Ellis,* 29 Maine,

422. In that case the question of fraud was distinctly before the Court.

The plaintiff brings this suit, not only against the parties with whom he has been in litigation, who are now living, and the representatives of such as have deceased, and their principal attorney, but includes the officers by whom precepts in these cases were served, charging all in one extended count, with conspiring together, fraudulently to wrong, injure and defraud him. If the declaration were free from defects, such an action, under such circumstances, cannot be maintained. While those judgments stand unreversed, the presumption of the law is, that they were fairly obtained; and this presumption is very strong when it appears, that the ground on which this action is now sought to be maintained was fully known and presented when those former actions were tried. Those cases cannot be re-examined in this collateral way. *Dunlap* v. *Glidden*, 31 Maine, 435.

At the trial, on the reading of the plaintiff's writ, and before any evidence was offered, a nonsuit was ordered by the presiding Judge. To this order the plaintiff excepted.

The proper way to take advantage of a declaration which does not set out any legal cause of action, is by demurrer. But when a nonsuit has been ordered in such case, the Court will refuse to set it aside on the ground of convenience, it being clear that the plaintiff cannot sustain a judgment upon such defective declaration. *Boyd* v. *Brent*, 1 Tread. Const. R. 101; *Martin* v. *Mitchell & al.*, Harp. R. 455.

There being no legal cause of action exhibited by the plaintiff's declaration, he has suffered no injury by the direction of the Court, and therefore has no cause for exceptions. *Exceptions overruled.*

† YORK & CUMBERLAND RAILROAD COMPANY *versus* PRATT.

By c. 369, § 5, of special laws of 1846, delinquent subscribers or stockholders in the York & Cumberland Railroad Company were made accountable for the balance, if their shares should sell for less than the assessments due thereon, with the interest and cost of sale.

By an additional Act of June 21, 1848, the capital stock was to consist of not less than four thousand shares.

The defendant subscribed for two shares in the capital stock of the plaintiff corporation on certain conditions named therein, none of which had reference to the number of shares subscribed for, and paid three assessments thereon; afterwards more assessments were made, their payment by him refused, and the shares were sold in accordance with the charter and by-laws for a less sum than the amount assessed: — *Held*, that defendant was liable for the balance, although the minimum number of shares had not been subscribed for.

A stockholder in a corporation has no such interest as to prevent him from testifying to his official acts in such company.

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

ASSUMPSIT, to recover the balance due on two shares of the stock of the Y. & C. Railroad Company, subscribed for by defendant, after their sale at auction for alleged non-payment of assessments thereon, and the cost of sale. The general issue was pleaded.

It was in evidence that defendant appended his name for two shares, to a paper of the following tenor: —

"The subscribers hereby agree to take and fill the number of shares in the stock of the York and Cumberland Railroad Company, set against their names respectively, on the terms and conditions following, viz: —

"1st. The advance payment on each share shall be one dollar.

"2d. The shares shall not be assessed more than five dollars each, payable at one time, nor to a greater amount in all, than fifty dollars, including the advance of one dollar.

"3d. Whenever the whole amount of fifty dollars shall be assessed, and the road put in operation for the whole or any part of its distance, the holder of stock upon which the assessments shall have been paid in full, shall receive interest

at the rate of six per cent, on the sums paid on his or her share or shares, computed from the days of payment up to the time the last assessment shall become due and payable. If any stockholder shall be delinquent, after said time, interest shall be charged on his assessment from said time till payment.

4th. "Whenever the directors shall call for any assessment, every stockholder shall be at liberty to pay such sum over and above the amount actually assessed, as he or she may see fit to pay, not exceeding fifty dollars on each share, and interest shall be allowed and paid thereon, as provided in the third regulation.

"5th. If the whole number of shares subscribed for, shall exceed eight thousand, such excess shall be disposed of by reducing *pro rata* the subscriptions which are over twenty-five shares, without making fractions in the apportionment of the excess."

By the stockholders' record of July 20, 1848, it appeared that the corporation accepted of an additional Act to establish the company, excepting the second section thereof. At that meeting a code of by-laws was accepted, the thirteenth of which was as follows:—

"The president and directors may, from time to time make such equal assessments on all the shares in said corporation, as they may deem expedient and necessary for the purposes of the company; and may direct the same to be paid to the treasurer, at such time and place as they shall deem proper, governing themselves as to the amount of assessments, the allowance of interest, and in all other respects, by the terms, conditions and regulations prescribed by the persons having charge of the original subscription books for stock, before the opening of said books; and the treasurer shall give notice of the amount per share of every such assessment, and of the time and place, when and where the same will be due and payable, by advertisements, to be printed in one or more newspapers to be printed in Portland and Saco, at least thirty days before the day fixed for

payment thereof. And if any stockholder shall neglect or refuse to pay any assessment or assessments on his share or shares in said company, for the space of thirty days after the first publication of such notice, the directors may order the treasurer, after giving notice, (as hereinafter provided,) of the sale, to sell any or all such shares, by public auction, to be held in said Portland, to the highest bidder; and the same shall accordingly be transferred by the treasurer to the purchaser; who shall be entitled to receive a certificate thereof. And notice of every such sale shall be given by the treasurer, in one or more newspapers, printed in Portland, at least thirty days before the day of such sale, designating the time and place thereof, and the shares to be sold."

The officers of the company produced their books, by which it appeared that several assessments upon the shares had been made in accordance with the regulations thereof. Four of these assessments had been paid by defendant on the two shares by him subscribed for.

The balance of the assessments, to fifteen in the whole, the defendant had not paid. These assessments were duly advertised, and amounted in all to fifty dollars per share, the par value thereof.

By the directors' records of Sept. 13, 1853, the following vote was passed, and the defendant's name attached with his residence and his number of shares: —

"*Voted,* That whereas the persons named in the following list, holding the number of shares set against their names respectively, have neglected or refused to pay the assessments due thereon, the treasurer is hereby ordered, authorized and directed to sell all such shares at auction, to the highest bidder, at the office of Wm. D. Little, in the city of Portland, on Saturday the 22d day of October, A. D., 1853, at 10 o'clock, A. M., for the non-payment of the assessments due thereon."

The treasurer advertised, according to the by-laws, on Sept. 23, 1853, the sale of the following shares of the capi-

tal stock of the railroad corporation, on Oct. 22, following, for the payment of assessments due thereon, and the interest and cost of sale, which stood on the books of the company in the names of the following persons (giving the defendant's name, residence and number of shares, with other delinquents.)

At the time appointed, these shares, with others, were sold at public auction for $12 per share, and certificates given to the purchaser.

No shares were *numbered* as belonging to defendant, and none were so done until fully paid for.

Toppan Robie was called as a witness, who was a stockholder, and was admitted against the objections of defendant. He testified to certain official acts he did as treasurer of the company. He prepared the assessment book; the first payment of one dollar per share, voted by directors, was called by him the first assessment, although it was intended the advance payment named in the subscription. He gave due notice of the assessments according to the by-laws.

Upon the evidence, if the plaintiffs were entitled in law to recover, a default to be entered; otherwise, the plaintiffs to become nonsuit.

J. Pierce, for plaintiffs.

I. The defendant, by his subscription and by his subsequent admissions thereof, by payments in pursuance of it, and other participation in the business of the company, became liable as a "subscriber" to pay the plaintiffs, as alleged in the writ, fifty dollars per share upon the shares he subscribed for; and having neglected to do so, to pay to them the balance due on said shares after their sale by the plaintiffs, on account of said neglect, with costs of sale and interest, according to the law established and stated,—

1. As to the meaning of the words "take and fill," in his subscription, in the case of *Bangor Bridge Co.* v. *McMahon,* 10 Maine, 478.

2. As to the validity of the contract between him and the plaintiffs, in the cases of *Kennebec & Portland R. R.*

Co. v. *Jarvis*, 34 Maine, 360; *same* v. *Palmer*, 34 Maine, 366.

3. As to his admissions in recognition of the contract, in Greenl. on Ev., vol. 2, § 444; *South Meadow Dam Co.* v. *Gray*, 30 Maine, 547.

4. As to his said liability as such subscriber, in c. 369, § 5, of Special Laws of Maine, of the year 1846, being the Act of incorporation of said Company, approved July 30, 1846; and case of *Lexington & W. Cambridge R. R. Co.* v. *Chandler*, 13 Met. 314.

II. The witnesses were competent. Greenl. on Ev., vol. 1, § § 411, 416; *Wiggin* v. *Lowell*, 8 Met. 301; Angel & Ames on Cor., § § 653, 655, 656.

O'Donnell, for defendant.

TENNEY, J. — The Act creating the York & Cumberland Railroad Company, was passed July 30, 1846, and an additional Act was passed June 21, 1848.

In the spring of 1848, the defendant put his signature to a subscription book, on which were the names of the subscribers, in the hands of an agent of the company, authorized to obtain subscriptions for its stock, preceded by the printed charter; and also a paper containing the terms of subscription, by which he agreed "to take and fill" two shares on the terms and conditions, specified in that paper.

At a meeting of the stockholders, on July 20, 1848, the 13th by-law was adopted. And at a meeting of the stockholders holden on August 10, 1852, Dan Carpenter acted as the proxy of the defendant, as a stockholder, for two shares in the capital stock, under a written authority in his name, to appear, act and vote at such meeting. The case finds, that the defendant, as a subscriber to the capital stock in the company, paid to the agent thereof, on Dec. 16, 1848, the first, second and third assessments on two shares of the stock amounting to $10, and on March 7, 1849, the fourth assessment on two shares amounting to $4, which assessments were made by the directors on August 16,

October 5, November 8, and December 9, 1848, respectively. Other assessments, with those paid, making fifty dollars on a share in all, were made subsequently, which have not been paid by the defendant, but they have been duly advertised as having been made, and the time and place of payment duly specified in the notices published.

At a meeting of the directors, held on Sept. 13, 1853, the treasurer was ordered, authorized and directed to sell all shares at auction of persons named in the list annexed to the order, who have neglected or refused to pay the assessments due thereon; and among several other names was that of the defendant for two shares. And on the same day, said shares were advertised to be sold, by the treasurer, on Oct. 22, 1853. And the same were sold accordingly to Dan Carpenter, for sums less than the amount of the unpaid assessments.

Delinquent subscribers or stockholders are 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 costs of sale. Special Laws for 1846, c. 369, § 5.

The word "fill," in the defendant's subscription, imported a promise to pay assessments, and was sufficient for the maintenance of an action for the recovery of an unpaid balance, if on good consideration.

The contract was upon a good and sufficient consideration, and was binding upon the defendant. *Kennebec & Portland Railroad Co.* v. *Jarvis*, 34 Maine, 360; *Bangor Bridge Co. v. McMahon*, 1 Fairf. 478. And the plaintiffs are entitled in this action to the balance of the assessments after deducting the amount paid, unless some of the objections relied upon in defence, shall be found valid, which we will now consider.

The authority of Dan Carpenter to act under the defendant's proxy, at the meeting of the stockholders on Aug. 10, 1852, is full, and no specific defect is pointed out in argument. This must be treated as an admission, that he

was the holder of two shares of the capital stock, for which he had subscribed and paid assessments.

The witness Carpenter was not a stockholder at the time that he was allowed to testify for the plaintiffs, and on no principle was he incompetent.

Robie was a stockholder at the time he was admitted as a witness for the company. The testimony given by him, so far as it was in the least material, had reference only to his official acts, as treasurer of the corporation, and the evidence for that purpose was competent. 1 Greenl. Ev. § 416. Enough of contingency in the nature of the interest of the witness appeared to render him competent on other grounds. *Ib.*, note (1.)

The defendant's delay in making the advance payment of one dollar on each share, for which he subscribed, cannot relieve him, if otherwise liable. If the call for this payment was delayed by the corporation without taking advantage of his neglect, and the money was received, upon his voluntary offer, he cannot now avail himself of this objection as a defence to the present suit. And for the same reasons he cannot object effectually, that the treasurer did not give notice of the vote of the directors, that he be directed to collect one dollar per share, subscribed to the Y. & C. Railroad Co. stock, as provided in the 13th by-law.

The treasurer, who caused the defendant's two shares to be sold, stated that the same were sold to Dan Carpenter, with many others, all of which were transferred to him together, without specifying any particular two shares as belonging to him; and that the defendant's name is not entered on the stock ledger, and in the transfer book, and no shares were numbered as belonging to him. And it is insisted, that upon this ground, no valid sale of the defendant's shares were made, and consequently the basis for the maintenance of this action, for the balance of the amount of the assessments, fails.

The directors, at their meeting, Sept. 13, 1853, voted: "that whereas, the persons named in the following list,

holding the number of shares against their names respectively, have neglected, &c., the treasurer is hereby ordered, &c., to sell, &c., for the non-payment of assessments due thereon, as follows." Among several other names, is that of Charles W. Pratt, of Westbrook, two shares. The treasurer's advertisement purports to be in pursuance of the director's order, that he will sell the following shares of the capital stock, &c., for the payment of the assessments due thereon, and interest and costs of sale; which shares stand on the books of said company in the names of the following persons, to wit:—"Pratt, Charles W., of Westbrook, two shares," and other delinquents' names are on the list.

By the 13th by-law, after the order of sale by the directors, the treasurer is required to give notice of every such sale, in one or more public newspapers printed in Portland, at least thirty days before the day of such sale, designating the time and place thereof, and the shares to be sold. This by-law is silent touching the kind of designation of the shares to be sold. Any description sufficient to show clearly what shares were intended to be the subject of sale, is a compliance with the requirement in this rule. It does not appear that particular numbers had been assigned to the several stockholders, but it is manifest that the defendant had subscribed for two shares, had paid assessments thereon, and was recognized by the company as holding two shares of the capital stock, and was really the owner of the same, and subject to all the liabilities of a stockholder, under the contract to which he was a party, at the time of the sale.

The treasurer's notice of sale does not state the amount due on the assessments, upon any share, and hence it is urged, that the defendant had no opportunity of ascertaining the balance due, in order that he might make payment and prevent the sale. The treasurer was required by the 13th by-law to give notice of the amount per share of every such assessment, and of the time and place, when and where the same may be due and payable. It is admitted that this

was done, thereby giving the defendant the means of knowing with entire certainty the balance remaining unpaid.

It is again objected, to the validity of the sale, that it does not appear in the vote of the directors on Sept. 13, 1853, that any stockholder's share was advertised to be sold, but only the shares named in the following list. This objection fails upon the facts of the case. The treasurer's notice is, that the following shares of the *capital stock*, &c., will be sold for the payment of assessments due thereon, which shares stand on the books of the company, in the names of the following persons. If the defendant was represented to hold two shares of the capital stock, it is not difficult to perceive, that the notice treated him as a stockholder.

The person who obtained the defendant's subscription was the authorized agent of the company, which became a party to the contract, that has been ratified by the acts, making assessments, receiving payments thereof, making sale of the shares for the non-payment of other assessments, and the institution and prosecution of this suit.

There is no affirmative proof in the case that any particular number of shares were taken up before the final assessment of March 11, 1850, and hence it is insisted, that the assessments were unauthorized; and a distinction between the case at bar, and that of *K. & P. R. R. Co.* v. *Jarvis*, cited for the plaintiffs, is contended for.

In the case cited, the charter did not determine the number of shares, into which the capital stock should be divided. But by a by-law the stock was to consist of 12000 shares of $100, each, to be increased from time to time, as the directors should determine, and the Legislature should authorize, not to exceed 20,000 shares; and the by-laws authorized the directors from time to time to make such reasonable assessments on all the shares as they may deem necessary. The Court, in their opinion, holding the defendant in that case liable, say,— The contract in this case could not have had reference to any certain number of

shares, or certain amount of capital as fixed by the charter, and there is no language used in the contract prescribing the number of shares or the amount of the capital. The promise is not, to pay "all legal assessments." It is to pay for the shares as he should be required by a vote of the company, without any reference to assessments or payments to be made on other shares.

In the case before us, although by the additional Act of June 21, 1848, the capital stock was not to be less than 4000 shares, the precise number was not fixed in any mode by the company. By the contract, the defendant was bound to take and pay the assessments on two shares, on certain conditions, none of which required that the least number of shares, made necessary by the charter as the capital stock, had been taken. And the second condition of the contract is, that no shares shall be assessed more than $5 each, payable at one time, nor to a greater amount in all than $50. The liability was not predicated upon any implied condition, that the number of shares taken should be 4000. The cost of construction was necessarily uncertain, and if the shares are limited to 4000, and the amount of $50 on each should be paid, and expended without the completion of the road, the object of the charter would so far fail, unless the number of shares under contracts like the defendants should be increased.

Upon a proper construction of the contract, the principle of the case of *Kennebec & Portland Railroad Co.* v. *Jarvis*, is applicable, and the defendant is liable, notwithstanding 4000 shares have not been subscribed for.

Defendant defaulted.

PATTEN *& al. versus* HOOD.

The defendant agreed to purchase a cargo of southern pine lumber at a certain price per M., and *pay the freight;* when it was delivered, he refused to pay the freight, and the plaintiffs told him that if he took it he should pay $40, a thousand, unless he paid the freight: —

Held, that defendant, by his refusal, repudiated the contract, and by keeping the lumber was chargeable for it at the price fixed by plaintiffs.

But *such demand* would not carry *interest* from the time it was made; *that* could only be cast from the date of the writ.

This was an action of ASSUMPSIT, on an account annexed, as follows: —

1854, May 22,	To 136,201 feet re-sawed Southern pine lumber, at $40, per M., (for new ship)	$5448,04
	Survey at ,25	34,05
	Interest to Sept. 6, 1854,	95,97
		$5578,06

The writ was dated Sept. 9, 1854.

On the trial, the jury returned a verdict for the sum of $5717,40.

The plaintiffs filed a *remittitur* of $43,00.

Defendant moved to set aside the verdict as against evidence and the weight of evidence.

All the evidence bearing upon the case is set forth in the opinion of the Court, drawn up by

RICE, J. — Motion for a new trial on the ground that the verdict is against evidence.

It appears from the evidence reported, that the parties, anterior to the arrival of the lumber for which the action is brought, had a conversation in which the plaintiffs proposed to furnish the defendant, with a cargo of hard pine lumber for ship building. The price named in the presence of the witness was sixteen dollars per thousand, and freight. The same witness, on cross-examination testified, that the defendant said the price was to be sixteen and nineteen dollars per thousand, and freight. There is no evidence,

that this negotiation was ever reduced to the form of a written contract, nor does it distinctly appear what was the verbal understanding between the parties as to the price to be paid for the lumber. It is manifest, that whatever the price may have been, the defendant was to pay the freight from Savannah.

After the arrival and delivery of the lumber, application was made to the defendant to pay the freight thereon. This he refused to do. Negotiation upon this point terminated by the plaintiffs informing the defendant, "that if he took any of that lumber he must take the whole, and pay forty dollars a thousand for it, unless he paid the freight," and a final refusal on the part of the defendant to pay the freight.

If, from the evidence in the case, it can be inferred, that a contract existed between the parties, as to the price of the lumber, it is also manifest, that a part of that contract was, that the defendant should pay the freight thereon. When the lumber had been delivered the freight was earned, and was then due and payable. This was all that was then demanded of the defendant. He did not contest the correctness of the amount claimed. It was his duty to have paid it. By refusing to do so, he repudiated the contract, if any existed, and made himself chargeable with the value of the lumber received by him. If he had paid that demand, and thus performed his part of the contract, he would have been in a position to have contested the price of the lumber in case the plaintiffs claimed more than they were authorized to receive by the terms of the contract. By refusing to pay freight, he waived that right.

After having been notified by the plaintiffs, that unless he paid the freight, he must pay forty dollars a thousand for the lumber and take the whole, if he took any, and in view of this admonition, having received and used the lumber, he may fairly be deemed to have elected to take it at that price; at all events, he is not in a position to controvert the reasonableness of that charge.

There does not appear to have been any demand of pay-

ment for the lumber before the date of the writ. The demand for the payment of freight, having reference to the existence of a contract, which was repudiated, was not a demand of payment for the lumber without reference to the contract. The plaintiffs are, therefore, not entitled to interest before the date of their writ. Nor do we perceive any ground on which they are entitled to recover the item charged for the survey.

The result is, that the plaintiffs are justly entitled to recover for the amount of lumber delivered, at the rate of forty dollars per thousand, with interest thereon from the date of their writ, and may have judgment for that sum if they elect to remit any excess which is found in the verdict of the jury; if not, the verdict must be set aside and a new trial granted.

Rand, for defendant.

Shepley & Dana, for plaintiffs.

HULL, *in Equity, versus* NOBLE *& al.*

An agreement in writing to sell certain tracts of land, signed by each party thereto, *remaining in the hands of the vendor*, with a further agreement by him to *deliver* to the other a *duplicate*, on payment of a certain sum at a time fixed, is, on payment thereof according to the terms, in equity, valid, and on fulfillment of its conditions by the vendee, or an offer so to do, specific performance may be required.

After the payment is made to entitle the party to a *duplicate*, no demand of it is essential to vindicate his rights under it.

It is a reasonable excuse for not fulfilling the conditions of a sale of real estate, as to the *time* of payment, by the party seeking a specific performance, that the agreement was withheld from him by the other party, after he was entitled to its possession.

Of the notice of claims to real estate which will affect a *purchaser*.

BILL IN EQUITY, for the specific performance of a contract.

The bill set forth the following contract, signed by Noble, one of the defendants. —

"Boston, May 20, 1851.

"Upon the following conditions, I will sell Mr. Robert Hull, of Portland, by deed of quitclaim, all my right, title and interest in and to the following lots of land, as laid down on the plan of land or lots in Portland, west of Brackett's estate, recorded Cumberland Registry, Feb. 18, 1836, in the Plan Book No. 1, No. 10, in said book. The lots numbered on said plan 7, 8, 9, 10, 11, 12, 25, 26, 27, 28, 29, 30, also the lot 60 feet by 286, or thereabouts, being on Vaughan and X St. The same I purchased of Pain's estate, and two undivided thirds of the lots of land marked 35 and 37, being about 86 feet each by 200 feet, also two undivided third parts of four lots, about 20 feet, more or less, by 100, being southerly of, and adjoining lots Nos. 9, 10, 27, and 28, and lot No. 67, adjoining T. and W. streets 60 by 100 feet, his paying me for said land two thousand dollars, five hundred dollars in nine months, with interest from this date, and the taxes on said land within the ninety days, and pay the taxes yearly, hereafter, and the balance, being fifteen hundred dollars, in three years with interest, payable annually, to be secured by notes and mortgage of the premises. Now if the five hundred and interest is paid me on the 20th day of Feb., A. D. 1852, and he gives me the notes secured by a mortgage for $1500, payable in three years with interest, payable yearly, as the same fall due on or before said day; and if the said Hull shall well and truly perform, on his part, this agreement, and make the payments therein stipulated, to be made at the time and in the manner stated, I will give him the deed of quitclaim, as above provided for. Now upon the failure of said Hull to perform any part of the above agreement, or make the payments as provided for, then this obligation shall be void, and of no effect as against said Noble."

It was also alleged that the above agreement was signed by the orator, and remained in the keeping and possession of Noble, the orator having no copy of the same. But on

the same day, Noble delivered to him a writing, signed by himself, running thus: —

"If Robert Hull pays me forty-three dollars and thirty-three cents, with interest, within thirty days from this date, I will give him a duplicate bond of sundry lots of land, signed by him and me, this day."

The bill further alleges, that on June 14, 1851, the orator paid, at the counting room of Noble, to one Hall, his partner or clerk, the sum of $43,50, Noble being then absent from Boston, who gave a receipt therefor in his name, and which afterwards was paid by him to said Noble; and then and there demanded the duplicate bond or agreement referred to in this last agreement, but could not obtain the same; and that he frequently applied for it afterwards and stated his willingness and readiness to fulfill the same on his part, but said Noble neglected and refused to deliver it, and after the expiration of nine months from the date of said instrument, the said Noble claimed and pretended that this complainant had lost all rights under the same, because he had not made the first payment according to the terms of said agreement, although he was ready so to do, and was prevented solely by the acts of said Noble in wrongfully withholding it; and that it was not until June 30, 1852, that he was enabled to see or read said instrument, or to become acquainted with the terms or dates of the payments provided for therein, at which time he called on said Noble and informed him he was ready to fulfill said agreement, and pay all that was required by the terms thereof, but said Noble refused to receive any payment, and insisted the same was cancelled and of no effect, and that this orator had no rights under the same; but the said Noble then, for the first time, offered him a copy of said agreement, which he called a duplicate, which he refused to accept, because said Noble declared the same was void, fearing that it might be construed into an admission that the statements made by said Noble were true.

It was further alleged, that after consulting counsel, the

plaintiff concluded to receive said paper, but could not find Noble, and then requested his counsel to apply to the counsel of Noble for it, and that they obtained it on July 24, 1852. That on July 30, of that year, he tendered to the counsel of said Noble $500, with the interest thereon, together with his note for $1500, with a mortgage on the land described in said agreement to secure its payment, and requested the counsel to notify said Noble. That on Aug. 2, of that year, he dispatched a person with the money, note and mortgage to Boston to make the tender to said Noble in person, but he was absent at Philadelphia, and was unable to make the tender. That on Sept. 10, 1852, thinking Noble would be at home, he sent again, but was unable to find him, and then such tender was made at his counting room.

The bill also set forth that plaintiff, at divers times, on account of said land, had paid said Noble large sums of money, and the taxes assessed on the same for many years past, and expended large sums in fencing and improving the same.

The bill also alleged, that said Noble, not regarding his said agreements, has refused, though thereto requested, and still refuses to convey said premises according to the terms of said agreement, but confederating with John B. Brown, the other defendant, has conveyed, or agreed to convey to said Brown, or entered into some written agreement with said Brown respecting the same, of the precise nature of which this complainant is not advised, and that when he entered into said agreement, or took the conveyance from said Noble, was well aware of the rights of plaintiff in the premises, and well knew he was in the open and peaceable possession of the same, that said Brown claims the occupation and possession of said premises, and some title thereto, of the precise nature of which the complainant is not advised.

The bill prayed for relief, for full answers under oath, and for a conveyance, &c.

The defendant Brown, in his answer stated, that long before the making of this bill, he bargained with Noble for certain lots of land in Portland, among which were lots numbered 7, 8, 9, 10, 11, 12, 25, 26, 27, 28, 29 and 30, mentioned in the bill, and in pursuance of said agreement, on April 30, 1852, Noble conveyed the same to him, and he entered upon and took possession thereof under his deed, which he made a part of his answer. He also denied any combination or confederacy with said Noble to deprive plaintiff of the benefit of his agreement, but was informed by said Noble, and he verily believed that the plaintiff had not any right to said lots or any interest in them. That although Noble did offer to show him certain old agreements and correspondence between Noble and plaintiff, he did not read the same, being told they were of no value or consequence; that he knew nothing of his own knowledge about any of the doings and negotiations in regard to said lots, between said Hull and Noble, nor believed the allegations in the bill to be true.

In the deed annexed to his answer, the consideration was inserted as $12000, but it was merely a quitclaim, without any covenant against persons claiming under the grantor.

Noble, in his answer, alleged that the land described was formerly owned by himself and two other persons, which in 1835, they sold to plaintiff at auction, on which the first payment was made, and he mortgaged the same to the grantor to secure the purchase money. This mortgage was foreclosed, and the estate forfeited. He purchased out his partners, and that all the money paid by plaintiff was paid prior to the foreclosure of that mortgage. That he then made a new contract with said Hull on June 10, 1849, which he failed to fulfill, and applied to respondent for an extension of it. And this respondent, although he believed the complainant would still be unable to make the stipulated payments, yielded to his urgent request, and made the agreement described in the bill, at the same time stating to him, that unless he punctually complied with the terms, he

should have no further accommodation. To this agreement was annexed the following, signed by plaintiff:—

"For a valuable consideration, I hereby agree to purchase the premises as within described, and make the payments as herein provided for, and give the notes and mortgage, and perform all the obligations as set forth in the paper signed by Joseph Noble above for me to perform."

He admitted the payment of $43,33, and averred his readiness and willingness to make and deliver a duplicate of said agreement, whenever said complainant should call upon him for the same at Boston, his place of residence and business, and where the original agreement was made, or should send for the same. And he denied, that plaintiff frequently, within nine months from May 20, 1851, at any place, applied to him in any way for a duplicate, or stated his readiness and willingness to perform his part thereof, or that he ever refused to make and deliver the same.

That he did not see or hear from plaintiff within nine months from May 20, 1851, except once, when about Nov. 1, 1851, he accidentally met him in Portland, and plaintiff asked him if he had the bond with him, when he made answer, that he had not, but that it was ready for him in Boston. That plaintiff did not then state his readiness to perform his part of the agreement, but on the contrary, always declared his inability, and at no time did he make any inquiry as to its terms, or at any time within the nine months aforesaid, pretend that he did not know the terms thereof.

The defendant Noble, further averred, that in June, 1852, at Portland, the plaintiff stated to him, that he had not been able before and could not then raise the amount required to make the cash payment named in said agreement; and then offered to pay $300, if he would wait eight months for the balance, which he refused, as he had before that sold and conveyed said lands to J. B. Brown. Whereupon the complainant, after said refusal of this defendant, for the first time, said he was ready to perform the conditions and stipu-

lations of said agreements, but made no tender of money, notes or mortgage, but afterwards, during the same interview, stated his inability, and requested an extension, which was refused.

The tenders mentioned in the bill were admitted for any thing known to the contrary. He also denied that any thing had been paid for said land under the last agreement or any prior agreement subsequent to the mortgage of 1835. That under the agreements and deed aforesaid, and notwithstanding plaintiff's repeated failures to comply with their terms, he had been permitted to occupy the premises and receive the rents and profits thereof, from the date of his deed, in 1835, to the time of said conveyance to Brown, without any account. And that after the time for making the payment and performing the other conditions of the agreement of May 20, 1851, by the complainant, had expired, and the complainant had wholly failed to comply with the same, this defendant, desirous of disposing of his land, received proposals from Brown, and conveyed to him these premises with sundry other lots. That he stated to Brown he had been advised by counsel, and verily believed that complainant had no interest in said lands, and no claim for a deed, &c.

The complainant introduced depositions tending to show that, in October or November, 1851, he demanded the duplicate bond of Noble, and offered to pay any thing due; and that about the first of October, of the same year, Noble was called upon, by one Furlong, to see if he would sell a couple of those lots, and that he said he could not, they were plaintiff's, if he paid the balance, but if he did not pay it, the land would belong to him, and he had promised it to J. B. Brown, and he should sell it to Brown, if to any one, and had agreed if he held the land, to deed it to him.

Shepley & Dana, for plaintiff.

By the payment of $43,33 to defendant Noble, the plaintiff had a right to the possession of a duplicate bond, and it became an operative, executed and delivered instrument, in force against both parties, and he had a right to a convey-

ance of the land upon the subsequent performance by him of the terms of the bond. This bond was, in Oct. or Nov., following, demanded, and according to the evidence, refused. Noble was then in default, and so remained until his power of performance was divested by his own act.

The complainant did not offer the payments at the exact time. He has a legal excuse, he did not know when the payment was to be made, and if he had known, he could withhold until defendant performed his duty.

In Oct. 1851, Noble was conspiring with Brown to work a forfeiture. Hull owed nothing then, nor would he until the February following. After the time had expired, he received, by his agent, money towards these premises.

Brown is chargeable with notice. He bargained in Nov., 1851, and was to have the property in case Hull did not pay. His deed is dated in the following April. It shows on its face that he knew Hull's rights, and that Noble knew he had rights. No covenants of any kind, and still a consideration of $12,000. This was not recorded till June 22, of the year following, after this bill was commenced. The answers of Brown and Noble admit sufficient knowledge to charge Brown with notice. If he did not read the papers, he had notice enough to put him on inquiry.

As to what amounts to notice, we cite *Carr* v. *Hilton*, 1 Curtis, 390, and to the effect of it. 2 Story's Eq. § 784.

Here the time of performance was not of the essence of the contract, and specific performance in such cases will be decreed. *Jones* v. *Robbins*, 29 Maine, 351. If it was, then we show the failure owing to the fault of the other party. *Rogers* v. *Saunders*, 16 Maine, 92. We might rely also upon a waiver of strict performance. *Longworth* v. *Taylor*, 14 Peters, 172; White & Tudor's Leading Cases in Equity, vol. 2, part 2, pp. 26, 29, 30, 33 and 36.

Rand, for defendant, Noble, contended that the agreement of May 20, 1851, was a conditional one, based upon conditions precedent, which were not complied with, or pre-

vented by Noble. Plaintiff was notified that no extension would be given.

That it was well settled that equity will not ordinarily relieve against the breach of a condition precedent.

That the agreement and the memorandum for a copy, were entirely independent matters, the neglect to furnish the duplicate was no excuse for non-compliance with the conditions; that it was not even alleged that plaintiff did not know the terms of the agreement.

That in the interview, in Nov. 1851, plaintiff admitted his inability, and did not pretend ignorance of the terms, and so also in June, 1852, when he offered $300, and wished an extension for the balance, which was refused; at the same time after this, admitted his inability; but this was the interview, when, according to a witness, plaintiff said he was ready to perform.

That under this agreement, not a cent had been paid towards the land; the sums paid, were merely for rent.

That plaintiff had never performed the stipulation as to taxes, and never offered to do so; and that the answer is to be taken as true, no attempt being made to disprove it.

W. P. Fessenden, for Brown, the other defendant.

TENNEY, J. — The complainant seeks a decree for specific performance of an agreement in writing, executed by him and the defendant Noble, on May 20, 1851. By that agreement, Noble contracted to give to the complainant a quitclaim deed of all his right, title and interest in and to certain lots of land, particularly described in the agreement, on the condition, that the complainant should pay therefor the sum of $2000; $500, of which was to be paid in nine months with interest from the date of the contract; the taxes upon the land within ninety days, and the taxes afterwards assessed, to be paid yearly, and the balance, being the sum of $1500, to be secured by notes and a mortgage of the land described in the contract, in three years, with interest, payable annually. Upon failure of the complainant to per-

form any part of the agreement, or make the payments as provided for, the obligation was to be void and of no effect against the defendant Noble. On the same 20th day of May, 1851, Noble delivered to the complainant a written agreement in the words and figures following,—"If Robert Hull pays me forty-three dollars and thirty-three cents with interest, within thirty days from this date, I will give him a duplicate bond for sundry lots of land, signed by him and me this day. Joseph Noble."

"Boston, May 20, 1851."

And the complainant alleges in his bill, that on June 14, 1851, he paid at Boston, in the counting room of said Noble, to one F. A. Hall, the partner or clerk of said Noble, the sum of $43,50, being the amount to be paid, with interest, Noble being absent at Philadelphia, as he was at the time informed and believed. And the complainant alleges, that he then and there demanded the duplicate bond or agreement, but could not obtain the same.

Noble admits in his answer, that the contract for the sale of the land, was not delivered to the complainant on the day of the execution of the agreement, for the reason, that the complainant had agreed to give him as a bonus or consideration therefor, the sum of $169, and not being prepared to pay the whole sum, the complainant gave to him, as a part thereof, a note dated May 12, 1851, for the sum of $56,70, signed by J. M. Kinsley, and indorsed by the complainant, and gave the written agreement of May 20, 1851, which has just been copied herein, and he admits that the sum of $43,33, and interest, was paid by the complainant, as alleged in his bill; and that the note signed by Kinsley and indorsed by the complainant was paid by the latter. And it is proved by other evidence, that the indorser being called upon, paid the note on April 23, 1852, and the money was received by the defendant Noble.

It is also admitted in the answer, that in November, 1851, on a meeting of the complainant with Noble in Portland, the latter inquired of the former, if he had the bond with

him, and Noble replied that he had not, but that it was ready for him in Boston.

It is averred in the bill, that June 30, 1852, was the first time, after the execution of the contract, that the complainant had opportunity to see or read the agreement of May 20, 1851, or to become acquainted with its terms or the dates of the payments provided for therein; at which time Noble insisted, that the same was cancelled and of no effect, and denied that the complainant had any rights under the same, and declared that he would receive no payments on account thereof, but at the same time offered to him what he supposed was a copy of the agreement, but the complainant refused to accept the same, because, not having the advice of counsel, he apprehended the acceptance of the paper offered, might be regarded as an admission on his part, that the agreement was then of no effect.

Noble admits, that at the time referred to, in June, 1852, he refused to grant any extension of time under said agreement, as he was requested to do by the complainant, as he had before that sold and conveyed the lands described in the agreement to John B. Brown, and thereupon the complainant said he was ready to perform the conditions and stipulations of said agreement, but made no tender of notes, money or mortgage, and complained that he had not received a duplicate of the agreement, and threatened to bring a bill in equity against the defendant Noble, to compel a performance of the contract on his part. And immediately Noble offered to deliver a duplicate of the agreement, but the acceptance was refused.

Noble further admits, that on Sept. 17, 1852, the complainant, by one Woodbury, made a tender to him in Boston of the sum of $540, in gold, together with a note signed by himself for the sum of $1500, dated July 30, 1852, payable in three years from May 20, 1851, with interest, payable semi-annually, with a mortgage of said land described in the agreement, as security for said note, which defendant Noble declined to receive, or give a deed of said lands; and he be-

lieves that on Sept. 10, 1852, the complainant made a similar tender to F. A. Hall, the partner of the defendant in the coal and commission business in Boston; and that, on July 13, 1852, he made a like tender to William Willis, in Portland; and the defendant avers that neither Hall nor Willis had any authority to act for him in the premises; and that the complainant was informed and well knew that before making these offers or tenders, this defendant had declined to make any conveyance of said land to him, for the reasons set forth in his answer, which have been referred to. And that being desirous of disposing of all lands described in the agreement, he received proposals from John B. Brown, the other defendant, for the purchase of them and other lands, and by deed, dated April 30, 1852, he conveyed to said Brown all his title in and to the lands described in said agreement of May 20, 1851. And at the time of the negotiation with Brown, and ever after, he stated to him that he had been advised and verily believed that the complainant had no interest in the lands, and no claims whatever upon Noble, either in law or equity, but had wholly lost all interest in, and all right to the same.

Brown, the other defendant, answers, that long before the making and filing of the complainant's bill, he had bargained with Noble for the purchase and conveyance of the lots described in the bill, and in pursuance of the agreement between him and Noble, on the 20th day of April, 1852, Noble executed and delivered to him a deed embracing said lots, of which the defendant Brown took possession under the deed, which makes a part of his answer, and he denies having combined or confederated with Noble, to deprive the complainant of the benefit of his alleged agreement with Noble, in relation to said lots of land. But on the contrary he states in his answer, that prior to making said purchase, he was informed by the defendant Noble, that the complainant had no right, title or interest in said lots of land, in law or in equity, and that Noble offered to show him certain old agreements and correspondence between him and this com-

plainant, and that he did not read the same, being told they were of no value or consequence.

The deed from Noble to Brown is a release of the grantor's right, title and interest, in the land described in the agreement, with other lands, for the consideration of $12000, with no covenants of any description.

Uriah H. Furlong deposes, that about Oct. 1, 1851, he inquired of the defendant Noble, if he owned the land, which the complainant formerly owned in Vaughan street; he answered that he did not; but had a claim on it. Upon being asked for what sum he would sell two of the lots referred to, said he could not sell them; if the complainant paid, it would fall to him; if he did not pay, the land would belong to him, and he had promised it to Mr. Brown; that Mr. Brown had the refusal of Mr. Gerrish's land, and had come to him to get the refusal of his; said he should sell it to Mr. Brown, if he sold it to any one; that he had agreed, if he held the land, to deed it to him.

The bill contains allegations which are denied in the answers, and are not supported by the requisite proof.

Allegations are also made in the answers, not responsive to the bill, and which are not proved by the proper evidence.

Other testimony is before us, which is not deemed very important under the aspect of the case as presented by the bill and answers, with other proofs of facts, not expressly alleged in the bill or denied in the answers. Some other evidence is relied upon, but it has but a remote bearing upon the questions involved, and is too loose and uncertain to be very satisfactory.

An important question presented in this case, is whether the agreement for the conveyance of the land, which was the subject matter of it, ever became a binding and effectual contract upon the defendant Noble.

The instrument was fully executed by both parties, and a duplicate also made and executed by the same. At the time of the execution, neither of these instruments was 'deliver-

ed to the complainant, because he had not fully paid the sum, which was the consideration of the delivery. To entitle him to the possession of one part of this contract, and the benefit thereof, it was necessary, that he should pay to the other party a certain sum. This sum he did pay within the time stipulated, at the place of business of Noble, in his absence, to one who gave a receipt therefor, and which money Noble received. The only condition required of the complainant to make the agreement effectual was performed. In equity certainly, the contract was perfect, so far, that the agreement was the rightful property of him, as much as by a delivery of the instrument at the time of the execution. What was agreed to be done, on the payment of the sum of $43,33, must be treated as done, and the rights of each to be examined accordingly. No demand was required to be made after this by the complainant, for none was contemplated by the parties. The absence of Noble from the place where the contract was made, and to be delivered at the time the money was paid, imposed no new duty upon the complainant. The express agreement between them was, that the payment by the one party, and the delivery of the contract by the other, were to be simultaneous acts. The one was performed, and the obligation of Noble to perform the other remained entire, and it was his duty to transmit it immediately, on his having the opportunity, to the complainant.

But the omission to make the delivery by Noble did not change the rights of the complainant, and it was not treated by him, as having such effect. About Nov. 1, 1851, at the time he met the complainant in Portland, the meaning of Noble cannot be misunderstood, that he considered the written agreement as an effectual contract and binding upon him, when he said he had not the instrument with him, but it was ready for the complainant in Boston. And Noble does not in any act referred to in his answer, nor does he in the defence relied upon therein, insist, that the contract of May 20, 1851, was not regarded by him as having be-

come binding as perfectly as it would have been, by an actual and seasonable delivery; but it is insisted, that the same was forfeited, by the omission of the complainant to perform the conditions therein specified. The conduct of Noble, as disclosed in the deposition of Furlong, speaks the same language. He treated the rights of the complainant just as if they were, under the agreement, perfected in all respects.

It is insisted by the defendants, that notwithstanding the contract had, in the hands of Noble, all the effect which it might have had under the delivery to the complainant, that the latter has omitted the performance of the conditions, which were indispensable to entitle him to a conveyance of Noble's interest in the premises described. No attempt is made by the complainant to show that the money and the notes, secured by a mortgage which were the consideration of the conveyance, were offered until nearly the expiration of five months after the time fixed by the contract. Was he excused from doing this, under the facts disclosed in the bill, answer and proofs?

Lord HARDWICK says, "It is the business of the Court, to relieve against lapse of time in the performance of an agreement, and especially when the performance has not arisen by the default of the party seeking to have a specific performance." 1 Vesey, 450. Chancellor KENT says, in *Benedict* v. *Lynch*, 1 Johns. Ch. 370, "this is the true rule," and "that when the party who applies for specific performance, has omitted to execute his part of the contract, by the time appointed for that purpose, without being able to assign any sufficient justification, or excuse for his delay; and when there is nothing in the acts or conduct of the other party, that amounts to an acquiescence in that delay, the Court will not compel a specific performance. The rule is founded in the soundest principles of policy and justice." And again he says, "If, on the other hand, the circumstances of the case, and the conduct of the opposite party, will afford ground for a just inference, that he has

acquiesced in the delay, and waived the default, the non-performance at the stipulated time will be overlooked, and will be deemed to have been waived by the other party." And the cases *Seton* v. *Slade*, 7 Vesey, 265; *Smith* v. *Burnam*, 2 Anst. 527, and *Paine* v. *Meller*, 6 Vesey, 349, are relied upon, with others, which the Chancellor remarks, may be cited as turning upon the same distinction.

"Time is not generally deemed in equity to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows, from the nature and circumstances of the contract. It is true, that courts of equity have regard to time, so far, as it respects the good faith and diligence of the parties. But if circumstances of a reasonable nature have disabled the party from a strict compliance, the suit for specific performance is treated with indulgence, and generally with favor by the Court." And it is further said, that "he, who asks specific performance, is in a condition to perform his own part of the contract, and that he has shown himself ready, desirous, prompt and eager to perform the contract." Story's Eq. § 776.

In *Young & Collyer*, cited for the complainant, Mr. Baron ALDERSON says, "Now the first question is, whether time is of the essence of this agreement." "A court of equity must be governed by this principle. It is to examine the contract, not merely as a court of law does, to ascertain what the parties have in terms expressed to be the contract, but what is in truth the real intention of the parties, and to carry that into effect. In the ordinary case of the purchase of an estate, and fixing a particular day, for the completion of the title, the Court seem to have considered that the general object, being only the sale of the estate for a given sum, the particular day named is merely formal; and the stipulation means in truth, that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case, and the nature of the title to be made." But it is further remarked, "If the thing sold is of greater or less value by the

effluxion of time, it is manifest, that time is of the essence of the contract, and the stipulations as to time must then be literally complied with in equity as well as in law."

This question was considered by this Court, in *Rogers* v. *Saunders*, 4 Shep. 92, and many authorities examined. And it was held therein, in accordance with well settled principles, that in the case put by Mr. Baron ALDERSON, of a sale of an estate, that time is not in such cases to be altogether disregarded, but to entitle him to relief, when time is not essential, the party asking it must show, that circumstances of a reasonable nature have prevented a strict compliance, or that it has been occasioned by the fault of the other party, or that a strict compliance has been waived.

With the principles which have been adverted to in view, has the complainant been wanting in that diligence in the performance of the conditions in the agreement, necessary to entitle him to a quitclaim deed, so that he has forfeited his right thereto?

The contract of May 20, 1851, contained no agreement of the complainant, which the other party could enforce; or promise, for the breach of which damages could be recovered. It obligated Noble to make the stipulated conveyance of the land referred to therein, on the performance of the conditions by the complainant. A failure to do this without excuse, would be treated as an abandonment of the contract by him, and the land would continue the property of Noble, as it had been before.

No tender of the money or notes, which were to be the consideration of the conveyance, was made by the complainant to Noble, until a long time after the time agreed upon in the contract, and until the sale and conveyance to the defendant Brown. The excuse relied upon by the complainant is, the wrongful omission of Noble to give to him the duplicate agreement upon the receipt of the money, which was the only condition of delivery. The defendants insist that the possession of this evidence of the contract would

have been a matter of form only, and that it secured the same rights to the complainant while lying in the hands of one party, as it would have done if it had been in the possession of the other.

It is conceded by the complainant, that the withholding of the contract from him did not deprive him of the absolute rights which he had acquired under it. But it is denied that the defendants had the right to insist upon the literal fulfilment of the conditions when Noble retained exclusively the evidence of the agreement.

It is very clear that the want of the possession of the contract by the complainant, must almost necessarily be attended with uncertainty and inconvenience. It must have been known to the complainant, that no necessity existed to take a memorandum of every thing contained in the contract, when, as part of that very agreement, he was to have possession of a duplicate, which was executed by both parties, as soon as he paid a small sum, which was the condition of his right thereto and all its benefits. And it would have been unreasonable to suppose that under such circumstances he would recollect, several months afterwards, the date of the contract, the exact terms of the conditions in the same, and the time of performance, much less the description of every one of the numerous lots of land to be conveyed. It is quite apparent, from these considerations, that without the duplicate, the complainant would have been exposed to such errors as might work the forfeiture of his rights under the agreement.

But the possession of the written contract by the complainant, must be seen to have been very material to him. It was the instrument designed by the parties to it, to secure to him the whole benefit of his agreement, and the money expended in obtaining it. If it had consisted of one part only, its very nature was such, that to be effectual, without further proof, which is not shown to have existed in this case, it must have been in the hands of the complainant. It being in two parts, it was no less essential to him that he

should have one, and the necessity for the retention of both by Noble is not in the least apparent. It was in equity a conditional sale to the complainant of real estate. *Seton* v. *Slade*, 7 Vesey, 265.

The complainant had rights under the contract, which, without proof, he must be presumed to have regarded as important. He paid value for it, and took pains to obtain it. He treated it as one of value by going from Portland to Boston, and making payment of the sum required for its possession, within the time agreed. The defendants, too, by their negotiation with each other, touching the sale of this land by one, and the purchase by the other, as early as the fall of 1851, which negotiation resulted in the conveyance in April succeeding, the consideration of this deed, the omission of all covenants therein, may well be presumed to have regarded the contract as one of value.

In the absence of all evidence of the terms of the contract, or, in fact, of there being such a contract, excepting from the instrument itself, what were the means of this complainant of taking the steps which should result in the right to a quitclaim deed of the lands? Besides, the inconvenience and uncertainty, which have been adverted to, what rights could he have shown to the witnesses, upon whom he might call when he should proceed to make the tender of his money and his notes, and demand the deed? If he should have been met on the part of Noble with the same indifference to his rights, which had been manifested from the time of the payment, in Boston, to that moment, had he the assurance, which he could regard as a legal right, that his tender and demand would have been so heeded, that the duplicate contract would have been even at that late day, delivered to him? or that the deed, with the proper description of the land, would have been offered in its stead? He had, as we have seen from what has been disclosed in this case, the legal right, but in making the tender, on February 20, 1852, had he the ability of making that right manifest?

The contract, which the defendant Noble withheld from

the complainant, was constituted by the parties thereto, as the evidence of the agreement between them. It was deemed important to Noble that he should have possession of one part, and to the complainant, that he should have the other. And as well might the grantee in a deed after delivery, or the payee of a promissory note, after it became effectual, rest secure in the legal right of each, while the deed should be deposited in the hands of the grantor, unrecorded, or the note in the hands of the maker, as the complainant be protected fully in his rights, with the only contract in the hands of the one, by whom was to be done the material act, in execution of the purpose entertained by both. And in this case, the contract was held by Noble, in violation of the agreement with the complainant, and without his consent. It cannot be doubted that an obstacle has been thrown in the way of the complainant by the other party to the contract of May 20, 1851, which was sufficient to excuse the former from a strict fulfilment of the conditions in the agreement; that this was done by a breach of the contract, without the fault of the one now seeking to have a specific performance. The complainant cannot be treated as guilty of *laches,* in omitting to make the tender of the money and the notes at the time stipulated in the bond. It is true he might have gone to Boston after he had paid the money to Hall for Noble, and made demand of the contract. But he was under no obligation to do so. And when Noble must have known he expected it, it lies not with him to charge the other party with negligence. And there is nothing in this case showing that the complainant was not "ready, desirous, prompt and eager to perform the contract," if Noble had done what the law required of him.

But the complainant, according to the answer of Noble, which is responsive to an allegation in the bill, had the opportunity of possessing himself of the duplicate contract, in June, 1852, and could have made the tender of the money and note sooner than September 17, 1852, when it was

first made to Noble. At the time the contract was offered to the complainant, he was informed by Noble, that he had no rights under it, and that the conveyance would not be made to him; and at the same time, he was informed, that the right, title and interest in the lands had long before been conveyed to Brown, the other defendant, though the deed of conveyance appears to have been registered long afterwards.

The omission in the complainant, to make an earlier tender, could not have operated to the injury of Noble. It was refused, but not because it was not made immediately after the complainant had opportunity of knowing the terms of the contract, but on account of the alleged forfeiture of all his rights, under the agreement, and the inability of Noble to make the conveyance. The tender had only the effect, to show that the complainant had not abandoned his rights, but designed to protect them. This omission compromitted none of those rights as they existed, when the contract was offered.

The proofs, in relation to the taxes, which the complainant was to see discharged under the agreement, are not full or definite. What the taxes were, whether paid or not by Noble, does not distinctly appear. But the complainant was not bound to discharge the taxes while the contract was in the hands of Noble, more than to make payment of the money and deliver the note, which was the consideration of the conveyance. And whether the tender of the amount of taxes was added to the other amount, was quite immaterial. *Jones, in equity*, v. *Robbins*, 29 Maine, 351.

From the view, which we have taken of the matter, if the title had continued in Noble, he should be ordered to make conveyance of the land to the complainant according to the contract of May 20, 1851.

John B. Brown, the other defendant, negotiated with Noble for the purchase of the property a long time before he took the conveyance. Noble informed him, before the execution of the deed, or the purchase was made, that the complainant

had no right, title or interest in the land, and offered to show him agreements between himself and the complainant, to which Brown gave no heed.

The answer of Brown shows clearly, that he was apprised of a claim to the land made by the complainant. Noble did not deny this, but expressed his belief in its want of foundation. It is manifest, that he did not intend to incur any liability to Brown by a concealment of the facts within his knowledge, and gave him the means of knowing fully the relation in which he stood to the complainant, in reference to the land, that he might form his own judgment, aided by such counsel, as he might choose to call upon, judge of the validity of the claim of the complainant, and determine for himself, whether he was interfering unlawfully with that claim. It does not appear what agreements and correspondence was offered to Brown for his examination, and the Court is not informed whether the offer was of every thing appertaining to the subject; but if Noble knowingly withheld any thing material to that question, it was a fraud upon Brown, which, under the facts presented, is not to be inferred.

The depositions of Andrew Libbey and of Alvan Cushman represent that the complainant was in possession of a portion of the land described in his contract of May 20, 1851, at that time, had occupied the same for a long time previous, and continued to use and improve the same, till he was disturbed by Brown.

From the proof in the case, touching the question whether Brown had notice of the complainant's interest in the land, before his purchase, sufficient to charge him, the result cannot be doubtful. If he had not actual information of all the facts upon which the complainant's claim rested, he certainly was so admonished thereof, that he omitted inquiry, at his peril. "For whatever is sufficient to put a party upon inquiry, (that is, whatever has a reasonable certainty as to time, place, circumstances and persons,) is in equity, held to be good notice to bind him. Thus, notice of a lease,

is notice of its contents. So, if a person should purchase an estate from the owner, knowing it to be in the possession of tenants, he is bound to inquire into the estate, which these tenants have; and, therefore, he is affected with the notice of all the facts as to their estates." 1 Story's Eq. § 400.

"It is a rule in equity, that the possession of a tenant, is notice to a purchaser of the reversion, of the actual interest of the tenant, and of the whole extent of that interest, and he is bound to admit every claim which could be enforced against the vender." *Chesterman* v. *Gardner*, 5 Johns. Ch. 29. This principle is supported by the case of *Daniels* v. *Davison*, 16 Vesey, 249, in which Lord Chancellor ELDEN says, "where there is a tenant in possession under a lease, or an agreement, a person purchasing part of the estate must be bound to inquire, on what terms that person is in possession."

The answer of Brown, and the proof adduced, bring him within the principle which has been referred to, and he must be treated as having had that notice which affects him as a purchaser of the estate, equally with Noble.

The complainant is entitled to a decree for specific performance, with costs.

PRINCE *versus* THE OCEAN INSURANCE COMPANY.

Whether the master of a disabled vessel has authority to sell her for the benefit of those concerned, is to be alone determined by the circumstances and condition of the vessel, at the time and place where the sale is made.

When a survey is called upon such disabled vessel, it is presumed to be correct, but is not conclusive; it cannot *control* the rights of the parties, but is important evidence, designed generally to protect the rights of all interested.

Where the master, as such, makes sale of his vessel on account of its injury, he must show that he proceeded correctly, and that the sale was justifiable. To establish this, it must have arisen from *necessity*.

In instructing the jury as to the necessity under which a sale may be effected, no particular form of words is necessary. Any mode of expression by which the jury will clearly understand, that to justify the proceedings it must appear that the master, under the circumstances, acted for the good of all, is sufficient.

Thus, if the jury are told there must be an *apparent* necessity for the sale, existing at the time and place, such instruction will be all that is required. No qualification to intensify the term *necessity*, is necessary.

A master owning a part of the vessel thus sold, is justifiable under the same circumstances as if he was not a part owner.

And where a sale is thus made of a vessel *insured*, no abandonment is required for the assured to recover for a total loss.

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

ASSUMPSIT, on a policy of insurance on five sixteenths of the bark St. Lawrence, dated Feb. 7, 1853, for one year.

The general issue was pleaded and joined.

The execution of the policy and the interest of the assured were not disputed.

Evidence was introduced by plaintiff, tending to show, that, on May 19, 1853, between Aspinwall and Porto Bello, the bark run on to a coral reef and injured her materially; that in the afternoon of the same day she arrived at Aspinwall, and constant pumping was required. After she was discharged she did not leak at all. But the keel was settled under the mast, the step of the mast mashed, some of her copper torn off, the keel bruised considerably, her keelson parted and the port bilge raised up.

That at Aspinwall no repairs could be made, and on May 30, a survey was held by J. B. McKinstry, commander of steamer Philadelphia, S. N. Staples, master of schooner Wm. Mason, and Wm. Thomas, who signed the following certificate: —

"The undersigned have held a survey of the bark St. Lawrence, of Portland, and find that the keelson at the step of the mainmast is broken and settled some three inches, and that the port bilge between the fore and mainmast is raised some four inches. Her keel, so far as can be seen, is much broomed, and the copper torn off. So far as we can ascertain, now being light, she is making about ten inches of water per hour. We are of opinion that it would cost much beyond the value of the bark to heave her out and make the requisite repairs in this bay. In this survey we have

not had the opinion of a mechanic, Mr. Scott being too ill to attend, by the advice of his surgeon."

That under these circumstances, the captain, as agent of the underwriters, advertised and sold her at auction for six hundred dollars.

The defendants also introduced evidence tending to show, that the vessel was but little damaged; that she might have been taken to Carthegena, 48 hours sail from Aspinwall, and repaired; that the purchaser made but slight repairs upon her at Baltimore, where she soon after arrived.

There was much evidence in the case as to the condition of the vessel after her injury, and it also appeared that the master was part owner.

Steam communication was had with the Isthmus twice a month, but no notice was given defendants of the disaster before the sale.

Upon the evidence, the counsel for the plaintiff contended, that he was entitled to recover as for a total loss. The counsel for the defendant contended, on the other hand, that, on the testimony, the plaintiff could not recover without proof of an abandonment; that, even if the plaintiff had a right to abandon after his arrival at Navy Bay, before a sale of the vessel, yet the facts proved did not show such a necessity for a sale as would justify the master and owner to sell the vessel, and thus avoid the necessity of an abandonment; that, under the circumstances, the insurers were entitled to be notified, and to exercise the privilege of taking the vessel; that, if the owner would recover for a total loss, under such circumstances, he must first abandon, and not transfer the title to the vessel without notice, and then claim to recover for a total loss; that, being owner, his sale passed the title, whether there was such a necessity as the law requires to justify a sale or not; that, being owner, the master could not be considered as the agent of the insurers, so as to render his acts as agent binding upon them, if not justifiable on other grounds; that it was the duty of the master and owner under such circumstances, to notify

the insurers, and take measures to preserve the vessel, for a reasonable time, until they could be heard from, and if he claimed a total loss, to abandon; that, not having done so, not having abandoned, but having sold the vessel, his claim could be only for a partial loss, and this must be predicated upon the expense of getting the vessel to a port of repair, and what the repairs would cost, upon the terms of the policy, and established legal principles in such cases.

He further contended, that, under the circumstances, it was the duty of the master and owner to have made the experiment of putting the vessel in ballast, and thus ascertaining her condition, and thus make the experiment of getting her to Carthagena, or some other port of repair, before selling her; that the facts show that such an effort would have been successful, if made, and that no necessity for a sale could have existed or been presumed, until such an effort had been made.

But the Court, among other instructions not herein stated, instructed the jury that the question turned upon what transpired at Navy Bay, and not upon what occurred afterwards, but that what occurred afterwards, might be taken into consideration as showing the existing state of facts there.

That a survey is presumed to be correct, but is not conclusive; it does not control the rights of the parties, but is to be considered an important transaction, designed generally to protect the rights of all interested.

That when a vessel is so injured, by perils insured against, that she cannot be repaired without exceeding one-half her value, after deducting one-third new for old, she may be abandoned to the insurers.

That the interest of the master and owner is the same, whether he abandons or sells. That as to the right to abandon, the jury would inquire, whether the cost of repairs at Navy Bay would have exceeded one-half the value, making the deduction of one-third new for old, before stated.

That if a sale was justifiable, the master had a right to

sell; but the burden is on him to show that he proceeded correctly, and that the sale was justifiable.

That the sale by the master is justifiable, when an owner, of reasonable prudence and discretion, under the same circumstances, would, in the exercise of good faith and a sound discretion, have directed the sale, from an opinion that the vessel could not be delivered from the peril, or without the hazard of expense greatly disproportionate to her real value.

That the master, in such cases, acts under the pressure of an emergency, and must decide, but to authorize a sale by him, there must be an apparent necessity for it, existing at the time and on the spot. If there was such a necessity apparent, the master would be justified, though subsequent events should show that he might have taken a different course with success.

The sale would be justifiable, if there was such an apparent necessity for it, and the master acted in good faith, and in the exercise of his best judgment, even if it was shown by subsequent events, that he acted unwisely.

That where the sale is thus necessary and justifiable, and has transferred the property, no abandonment is necessary.

The question was submitted to the jury, as a matter of fact, whether there was such an apparent necessity for selling the vessel under the circumstances. If so, the plaintiff was entitled to recover for a total loss.

If the jury found no such necessity, or that the master acted heedlessly, and without the exercise of his best judgment, then he would not be justified. Subsequent events might be adduced to show that he did not act faithfully and properly or in the exercise of a sound discretion.

Instructions were also given as to the principles to guide them in estimating for a total or partial loss.

The counsel for defendants then requested the following instructions:—

1st. That as a matter of law, the facts proved do not establish such a necessity as would justify the master, being

a part owner, in making a sale of the vessel; and, consequently, the plaintiff cannot recover for a total loss, not having abandoned, and not having the power to abandon; which the Court declined to give.

2d. That the master, being part owner, cannot, in this case, be considered as the agent of the insurers, and his acts as their agent do not bind them on that ground; which was also declined by the Court.

3d. That unseaworthiness alone would not justify a sale, without other circumstances; that to constitute such a necessity as would justify a sale, there must be such an imperious, uncontrollable necessity as left no other reasonable course to be adopted; which instruction the Court refused to give.

4th. That to constitute such a necessity as would justify a sale, the vessel must be in such a situation as left no reasonable chance of saving any part of her for the insurers, except by selling her. Upon this point, the Court said that he could give no other instructions than he had already given.

5th. That to constitute such a necessity as would justify a sale, the vessel must be apparently as much totally lost to the owner, as if she was destroyed in fact. This instruction the Court declined to give.

The jury found a verdict for plaintiff, for a total loss, and defendants excepted.

Fessenden & Butler, for defendants, said this was the first case where the Court was called upon to define the necessity under which a master may sell; the Court should furnish the definition for the jury; it was an imperious uncontrollable necessity; and they argued this position at length. They also supported the positions taken at the trial, and relied on the following cases: — *Pierce* v. *The Ocean Ins. Co.*, 18 Pick. 88; *Robinson* v. *Commonwealth Ins. Co.*, 3 Sumner, 220; *Patapsco Ins. Co.* v. *Southgate*, 5 Peters, 604; *Gordon* v. *Mass. Fire & Marine Ins. Co.* 2 Pick. 249; *Bryant* v. *Com. Ins. Co.*, 13 Pick. 543; *Brig Sarah Anne*, 2 Sumner, 287; *Hall* v. *Franklin Ins. Co.*, 9 Pick.

466; *Winn* v. *Col. Ins. Co.*, 12 Pick. 270; *American Ins. Co.* v. *Senter*, 4 Wend. 45; *Hayman* v. *Holton & al.*, 5 Esp. 64; *Schr. Tilton*, 5 Mason, 465; *Somes* v. *Sugrue*, 4 Car. & P. 276; 3 Kent's Com. 173; *Parker* v. *Hunter*, 7 Mees. & Wels. 322.

Shepley & Dana, for plaintiff, denied that the main question argued by defendants' counsel was the one to be presented to this Court; that question was presented to the jury; now the only question is, whether the instructions given at the trial were correct, and in support of the instructions given, cited *N. E. Ins. Co.* v. *Sarah Ann*, 13 Pet. 401; 3 Kent's Com. 324, 325; *Bradley* v. *Insurance Company*, 12 Peters, 378; *Gordon* v. *Mass. Ins. Co.*, 2 Pick. 264; *The Fortitude*, 3 Sumner, 228; *Peele* v. *Ins. Co.*, 3 Mason, 27; *Dunham* v. *Ins. Co.*, 11 Johns. 315; *Orrok* v. *Ins. Co.*, 21 Pick. 456; *Hunter* v. *Parker*, 7 Mees. & Wels. 342; 2 Phil. on Ins. 307; *Fuller* v. *Kennebec Ins. Co.*, 31 Maine, 325; *Idle* v. *Ins. Co.*, 8 Taunt. 755; *Amer. Ins. Co.* v. *Center*, 4 Wend. 52; *Patapsco Ins. Co.* v. *Southgate*, 5 Peters, 620; *Gordon* v. *Mass. Ins. Co.*, 2 Pick. 249.

They also argued that defendants' requested instructions were properly withheld.

SHEPLEY, C. J. — The plaintiff claims to recover for a total loss of five-sixteenth parts of the bark St. Lawrence. That vessel, being on a voyage from New York to Aspinwall, on May 19, 1853, appears to have struck a coral reef, in Navy Bay, by which a small piece of the rock penetrated in one place entirely through her bottom, and in two other places nearly through. She appears to have proceeded to her port of destination, where her cargo was discharged.

On the thirtieth day of the same month, a survey upon her, called through the agency of the American consul, reported, that her keelson was broken and settled some three inches, that her port bilge was raised some four inches, that her keel, so far as it could be seen, was much broomed, and

the copper torn off. The persons called to make the survey appear to have been competent and impartial. One was an officer in the United States Navy, having been employed in the merchant service and then having the command of a steamer. One of the others, to have been a present, and the other a past ship master. They agreed upon a result, stating that it would cost much beyond the value of the bark to heave her out and make the requisite repairs in that bay. There is a difference in the testimony, whether it would have been safe or prudent to have proceeded with her to a place where her bottom could have been examined and repairs made. The master caused her to be sold at auction. The purchaser appears to have sent her with a cargo to Baltimore, without making any, or any important, repairs.

The authority of a master to sell his vessel or cargo, under any circumstances, was not admitted by the ancient maritime law.

As commerce and navigation increased and extended, it was perceived that masters, without fault, might be so situated, that they could not consult any person interested, and that they must abandon the property as wholly lost or sell what remained of it. The authority to sell was fully conceded by the mercantile law. The remaining difficulty was to so define and limit that authority, that its abuse might be prevented. For this purpose, different language appears to have been used in different judicial judgments.

It may be useful to notice that used in some of the leading cases in England and in this country, to ascertain whether any particular language is required to be used, and if so, what it is.

Lord Mansfield, in his opinion in the case of *Miller* v. *Fletcher*, Doug. 231, says, "I left it to the jury to determine whether what the captain had done, was for the benefit of the concerned." The captain had sold part of the cargo, and had attempted to sell the vessel without success, and had left her to be sold.

LORD ELLENBOROUGH, in the case of *Hayman* v. *Molton*, 5 Esp. 65, speaking respecting the sale of a vessel by the master, says, "where a case of urgent necessity and extraordinary difficulty occurs; where a ship has received irremediable injury, I am disposed to go as far as I can to support what has been contended for by Mr. Erskine, that under such circumstances, the captain, acting *bona fide*, and for the benefit of the owners, might sell the ship for the benefit of the owners. This is the disposition of my mind; but I cannot lay it down as positive law. At all events, it can only be justified by extreme necessity and the most pure good faith; that is, if the vessel is in such a state as it would be probable the owners themselves, if on the spot, would have acted in the same way as the captain has done, and have sold the ship; I shall, therefore, leave it to the jury to say whether, in this case, there was such a necessity as called upon the captain, acting for the benefit of his owners, to sell the ship." The case of *Milles* v. *Fletcher* does not appear to have been noticed by the Court or counsel.

LORD STOWELL, in the case of the *Fanny and Elmira*, Edw. 117, says, "In the first place, it must be shown that there was a necessity, and then it remains to be considered whether it was such as would, by law, give the master a right to sell."

Mr. JUSTICE PARK, in the case of *Cannon* v. *Meadburn*, 1 Bing. 243, says, "Nothing, therefore, but extreme necessity, will justify the master in disposing of the cargo."

GIFFORD, C. J., says, in the case of *Robertson* v. *Clarke*, 1 Bing. 445, "This principle may be clearly laid down, that a sale can only be permitted in case of urgent necessity; that it must be *bona fide* for the benefit of all concerned."

The question has been presented several times in the Supreme Court of Massachusetts. PARKER, C. J., in the case of *Gordon* v. *The Mass. F. & M. Ins. Co.*, 2 Pick. 249, says, "It is certain that a master of a vessel, as such,

has no authority to sell the vessel or cargo, unless in a case of extreme necessity."

PUTNAM, J., in the case of *Hall* v. *Franklin Ins. Co.*, 9 Pick. 466, after quoting the language referred to in the last case, says, "There must be something more than expediency in the case; the sale should be indispensably requisite."

The same Justice, in the case of *Bryant* v. *Com. Ins. Co.*, 13 Pick. 543, remarked, "It is for the plaintiff to prove the legal necessity. * * * They must maintain that there was good intention on the part of the master, and that he was compelled by the necessity of the case to act."

SHAW, C. J., in the case of *Peirce* v. *The Ocean Ins. Co.*, 18 Pick. 83, having referred to the former cases as settling the law, says, "Here is not that imperious, uncontrollable necessity for a sale, which is requisite to confer such an authority on a master."

The question has, at different times, been presented in the courts of the United States.

Mr. JUSTICE STORY, in the case of the schooner Tilton, 5 Mason, 465, says, "My judgment is, upon the most careful survey of the authorities, as well as upon general principles of law, that the master has a right to sell the ship in cases of urgent necessity. * * * I adopt the argument at the bar, that it must be proved that there was a pressing necessity to justify the sale."

The same Justice, in the case of *Pope* v. *Nickerson*, 3 Story, 465, says, "He had no right to sell the same, unless in case of necessity; that is, of a moral necessity to prevent a greater loss to the shippers."

So he had before stated, in the case of *Robinson* v. *Com. Ins. Co.* 3 Sum. 226, "The master has an authority to sell only in cases of extreme necessity; not indeed of physical necessity, but of moral necessity."

In the case of the *Patapsco Ins. Co.* v. *Southgate*, 5 Peters, 604, the plaintiff's counsel appear to have submitted a request for instructions, that the sale should be found to be "absolutely necessary and for the interest of all con-

cerned." While the defendant's counsel requested instructions, "that no necessity will justify a sale by the master, unless it be urgent and inevitable; in other words justifiable."

The instructions prayed by each were given.

ARNOULD states the law thus, — "It is obvious, that nothing but a case of absolute and extreme necessity, such as sweeps away all ordinary rules before it, can justify the master in such a sale." Arnould on Ins. 89.

KENT states, "The master of an insured ship injured by the perils of the sea and not competent to complete the voyage may sell her in case of necessity; as where the ship is in a place in which she cannot be repaired; or the expense of repairing would be extravagant and exceed her value; or he had no means in his possession, and was not able to raise any." 3 Kent's Com. 332.

PHILLIPS says, "The authority of a master in case of extremity to sell a disabled ship, rests upon much the same principles as that to raise funds on bottomry." * * * "The master is authorized to manage and dispose of the ship and cargo in the same manner as a prudent owner would do in like circumstances, being influenced by predominating motives to prosecute the voyage." 2 Phill. on Ins. 305.

Lord ELDON is reported to have stated in the case of *Smith* v. *Robertson*, 2 Dow's Parl. Cas. 479, "The very ground upon which the authority rests, namely, extreme necessity, is pregnant with uncertainty; as the facts, which create it, will vary in their effect upon minds differently constituted."

Mr. Justice PUTNAM, in the case of *Hall* v. *Franklin Ins. Co.*, says, "We mean a necessity, which leaves no alternative; which prescribes the law for itself and puts the party in a positive compulsion to act."

Lord STOWELL had before stated, in the case of *the Gratitude*, 3 Rob. Adm. 240, "The law of cases of necessity is not well furnished with precise rules; necessity creates the

law; it supersedes rules; and whatever is just and reasonable is likewise law."

Mr. Justice STORY also attempted to explain the meaning of necessity as thus used; he says, in the case of *Robinson* v. *Com. Ins. Co.*, "By moral necessity, I mean not an overwhelming and irresistible calamity or force, but a strong and urgent, and if one may so say, a vehement exigency, which justifies and requires the sale to be made as a proper matter of duty to the owner to prevent a greater sacrifice or a total ruin of the property."

TINDAL, C. J., had before said, in the case of *Somes* v. *Sugrue*, 4 Car. & P. 276, "A great deal has been said about the word necessity, undoubtedly it is not to be confined to or so strictly taken as it is in its ordinary acceptation. There can in such case be neither a legal necessity, nor a physical necessity; and therefore, it must mean a moral necessity; and the question will be, whether the circumstances were such, that a person of prudent and sound mind could have a doubt as to the course he ought to pursue."

With all these explanations, the necessity which authorizes and requires the master to sell, being a moral necessity, can be, when carefully examined, no more than a faithful performance of a duty imposed by the circumstances in which he is placed. Being called upon from the best information to be obtained respecting the actual condition of his vessel and respecting the danger of allowing her to remain as she is, and the danger and expense of repairing her there and of proceeding elsewhere, to determine whether he must abandon her as a wreck or repair her, or attempt to obtain something for her by sale or otherwise, he is under moral obligation to pursue that course and make that decision which will best promote the interests of all for whom he has become the agent. He must do wrong if he does not do so. He has no alternative left, and must sell, if, in the faithful discharge of that duty, he determines, that the calamity will be most alleviated and the interests of all be

best served by a sale. A moral necessity for a sale can mean no more.

The inquiry arises in this case, what idea would be presented to the minds of jurors by instructing them, that there must be an absolute, urgent, pressing, imperious, uncontrollable, extreme and inevitable moral necessity to authorize a sale? If an explanation were asked by a juror of the meaning, might the answer be, it means, that he must act faithfully and discharge his duty to all; the necessity is a necessity to sell, if he could not so act for all without doing it. There is a fact underlying this moral necessity or duty, from which alone it can arise, that the vessel has been so disabled as to render it unsafe for her to proceed on her voyage as she is. This fact must be established before the master's authority is so enlarged, that he becomes the agent of all concerned and clothed with power to judge for all, what must be done for their good.

With respect to the authority of the master to sell, the jury were in this case instructed, "that the question turned upon what transpired at Navy Bay, and not upon what occurred afterwards." This will be found to be the settled rule of law, as stated in the authorities cited.

The instructions respecting the effect of the surveyor's report, and the lack of proof of abandonment, are also fully sustained by authority.

The principal complaint rests upon the instructions respecting the right of the master to sell the vessel. One especial cause is, that no adjective was used as connected with the word necessity to increase or intensify its meaning.

In the case of *Milles* v. *Fletcher*, the word necessity does not appear to have been used. Lord MANSFIELD, in the opinion, says, "The captain, when he came to New York, had no express order, but he had an implied authority from both sides to do what was right and fit to be done, as none of them had agents in the place; and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because this is within the contract of indemnity."

In the case of *Idle* v. *Royal Exchange Assur. Co.*, 8 Taun. 755, DALLAS, C. J., says, "The authority of *Milles* v. *Fletcher* has been recognized in a great number of subsequent cases, and has never, that I am aware of, been in the slightest degree impeached."

In the case of *The Patapsco Ins. Co.* v. *Southgate*, adjuncts to the word necessity were freely used, and yet it is stated in the opinion, that the doctrine of the case of *Milles* v. *Fletcher*, "has been repeatedly sanctioned by the later decisions both in England and in this country."

In the case of *Hayman* v. *Molton*, while urgent necessity is spoken of, the case appears to have been left to the jury without any expletive to find, "whether there was such necessity as called upon the captain, acting for the benefit of his owners, to sell the ship."

In the case of *Greene* v. *Royal Exchange Assur. Co.*, 6 Taun. 68, the opinion states:—"It ought, therefore, to have been left to the jury, whether a prudent man would have sold the ship, in these circumstances, or have repaired her, and proceeded with her to earn what he could."

In the case of *Robertson* v. *Clarke*, the question left by the instructions to the jury appears to have been to find, "whether they thought the captain justified in selling the vessel, under the circumstances, which had been proved; and (he) told them, if they thought the sale a matter of necessity, they must find for the plaintiff."

In the case of *Cambridge* v. *Anderton*, 2 B. & C. 691, ABBOTT, C. J., told the jury, "that if, under the circumstances in evidence, they thought the ship was not repairable at all, or that when repaired she would not be worth the expense of doing the repairs, the plaintiffs were entitled to recover for a total loss."

In the case of *Somes* v. *Sugrue*, 4 Car. & P. 276, TINDAL, C. J., in his instructions to the jury, is reported to have said, "The only question in this case is, whether, under the circumstances, there has or has not been a total loss of the vessel, if at all, in consequence of the sale, and that will

depend upon, whether the sale was a sale, that was necessary for the benefit of the parties concerned. * * * A captain has no power to sell, except from necessity, considered as an impulse acting morally to excuse his departure from the original duty cast upon him of navigating and bringing back the vessel. * * * If you think that if the owner himself had been on the spot uninsured, he, in the exercise of sound discretion, would have repaired the vessel, or that if an agent of the underwriters had been there, he, exercising such discretion, would have repaired, then this captain ought certainly to have done so. But if they would not have done so, then, I think, this captain was not compellable to repair, and the sale, in such case, will have taken place under a justifiable necessity."

In the case of *Hunter* v. *Parker*, 7 Mees. & Wels. 322, the questions on this point as left to the jury were, "whether the master in selling the ship had acted *bona fide* and with the intention of doing the best for the advantage of the owners and of all parties concerned." And "whether there was an actual necessity for the sale."

In the case of *Gordon* v. *Mass. F. & M. Ins. Co.*, although it is incorrectly said all "the Judges, who have adverted to this subject, except Lord MANSFIELD, have put the authority of the master to sell upon *extreme* necessity," yet the same Judge, when he comes to state definitely, what the instructions to the jury should have been, uses this language: "The instruction should have been, that if they were satisfied from all the evidence, giving due weight to the opinion of the surveyors, that the sale was necessary, then the sale constituted a total loss." These instructions prescribed, must have been carefully considered, for the case was to be presented for a new trial, and the very language might be expected to be used on that trial in instructions to the jury.

It is not common to find different persons using the same language to communicate the same idea. An examination of the decided cases shows, that the omission of any epithet

in connexion with the word necessity cannot be considered erroneous.

It is on the circumstances ascertained by the best information, as they are presented at the time, that the surveyors and master must act and decide. "An apparent necessity for it existing at the time," could communicate no other idea to the jury, than a necessity, which appears to exist at the time. The intention appears to have been to inform the jury, that they were to judge of the necessity of the sale upon the proof of the circumstances, as they were presented to the master. This would be correct. And it is not perceived, that they could have been led into any erroneous judgment by the use of that language. The question is not, whether it was the best suited and most appropriate which could have been used, but whether the jury could have been led into any misapprehension of duty by its use. The presiding Judge had most respectable authority for its use.

In the case of *Freeman* v. *East India Company*, 5 B. & A. 617, ABBOTT, C. J., says, "And under these circumstances a sale of the cargo or any part of it by the master, could confer no title on the purchaser, unless there was *an apparent necessity* for such sale. That question I left for the jury, and they were clearly of opinion, that there was in this case no such *apparent necessity*." In that case, HOLROYD, J., speaks of an absolute necessity for a sale. And BEST, J., says, "The case of absolute necessity constitutes the only exception to the general rule." And yet he says, "I think the case was properly left to the jury, and that there ought to be no rule granted." No important distinction appears to have been presented to their minds in the use of the words absolute necessity and apparent necessity. They appear to have regarded them as different forms of language to communicate the same idea.

Mr. PHILLIPS, when stating the result of the decided cases, uses this language:—"A sale, whether by the owner or master, will be justified or not in respect to the underwriters according to the *apparent circumstances* when atten-

tively and fairly examined and considered; the estimates, opinions and advice of competent persons, who can be consulted being first obtained; and not according to the result of an experiment of the purchaser in floating, recovering and repairing the vessel." 2 Phill. 307.

The other instructions on this point appear to have been taken from, or to have been authorized by, the decided cases already noticed. The testimony on this point was quite different and not easily reconcilable. It was especially within the province of the jury to decide upon it. There is no motion to set aside the verdict as having been found against the evidence. Nor is it intended to intimate, that it could have been of importance, for it is the duty of the jury, and not of the Court, to decide upon the credibility of testimony.

The first and second requested instructions appear to have been based upon the position, that the master, being a part owner, would not have the same authority as a master, who was not an owner. The settled law is otherwise. "Whether the sale be by the owner or the captain will make no difference if the circumstances justified the selling, and the sale was honestly and fairly conducted." *Idle* v. *Royal Ex. Assur. Co.*, before cited.

The third request was for instruction, that there should be such an imperious and uncontrollable necessity as left no other reasonable course to be adopted. Although the language used in the request may have been selected from the opinion in the case of *Peirce* v. *Ocean Ins. Co.*, it has become apparent from an examination of the decided cases, that the law does not require the use of any form of words or of any adjuncts to intensify the word necessity. The jury would be instructed without the use of any such words, that there must be a necessity that left no alternative or other course to be pursued consistently with a faithful discharge of duty, and that is all which the law requires.

The fourth and fifth requested instructions would have

deprived the master of authority conferred upon him by law, as exhibited in all the well considered cases.

Exceptions overruled.

† MUSGRAVE *versus* HALL.

Goods seized upon a warrant issued in due form against their *owner*, by a magistrate having jurisdiction under a valid statute, cannot by *him* be replevied.

Thus, the owner of spirituous liquors seized by virtue of a warrant in due form against him, under c. 48, of the Acts of 1853, cannot replevy them from the possession of the officer who executed it.

ON FACTS AGREED.

REPLEVIN, for fifteen barrels and three kegs of spirituous liquors.

On June 13, 1853, the defendant, as a constable of Portland, seized the liquors described in the writ, under a warrant issued in conformity to c. 48, of the Acts of 1853, and made due return of his warrant, having conveyed the liquors to a proper place of security for final action.

While this complaint was pending, the plaintiff, being the owner of the liquors, on Aug. 25, 1853, caused them to be replevied, without defendant's knowledge.

Afterwards, on Nov. following, on trial of the complaint, the plaintiff was adjudged guilty, as to the liquors contained in the kegs, and they were declared forfeited, and not guilty as to the other, which was ordered to be returned to plaintiff.

On account of this suit, no action has been had under these orders.

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

TENNEY, J. — The warrant, under which the liquors in question were seized, not being referred to as a part of the case, must be treated, under the agreed statement, as conforming in all respects to § 1, c. 48, of the statutes of 1853,

and as being against the plaintiff, who was the general owner of the property.

The plaintiff has presented to the Court no argument in the case, and consequently has made no objection to the validity of the statute referred to. Exceptions taken to the ruling of Judges in jury cases, that the search for spirituous and intoxicating liquors, and the seizure of the same, under the statute of 1851, c. 211, § 11, were legal, and argued to the whole Court, have not been sustained. Objections to the part of the statute, under which the warrant in this case was issued, can certainly have no better foundation. The property may, therefore, be regarded as legally seized, and it being conveyed to a proper place of security, to be there kept until final action upon the complaint, under which the warrant issued, and due return being made upon the warrant, it was in the custody of the law at the time it was taken on the replevin writ.

Can the owner of property, seized upon a warrant against him, in due form, issued by a magistrate having jurisdiction under a valid statute, be replevied by such general owner? As a general principle, the owner of a chattel, at common law, may take it by replevin from any person whose possession is unlawful, unless it is in the custody of the law. But chattels in the custody of the law, cannot be replevied; as goods taken by distress, upon a conviction before a justice, or goods taken in execution. Neither can goods attached by an original writ, as security for the judgment, be replevied, at common law, but by the statute, the claimant, who is not the party against whom the precept issued, on which they were taken, may replevy the goods so taken. *Ilsley & al.* v. *Stubbs*, 5 Mass. 280.

The statute of this state, c. 130, § 8, has authorized the taking of goods on writs of replevin, when they shall be unlawfully taken or unlawfully detained from the owner or person entitled to the possession thereof, but has not changed the common law so that the owner of the chattel can take them from the possession of the officer who seized

them and detains them upon a legal precept. If it could be done, it would effectually repeal the provision by authority of which goods can be seized. Two statutes could not consist together, one authorizing a seizure of the goods upon a process against the owner, and the other giving power to the owner to take them from the officer who seized them. The suit in replevin cannot be maintained, and by the agreement of the parties, the plaintiff must be

Nonsuit.

Strout, for plaintiff.

S. Fessenden, for defendant.

GOODRICH *versus* BUZZELL *& als.*

A note given for interest above the rate of six per cent. per annum for the forbearance of payment of a sum of money, is without legal consideration.

An indorsee of such a note cannot claim the character of an *innocent* purchaser, whose agent was cognizant of all the circumstances under which the note originated.

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

ASSUMPSIT, on a note payable to Luke Buzzell or order, and by him indorsed.

The defence relied upon was usury.

John Buzzell, one of defendants, was called, and testified that the note was wholly usurious. To rebut this, plaintiff tendered his own oath, and testified that he was not present at the time of the transaction, nor when the note was given.

The evidence of the party defendant was objected to, as the suit was by an indorsee, and was ruled out.

Other evidence was produced by defendants, and the cause was submitted to the full Court upon so much as was admissible, to render a judgment by default or nonsuit.

The Court found, that the consideration of the note in suit was entirely for *extra* interest, of which plaintiff had full knowledge by his agent.

Anderson & Harmon, for defendants.

Willis & Son, for plaintiff.

RICE, J. — The material question is, what was the consideration for the note in suit? Was it a bonus for the exchange of securities, or was it for interest reserved beyond the rate of six per cent.?

Mr. Sweat, who has no legal interest in the event of this suit, testified, that Mr. Willis had commenced a suit against F. O. J. Smith, on a note for $2120, in favor of the plaintiff. Doct. Buzzell, one of the defendants in this case, was anxious to have the suit against Smith settled, in order to get up a note which Smith held against Buzzell and others as collateral for the said note of $2120. The amount due on the Smith note, with interest and cost, was $2231,26.

This amount was paid by Doct. Buzzell and Doct. G. W. Smith to Mr. Willis, in this manner, to wit: $1200, furnished by Hanson, $31,26, furnished by Luke Buzzell, and our (witness and Dr. Sweat,) note for $1000. Mr. Willis said he was not willing to take the $1000 note, unless Goodrich could have a bonus of sixty dollars; for he said Goodrich told him his money was worth twelve per cent. and the note on time must be as good as money. Mr. Willis therefore demanded of Dr. Buzzell a note for sixty dollars to pay this bonus or extra interest of six per cent. on the $1000. Accordingly this note now in suit was given.

The testimony of this witness is direct, distinct and to the point. He was called by one of the defendants to aid in adjusting the transaction out of which this note originated.

Mr. Willis, called also by the defendants, testified among other things, "that Smith desired to have the suit against him settled. After a long negotiation, Goodrich authorized us to settle, if they would turn out Dr. Sweat's note for $1000, to run one year, and pay the balance in money, provided they would pay sixty dollars for giving up security which we held, and give new security as a bonus for changing securities. Did not know the Sweats or Smith in the

transaction. They turned out this note for $1000, of persons who were not on the other note, paid cash $1231,26, and this note now in suit was given for a bonus in making the exchange of security. Goodrich said his money was worth 12 per cent. and he could make that if he had his money."

There is no suggestion, that the note of the Sweats was not perfectly good, or was in any respect inferior in point of security to the note of Smith which was given up.

Whatever may have been the form of the language used by the plaintiff in his instructions to Mr. Willis, we think that the inference from all the facts in the case is irresistible, that the note in suit was given for interest above six per cent. for the forbearance of payment of the sum of $1000, for one year. In other words, the plaintiff deemed the use of his money worth 12 per cent. per annum, and stipulated for that rate. Six per cent. was reserved in the $1000 note, and the six per cent. extra, was the consideration of the note in suit.

Such being the real transaction, as we are satisfied from the evidence it must have been understood by the parties, there was no legal consideration for this note.

The evidence shows, that the agent of the plaintiff was fully informed of all the circumstances under which the note in suit originated. The plaintiff is not, therefore, entitled to the protection which the law affords an innocent indorsee, without notice. He is in fact, though not in form, the original holder of the note in suit, and well knew what was its consideration.

The question whether the testimony of the defendant, John Buzzell, was properly or improperly stricken out, does not become material, as the result must be the same in either event.

According to the agreement of parties a nonsuit must be entered.

COUNTY OF FRANKLIN.

PIKE, *in review, versus* CREHORE.

The plaintiff being indebted to defendant, in Sept. 1834, sent him the money by mail, which he alleged he never received, and the plaintiff afterwards paid him the debt. Subsequently the plaintiff was satisfied that the money sent by mail was received by the defendant, and commenced his suit to recover it. The defendant offered to prove that, in 1836, there were found in the house where the mail carrier of the supposed lost letter lived in 1834, a number of letters, secreted in the wall and under the floors of the house, broken open, bearing date in 1834, post marked at other places than where found, and directed to persons in another town: —

Held, that this evidence or any declarations by such mail carrier, unaccompanied by any acts, was inadmissible.

In such suit, the entries in the books of a bank, made by a cashier, deceased, in the ordinary course of his business, tending to prove any fact material to the issue, are proper evidence; but where such books are rejected by the presiding Judge, the objecting party must bring the rejected documentary evidence before the Court, that by inspection or some other way, the fact of its admissibility may be determined; otherwise, the presumption is, that they were rightfully excluded.

As proof of the bankruptcy of plaintiff, were offered copies of all the papers made by the applicant to the District Court of Massachusetts, the orders and decrees of the Court, appointment, bond and account of the assignee, and the marshal's certificate, tacked together by a ribbon, to which was prefixed the certificate of the clerk of that District Court, that it contained the copies of the whole record in that case, with the seal of the Court affixed, but on several of the papers thus tacked together, was also his certificate that they were true copies: It was held, that the document thus offered, was not duly authenticated as a copy of a record, and was rightfully rejected.

Quere, whether, under the plea of the general issue only, the bankruptcy of a plaintiff may be given in evidence.

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

This was an action in REVIEW, tried at the Oct. term, 1854.

The original action, *Crehore* v. *Pike*, was assumpsit for money had and received, commenced on April 10, 1849, and

tried, under the general issue, in August, 1851, when a verdict was returned for the plaintiff.

On the trial in review, the original plaintiff introduced evidence tending to show that, on Sept. 2, 1834, he enclosed, from Boston, a $500 bill on the Oriental Bank, by mail, to said Pike, at Kingfield, Maine, being indebted to him in that or a larger sum, and that Pike, by some means, without the knowledge of the post-master at Kingfield, obtained possession of said letter enclosing the bill, and then denied the reception thereof; and, thereupon, Crehore paid the whole amount due to said Pike without deducting this sum; and there was evidence introduced by Pike, tending to repel the same.

There was testimony on the part of the original defendant tending to show, that the letters directed to Kingfield and mailed at Boston, would be carried there either by the way of Anson on one route, or by the way of Belgrade, Industry and New Vineyard on the other, and it appeared by the records of mails received at Kingfield in the month of September, 1834, that but one letter on which the postage was equal to 18¾ cents was received at said Kingfield during that month, and that was received upon the 18th day thereof; and there was testimony tending to prove, that the letter received on that day was taken from the post-office by one Welcome, the then clerk of said Pike, and while said Pike was away from home and at Dead river, and that that letter contained no bank bill.

It was further proved, that the mail to Kingfield which then passed through Industry was detained at West's mills in that town over Sunday, and during the month of September, A. D. 1834, and for a year or two before was carried by one Josiah Emery, and further, that one West was present at an examination of one of the mail bags so carried by Emery, neither near the commencement nor close of his carrying, and ascertained that letters could be taken from it without opening it; that this bag was not used afterward, and that Emery carried the mail but one trip after

the rumor that the $500 bill had been lost; and there was further testimony tending to prove, that a bill of $500, on the Oriental Bank, Boston, was exchanged with the cashier of the Augusta Bank, at Augusta, in September, 1834, as early as the 22d of that month, and that the person with whom he exchanged the money was rather tall, slim, light complection, sandy, straight, and quick in motion; and there was also testimony, that Josiah Emery, the then mail carrier by the way of Industry, was a man a little above common height, slim, light complection, and quick in motion, little sandy, and that at the time said Emery carried the said mail in 1834, and before, he resided in a certain house near to West's mills in said Industry. And the defendant offered to prove, and called witnesses for that purpose, that in the year 1836, there was found by said witnesses in the same house where said Emery resided, during the month of September, 1834, a number of letters secreted in the wall and under the floors of said house, bearing date in 1834, postmarked at other places and directed to persons who did not reside in said town of Industry, but at Kingfield aforesaid, and that said letters had been broken open before they were found; he further offered to prove, that said Emery, having quit carrying said mail, at the next trip after the news of the loss of said five hundred dollar bill was received at Industry, obtained leave to carry it to Kingfield for another trip, and made certain statements at the time tending to implicate himself, such as that he wished to carry the mail that trip to prevent suspicion falling on him; and further, that said Emery, while in prison at Bangor within the last year, had confessed that he took the letter addressed to said Pike and the money enclosed, and that Pike was innocent.

But all the foregoing offers and the testimony therein contained was rejected by the Court.

It became material in the progress of the trial to show on what day the said $500 bill went out of the Augusta Bank, and that it was in the forenoon of September 22,

1834, and for that purpose, they offered the book of discounts, the journal and cash book of the Augusta Bank for Sept. 1834, which were in the handwriting of the cashier, long since deceased, wherein were certain entries made by Crosby, the cashier, of moneys paid out by him in the ordinary course of his business, tending to prove that said bill went out of the bank in the forenoon of Sept. 22, 1834, but it not appearing there was any entry respecting that bill, the books were excluded.

The original defendant further offered in evidence a document which was marked A, and consisted of copies of all the papers in a case in bankruptcy, on the petition of Edward Crehore, under the late Bankrupt Act of the United States, addressed to the District Judge of Massachusetts, and his discharge under said Act. The papers were fastened together by a ribbon with a seal of the District Court of Massachusetts attached; and a certificate of the clerk, that the papers hereunto annexed are each and all true copies of the record in the matter of Edward Crehore, and that they were copies of the whole record in that case. The several papers were also certified by the clerk as true copies.

This document was rejected by the Court.

A verdict was returned for the original plaintiff, and the defendant excepted to the rulings. The action in review was tried upon the former pleadings, the general issue, and a brief statement of the statute of limitations.

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

The finding of the letters and the anxiety manifested by Emery when the rumor circulated of the loss of the bill were competent, considered in the light of acts or declarations. Emery was the agent of Crehore for transmitting the money to Pike at Kingfield. Whether these declarations and acts were made while he held the money as such agent or not, is not certain, but if made while he held the money, being the acts and declarations of Crehore's agent, should bind Crehore.

The hidden letters, under the circumstances proved, strongly pointed to Emery as the guilty party, and so far exculpated the defendant, and that fact should have been allowed to go to the jury.

The confession of Emery in prison, made to his own prejudice, must be presumed to be true, and so would exonerate Pike.

The case finds that it became material to prove that the bill in controversy went out of the Augusta Bank in the forenoon of Sept. 22, 1834, and that the books offered, tended to prove that fact. Why should not such evidence be admissible? According to the case, it had a direct bearing upon the issue. These books and entries were, therefore, of the utmost importance to Pike, if admissible. And as between these parties, we contend they were.

The cashier was dead; the entries were made in the usual course of his business, and they became evidence for third persons. *Welch* v. *Barrett*, 15 Mass. 380; *Price* v. *Earl of Torrington*, 1 Salk. 285; *Pitman* v. *Maddox*, 2 Salk. 690; *Warren* v. *Greenville*, 2 Stran. 1129; *Higham* v. *Ridgeway*, ——; *Barry* v. *Babbington*, 4 T. R., 514; *Herbert* v. *Tuckel*, 5 T. R. 84; *Doe* v. *Turford*, 3 Bar. & Al. 890; *Union Bank* v. *Knapp*, 3 Pick. 96; *North Bank* v. *Abbott*, 13 Pick. 465; *Augusta* v. *Windsor*, 19 Maine, 317; *Nichols* v. *Webb*, 8 Wheat. 337; *Trull* v. *True*, 33 Maine, 367.

Again, that which is called a *document* in the exceptions, was offered as an authenticated copy of the record in bankruptcy in the matter of said Crehore, and called a *document* to procure the signature of the presiding Judge to the exceptions, as he declined to sign them if it was called a record. It is contended that the *document* produced was an authenticated copy of the record, and a copy of the whole record, and contained nothing more, and that the omission of a single thing or paragraph therein contained, would leave the record incomplete. Stat. U. S. of Aug. 19, 1841,

§ 13, also § 6. The rules made under this section, become a part of said Act in the district where they are made.

The petition, order of Court, with the schedules annexed, are made part of the record by § § 1 and 13 of that Act.

Next comes the bond of the bankrupt, required by rule 30, of the Mass. Dist. Court, and such bond became part of the record, under § 13.

The decree declaring Crehore a bankrupt, no one will deny as being part of the record. The decree appointing the assignee, with the marshal's return thereon with the assignee's acceptance of the trust, furnished evidence that he assumed to act. That belongs to the files of the Court, and becomes, by § 13, part of the record.

So all the papers of the assignee are made and returned under the rules prescribed by said Act, and go to make up the record.

Is this record properly authenticated? *Every* paper is separately certified by the district clerk, in his official capacity.

By the Bankrupt Act, every U. S. District Court, so far as it proceeds in bankruptcy, is made a domestic court to every State court. And copies of records of domestic courts, attested by their clerks, are held to be evidence of the record. *Ladd* v. *Blunt*, 4 Mass. 402. In accordance with this usage, every paper in this record is properly authenticated, and in addition to the certificate to the original petition and schedules, the first decree, to the discharge and the assignee's return the clerk has affixed the seal of the Court.

This record ought to have been admitted, and by § 3, of the Bankrupt Act, all property and rights of property by decree of bankruptcy, are vested in the assignee.

By this proceeding, the plaintiff was estopped to maintain this action. The plaintiff had no interest in this bill, he was divested of its possession before his bankruptcy, and all his rights vest in his assignee. *Brandon* v. *Pate*, 2 H. Bl. 308; *Smith* v. *Coffin*, 2 H. Bl. 444; *Clark* v. *Col-*

vert, 8 Taunt. 742; *Kitchen* v. *Bartsch*, 7 East, 53; *Day* v. *Lafflin*, 6 Met. 280; *Ames* v. *Gilman*, 10 Met. 239; *Mitchell* v. *Great Works Milling and Manuf. Co.* 2 Story, 648.

The bankruptcy of plaintiff having taken place before action brought, may be given in evidence under the general issue. 1 Chit. Plead. 158, 465, and authorities there cited; *Webb* v. *Fox & al.* 7 T. R. 391; *Thompson & al.* v. *Freeze*, 10 East, 418; 2 Chit. Pl. 426, (note n;) Bull. N. P. 153.

The decision of this case cannot be affected by an Act passed by the present Legislature, entitled "An Act in relation to bankrupt plaintiffs," and designed to influence this case. The law, as it was at the hearing, is to be settled. *Inhab. of Macnawhoc plan.* v. *Thompson*, 36 Maine, 365.

The Legislature had no constitutional power to pass such a law to have any binding effect on this case. It is an attempt to repeal a portion of an Act of Congress.

J. S. Abbott, contra.

The offered evidence, as to the letters, was altogether too remote, and had no connection with the subject matter of the suit.

The declarations of Emery, made in 1834, could have had no legitimate effect, if received. But neither them nor the statements alleged to have been made at Bangor, are receivable on legal principles. They were not under oath, nor any part of any act provable, and no reason appears why the testimony of Emery should not have been given.

The bank books contained nothing relevant to the case. There was no entry respecting the bill in controversy. There is an error in the exceptions in relation to this. It should have read, "tending to prove, *as alleged*, that said bill," &c.

Unless some specific entry on said books is exhibited to the Court, which ought to have been received by the jury, the Court could hardly, after these repeated trials, set aside the verdict, and especially if, on inspection of the books, it

is apparent that no such entry exists, and that if a new trial should be granted, the books would be again excluded.

Besides, I know of no principle on which the books are receivable, even if the entries tend to establish the fact as claimed.

As to the rejection of the document, there are several reasons for it:—

1st. There was no appropriate plea or brief statement under which such evidence was admissible. The Court might have allowed additional issues, but could not in this case, as it was apparent, by so doing, injustice would be done.

2d. The document is not properly certified. The certificate on the first page is a loose, uncertain and insufficient way of certifying a record. On page 10, the clerk certifies that the foregoing are true copies of the petition and of his schedules; not true copies of the record of the same, as stated on page 1. There are sundry papers including forty six pages; and after the eleventh page there are ten more certificates of the clerk, some of which certify that the preceding papers are true copies of the *record*, and some true copies of the *papers*. Hence, the certificates are contradictory and it is impossible to tell which to rely on.

3d. The document contains twenty-three separate papers, and many of them irrelevant under any state of pleadings; as they were all presented together, the whole are properly rejected. *Tibbetts* v. *Baker*, 32 Maine, 25.

4th. The Act passed March 16, 1855, has a legal applicability to this case, affecting only the remedy and mode of proceeding, and the party here has complied with the provisions of that Act. *Thayer & al.* v. *Seavey*, 11 Maine, 284; *Madison* v. *Co. Com.* 34 Maine, 592; *Detroit* v. *same*, 35 Maine, 373.

Besides, this action can be maintained on the authority of *Sawtelle* v. *Robbins*, 23 Maine, 196, especially after the filing of the assignee's consent, a copy of which is herewith furnished the Court.

RICE, J. — The case comes before us on exceptions. The first objection to the ruling of the Judge who tried the cause is founded on the exclusion of testimony offered, to prove that, in 1836, letters were found secreted in a house in which one Emery lived, in Sept. 1834, in the town of Industry. Said Emery, in 1834, carried the mail through Industry to Kingfield, over one of the routes by which a letter from Boston might pass on its way to Kingfield. The letters found secreted, bore date in 1834, had been opened, and were directed to persons residing in Kingfield. But it did not appear that Emery lived in the house referred to after Sept. 1834, nor that the letter in which the original plaintiff forwarded the money in controversy was there found, nor that those letters, which were found, in any way related to the parties in this suit. No ground is perceived upon which such letters could have been legally admitted.

An offer was also made to prove certain declarations of the same Emery, made at different times after the loss of the money in controversy. Those declarations were unaccompanied by any acts of which they were explanatory, and came from a person, who, so far as any thing appears in this case, was a competent witness. Such declarations were merely hearsay, and as such properly excluded.

The case finds, that it became material in the progress of the trial to show on what day the said $500 bill went out of the Augusta Bank, and to show that it was in the forenoon of the 22d day of September, 1834, and for that purpose the books of said bank, the cashier by whom said books were kept, having long since deceased, were offered as evidence, tending to prove that said bill went out of the bank in the forenoon of said 22d day of September, 1834; but it not appearing that there was any entry respecting that bill, the Court excluded said books.

It is now contended, that these books were improperly rejected. If the entries in those books did tend to prove a fact material to the issue then before the jury, they should have been admitted. They were manifestly rejected, be-

cause, in the opinion of the Judge, they had no such legitimate tendency. The case does not show how, or in what manner the entries in the rejected books became material, nor in what way they would tend to establish any fact proper to be proved in the case. They are not made part of the case by reference or otherwise. It was the duty of the excepting party to bring the evidence so rejected before the full Court, that by inspection, or in some other way, it could determine upon its admissibility. Not having done so, the presumption is, that the evidence offered was properly excluded.

The next matter of exception is the exclusion, by the Judge, of a *document*, referred to in the exceptions, and marked A. This document contains a large number of papers, purporting to be copies of record, and of other papers, on file in the office of the clerk of the United States District Court, for the District of Massachusetts, and were offered as evidence of the bankruptcy of the plaintiff before he commenced the original action.

The action was assumpsit. The trial was upon the general issue. The bankruptcy of the plaintiff was not pleaded either specially or by brief statement. It is contended by the original defendant, that the bankruptcy of the plaintiff may be proved under the general issue, without being otherwise pleaded. This position is controverted by the plaintiff.

Judge STORY, in his work on pleading, page 132, says, "Bankruptcy of the defendant must be specially pleaded. But bankruptcy of the plaintiff may be given in evidence under the general issue."

In 1 Saunders' Pleading, 433, it is said that "the plaintiff's bankruptcy might, formerly, be given under the general issue," and *Webb* v. *Fox*, 7 T. R. 396; B. N. P. 153; *Norton* v. *Shakspeare*, 15 East, 622; 3 Camp. 236, are cited as authorities for the practice. "But now, it must be pleaded specially in assumpsit and debt," for which *Pitt* v. *Chappellow*, 8 M. & W. is cited.

Under the plea of non assumpsit, the defendant might, before the new rules, give in evidence, that the plaintiff was a bankrupt, when that circumstance would defeat his right of action. 1 Chit. Pl. 478.

As the object of pleading always is to apprise the other party of the ground of defence, in order that he might be prepared to contest it, and might not be taken by surprise, it was singular, that under the general issue, which, in terms, only denies the promise, the defendant should be permitted to avail himself of a ground of defence which admitted a valid promise, but insisted that it had been performed, or that there was an excuse for non-performance, or that it had been discharged. 1 Chit. Pl. 478.

The authorities upon this point are conflicting, and though we do not intend to say, that the bankruptcy of the plaintiff may not be given in evidence under the general issue, it is more in conformity with the principles and objects of pleading that such defence should be distinctly set out by plea or brief statement. It does not appear, however, that the papers offered to prove the plaintiff's bankruptcy were rejected on that ground.

The document marked A, contains, as has been before remarked, a large number of separate papers, attached together by an ordinary tape. Prefixed to these papers, and under the seal of the Court, is a certificate of the clerk to the effect, that the "papers hereunto annexed, are each and all true copies of the record in the matter of Edward Crehore of Dorchester in bankruptcy, in said Court, and that they are copies of the whole record in that case." There are no marks upon the papers annexed to this certificate, by which their identity can be determined. Upon one of the papers now in the *document* is a certificate of the clerk of said District Court, "that the foregoing are true copies of the petition of Edward Crehore of Dorchester, to be declared a bankrupt, and of his schedules of assets and liabilities annexed to the said petition." Several other papers are simply certified as "a true copy." These papers

were offered, in one document, as evidence to prove the bankruptcy of the plaintiff.

Section 45, c. 133, R. S., provides, that the records and proceedings of any Court of another State or of the United States, shall be admissible in evidence in all cases in this State, when authenticated by the attestation of the clerk, prothonotary or other officer, having charge of the record of such Court, with the seal of such Court annexed.

There being many papers in the document referred to, which were not legally authenticated as copies of any record, of any Court, and which were consequently irrelevant to the issue then before the jury, and these papers being offered with others to which the objection might not apply, in such a manner as that they must all have gone to the jury together, without any thing to indicate to them which were, and which were not, proper for their consideration, the whole document was properly excluded. *Tibbetts* v. *Baker*, 33 Maine, 25.

The operation of the statute of March 16, 1855, in relation to bankrupt plaintiffs, is unimportant, so far as this action is concerned. *Exceptions overruled and Judgment on the verdict.*

COUNTY OF ANDROSCOGGIN.

† HILL *versus* MORE.

Under a mortgage of real estate to secure a bond with certain conditions, in which was also this stipulation: — "that should either party be dissatisfied with the fulfilling of the above bond, it shall be submitted to certain persons, (named,) and their decision shall be final," the mortgagee may enter for foreclosure, for a *breach* of the mortgage, without resorting to the opinions of the arbitrators named in the bond.

And in an action involving the legality of the foreclosure, other evidence of the breach of the bond is admissible.

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

WRIT OF ENTRY. *Nul disseizin* was pleaded.

The demandant claimed the premises in fee, and to support her title, introduced a mortgage deed of the premises from Ebenezer H. Ayer to Mark Hill, dated March 24, 1844, with the note mentioned in the condition, also a published notice of the foreclosure of the same by said Hill. She also proved that Mark Hill died in April, 1848, and offered, in evidence, a copy of his last will and testament, in which was a devise to demandant of all his real estate in the county of Cumberland, (the premises were then in that county,) to hold the same, *so long as she remained a single woman.* On the day of her marriage or death, it was bequeathed to another.

It was objected by defendant that the action was not supported by this evidence, and its admission resisted as incompetent.

The tenant's title to the premises was a mortgage deed from Ebenezer H. Ayer to True Woodman, dated March 24, 1835, duly recorded on the same day, which provided for the performance of a bond, given by Ayer to Woodman, for

the maintenance of the latter and his wife, the conclusion of which was as follows: —

"And we agree that should either party be dissatisfied with the fulfilling of the above bond, it shall be submitted to Ebenezer Whitehouse, Moses Emery, jr. and John Verrill, and their decision shall be final."

The tenant also put in an office copy of an entry upon the premises, in the presence of two witnesses, by True Woodman, on Feb. 15, 1845, for condition broken, and a deed of warranty from said Woodman to himself, dated June 18, 1845. It also appeared that the tenant mortgaged back to Woodman the same, to secure an obligation to support him and his wife during their lives.

There was evidence tending to show that the bond of E. H. Ayer, by his own admission, prior to the entry of Woodman, had been broken, and that there was no dispute on that question. There was also rebutting testimony.

The tenant also offered to prove, by witnesses in Court, that said E. H. Ayer did actually break the condition of the bond in several particulars, prior to the entry of True Woodman; and that after such entry, Woodman maintained possession until he sold to defendant, and that the latter had been in possession since; also, that tenant had supported Woodman and wife until they died.

All this testimony was rejected by the Court.

It was agreed to submit the cause to the full Court, with power to draw inferences as a jury might, and if, on the evidence admissible, the action was not maintainable, judgment to be rendered for defendant; otherwise, for plaintiff; and if the testimony offered in defence, was erroneously rejected, which, in connection with the legal evidence in the case, would bar this action, then the case to be sent to a jury.

May, for plaintiff.

On the facts proved, the demandant took a freehold estate in the premises, and may maintain this action, notwithstanding she alleged her seizin in fee simple. But, if necessary,

we wish for liberty to amend the writ to conform to the title proved. R. S., c. 145, § § 3, 4.

Section 5, of same chapter, is merely directory.

As against Hill, the tenant acquires no title. The only title Woodman had to convey, was a mortgage, given to secure a bond, which, in its nature, was not assignable, being a personal trust. *Clinton* v. *Flye*, 10 Maine, 292. No attempt was made to assign that, and it did not pass by this deed. *Dockray & ux.* v. *Noble & al.* 8 Greenl. 278; *Gould* v. *Newman*, 6 Maine, 239.

An assignee of a mortgage, without any part of the debt secured, cannot recover the land. *Johnson* v. *Candage & al.* 31 Maine, 28; *Cram* v. *March*, 4 Pick. 131; *Haynes* v. *Wellington*, 25 Maine, 458.

We further contend, that no foreclosure of the Woodman mortgage has been effected. No legal entry has been made for a breach of the bond. That question, by both parties, was agreed to be determined by certain persons therein named, and no attempt to obtain their decision has been made.

There was no other mode by which to prove a breach of the bond. This part of the agreement was as binding as any other part, and no action upon the bond or mortgage can be maintained until offers and attempts at reference have been properly made.

Again, we say the entry was not effectual, as there was no visible change of possession, and Hill had no notice of the entry.

Nor could the possession of the tenant be the same as that of Woodman to work a foreclosure. The statute contemplates that the person entering, shall continue *his* possession for the three following years. To work a forfeiture, the requirements must be strictly followed. *Call* v. *Leisner & al.*, 23 Maine, 25.

J. C. Woodman, for tenant, objected first to the sufficiency of the evidence to show a foreclosure of the mortgage under which the demandant claimed, and that if not foreclosed,

the action for possession must be brought by the executor or administrator. *Smith* v. *Dyer*, 16 Mass. 18; *Dewey* v. *Van Deuson*, 4 Pick. 20; Stearns on Real Actions, pp. 258, 259 and 260; Kent's Com. 154–5.

That if foreclosed, the demandant only shows a life estate, and the evidence does not support the declaration in which she claims a fee. Stearns on Real Actions, 206; Forms of declarations in same; R. S., c. 145, § § 5, 6, 11, 46.

Again, the title of the tenant is perfect. The bond of Ayer, though informal, was sufficient. 1 Shep. Touchstone, 367; 2 Black. Com. 295; *Storer* v. *Bradbury*, 14 Maine, 185. This bond was described in the condition of the mortgage, and subsequent purchasers are charged with notice. *Perkins* v. *Lyman*, 11 Mass. 83; *Low* v. *Piers*, 4 Bur. 2227; *Pike* v. *Collins*, 33 Maine, 45.

We had a right to show a breach of the bond without calling on the persons named therein as arbitrators. That clause did not negative the preceding clause, where he was required to keep its conditions.

This part of the bond, relied upon by the other side, seems to have been inserted for the benefit of the parties, particularly the obligor, that he, if desirous to fulfil the bond, might appeal to the arbitrators, in a doubtful case, where there was a dispute.

But if necessary to call on the arbitrators, before an action could be maintained on the bond, it would not be necessary to call on them before the obligee could proceed to foreclose the mortgage, provided he could show that the obligor had broken the conditions of the mortgage, which would involve an inquiry whether the bond was broken. It was not necessary to show the bond at all. *Brooks* v. *Briggs*, 32 Maine, 447; *Thayer* v. *Mann*, 19 Pick. 537; *Joy* v. *Adams*, 26 Maine, 333.

The bond being shown, is itself, like a note of hand past due, *prima facia* evidence of a breach, and casts the burden on the plaintiff, that Ayer furnished the requisite support to the time True Woodman entered for foreclosure. 1 Stark.

Ev. 376, part 3, § 1; 2 Stark. Ev. 309, title, "Bond"; *Gray* v. *Gardiner & als.* 17 Mass. 189.

But if the burden is on the defendant to show a breach of the bond before entry for foreclosure, the evidence authorizes that conclusion.

As to the objection, that the mortgage debt was not assigned, we answer, that True Woodman's warrantee deed, conveyed to Samuel More the title by the mortgage deed, the mortgage deed and Ayer's bond to Woodman and wife for support; and if it did not *eo instanti* convey the bond of Ayer, it conveyed the mortgage to More and made him a trustee for the bondholder; and the moment the mortgage was foreclosed for the benefit of True Woodman, it passed to the defendant by way of estoppel by the covenants of warranty in Woodman's deed.

An assignment of a mortgage is effected by a quitclaim deed, if the intent thereby to convey the title is manifest. *Crooker* v. *Jewell*, 31 Maine, 306, 313 and 314. In this case, there is no intimation, that any personal security was conveyed. The true construction of the 17th § of the 125th chapter of the R. S., requires, that the tender, in order to lay a foundation for a bill in equity to redeem, should be made to the mortgagee, until he makes an assignment of the mortgage and that assignment is recorded; and this, if he has parted with all the personal security connected with the mortgage. After that, the tender should be made to the assignee; certainly if he has entered. *Smith* v. *Kelley*, 27 Maine, 240; *Wing* v. *Davis*, 7 Greenl. 31, 33, 34; *Dockray & ux.* v. *Noble & al.*, 8 Greenl. 278, 285. A mortgagee, especially after entry for foreclosure, is considered as having a legal estate, which may be aliened and transferred by any of the established modes of conveyance, subject only, until foreclosure, to be redeemed by the mortgager. *Hunt* v. *Hunt*, 14 Pick. 380.

When True Woodman made his warrantee deed to the defendant, March 27, 1845, retaining the bond of Ayer, he took from the defendant a new bond, with mortgage, for the

support of himself and wife. The warrantee deed did not convey an absolute and unconditional fee, for the grantor did not own one. By the covenants in the deed, True Woodman and the defendant were both estopped to deny, that an unconditional fee passed subject to the new mortgage. *Lawry* v. *Williams*, 13 Maine, 284; *Crocker* v. *Pierce & ux.*, 31 Maine, 182. Ebenezer H. Ayer was sitting by and assenting to this, and is also estopped. *Colby* v. *Norton*, 19 Maine, 412; *Hatch* v. *Kimball*, 16 Maine, 146; *Sullivan* v. *Park*, 33 Maine, 439; *Matthews* v. *Light*, 32 Maine, 309.

It was clearly the intent of the parties to uphold the bond, and transfer it to the defendant. If not, he would be giving his bond to True Woodman without consideration. And if he acquired nothing from True Woodman by the deed, he would convey nothing back by his mortgage. If that was his purpose, True Woodman would destroy his whole security on the property for support, which we cannot believe. For True Woodman, after he gave his warrantee deed, to combine with Ayer and Mark Hill, to surrender the bond to Ayer, in order to defeat the defendant's title, would be inconsistent with the covenants of his deed, and a fraud on the defendant.

From all the cases, the inference arises, that an ordinary assignment without covenants or a quitclaim deed, will be effectual to transfer a mortgage, if that is the intent, but not the personal security without naming it; that such a conveyance makes the assignee a trustee for the holder of the personal security. But that, if the conveyance be by a deed with covenants of general warranty, the personal security also passes without delivery even, in order to make the title as nearly perfect as can be done by the warranty. This last principle was expressly decided in the case of *Lawrence* v. *Stratton & al.*, 6 Cush. 163, 165, 169 and 170; and in *Wing* v. *Davis*, 7 Greenl. 31 and 33; and in *Weeks* v. *Eaton*, 15 N. H. 149.

Upon principle, this must be so, for after the assignee of

the mortgage has foreclosed it, he never can be ousted by his assignor by warrantee deed, although such assignor may hold the personal security. The assignor will be estopped to claim by his covenants of warranty. The following cases go to establish the same doctrine.—*Jones* v. *Huggeford*, 3 Met. 515, 519; *Crane* v. *March*, 4 Pick. 131, 136. We are met on the other side by the case of *Webb* v. *Flanders*, 32 Maine, 175. That case is distinguishable from this in two particulars. The warrantee deed was made before breach of the condition of the mortgage. Secondly, in that case, it was proposed to foreclose the mortgage by a suit at law. But the case is a very short one, without arguments of counsel; without reasoning from the Court; a mere *per curiam* opinion. It is admitted in the opinion, that the mortgage was transferred by the warrantee deed. According to the authorities cited in this case, and upon principle, the warrantee deed, *ipso facto*, operated as a transfer of the bond, and if not, the assignee of the mortgage became a trustee for the bond holder, and the conclusion is, that unless the foreclosure was interrupted by the sale to Samuel More, the fee simple became absolute in the defendant at the close of three years, (Feb. 15, 1848.) That the foreclosure was not interrupted by the sale is settled and certain. R. S., c. 125, § § 3, 4, 6 and 15; Stat. 1821, c. 39, § 1; *Wing* v. *Davis & al.*, 7 Greenl. 31 and 33; *Hatch* v. *Kimball*, 14 Maine, 12; *Cutts* v. *York Manf. Co.* 18 Maine, 203. These cases settle the question in Maine, and the same is settled law in New Hampshire. *Smith* v. *Smith*, 15 N. H. 55.

The tenant More, being in possession by a warrantee deed from True Woodman, the original mortgagee, who had entered and taken possession for foreclosure for condition broken, the only remedy of Mark Hill, or those who represent him, even if the bond was all paid up and discharged by Ayer, the mortgager, would be by Bill in Equity. R. S. c. 125, § § 16, 17, 18, 19 and 20; *Parsons* v. *Welles*, 17

Mass. 425; *Bigelow* v. *Willson*, 1 Pick. 491; *Sherman* v. *Abbot*, 18 Pick. 451.

APPLETON, J. — On March 17, 1835, E. H. Ayer conveyed the demanded premises to True Woodman, in mortgage, to secure the performance of a bond or contract he had given to said Woodman, conditioned to support him and his wife during their natural lives, and to do and perform certain other things therein specified. On Feb. 15, 1845, True Woodman entered to foreclose his mortgage for condition broken. The defendant offered to prove, if admissible, and of the admissibility of this evidence there can be no question, that Ayer had broken the conditions of his bond in several particulars, before the entry of Woodman to foreclose; and that after such entry, Woodman remained in possession of the mortgaged premises until March 27, 1845, when he conveyed the same, by deed of warranty, to the defendant, who, at the same time, gave back a mortgage to said Woodman to secure the performance of a bond given for his support and that of his wife; that the defendant performed all the terms of the bond, and supported Woodman and his wife till their death, and since their decease, has remained in possession to the present time.

It was in proof, on the part of the plaintiff, that on March 24, 1844, E. H. Ayer mortgaged the same premises to Mark Hill, under whom the demandant derives her title.

In deducing her title, the demandant shows that she is only entitled to a life estate. The writ alleges a fee, and the evidence fails to show that the demandant has a fee in the demanded premises. Were the plaintiff entitled to recover, an amendment might be allowed, by which this objection would be avoided.

The title of the tenant, if legally connected with the mortgage of Ayer to Woodman, is prior to that of the demandant, who claims by a subsequent mortgage from the same Ayer. The demandant, however, denies the entry to foreclose to have been legally made, and that the tenant

can avail himself of the mortgage given by Ayer to Woodman to defeat the present action.

The bond of Ayer to Woodman, to which reference has already been had, after reciting conditions, proceeds as follows:—"Now if the said Ebenezer H. Ayer, shall well and truly perform all the above conditions in the above bond, then the above obligation for one thousand dollars to be void; otherwise, to remain in full force and virtue, and we agree that should either party be dissatisfied with the fulfilling of the above bond, it shall be submitted to Ebenezer Whitehouse, Moses Emery, jr., and John Verrill, and their decision shall be final." The ground taken in the defence is, that as these referees have not decided, that there has been a breach of the conditions of the bond, there could be no valid entry to foreclose, and, consequently, no foreclosure.

It is fully proved, by the admissions of Mark Hill, and the other proof adduced, that there was a breach of the conditions of the bond given to True Woodman, prior to his entry to foreclose.

It is insisted by the counsel for the plaintiff, that an adjudication of such breach is an essential prerequisite to a valid entry by the mortgagee, and constitutes the only proof by which a breach of the bond can be established.

An agreement to refer or a general provision that all disputes which may arise in the execution of a contract shall be decided by arbitrators, will not be allowed to deprive this Court of its jurisdiction. *Thompson* v. *Charnock*, 8 D. & E. 139; *Haggard* v. *Morgan*, 4 Sandf. S. C. 198. It is undoubtedly true, that parties may by agreement "impose a condition precedent with respect to the mode of settling the amount of damage or the time for payment or any matters of that sort which do not go to the root of the action." *Avery* v. *Scott*, 8 Exch. 497. But in this case no condition precedent to an entry is imposed. Nothing in the bond prevents the entry of the mortgagee whenever a breach of the condition has accrued. The case is within the principles laid down by Lord CAMPBELL in *Livingston* v. *Ralli*,

30 Eng. Law & Eq. 279, where he says, "though an agreement to refer has been considered no bar to an action upon the subject agreed to be referred, the language of Courts and Judges has always been, that if the party was damnified by the refusal to refer, he might bring an action."

If True Woodman, having legally entered for condition broken, and remaining in possession of the mortgaged premises, conveyed the same by deed of warranty to the tenant, such conveyance would transfer to him the legal possession of the same. "A mortgagee," remarks SHAW, C. J., in *Hunt* v. *Hunt*, 14 Pick. 374, "especially after entry for foreclosure, is considered as having a legal estate which may be alienated and transferred by any of the established modes of conveyance, subject only, until foreclosure, to be redeemed by the mortgager." In *Freeman* v. *McGaw*, 15 Pick. 82, it was held, an assignment of a mortgage might be made by quitclaim. In *Lawrence* v. *Stratton*, 6 Cush. 163, the Court held, that a warrantee deed would convey all the right the mortgager had in the mortgage, which is a conditional fee, and would also operate as an equitable assignment of all interest in the notes secured by it. In *Given* v. *Doe*, 7 Blackf. 210, it was held, that a mortgagee in fee of real estate has the legal title to the estate, and the same right to transfer it by deed that he has to convey by deed the legal title of any other real estate. In that case, there was no legal assignment of the mortgage debt, but the Court held the grantee had the legal title to the land and an equitable claim to the debt. "Such separation," says BLACKFORD, J., "of the legal title to the land from the claim at law frequently occurs." So it has recently been held in New York, that although a sale made by a mortgagee is irregular, his deed operates as an assignment of the mortgage. *Olmsted* v. *Elder*, 2 Sanf. S. C. 325. In that case, the Court say, "The deed was sufficient, at least to transfer to the defendant the money due upon the mortgage. The interest on the mortgage was in arrear, and the mortgagees were entitled to foreclose or to sell under the

statute. The defendant, therefore, occupies the position of a mortgagee in possession of the mortgaged premises," &c. In *Crooker* v. *Jewell*, 31 Maine, 306, it was decided, that a mortgage might be assigned by deed of quitclaim. In *Lincoln* v. *White*, 30 Maine, 294, the interest of a mortgagee, before the foreclosure had become perfected, was conveyed by deed, and the conveyance held valid.

The tenant being lawfully in possession by warrantee deed from the mortgagee in possession, his grantor would be estopped from questioning his title, and if, being defeasible at the time of the grant, it should subsequently become perfect, it would inure to his benefit. *Pike* v. *Galvin*, 29 Maine, 183; *Baxter* v. *Bradbury*, 20 Maine, 260.

The tenant, then, connecting his possession and title with that of the mortgagee, who had legally entered to foreclose, cannot be ejected by the owner of the equity of redemption, though the mortgage debt may have been paid or discharged since such entry. The only remedy, which the law recognizes in such case, is by bill in equity, where the rights of all parties can be equitably adjusted. *Parsons* v. *Welles*, 17 Mass. 419; *Hill* v. *Payson*, 3 Mass. 559.

Upon the evidence before us, the plaintiff fails to show a right of action as against the tenant, and a nonsuit must be entered. *Plaintiff nonsuit.*

COUNTY OF OXFORD.

† CALDWELL *versus* HAWKINS.

A collector of taxes legally qualified, acting within the scope of his powers, under a *warrant* from competent authority, may justify thereby the seizure and sale of the property of such delinquents as refuse to pay the taxes assessed against them.

His justification will not fail by reason of any errors in the assessment or in the proceedings of the town, at the meeting at which he was chosen.

And the return of his doings, upon the warrant, is *prima facie* evidence of the facts therein stated.

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

TRESPASS.

The defendant, as collector of taxes of the town of Oxford, took a pair of steers, the property of plaintiff, wherewith to satisfy a tax against him.

The defendant introduced a portion of the records of the town, a copy of the tax bills, warrant, and his doings thereon.

The plaintiff also introduced other records of the town. All the evidence was subject to any legal objections.

The return of the defendant upon the warrant set forth his doings, which appeared to have been in conformity with the provisions of law. No other commitment of the taxes to defendant appeared than by the warrant, which was directed to him and signed by three individuals, "Selectmen and Assessors of Oxford."

It was agreed that if, upon the evidence legally admissible, the justification is made out, a nonsuit is to be entered; otherwise, a default.

C. W. Walton, for defendant, maintained that the evidence admissible showed: —

1st. That defendant was the collector of taxes.

2d. That in taking plaintiff's property, he acted regularly under his warrant and tax bills.

3d. That they came from competent authority, and were in legal form.

4th. That his warrant is his protection against all illegality but his own, and cited *Ford* v. *Clough*, 8 Maine, 334; *Kellar* v. *Savage*, 17 Maine, 444; *Smith* v. *Titcomb*, 31 Maine, 272; *Holden* v. *Clarke*, 8 Pick. 436; *Sprague* v. *Bailey*, 19 Pick. 436.

5th. The collector's return is *prima facia* evidence in his favor of the facts therein stated. *Dean* v. *Washburn*, 18 Maine, 100.

6th. Selectmen are to be assessors in certain cases. R. S., c. 14, § § 29, 30.

J. J. Perry, for plaintiff, argued that defendant must show that the town, in all its proceedings and by its officers, have complied with the requirements of law, and without this, the justification fails, and cited many omissions in the records introduced of matters required by the statute, and pointed out various defective proceedings.

He also argued, that the warrant was not legal, being signed by *selectmen*, who have no authority, and that a larger amount was assessed than was raised by the town, and cited *Huse* v. *Merriam*, 2 Maine, 375; *Moshier* v. *Roby*, 11 Maine, 136; *Sibley* v. *Burnham*, 15 Maine, 144. That the warrant was void on its face, and was no protection.

The tax bills were never *committed* to defendant under the hands of legally qualified assessors. If the bills were not legally committed, the defendant had no right to distrain for the payment of any tax in such list. R. S., c. 14, § 66.

Before distraining there must be a demand and refusal. Of this the return is not legal evidence. *Bicknell* v. *Hill*, 33 Maine, 297.

GOODENOW, J. — This is an action of trespass, for taking a pair of steers, the property of the plaintiff. The defen-

dant admits the taking, and justifies as collector of taxes for the town of Oxford.

By the copies from the records of the town of Oxford, it appears that the defendant was duly chosen and qualified as collector of the town of Oxford; that he had given bond as required. And it also appears, that in taking and selling the plaintiff's steers, he acted regularly under a warrant and tax bills duly issued from the selectmen and assessors of said town of Oxford.

"A collector's warrant is his protection against all illegality but his own, and his return is *prima facie* evidence in his favor of the facts therein stated."

Upon the evidence in the case legally admissible, we are of opinion, that a justification is made out, and that a nonsuit should be entered. *Plaintiff nonsuit.*

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† QUIMBY *versus* DILL *& als.*

A lease to one during his life, with the privilege of furnishing his daughters a home so long as they remain unmarried, gives to them no rights as tenants of the freehold.

A creditor who blends together his claims accruing *before* and *after* a voluntary conveyance of his debtor, and levies on the estate conveyed, has only the rights of a *subsequent* creditor.

In a writ of entry, the question whether a life estate in the premises has been forfeited on account of *waste*, cannot be considered.

A levy of land on a judgment obtained *collusively* by the tenant of a life estate therein, does not work a forfeiture of such particular estate.

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

WRIT OF ENTRY.

The defendants pleaded the general issue, and Enoch Dill and his wife, two of them, by their brief statement, claimed a life estate in the demanded premises; Mercy Dill, the other defendant, claimed title to a portion by force of a levy, and to the residue as tenant under the other defendants, and if the levy failed, a tenancy in the whole under Enoch and his wife.

On July 3, 1843, Enoch Dill conveyed the premises to Eben. M. Dill, and the latter executed a lease of the same under his hand and seal to Enoch Dill and his wife Doraxa, during their lives, which was recorded in April, 1849. The lease contained the following stipulations: — "And the said Eben. M. Dill is not to make waste or strip the farm, or any part thereof, by virtue of the deed which I have this day given him, and the said Enoch Dill has the privilege of furnishing a home for his daughters at his house so long as they shall remain unmarried, the said Eben. M. to have the privilege of carrying on the farm with me, as long as we shall agree to carry it on together, and at no time shall the said Eben. M. be debarred from entering on said farm for the purpose of viewing it or making repairs, the said Eben. M. to pay all the taxes assessed on said farm."

On March 22, 1853, Eben. M. Dill conveyed the premises to demandant, by a deed of quitclaim.

Mercy Dill, the daughter of Enoch, and who remained unmarried, introduced a judgment in her favor against Enoch Dill, and a levy upon that part of the premises described in her brief statement. This judgment was upon account annexed to the writ, which was sued on Nov. 9, 1850, for her personal services, for the years from 1827 to 1840, inclusive, and 26 weeks of the year 1842, together with one item of $10, in 1837, for cash lent.

The services were charged at $52, per year, and the interest for each yearly services. The judgment was for the sum of $1065,46.

Upon the account annexed to the writ was the following admission signed by Enoch Dill: —

"Nov. 8, 1850, I hereby acknowledge, that the within account is correct and justly due Mercy Dill, and that I will pay the same."

The demandant introduced evidence tending to show, that Mercy, during the time charged, worked at various places, and that during the time, it was not expected that she should have any wages; and that the consideration of the

deed to Eben. M. Dill, was for his personal services; also, that much of the wood on the premises had been sold off by Enoch Dill.

There was also opposing testimony.

It was agreed, that upon the legal evidence the Court might draw inferences as a jury might, and render the proper judgment.

May, for tenants.

Under the papers in the case, Enoch Dill and wife are entitled to the possession of these premises during their lives, unless they have done something to forfeit it, and if they have not forfeited their estate, the plaintiff cannot oust them by a writ of entry.

In this action, the question of forfeiture cannot be tried for, or by reason of waste. The only mode of trying that question is an action of waste by the one who has the next immediate estate of inheritance. R. S., c. 129, § § 1, 4.

The only remedy for waste is by force of our statutes, and the statute remedy only can be pursued. *Smith* v. *Follansbee*, 13 Maine, 273.

But if, in this form of action, a forfeiture may be established on the ground of waste by the tenant, still the plaintiff could only recover for waste after his ownership of the premises. In this case none is proved after the plaintiff obtained his deed.

If it be possible for plaintiff to recover the place wasted, to use the language of the statute, what is to be included in such recovery? Is it the whole estate? If the waste consists in cutting wood, is the dwellinghouse, barn, tillage, land, &c., forfeited? Such is not the construction in New York. *Jackson* v. *Tibbetts*, 3 Wend. 341. Enoch Dill and his wife would seem to be entitled to hold possession of the premises.

As to the other defendant, the outstanding title in the freehold in Dill and wife, is a good defence for her. The plaintiff has no right to possession.

But she has also a defence as to a portion of the premises

as the owner in *fee simple.* The levy shows her rights. It was for a debt due. True it was outlawed, but the statute does not pay a debt, though it may prevent its recovery. But the right to set up the statute, is in the debtor alone. On the evidence, here was a *bona fide* debt. But whatever may be thought of the levy, she is still protected by the life estate of Enoch Dill and his wife, whose faithful servant and daughter she is.

L. M. Morrill, for demandant.

The positions of Mercy Dill are not tenable or allowable as legal propositions. The rules and principles of pleading will not permit her to maintain this *hypothetical* defence; "if she is not seized of a part by her levy, then she is tenant as to the whole."

She must, at her peril, stand upon the averment that she is seized of a part in fee, or that she claims the whole, as tenant. No alternative statement is admissible.

Her plea must be regarded as bad, and her defence under it rejected, so far as she claims as tenant.

1. It is bad for duplicity.

2. It is repugnant. She claims that she is seized in her own right, and at the same time, as tenant. These statements are both affirmative statements, or, to be allowable at all, must be regarded so, and as such, it is obvious they cannot both be true.

3. It is a *felo de se,* as, by her plea, she both affirms and denies demandant's title. By setting up her levy, she denies and repudiates his title, while, by her plea of tenancy, under the lease of Enoch Dill from Eben. M. Dill, she affirms it and claims under it.

As to the title of Enoch Dill and wife, their estate under the lease, has been forfeited.

They have undertaken, by conniving at the suit of Mercy Dill and her levy upon the premises, to destroy the title of their landlord, and to affirm the same in Mercy, and thus effectually to alienate the estate in fee, and put a stranger in possession of it and embarrass it. 4 Kent's Com. 105.

Any act of desertion or which is inconsistent with the tenant's estate, will determine it. *Campbell* v. *Proctor*, 6 Maine, 12; 11 Mass. 222.

They consented to, and aided in the perpetration of a fraud on the estate and title of the lessor, and thus usurping his estate and title they lose their own.

As to the defence of Mercy Dill, she cannot be permitted to interpose a tenancy, which her suit and levy show she did not claim, and the institution of which suit, if she had such tenancy, would have destroyed it.

The position of reliance upon her levy for part must fail, if not upon the legal grounds above indicated, upon the ground of fraud.

Her suit and levy, and all the proceedings connected with it, are fraudulent. A bare statement of the facts shows it.

The account, upon its face, shows it to have been trumped up. If she ever had any such account, it was barred by the statute of limitations, and it is obvious she obtained an acknowledgment of indebtedness from her father for the purpose of these proceedings.

To be satisfied of this, it is only necessary to consider, that she knew of the conveyance of her father to her brother when made, was assenting to it for more than ten years; accepted and enjoyed the privileges of home under and provided for in the lease; all showing that she had no right or cause to complain, either as regarded the character of the transaction between father and brother, or on account of any claim she had as a creditor to her father.

Again, her debt, under the circumstances, must be regarded as subsequent to the conveyance, dating from the written acknowledgment of the father, which is subsequent to the conveyance from Enoch Dill to E. M. Dill.

Again, her levy should have been upon the life estate of Enoch Dill; it is upon the estate of Eben. M. Dill, whose title is not impeached, and of which she has no right to complain, and is invalid.

GOODENOW, J. — This is a writ of entry. Enoch Dill and Doraxa, his wife, two of the respondents, plead the general issue, and filed a brief statement, claiming that they are seized of a life estate in the demanded premises, by virtue of a lease from Eben. M. Dill to them. The respondent, Mercy Dill, pleads the general issue, and also files a brief statement, claiming that she is seized of a portion of the demanded premises, by virtue of a levy of an execution in her favor, against said Enoch Dill; and that, as to the residue of said premises, she claims to hold the same, as tenant of the said Enoch and Doraxa, under their lease; and that if she is not seized by virtue of said levy, of any part of said premises, then she claims possession of the whole, as tenant of said Enoch and Doraxa Dill.

The demandant puts into the case a deed from Enoch Dill to Eben. M. Dill, embracing the demanded premises, dated July 3, 1843, acknowledged the same day, and recorded Oct. 19, 1847. Also a deed of quitclaim of the same premises to himself, from Eben. M. Dill, dated March 22, 1853, acknowledged the same day, and recorded May 17, 1853.

The respondents put into the case a lease of said premises, from said Eben. M. Dill, to said Enoch Dill and Doraxa Dill, his wife, acknowledged July 3, 1843, and recorded April 9, 1849, to hold the same, "during their natural lives, or the life of the survivor." "And the said Enoch Dill has the privilege of furnishing a home for his daughters at his house, so long as they shall remain unmarried." Mercy Dill is a daughter of Enoch, and remains unmarried.

The facts relied upon by Mercy Dill, independent of her levy, are insufficient to entitle her to hold the demanded premises against the demandant. The lease of Eben. M. Dill to Enoch Dill allowed him the privilege of furnishing a home for her on the premises while she remained unmarried. It did not make her tenant of the freehold, as she claims to be by her pleading. 2 Greenl. on Ev. § 556.

Is she tenant in fee of that part of the premises covered by her levy?

It is not contended that the deed from Enoch Dill to Eben. M. Dill, was fraudulent or void as to *subsequent* creditors. It was prior to her attachment, which was on the 9th of Nov., 1850. The account annexed to her writ, is for her "services doing house-work from June, 1827, to June, 1828; 52 weeks, at $1 per week,—$52,00." "Interest on the same sum, 14 years, up to year 1843, $43,68." And for each year the same sum, with the interest on the same, to 1843, including $10 for money lent, and interest on the same; and the whole amounting to $1055,28. There was no evidence in the case to prove an express promise, on the part of her father, to pay her for her services. The probability is, that they were rendered without any expectation of any pecuniary reward. There is no evidence that she ever demanded or claimed payment of her father until the 8th of Nov., 1850, the day before the action was commenced against him. It appears that he *then* indorsed the following admission and promise on her account, which was subsequently annexed to her writ, to wit:—"I hereby acknowledge that the within account is correct and justly due Mercy Dill, and that I will pay the same. Enoch Dill."

"Nov. 8, 1850."

Whatever may have been the merits of her claim for the principal debt, the case does not show any facts by which it can be *implied* that her father was bound to pay the interest charged in her account. He, perhaps, obliged himself to do so by his express promise on the 8th of Nov. 1850.

If a creditor, having demands accruing partly before, and partly after a conveyance by his debtor, which he would impeach, on the ground of fraud, blends them in one suit, and, having recovered judgment, extends his execution on the land; he can come in only in the character of a *subsequent* creditor. *Reed* v. *Woodman*, 4 Maine, 400.

We are of opinion that Mercy Dill is not entitled to hold

that part of the demanded premises covered by her levy. And that as to the residue, she has no title under the lease.

By the R. S., c. 129, § 1, if any tenant in dower, or by the curtesy, or tenant for life or years, shall commit or suffer any waste on the premises, the person having the next immediate estate of inheritance therein, may have *an action of waste* against such tenant, wherein he shall recover the place wasted, and the amount of damages done to the premises. And the fifth section gives the same right of action to one who has the remainder or reversion.

But this is not an action of waste, and it therefore becomes unnecessary to determine whether such an action could or could not be maintained, upon the evidence submitted to us in this case.

But it is contended, as to the title of Enoch Dill and wife, that their estate under the lease has been *forfeited.* That they have undertaken, by conniving at the suit of Mercy Dill and her levy upon the premises, to destroy the title of their landlord, and to affirm that the title to the same is in said Mercy, and thus effectually to alienate the estate in fee and to put a stranger in possession of it and to embarrass it.

And so far as the facts are concerned in this allegation it appears to be well founded. The whole of this extraordinary account of Mercy Dill was admitted by her father to be justly due to her the day before her suit was commenced; and it also appears by the officer's return, that he chose one of the appraisers, when the levy was made.

But is the proposition equally well founded in law? It is true, Mr. DANE says, while examining the English cases upon this subject, c. 136, a. 3, § 5, "It is a general principle, that if a particular tenant alien a greater estate than by law he is entitled to do, and thereby divests the remainder or reversion, he forfeits his estate to him, whose right is attacked thereby." And the reasons given are, 1. Because such alienation amounts to a renunciation of the *feudal* connexion and dependence. 2. It tends, in its nature, to divest the remainder or reversion expectant. 3. The

particular tenant, by granting a larger estate than his own, has, by his own act, put an end to his original interest, and on such determination, the next taker is entitled to enter regularly, as into his remainder or reversion."

It is also true, that with all his researches, he was unable to cite one American case in which a forfeiture of the estate has been adjudged or decreed for this cause.

Chancellor KENT says, "Estates for life were, by the common law, liable to forfeiture, not only for waste, but for alienation in fee." "And that in New York and Pennsylvania, this feudal notion of forfeiture is expressly renounced and the doctrine placed upon just and reasonable grounds. Any conveyance by a tenant for life, or years, of a greater estate than he possessed, or could lawfully convey, passes only the title and estate which the tenant could lawfully grant. It is, therefore, an innocent conveyance, whatever the form of the conveyance may be, and produces no forfeiture of the particular estate. It does not, like a feoffment with livery at common law, *ransack the whole estate*, and extinguish every right and power connected with it." 4 Kent, 83. By the R. S., c. 91, § 9, we have a provision similar to that referred to above.

Upon this branch of the case, we are of opinion that the defence is made out, and that, as the demandant has no right of possession till after the termination of the life estate, there must be *Judgment for the defendant.*

Tenney and *Rice, J. J.*, concurred in the result.

Appleton, J., concurred.

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† CHESLEY *versus* HOLMES.

A deed describing the land conveyed therein by *numbers* and *range*, *according to the new survey*, will not authorize the use of a *plan*, proved to have been made according to what was called the new survey, to establish the *extent* of the lots so conveyed.

Where the limits of the premises by *numbers only* are thus left *uncertain*, reference must be had to other parts of the deed to determine them.

And where, in such a deed, reference is had to the *farm* occupied by the grantor, that is the more certain description, and will determine the extent of the *lots* conveyed.

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

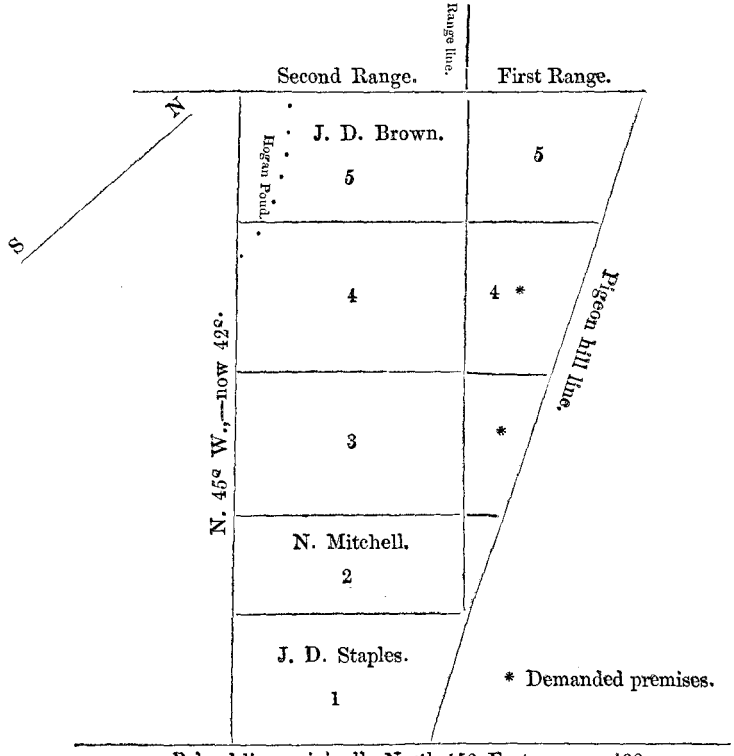
WRIT OF ENTRY, to recover possession of lots numbered 3 and 4, in the first range, according to the new survey, in the town of Oxford.

The tenant pleaded the general issue, and filed a brief statement of title in himself and in the heirs of Jacob Dwinal.

The demandant, through Jairus S. Keith, claimed title from the administrator of Samuel Brown, deceased.

And the question was, whether Brown, at the time of his death, was seized of the premises.

The following diagram, in connection with the evidence, will show more distinctly the nature of plaintiff's claims: —



The above sketch or plan was used at the trial, certified by David Noyes, on Dec. 1, 1854, as "the plan of the above lots in the first and second range of lots in the third division of lots in Hebron, a part of which is now Oxford, and is a true copy this day taken from the old original plan, now in possession of William C. Whitney."

"N. B. Lots No. 5, in the first and second ranges, are northwest of the Samuel Brown farm, and were once owned by Jacob B. Brown."

In the demandant's deed of quitclaim, from Jairus S. Keith, of Dec. 1, 1851, was this description:—

"One parcel of land situated in said town, called and known as lot numbered four, in the first range of lots in said town, and also another parcel lying aside the first described parcel, called and known as lot numbered three, in said first range, and those two parcels of land, being two jib lots, lying between lots numbered three and four, in the second range, and the pigeon hill lots in said town; for further reference they may be found described on the new survey and plan of Alexander Greenwood, as above set forth."

The deed from the administrator of *Samuel Brown*, to said Keith, contained the same description.

William C. Whitney testified, that Alexander Greenwood was directed to have the lands surveyed, and that his was called the new survey, and that a plan introduced of the premises, bearing his signature, was genuine.

Samuel Brown had a warrantee deed of lot No. 3, in 2d range, according to the new survey, in 1825, and a bond of No. 4, in 1826. There was evidence tending to show that he lived on these lots 25 or 30 years; that he would not take a deed of lot No. 4, as the bond did not embrace all the land he bargained for, and that he called a part of his land the back lot, which included all from Pigeon hill lots to Hogan pond, and that he bargained for the lot. His house was on the eastern side of the range line, marked on the diagram, and he occupied and improved them as his home-

stead; and there was no evidence of any line, or the range line, in fact.

On Jan. 22, 1838, *Samuel* Brown conveyed, by deed of warranty, to Leonard, John and Cyrus Brown, as follows:

"Two lots of land, situated in said Oxford, being lots numbered 3 and 4, in the second range, according to the new survey of lots in said town of Oxford," one-half to Leonard, and a quarter to each of the remaining grantees.

He also, on July 11, following, executed another warrantee deed to the same Leonard Brown, of "one undivided half of lots No. 3 and 4, in the second range, in said town of Oxford, according to the new survey, being the farm now occupied by said Samuel Brown, in Oxford."

The title acquired by Leonard, John and Cyrus, by these conveyances, was held by the tenant and others in common, with whom the demandant had no connection.

Upon so much of the testimony as was admissible, the Court were authorized to draw inferences as a jury might, and enter judgment by nonsuit or default.

Bartlett, for demandant, in the opening argument, maintained, that the title of Samuel Brown was by possession or disseizin. How that was obtained, he cited *Little* v. *Libbey,* 2 Maine, 247. That when a grant of land is made with reference to a plan actually made at the time, if it can be ascertained, it is to govern, according to *Heaton & al.* v. *Hodges,* 14 Maine, 66.

He also argued, that definite boundaries will limit the generality of a term previously used, as "my homestead farm, being lot No. 13, in range 4," was construed to convey only the lot, although the grantor occupied land adjoining the lot. *Allen* v. *Allen,* 14 Maine, 387; *Allen* v. *Littlefield,* 7 Maine, 220; *Thorndike* v. *Richards,* 13 Maine, 430; *Lyman* v. *Clark,* 9 Maine, 238; *Child* v. *Hickett,* 4 Maine, 471.

By the principle in *Allen* v. *Allen,* the tenant is limited to lots 3 and 4, in the 2d range. The definite boundaries limit. No mention is made in the deeds of lots 3 and 4, in the first range, by Samuel or any of his grantees.

He also maintained, that according to the evidence Samuel Brown always kept up a distinction in the ranges, and that of these jib lots he kept and maintained a quiet and peaceable possession of them until his death, and that no claim was ever made to those numbers in range one until after Samuel's death.

May, for tenant.

To enable the administrator to convey, Brown must have died seized in fee simple or in fee tail, general or special, of the premises, or he must have fraudulently conveyed them or been colorably disseized with intent to defraud his creditors, R. S., c. 112, § 31, otherwise nothing passed by the administrator's deed.

He also argued, from the evidence reported, that Samuel Brown held his homestead, not by disseizin, but, so much of it as was not embraced in the deed to him, by contract with the owner and in subordination to such title. That if the jib lots, so called, were not in reality a part of lots No. 3 and 4, 2d range, then his occupation would not constitute a disseizin, and would not give any title to the jib lots to said Samuel Brown, but the same would remain, notwithstanding his occupation, in the original owners, and they might lawfully convey it as they have undertaken to do. *Brown* v. *Gay*, 3 Greenl. 126; *Lincoln* v. *Edgecomb*, 31 Maine, 345. And that at no time did Samuel Brown have any legal title to the premises demanded either by deed or disseizin. But again, if he had any title whatever to those jib lots, so called, he parted with it before his death. The lots 3 and 4 were claimed to extend to Pigeon hill, and by new survey did reach that line.

The deeds he gave are not objected to as being in fraud of Samuel's creditors. According to the case of *Abbott* v. *Pike*, 33 Maine, 204, the word farm being more certain than the No., controls the description, and thus passes his title to his farm.

The objection made, that the tenant does not own the whole but only a fourth part, if any, is of no avail, if it ap-

pears that the demandant has no right there. It is upon the strength of his own title he must prevail, if at all.

Perry, in reply.

The title to lots No. 3 and 4, in the 2d range, is not in issue. The testimony in the case shows, that Samuel Brown acquired title to jib lots 3 and 4, in the first range, by disseizin, as maintained by my associate in the opening argument. This position is controverted, but neither the testimony nor the arguments used in defence are successful.

The case of *Dwinal* v. *Holmes* settles nothing in relation to No. 4, in the 1st range, and the whole argument of the Court, when applied to the last mentioned lot, entirely fails. The counsel for tenant labors to prove, from the declarations of Samuel Brown, that he held in subordination to the title of the Cragie heirs, but I contend, that all declarations of Brown which tend to contradict any sealed written instrument are legally inadmissible. The contract only related to that in the 2d range, and is the only evidence as to what the parties agreed to.

Again, random declarations carelessly made and imperfectly remembered, should always be received with great caution, especially when they contradict written contracts, and the deliberate acts of the parties making them.

There is no evidence in the case tending to show, that 4 in the 1st range was intended to be included in the bond. The counsel on the other side carefully avoids any allusion to the acts of Brown to show what he understood about it. What were his acts?

He went into possession of lot No. 4, first range, in 1811 or 12; that subsequently one or two other persons were there exercising acts of ownership, and in 1815 Samuel Brown purchased of Isaac Estes his betterments. This was ten years before the trade with the Cragie heirs for lot No. 4, 2d range. He also agreed to sell a part of lot No. 4, 1st range, in 1815 or 16, and the person with whom the contract was made went into possession of the same and remained two years.

Here was adverse possession, ten years before the trade for No. 4, in the second range. Douglass sold back to Brown, and he continued in possession thereof. These acts show no subordination to the Cragie heirs.

When Brown took the bond, he did nothing to recognize any right of the Cragie heirs to No. 4, in the first range. This bond was made of No. 4, in the second range, when it was perfectly well known that there was, by the survey, the same number of the first range, which fact shows that they only claimed title in range 2.

As to the other jib lot, the testimony shows that Samuel went into possession of it as far back as 1804, and built a house upon it, and the deed from Whitney to Brown, of 3, in second range, is dated in 1825. And the fact that he cut timber on this lot after the conveyance to his sons, of lot 3, in 2d range, shows that he never understood that it belonged to that lot.

These acts were notice of an adverse claim. *Alden* v. *Gilmore*, 13 Maine, 178; *Poignard* v. *Smith*, 6 Pick. 172; *School District No.* 4, *in Winthrop*, v. *Benson*, 31 Maine, 381.

All the acts of Brown show his possession in the premises to have been adverse, as well as open, notorious and exclusive.

Having established, as I trust, the title of Samuel Brown, to jib lots 3 and 4, in the first range, did he die seized of them? Does the tenant show any title to the premises? If any, it is by the deed of Samuel Brown to Leonard, John and Cyrus, of Jan. 22, 1838. This deed conveyed nothing but 3 and 4, in second range.

The deed of Samuel Brown to Leonard, of one-half of 3 and 4, was dated July 11, 1838.

It is a matter of no sort of consequence, so far as this case is concerned, whether the old gentleman, in this last deed, conveyed one lot or two, as the tenant does not pretend to claim any thing under it.

In *Abbott* v. *Pike*, 33 Maine, 204, the deed described

the land as being "lot No. 3, the same farm that Peter Wyman now lives on." The question was not, whether lot 3 extended over the whole farm; it is not at all analagous to the case. The facts found, the "farm to be on lot one, instead of three. The question was, whether the word "farm," as occupied by a certain person, was a more certain description than the number of a lot upon which said person never lived. This case does not, in any particular, overrule the case of *Allen* v. *Allen*, 14 Maine, 387; and the Court will so find by examining the two cases.

The plan put into the case as the new survey, as sworn to by Whitney, shows that 3 and 4 in the 2d range, did not extend to the Pigeon hill lots. This I put in against the bare assertion of Bro. May to the contrary, unsustained by a single particle of proof.

The case, as drawn up by the Chief Justice, finds no deed put in from John Brown to David Dunn, and yet one has been smuggled in by the tenant. This not having been put into the case, will not be considered by the Court.

This puts an end to the title of the tenant, as claiming any thing under Samuel Brown.

But supposing this deed was in the case, it does not help the matter any for the tenant, for the copy smuggled in, conveys only "¼ of 3 and 4 in the second range, and the same conveyed by Samuel Brown, Jan. 22, 1838."

Then the deed from Dunn to tenant describes the land "¼ of lots 3 and 4, being the same conveyed by the said Samuel Brown in Jan., 1838, and by him, since that time, conveyed to me."

If the tenant has any title under Samuel Brown, it is clearly to only ¼ of 3 and 4, in the second range. To contend for any thing more, is to argue against the express words in the deed making the grant.

There is no evidence, that the heirs of Cragie ever had any title to the demanded premises.

If the tenant has title to any part of the Samuel Brown farm, it is only to ¼ of lots 3 and 4 in the 2d range. These

the plaintiff does not claim. The demandant having shown, as we think, the title in the premises in Samuel Brown at the time of his decease, is entitled to judgment.

TENNEY, J. — The demandant derives her title to the premises demanded by a deed dated Dec. 1, 1851, from Jairus S. Keith, who received a deed from Moses Chesley, administrator of the goods and estate of Samuel Brown, deceased, on the same day. The administrator appears to have been duly licensed to make sale of the real estate of the intestate, and no defect in the proceedings is pointed out by the tenant. And it remains to be shown on the part of the demandant, that the premises described in the deed to her from Keith, were the property of the intestate at the time of his death. This she attempts to do by the proof of such facts as constituted a disseizin of the true owner and so long continued as to ripen into an absolute title in him.

The tenant denies, that a title was obtained by disseizin, by the intestate. But if it were so, he undertakes to show that he was divested of all interest before his death by a conveyance to his sons, by deeds, with covenants of warranty. One of those deeds is dated Jan. 22, 1838, and conveys to his sons Leonard, John and Cyrus, two lots of land situated in Oxford, being lots numbered 3 and 4, in the 2d range, according to the new survey of lots in that town, to Leonard one half and to each of the other two grantees one quarter, in common and undivided.

On July 11, 1838, the same grantor conveyed to Leonard Brown one undivided half of lots numbered 3 and 4, in the second range, in the town of Oxford, according to the new survey, being the farm now occupied by said Samuel Brown in Oxford.

The cause of the second deed to Leonard Brown is not attempted to be explained. It may have been, that he wished to possess exclusively, the deed of the land conveyed to him. A second deed is sometimes given, embracing a de-

scription of the land conveyed by a former with additional estate. If the latter was the intention in this case, the mode adopted does not seem well adapted to effect the purpose; for the description by the lots, and ranges in one, is identical with that of the other. And if it were the intention to embrace other lands in the second conveyance, a deed thereof alone, would be more appropriate. But we think by a reasonable construction, the design was to convey not only the land intended to be conveyed by the first deed, by the second, but to make the description more definite, and unambiguous.

The conveyances made by Leonard Brown to Jacob Dwinel, one dated September 19, 1840, and the other Feb'y 10, 1844, each of an undivided quarter of lots numbered 3 and 4, in the second range in the town of Oxford, show that he put upon the deeds of Samuel Brown, a similar construction to the one adopted by us, one deed being one fourth part of those lots, "according to the new survey, it being one quarter of said lot, where Samuel Brown lives in Oxford," and the other, "according to the new survey, being the farm now occupied by Samuel Brown in said Oxford."

The tenant denies, that it is established, that the conveyances of Samuel Brown to his sons were of lots numbered 3 and 4, in the second range, according to the plan, which according to the testimony of William C. Whitney was introduced at the trial. Whitney testified, that the name of "Alexander Greenwood" upon a plan shown, was the handwriting of Greenwood; that directions were given him, to have the lands surveyed, and they were; and that survey was called the new survey. But whether that plan was that of the new survey or some other, does not appear. The sketch of a plan taken by Noyes is not shown to have been copied from Greenwood's plan of his new survey; but the certificate thereon is, that it is a true copy of the old original plan, now in the possession of William C. Whitney.

But if it were made to appear clearly, that the plan exhibited at the trial was that made by Greenwood, when he was directed to make the survey, which probably was the

fact; and that the sketch was taken therefrom, which makes a part of the case, this plan, according to well established principles, cannot be treated as having any influence upon the decision of this case; because it is not referred to in the deeds of Samuel Brown to his sons, as part of the description.

It is only when the grant is made according to a plan, distinctly and certainly designated by the deed, that the plan becomes a part of the deed, and in such case it is subject to no other explanations, than other parts of the deed. *Pro. Ken. Purchase* v. *Tiffany*, 1 Greenl. 219.

In the deeds of Samuel Brown, no reference is made to any plan, or to the survey of Greenwood, or any other person. It is of lots numbered 3 and 4, second range, according to the new survey. This is certainly not a distinct and certain designation of a plan, or of a survey, and the plan introduced at the trial makes no part of the deeds of Samuel Brown.

We must, therefore, understand those lots which are mentioned in the deeds, as those, which composed the farm, occupied by Samuel Brown in the town of Oxford, at the time, when those deeds were dated. The case is not analagous to that of *Allen* v. *Allen*, relied upon by the demandant, in which no question was made touching the plan referred to in the deed; but it is more like that of *Worthington* v. *Hylyer*, 4 Mass. 196, and of *Abbott* v. *Pike*, 33 Maine, 204. It is true, that in those cases, the farm intended to be conveyed, as the Court held, in each case, was not in any part of it, on the lot referred to. In this case, no plan being a part of the description in Brown's deeds, the location of the lots, No. 3, and No. 4, in the range 1, is uncertain, excepting so far as they are made so by what follows.

The farm occupied by Samuel Brown in the year 1838, is shown very clearly to have extended from the line of the Pigeon hill lots to Hogan pond; and that there was no intermediate line. He lived upon land, which is easterly of the line on the plan introduced, representing the range line be-

tween the ranges, 1 and 2, from the time he moved into the town, which was about 1804, till his death in 1845. No evidence is introduced having a tendency to prove, that the farm on which he always lived in the town of Oxford did not extend to the line of the Pigeon hill lots. And it having been his intention, according to a proper construction of his deeds, to extend the boundaries to that line, he had no title to the premises described in the demandant's writ at the time of his death; and nothing passed by the deed of the administrator of his estate. *Demandant nonsuit.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1855.

PRESENT:

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

COUNTY OF PENOBSCOT.

† HALL *versus* PICKERING *& als.*

A company was allowed five years, under their charter, to construct their railroad, by making and filing their location with the county commissioners of the counties through which it passed, on or before Dec. 31, 1850. After they had made a survey, and staked out the track across plaintiff's land, but before it was accepted and filed, the company purchased of him, six rods in width of his land, and took a deed of the same, in which it was described as "covered by the location of their said railroad, or that may finally be covered by such location." Afterwards, under the authority of the legislature, a further time was granted to the company, to file their location, and they made a different one across the plaintiff's land, and accepted and filed the same, on which the road was constructed: —

Held, that the company obtained no rights in such new location *under the deed.*

The constitution prohibits the taking of private property for public use without just compensation.

By the provisions of c. 81, R. S., railroad companies are authorized to take a certain quantity of the land of individuals, and prescribes the mode of fixing the compensation by the county commissioners, on the application either of the owner of the land or of the corporation.

An omission, on the part of the owner of the land, to call on the county commissioners to assess his compensation, will not preclude him from maintaining an action of *trespass quare clausum* against the company, after they have *taken* his land, without making compensation.

Nor will an omission, by the corporation, to make the compensation in the way provided, after taking possession of an individual's land, work a forfeiture of their rights under their charter, to enter upon the land, and have an exclusive occupation *temporarily*, as an incipient proceeding to the acquisition of title to, or an easement in it.

While the law, under this constitutional provision, allows a *reasonable time* to the railroad company to make the compensation, after *such an exclusive occupation*, still, when the company takes this exclusive occupation under a claim of right in fee, as by a deed from the owner, when, in fact, no such right exists, no *reasonable time* is allowed for making the compensation, and an action of trespass lies against them, by the owner, for all the damages suffered by it.

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

TRESPASS *quare clausum.*

This action, commenced on July 25, 1853, is against two of the directors of the Penobscot & Kennebec Railroad Company, and the two contractors for building their road.

The defendants pleaded the general issue, and, by way of brief statement, justified their acts as servants of that corporation.

The acts complained of were done by the contractors, under the direction of the directors, in the construction of the railroad over the land of the plaintiff, on June 2, 1853, and at various times between that and the date of the writ.

Under their charter, the company were required to be organized, and the location of their road, by actual survey, filed with the county commissioners of the counties through which it passed, on or before Dec. 31, 1850, or the charter would be void.

On the last day of Dec., 1850, a location of said road was filed with the county commissioners, which location

crossed the plaintiff's land, and was staked out some time previously, beginning westerly on the land of Isaac Temple, and ending easterly at the land of Henry Crocker.

On Dec. 5, 1850, plaintiff, for a valuable consideration, made, executed and delivered to the Penobscot & Kennebec Railroad Company a deed, in which the description was as follows: — "A certain parcel or strip of land, six rods wide, and about one hundred and ten rods long, being the same land belonging to me, covered by the location of their said railroad, or that may finally be covered by such location, in the town of Hermon, beginning westerly at the land of Isaac Temple, and ending easterly at the land of Henry Crocker, with a right to pass over my land during the construction of said road, and provided the road be made thereon within five years."

The Legislature, by an Act approved June 3, 1851, extended the time for the company to file the location of the road, to Dec. 31, 1852.

Under this Act, a new location was filed, and it crossed the plaintiff's tillage land, and near his house about twenty-four rods from the first location.

On the second location the road was afterwards made, and this is where the acts complained of were done.

The evidence of plaintiff tended to prove, that no acts were done by the company or its contractors in opening or constructing the road, until June, 1853, when they entered upon the land and prosecuted the work of constructing the road.

No question arose as to the organization of the company, and that two of the defendants were directors, and that the other two were contractors, and directed the acts complained of, to be done.

The case was taken from the jury in order to settle the legal rights of the parties, the question of damages, if any, to be settled by a jury afterwards.

Rowe & Bartlett, for defendants.

The land which passes by the deed is, that which "may

be finally covered by such location, and on which the road should be built in five years." The first location was not final. The company never entered to take possession of the land covered by it. When the road was made, the power of selection was finally exercised and the right of appropriation exhausted.

But if the company did not acquire title to that taken, by the deed, they have a right of way over it, by charter and by the statute, and plaintiff has his remedy for damages by application to the County Commissioners.

A. W. Paine, for plaintiff.

1. Under the deed the defendants cannot justify their doings. It did not pass the title to this new track thus located under a new law, after the deed was made and after a legal location had been made under the law then in force. The deed was made with reference to the charter which provided for a location on or before Dec. 31, 1850. At the time it was made there was the actual survey. In giving construction to the deed these facts become essential.

The location then made was the one referred to. The word "finally," in the description, has its meaning; it has reference to something then in progress.

In making the deed, the parties had reference to matters as then in progress, and in the terms, "the final location," they referred to the *final approval by the directors* of the survey already made. *Grover* v. *Drummond*, 25 Maine, 185.

2. It is a well established legal principle, that "a contract made under a law, is presumed to be made with reference to it. The law is a part of the contract." *Blanchard* v. *Russell*, 13 Mass. 16. The deed should then be construed as if it contained the whole charter within its descriptive part.

The new statute can give it no construction which it had not before. *King* v. *Dedham Bank*, 15 Mass. 454.

3. Whenever uncertain premises or rights are granted, with the right of subsequent location, the first *legal* de-

termination or location of those rights or premises, determines forever its extent and bounds. *Farrar* v. *Cooper*, 34 Maine, 394.

A legal location was here made on Dec. 28, 1850, and thenceforward the deed was satisfied.

4. Nor does the new statute, passed for the purpose, give the company the right of changing the location. It merely extends the time when it may be filed. *B. & P. Railroad Co.* v. *M. Railroad Co.*, 1 Gray, 340.

5. But if, from the language of the Act, any such meaning may be made out, it is then unconstitutional as impairing the obligation of contracts. *Dartmouth College Case*, 4 Wheat. 518; *Foster* v. *Essex Bank*, 16 Mass. 271.

Nor can the defendants justify under their proceedings if the deed is void. The company have claimed to be acting under the deed, and, in virtue of it, seized the land, cut down his trees, dug up his soil and fully completed the road, and taken no steps whatever to pay for it, and it is too late to turn round now and set up a right under law. This branch of the defence is disposed of by the case of *Cushman* v. *Smith*, 34 Maine, 247.

No question of reasonable time under the facts of the case can possibly arise. They never intended to pay. *Winslow* v. *Gifford*, 6 Cush. 327.

On no ground set up in defence are defendants justifiable in making the road across plaintiff 's land, and are liable to the whole damage done by them.

TENNEY, J. — The action is trespass *quare clausum*, against two of the directors of the Penobscot & Kennebec Railroad Company, and two of the contractors for building the road of that company. The writ is dated July 25, 1853. The defendants plead the general issue, and justify the acts complained of, as the servants of the company.

The defence principally relied upon is under a deed from the plaintiff to the Penobscot & Kennebec Railroad Company, given upon the condition that the road be made upon

the land described within five years. The premises in the deed are, "a certain parcel or strip of land six rods wide, and about one hundred and ten rods long, being the same land belonging to me, covered by the location of their said railroad, or that may be finally covered by such location, in the town of Hermon, beginning westerly on the land of Isaac Temple and ending easterly at the land of Henry Crocker."

The deed being of land covered by a track surveyed for a railroad, the parties must have contemplated an immediate transfer of the land, in order that the road should be constructed. This condition, therefore, was subsequent. *Hayden* v. *Stoughton*, 5 Pick. 528; 4 Kent's Com., Lecture 56, p. 121. The estate having vested in the grantees, it cannot revest in the grantor or his heirs, unless by a re-conveyance, or by a forfeiture under the condition and a re-entry. Shep. Touch. 154; Litt. § 351; Co. Litt. 218, (b) note 133.

At the date of the deed, a survey of the track, caused by the directors, and staked out, before Dec. 1850, crossed land belonging to the plaintiff, from Temple's line on the west, to the land of Crocker on the east; and the survey of the entire railroad track from Waterville to Bangor, including that over the plaintiff's land just described, was made the location of the road, by the directors, according to their records, which location was duly filed in the office of the county commissioners of the respective counties on Dec. 31, 1850.

Under the authority of an Act of the Legislature, passed June 3, 1851, c. 453, to extend the time in which the location of the line of the Penobscot and Kennebec Railroad may be filed, to one year, from the last day of December next after, a new location of the road was made by the directors on Dec. 30, 1852, which is treated in argument by counsel on both sides, as having been filed the next day, in the office of the county commissioners. The new location was that on which the road was afterwards constructed, and in building of which, the trespass complained of was com-

mitted; and was about twenty-four rods from the location first made.

The defendants' counsel insist that the land on which the road was constructed, passed by the deed, under the clause therein, "or that may *finally* be covered by such location."

A deed in legal form, and appropriate to convey real estate, properly executed, acknowledged and recorded, will transfer to the grantee, the grantor's title to the land, which is therein described with such precision, that no doubt can exist touching its identity. R. S., c. 91, § 1. If the deed describes a certain quantity of land, to be taken, in a manner which is legal, and clearly described, from another and a larger quantity, the deed is operative on its delivery, to pass the title to the portion intended to be conveyed, in common and undivided, with the residue of the larger quantity. A designation of the land made afterwards according to the provisions in the deed, will be such a division, that the grantee will hold that so designated in severalty. And the bounds thereof, first established according to the terms of the deed, become unalterably fixed as the true boundary. *Grover* v. *Drummond*, 25 Maine, 185; *Farrar* v. *Cooper*, 34 Maine, 394.

At what time did the title to the land described in the deed from the plaintiff first become perfected in the Penobscot and Kennebec Railroad Company, and where was that land?

The deed being to the company, and of land covered by the location of the railroad of the company, after the survey of the track, with the condition that the road should be made thereon within five years, it must have had reference to the charter of that road. At the date of the deed, the directors of the company had caused the survey of the track of the road, but it had not then become the location by their vote and the record thereof, according to the requirement of the charter. The language used in the first clause of the description to specify the land, indicates that the "location of their railroad," was that then existing, and

not that which was to become such at a future time. It would seem not to be a far-fetched or absurd construction, under the facts disclosed by the case, to consider the deed as then operative, to pass a title to that part of the plaintiff's land covered by the survey, which had then been made and staked out. If so, there could not be any change afterwards of the land under the same deed. Whether it would have such operation or not, we do not now decide, inasmuch as by giving effect to the other clause, "or that may finally be covered by such location," under the facts of the case, we come to the same result.

The location, which was made according to the actual survey of the route, and filed with the county commissioners on Dec. 31, 1850, was the only location which could be legal, and save the forfeiture of the charter, after the expiration of that day. The power of further location had ceased. The rights of the plaintiff and the company, by the charter and the deed, had become fixed, and could not be changed without a new contract of some kind. Could the plaintiff object to the company's taking full possession of the land as their own, and for any purpose, without reference to the construction of a railroad, and continue that possession, and make improvements thereon, of any description, at pleasure, unless, after the lapse of five years from the date of the deed, the road should not be made, and he should reënter and hold the land as forfeited? If the location, recorded as made on Dec. 28, 1850, was not the *final* location, the day after it was filed with the commissioners, was the location made and filed in 1852, immediately after it was made and filed, any more so? And if the principle contended for by the defendants' counsel is correct, what they treat as the *final* location, they may postpone indefinately, provided they can have an extension of the time from the Legislature, in which to perform those acts.

The last location, which the company, by their charter, could effectually make, as their charter was at the date of the deed, was the final location. The land covered thereby

was that which became vested in the company; and, according to well established principles, their rights could not be taken away by any subsequent legislation. The plaintiff parted with the title to the land, covered by the location of the survey, and of that which was finally covered by such location, one being identical with the other. And no power existed in the Legislature, directly or indirectly, to substitute for this land, a different parcel from that owned by him. No attempt was made by the Legislature to do so; for the time to make a new location being enlarged only by the Act of 1851, could have no effect to essentially change the premises of a deed already made and delivered. The defence, under the deed, fails.

It is contended by the defendants, that if the company did not acquire title to the land on which the road was constructed by the deed, they have the right of way over it, by their charter, and the general statute, on the subject of railroads; and the plaintiff has his remedy for damages by application to the County Commissioners.

By the general statute, and by the charter, the plaintiff could have had his damages estimated by the County Commissioners, and demanded security for the payment of the same. It does not appear that he has made any attempt to procure an estimation in this mode. Was this an indispensable pre-requisite to the maintenance of an action of trespass against the company, or its agents, if in other respects such action could be sustained?

Chapter 81, § 3, of the R. S., provides that the damages to be paid by such corporation for any real estate taken, as is therein provided, when not otherwise agreed upon, shall be ascertained and determined by the County Commissioners, &c. By § 6, of the same chapter, the application to the County Commissioners for an estimation of damages may be made by the corporation, or the owner of the real estate taken. The statute does not declare the consequences of an omission in both parties, to make the application. Such omission in the owner is not declared to be a waiver of the

right to hold a corporation responsible, if they should appropriate the land, beyond the authority to do so, secured by the statute and the constitution, which forbids the taking of private property for public uses, without just compensation. Constitution, Art. 1, § 21. Neither does this omission in the corporation work a forfeiture of all their rights, secured by a charter like the one of this company, to enter upon the land of an individual, and have an exclusive occupation of the same "temporarily as an incipient proceeding to the acquisition of a title to it or an easement in it." The right to have an estimation made by the Commissioners, being secured to the owners of the real estate occupied by the corporation, and by the corporation also, the latter cannot take the land, in the sense of the section of the constitution referred to, without just compensation, because the owner and the corporation have been in the like fault, to take measures to ascertain the damages. The owner of the real estate has lost no rights in the same, by that omission; and the corporation may take the incipient steps to acquire an easement in the land, notwithstanding the failure to obtain from the Commissioners an estimation of the damages, at the earliest time after the location.

The counsel for the plaintiff, having treated the second location as filed with the Commissioners on Dec. 31, 1852, the company are not interested to controvert this fact, because if it were not so filed, the charter was forfeited and all rights thereunder are extinct. The location, therefore, may be considered as made on that day, effectual, and it could not cease to be so, by the 4th § of c. 41, of the statutes of 1853, which was passed several months subsequently. But the filing of the location with the Commissioners, under such a statute as that last referred to, is considered as a temporary occupation of the land, for the purpose of acquiring an easement in it, as an incipient proceeding. And when the company in this case, after having surveyed the whole route, and staked it out, made it the location, and filed it as such with the commissioners, they

must be treated as having taken the temporary occupation of the land in the same manner. The object must have been similar, notwithstanding it may have been done at that particular time, rather than at a period some later, to prevent a forfeiture of the charter.

No acts were done by the company, or their agents, in opening and constructing the road, after the filing of the location with the Commissioners on Dec. 31, 1852, till June following, and on the 20th day of that month, and not before, but since that time, they entered upon the land by their servants and prosecuted the work of constructing the road. It is therefore contended, that the case is brought within the principle of *Cushman* v. *Smith*, 34 Maine, 247. It was held in that case, that if the compensation is not made within a reasonable time, after the land has been exclusively occupied, the right to continue that occupation will become extinct, and the occupants will be trespassers, and liable to be prosecuted as such. The exclusive occupation being authorized only as a part of the proceedings for the acquisition of title, when it becomes manifest, by an unreasonable delay, that the avowed purpose is not the real one, or that, if real, it has been abandoned, the measures permitted for that purpose will be no longer authorized.

While the proprietors of a railroad are in exclusive occupation, and the delay to take the proper and the legal measures to obtain the title to the land over which it passes, or an easement in it, is evidence that they do not design to take those measures, and their continued occupation, therefore, becomes a trespass, certainly that occupation, under the claim of title in fee simple, to the land itself, is not authorized if they have no such title. If the company desire no time to take the measures, permitted under the statute to acquire a right to an easement in the land, they are not entitled to such time, as would be reasonable, if they wished to avail themselves of the provision of the statute to obtain rights upon the land, to which they set up no title. In such a case, the right to time at once ceases. So long as they hold

such a position, a delay in the owner of the land, to take steps to recover compensation for his land, is useless to the company, and the time, which would be reasonable, if they took the occupation of the land as that of another under their chartered rights, had already terminated when the claim of entire title was made.

It appears, from the case, that reliance was entirely upon the deed for the defence, and that failing, the defendants cannot object to the maintenance of this action, on the ground that a reasonable time has not elapsed in which the company could make compensation, or a tender of it, from the commencement of the occupation, before the institution of the suit.

The continuance of the occupation being unauthorized in the company, their servants can have no greater rights of occupation. Those who were the immediate cause of the injury to the plaintiff, in the acts complained of, and the directors who authorized their acts, are alike liable, and, by the agreement of the parties, the case is to stand, that the damages may be assessed by a jury.

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† STATE OF MAINE *versus* STEVENS.

In an indictment for keeping a *house* of ill fame, it is unnecessary to describe the *street* where it is situated.

And as the keeping of such a house is made a statute offence, it is not necessary for the indictment to conclude, that the act was to the *common nuisance* of the public.

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

INDICTMENT against the defendant in this form: —

The jurors, for the state aforesaid, upon their oath present, that William L. Stevens, of Bangor, in the county of Penobscot, laborer, on the first day of September, in the year of our Lord one thousand eight hundred and fifty-two, and on divers other days and times between that day and

the day of the taking of this inquisition, at Bangor, aforesaid, did keep and maintain, and doth yet keep and maintain a house of ill fame, resorted to for the purpose of prostitution and lewdness, against the peace of said state, and contrary to the form of the statute in such case made and provided.

On trial, a verdict was returned against the respondent, and he moved in arrest, for reasons which appear in the opinion.

Knowles, with whom was *Waterhouse*, for defendant.

Abbott, Att'y Gen., for the State.

TENNEY, J. — The indictment is not defective in substance or form, on account of the omission to state the street, in which the house, that is alleged to have been unlawfully kept, was situated. It is a general rule, when the act itself is not necessarily unlawful, but becomes so by its peculiar circumstances and relations, all the matters must be set forth in which its illegality consists. That which will constitute a nuisance in one situation, may be perfectly lawful in another. "But when the act is manifestly an offence, as for keeping a house of ill fame, this precaution is needless." 1 Chit. Cr. Law, 229 & 230. It is said by Lord MANSFIELD, in *Rex* v. *Horne*, Cowper, 672, "when the circumstances go to constitute a crime, they must be set out; when a crime is a crime independently of such circumstances, they may aggravate, but do not contribute to make the offence."

It is insisted, that the words, "to the common nuisance of all the inhabitants of the State," which are often, if not generally found in indictments, for an offence like the one intended to be charged in this case, are material. It is said, by Mr. Chitty, in 1 Chit. Cr. Law, 245, "in the conclusion of an indictment, or each count, there are several matters in common use, which do not seem to be at all material," and some are mentioned as examples, "but the words to the common nuisance of all the liege subjects of our Lord, the

King, seem, according to the better opinion, to be necessary in indictments for common nuisances."

A house of ill fame, by the common law, may be a common nuisance, and in an indictment against a person for keeping such a house, as being a common nuisance, the words, "to the common nuisance, &c., are undoubtedly essential to the validity of the indictment."

The indictment, which we are now considering, is for an offence created by statute c. 160, § 15, which provides, "any person, who shall keep a house of ill fame, resorted to for the purpose of prostitution or lewdness, shall be punished by imprisonment, &c. This chapter is entitled, "Of offences against chastity, morality, and decency," and the keeping of a house of ill fame, &c., is made a crime of itself, independent of other facts, or circumstances. The indictment is not for the offence of keeping a house of ill fame, *as a common nuisance,* but for a violation of the statute referred to. It is in the language of the statute, and is sufficient. *Exceptions overruled.*

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† CHAPIN *& al. versus* CRAM.

It is not essential to the validity of a mortgage of personal property, that a *schedule* of the goods therein referred to, but not made a part of it, should be *recorded.*

A mortgage of a stock of goods, containing a clause that goods which might thereafter be purchased by the mortgager, to replace those enumerated, as also *all additions to the stock,* should be held for the payment of the notes recited, will not transfer to the mortgagee goods afterwards purchased, and put in with the stock by the mortgager.

ON FACTS AGREED.

TROVER, to recover the value of a stock of goods.

The plaintiffs' title was derived by a mortgage from one Harford Knowles, of Nov. 3, 1853, in these words:—"All and singular, the drugs, medicines, goods, wares, merchandize, perfumery, fixtures and apparatus in store No. 22, west market place, in said Bangor, and in the cellar under

said store, being the store and cellar now occupied by me," &c. This mortgage was recorded on Nov. 5, of the same year.

Defendant claimed title to the same goods, under a mortgage from the same Knowles, dated May 19, 1853, in these words: — "All and singular, the drugs, medicines, goods, wares, merchandize and fixtures now in the store No. 22, west market place, in said Bangor, lately occupied by H. B. Hall, a schedule of which, dated May 2, 1853, of forty pages, in the hands of said Cram, is referred to for a particular description and enumeration of said drugs, medicines, &c. It is understood and agreed, that all drugs, medicines, goods, wares, merchandize and fixtures of every description, which may be hereafter purchased to replace any of them now in said store, shall be held for the payment of the sums hereafter named, in the same manner as those now in said store, as also all additions to said stock, to have and to hold to said Gilman Cram, and his personal representatives forever."

This mortgage was recorded on May 20, 1853, but no schedule therein referred to.

Both mortgages covered the same stock, with the exception that subsequently to defendant's mortgage, and prior to plaintiffs', Knowles purchased twenty-five dollars' worth of goods, and put into the store, which defendant took away with the entire stock, and converted to his own use.

If plaintiffs' mortgage was valid against defendant, for the whole stock, a default to be entered, and judgment for $500, if for the additional goods only, therefor, $25,00; but if, on these facts, the action was not maintainable, a nonsuit to be entered.

Peters, for defendant.

Wakefield, for plaintiffs.

TENNEY, J. — This case is essentially distinguishable from that of *Sawyer* v. *Pennell*, 19 Maine, 167. In that case, the mortgage was of "all the articles, stock and merchan-

dize of every description, in the store, now occupied by me, the said Thorndike, which are set forth and specified, and particularly enumerated in *the schedule hereto annexed, which said schedule constitutes a part of this mortgage bill of sale.*" But in the mortgage given by Knowles to the defendant, dated May 19, 1853, it is of "all and singular the drugs, medicines, goods, wares, merchandize and fixtures now in store No. 22, west market place, in said Bangor, lately occupied by H. B. Hall, a schedule of which, dated May 3, 1853, of 40 pages, in the hands of said Cram, is referred to for a particular description and enumeration of said drugs and medicines." The schedule is not annexed to the mortgage, and is not declared therein to be a part of it. Without the schedule, the mortgage is as full, in the description of the goods, as those have been, which have been held valid. *Harding* v. *Coburn*, 12 Met. 333; and as full as the mortgage under which the plaintiffs claim the same property.

The reference to the schedule, in the defendant's mortgage, is a mode by which the goods could with greater facility be identified, and does not therein differ essentially, from cases in which there are references to the bills of the same goods, from those of whom the mortgagers purchased them, or to the account of stock they have taken for their own convenience, without regard to subsequent mortgages or sales; or to a bill of sale, which may have been given by a former owner, to one under whom the mortgager derived title, through several subsequent mesne conveyances. The simple reference to a written document for the purpose of affording some proof of the property mortgaged, when the same is not declared in some way to be a part of, or to be annexed or attached to that, which is really the instrument executed by the mortgager, cannot be treated as a matter required to be recorded. The cases cited for the plaintiff, that by the reference in a deed of real estate, the deed referred to becomes a material part of the description, as much as if it were copied therein, do not conflict with this

view. This manner of describing the land designed to be conveyed, is, that the premises may be clearly ascertained; and it has not been held in any case known to us, that a deed referred to, unrecorded, must be registered in order that the one making the reference should be effectual, for any other purpose, than to complete the chain of title upon the records.

The identity of goods mortgaged must generally be shown to some extent by parol evidence. If the description is of the goods in a store described, at the date of the mortgage, testimony will be required, if the fact is disputed, to show the goods, which were at the time in the store. If a bill of the goods is referred to, evidence that the bill produced, is the one which the parties had in view, must be shown, unless it is admitted.

In this case, the reference to the schedule was evidently for greater certainty, and to save the trouble of identifying by parol proof the articles, such as are usually found in a shop like the one in which these goods were kept. The schedule not being essential to the validity of the mortgage, was not required to be recorded, merely because it was referred to, without being a part of the same.

The case finds, that in the stock of goods carried away by the defendant, there were those of the value of $25, which were in the store when the mortgage was given to the plaintiffs, but were purchased by the mortgager and put into the store subsequently to the mortgage to the defendant. The plaintiff's mortgage being recorded, passed the title of the mortgager to them. This would be sufficient, till the defendant should show a superior title in himself. The mortgage to the latter provides, "that all drugs, medicines, goods, wares, merchandize and fixtures of every description, which may be hereafter purchased to replace any of those now in said store, shall be held for the payment of the sums hereafter named, in the same manner as those now in said store, as also all additions to said stock." It is quite clear, that the "additions to said stock," obtained

by the mortgager, after the execution of the mortgage to the defendant, without any further act, would confer no rights therein. *Lunn* v. *Thornton*, 1 Man. Gran. & Scott, 383; *Jones* v. *Richardson*, 10 Met. 481; *Head* v. *Goodwin*, 37 Maine, 181. To purchase such additions to the stock, the mortgage constituted no agency in the mortgager. It does not appear, that the goods received into the stock were purchased for the purpose of replacing those which had been sold; they may have been additions only; and the defendant has not a title thereto, under the evidence reported.

Defendant dafaulted.

Damages the sum of $25.

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† BURNHAM, *Pet. for Partition, versus* PERSONS UNKNOWN.

By c. 94, § 11, of R. S., it is provided, that when an execution is levied upon the estate of the debtor held in common with others, the whole estate must be described by the appraisers, and the debtor's share or part thereof, so held, be so stated by them; and the whole or such part of the debtor's interest as may be necessary to satisfy the execution, may be taken, and thereafter held in common with the co-tenants.

A levy under this provision, in which the description of the *common* estate exceeds its real limits, and the shares of the debtor levied on are greater than he owns, will still be effectual to vest his real proportion in the judgment creditor. This provision relates merely to the mode of levying on such estates.

PETITION FOR PARTITION, for the interest of petitioner in the Webster farm, (so called,) in Orono.

The facts in the case were agreed to, and are stated in the opinion of the Court.

The respondents denied the seizin or title of petitioner to any part of the premises, but it was agreed that if, on the facts agreed, and such papers and records referred to as were legally admissible, the Court should be of opinion that petitioner is entitled to recover, judgment shall be entered for so much as he is entitled to.

The petitioner claimed under a levy made upon the in-

terest of one of the tenants in common, and the levy appeared to be of a greater portion than the debtor owned.

I. Washburn, jr. for defendants.

Peters, for petitioners.

TENNEY, J. — James, Reuel D. and Ebenezer Webster, jr. appear and make defence to this petition.

Originally the farm described in the petition was owned by Elijah and Ebenezer Webster in equal undivided moieties.

Before any rights accrued to others by attachment or otherwise, the Finn lot was conveyed by the owners of the whole farm, and this created a severance of that lot.

On June 20, 1838, the said owners conveyed a lot to Nathan Weston, jr. Were it not for an attachment, which will be referred to, this conveyance operated as a severance of that lot also.

But S. B. Stone, on June 19, 1838, in a suit brought by him, made an attachment upon the right of Ebenezer Webster. Judgment was obtained in that suit, and upon an execution issued thereon, a levy was made in season to preserve the attachment upon *twenty-seven* seventy-fourth parts of the whole farm, excepting the Finn lot, but including the Weston lot. This extent, upon a part only of the portion owned by Ebenezer Webster at the time of the attachment, left the ten shares of the seventy-four released from the attachment.

On July 27, 1842, Stone conveyed his interest in the farm, including the Weston lot, to Daniel White, who afterwards conveyed to Weston his interest in the Weston lot, and subsequently conveyed his remaining interest in the farm to Ebenezer Webster, jr, who, on December 18, 1851, conveyed one undivided half of this remaining interest to Paul D. Webster. In 1847, Webster conveyed his lot to said Ebenezer Webster, jr. So that the portion of twenty-seven seventy-fourth parts, divested under Stone's attachment, became vested in Ebenezer Webster, jr, before his conveyance to Paul D. Webster, not only in the residue of the

farm, exclusive of the Finn and Weston lots, but of the Weston lot also. And the title to that lot became as perfect as it was in Elijah and Ebenezer Webster before the conveyance from them, and was severed from the residue of the farm. James Webster, having succeeded to the rights of Elijah Webster, held one-half of the farm, after the two were severed, and Ebenezer Webster, jr., and Paul D. Webster held together twenty-seven seventy-fourth parts in the same, at the time the petitioner filed his petition, in common and undivided.

The petitioner made a levy within thirty days after he obtained a judgment against Ebenezer Webster, he having attached the debtor's interest on the original writ. This interest does not appear to have changed from the time of its attachment to that of the levy, and was ten parts of seventy-four of the farm, which was held in common and undivided. And although we understand, in terms, the appraisers' return describes the whole farm as it was originally, and a greater portion as belonging to the debtor, than he had any title to, the creditor obtained no rights whatever in what the debtor had no interest. R. S., c. 94, § 10. But it is insisted, that for this reason, the levy is so far void, that partition of the rights, owned by the debtor, cannot be made under this process.

Section 11 of c. 94, R. S., provides, that when the estate is held in common with others, the whole estate must be described by the appraisers, and the debtor's share or part thereof, so held, be so stated by them, and the whole or such part of the debtor's interest as may be necessary to satisfy the execution, may be taken, &c.

It is believed that the design of this provision was, to prescribe the mode of extending an execution upon the interest of a debtor, which he held in common, and undivided with another; not that the creditor should, at the peril of the loss of all benefit from the levy, cause to be described in the appraiser's return, the estate only held in common, and that he should be limited in the statement of the part

supposed to be held by the debtor, to the precise portion which it should turn out was actually owned by him; but that the estate, which the creditor claimed to treat as common and undivided, should be described, and the proportion thereof which he claimed as that of his debtor should be stated.

The extent of an execution upon real estate, is a statute conveyance of the same. It is generally true that no estate or interest in land can be transmitted by an extent, which the debtor might not have conveyed by a suitable instrument. And a debtor cannot convey land by a deed to a party, by metes and bounds, which is a portion of the common property, so as to entitle that party to maintain a petition for partition of the part attempted to be conveyed by metes and bounds. *Bartlett* v. *Harlow*, 12 Mass. 348. And under a levy of the same part by metes and bounds, a partition could not be made with greater effect. In both cases, such proceedings, if valid, would create new tenancies in common of tracts and parcels of estate, held in common, to their injury. *Blossom* v. *Brightman*, 21 Pick. 283.

If, however, a tenant in common of a certain tract, should make and deliver a deed of a fractional part thereof, greater than that owned by him, and the boundaries of the whole tract should embrace more land than was contained in the common tract, the deed would not be void for such reason, but would not operate at all, either beyond the common property or the part owned by the grantor. And no reason is perceived for denying its effect, so far as to convey the interest actually owned by him. By analogy, a levy must be attended with the same effect.

The difficulty of obtaining execution for such part as was, by return, satisfied by an interest which the debtor did not own, upon *scire facias*, at common law, or by the statute c. 94, § 23, is not involved between these parties. Such difficulty, if inseparable, would rather be held to prevent the obtaining of execution for such part of the judgment

really unsatisfied, than to preclude the effect of the levy upon the part actually owned by the debtor.

As the title stands, James Webster is the owner of one-half of that part of the farm which is held in common and undivided; Ebenezer Webster, jr., holds, out of seventy-four parts of the same, thirteen and a half of those parts, and Paul D. Webster the like portion; the petitioner has title to the residue, being ten seventy-fourth parts. There is no necessity of going back, as the counsel for the respondent insists, in order to trace the history and the origin of these several rights. We look at the common property as found, when the petition was filed, and make partition, according to the respective rights, then existing.

Partition cannot be made of the Finn and Weston lots, and it may be the most simple mode of proceeding, that the petition and pleadings should be so amended, as to except these lots, care being taken, that no party is injuriously affected, touching costs, and that partition be made of the other part. *Judgment for partition.*

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† MERRILL *versus* IRELAND.

By § 26, of c. 91, R. S., it is provided, that no conveyance of any estate in fee simple, fee tail or for life, and no lease for more than seven years from the making thereof, shall be good and effectual against any person, other than the grantor, his heirs and devisees, *and persons having actual notice thereof*, unless it is made by a deed recorded.

Where one in possession makes a conveyance of the premises, but in his deed inserts this clause, — "the said land is under an incumbrance of two hundred dollars, and interest from September last," and furthermore informs the grantee that they were under an incumbrance to J. L., and would be payable in September next, and interest: —

Held, that this was sufficient notice to give effect, as against said grantee, to a prior unrecorded deed to J. L.

And where *such grantee*, not being in possession, assigns the deed to demandant, and, in fact, was acting for him in the negotiation, the demandant can claim no rights as against the unrecorded deed.

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

WRIT OF ENTRY, to recover possession of a parcel of land in Corinna. The general issue was pleaded.

The demandant introduced a quitclaim of the premises, from one Sumner J. Pratt to John Underwood, dated March 10, 1851, and recorded on the 18th of the same month, in which the consideration was $500,00. After the description of the premises in this deed, it contained the following:—"The said land is under an incumbrance of two hundred dollars, and interest from September last."

On Aug. 14, 1851, Underwood, on the back of said deed, did grant and assign "the premises, within conveyed to me, and all my right, title, interest and estate in and unto the same," to the demandant, his heirs and assigns forever. This assignment was recorded, Dec. 13, 1854.

The tenant relied upon a warrantee deed of the premises, from said Pratt to John Lyford, for the consideration of $200, dated Sept. 24, 1850, recorded Sept. 29, 1851, with proof that the same was paid to Pratt, and at the same time Lyford gave him a writing to reconvey the premises, on payment of that sum and interest, in one year.

He also introduced a quitclaim deed of the premises from said Lyford to Samuel and Sumner Burrill, of Oct. 6, 1851, recorded Jan. 6, 1852, and proved they paid him therefor $275,00, also a deed of the same, from said Burrills to himself, dated Oct. 26, 1852, and recorded April 26, 1853.

By the magistrate, before whom Pratt's deed to Underwood was acknowledged, he proved, (if legal so to do,) that Pratt, at that time, informed Underwood that the premises were under an incumbrance to John Lyford, of St. Albans, which would be payable in Sept., then next, with interest.

It also appeared, by the deposition of Pratt, that notice, at the time of conveyance to Underwood, was given to him of Lyford's claim by a warrantee deed.

And, from the same source, there was evidence tending to show that the consideration of the conveyance was for an

interest in a patent right for a cheese press, and that the same was of no value.

The tenant also put in a letter of plaintiff's, as follows:

"Montpelier, Vermont, July 29, 1851.

"Mr. Sumner J. Pratt.

"Sir:—Your notes and deed to John Underwood have been assigned by him to me. I must raise money on them, but think it due to you, in justice and courtesy, to offer you the privilege of "shaving" your own notes. Please write me by return mail, if practicable, what you will give me, in money, for the whole. In case of your inability, very likely you can get some one to aid in the advancement, so that you can make something. Respectfully,

"Ferrand F. Merrill.

"P. S. I should say, in justice to Mr. U., that the notes have not been "trafficked" to me, but assigned, in pursuance of an arrangement made before your trade, by which I was to hold every thing for security, &c., to me."

The court were authorized to draw inferences, from the evidence admissible, as a jury might, and render a judgment according to law.

D. D. Stewart, for tenant.

Wakefield, with whom was *Kent*, for demandant.

RICE, J.—Both parties claim title under Sumner J. Pratt. Sept. 24, 1850, Pratt conveyed the demanded premises by deed of warranty to John Lyford, and at the same time took back an obligation, in writing, the condition of which was, that if said Pratt should pay a note of that date, for two hundred and twenty-four dollars, in one year, the land should be re-conveyed. This deed was not registered until Sept. 29, 1851. Lyford conveyed the same premises by deed of quitclaim to S. & S. Burrill, Oct. 6th, 1851, and the Burrills conveyed to the tenant by deed of warranty, Oct. 26, 1852.

Pratt also conveyed the premises by deed of quitclaim to John Underwood, March 10, 1851, which deed was record-

ed, March 18, 1851. Immediately following the description in this deed are the following words. — "The land is under an incumbrance of two hundred dollars and interest from Sept. last."

On the 14th of August, 1851, Underwood assigned to the demandant the deed which he received from Pratt, with certain notes from the same person. The assignment was upon the back of the original deed, and contains the following language, "do hereby grant, assign, release and convey unto the said Merrill, the premises within conveyed to me, and all my right and interest and estate in and unto the same." This assignment contains no covenants of seizin, possession or title, in the assignor.

Section 26, c. 91, R. S., provides, that no conveyance of any estate in fee simple, fee tail, or for life, and no lease for more than seven years from the making thereof, shall be good and effectual against any person, other than the grantor, his heirs and devisees, *and persons having actual notice thereof*, unless it is made by a deed recorded, as provided in this chapter.

The first question presented is, had Underwood actual notice of the existence of the deed of Pratt to Lyford, at the time Pratt made the quitclaim to him? That he had such notice there can be no doubt. The recitation in the deed, and the testimony of Cutler and Pratt, is conclusive on that point.

Does the demandant stand in any better condition than Underwood, his assignor? We think not. The actual possession of the premises has been in the tenant and his grantors. Underwood had no possession under his deed, and his deed, on its face, recited that there was an incumbrance upon the land. These facts the demandant knew, at the time of the assignment to him. And still further, it appears from his letter to Pratt, dated July 29, 1851, that Underwood was really acting for him, and in his behalf.

In that letter, he says, "your notes and deed to John Underwood have been assigned by him to me." And in a

postscript to the same letter adds, "I should say in justice to Mr. U., that the notes have not been 'trafficked' to me, but assigned in pursuance of an arrangement made before your trade, by which I was to hold everything for security, &c., to me."

In view of these facts, we think the demandant cannot claim to be exempted from any notice which Underwood was proved to have had. *Plaintiff nonsuit.*

TENNEY, J., concurred in the result only, and remarked upon that part of the opinion wherein inquiry is made, whether the demandant stands in *any better condition* than Underwood; that Underwood was informed *by the deed* which he took from Pratt, that "the land was under an incumbrance of $200, and interest from September last;" and Cutler testified, that at the time he made the deed, Pratt informed Underwood that the premises in question were under an incumbrance of $200, to John Lyford, of St. Albans, and that said incumbrance would be payable in Sept. then next. The demandant is not shown to have had the information which Underwood derived from Pratt, detailed in Cutler's testimony. But the deed to his grantor informed him that there was an incumbrance of $200. That incumbrance must have been under some deed, though none was recorded from Pratt; and when the demandant took a deed from Underwood, of "all my right, title and interest and estate in and unto the same," *he must be treated as expressly limited to the rights which his grantor then held.*

I do not find that "the actual possession of the premises has been in the tenant and his grantors. Underwood had no possession under his deed," as stated in the opinion, is shown by the case.

† WHITE *versus* WALL *& al.*

Where the *consignee* of goods sells them with the intent to defraud his consignor, and this intent is known to his *vendee*, it is a simultaneous joint conversion, for which trover will lie by the consignor against *both*.

By § 9, c. 148, it is provided, that in all actions, not founded on contract, or on a judgment on such contract, the original writ or process shall run against the body of the defendant.

Nevertheless, an action of *trover*, in the form of an original *summons*, will be maintainable, unless the objection is taken *seasonably* in abatement or by motion; otherwise, it will be considered as waived.

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

TROVER, for a lot of goods.

The defendant Crowley had mortgaged his goods to secure a debt due to plaintiff, and after such mortgage the plaintiff furnished such goods as he wanted, on consignment, until the stock he had was mostly consigned. Both parties living in the same town, payments for the goods were made twice a week. Finding a sudden disappearance of the larger portion of the stock, and no account rendered to him, the plaintiff took possession of the goods remaining, and finding that Wall, the other defendant, had purchased and removed them, under suspicious circumstances, he commenced this suit in trover against them, to recover for the goods so sold by Crowley and bought by Wall.

The suit was commenced in December, 1852, and was in form a summons, with direction to attach property.

The count in the writ described the goods converted as specified in the account and schedule annexed.

At the Jan. term, 1854, when the action came on for trial, the defendant's counsel moved to quash the writ, because it did not run against the bodies of defendants, and on account of the supposed defective count.

A second count was filed under leave to amend, subject to objections, and the motion to quash was overruled.

Evidence was introduced bearing upon the issue, and the

presiding Judge instructed the jury that the legal property of the goods mortgaged to the plaintiff was in him, but that Crowley had a right to sell both the goods which he had mortgaged to the plaintiff, and those consigned by the plaintiff to him, in the ordinary course of business, as allowed by their contract; and that any sales of the goods by Crowley, in the ordinary course of business, would be as valid, and pass the property as effectually, as if he had been the absolute owner of them.

But that if Crowley, out of the ordinary course of his business, secretly sold the goods to Wall, with the intention to defraud the plaintiff, and to withhold the goods from him, and did withhold them from him, and Wall knew of such fraudulent purpose, on the part of Crowley, and participating therein, secretly purchased the goods in pursuance thereof, then they would be jointly liable to the plaintiff for a conversion of his goods, thus fraudulently sold and purchased.

That the plaintiff, having intrusted Crowley with his goods for sale, &c., Crowley might have sold them to Wall fraudulently, as against the plaintiff, without Wall having any knowledge of his fraudulent purpose, and if such were the case, Crowley would be liable, but Wall would not be liable.

That in order to render Wall liable, they must be satisfied, from the evidence, that the sale, as against the plaintiff, was fraudulent on the part of Crowley; that Wall knew it was fraudulent, and, having that knowledge, became a party to it.

The jury returned a verdict against both defendants.

Peters, for defendants, after arguing from the facts proved, that the verdict was wrong, insisted that the law of the case was with defendants.

The writ should have been a capias. R. S., c. 148, § 9.

The count was defective. 2 Mass. 398; 13 Mass. 284. And that the last instruction of the Court was wrong. Wall

should himself have had the intention to defraud, to make him liable.

He also maintained that trover would not lie in such a case as this. Crowley had a right to sell, and if he had paid over the money to plaintiff, no complaint could be made. The fault was after the sale, so that the wrong was in keeping the money. The action should have been for the money, and not the goods.

Trover requires an unauthorized disposition of the property, as recognized in *Murray* v. *Burling*, 10 Johns. 194; *Sargent* v. *Blunt*, 16 Johns. 74, and 12 Johns. 304; 2 Greenl. on Ev. § 642.

There was no joint conversion.

Knowles & Briggs, for plaintiff.

TENNEY, J. — The writ in this case bears date Dec. 4, 1852. The trial took place, January term, 1854. Before the pleadings were filed, a motion was made that the writ be quashed, it not being made to run against the bodies of the defendants, according to the provisions of the statute, c. 148, § 9. In its form, the writ may be regarded as an original summons with an order to attach property; this is authorized by R. S., c. 114, § 23. If it were otherwise, the supposed want of conformity to the statute is a matter, which may be waived. And the omission to present the motion at an earlier stage of the proceedings, it being like a plea in abatement, must be treated as a constructive waiver. *Regulæ Generales*, 18, 1 Greenl. 416.

The defect in the declaration, on account of which the counsel for defendants moved that the writ be quashed, was cured by an amendment, made by leave of Court. This amendment, the Court, in the exercise of its discretion, was authorized to allow. R. S., c. 115, § § 9 and 10; *Lord, in error*, v. *Pierce & als.* 33 Maine, 350.

Under the instructions which were given to the jury, they must have found that Crowley, out of the ordinary course of his business, as allowed by the contract with the plaintiff,

secretly sold to Wall the goods, portions of which he had mortgaged to the plaintiff, and other portions had been consigned to the defendant Crowley, by the plaintiff, with the intention to defraud the plaintiff of the same, and to withhold from him the proceeds; and did withhold them; and that Wall knew of that fraudulent purpose, and participating therein, secretly purchased the goods in pursuance thereof.

The legal title to the property in question was in the plaintiff, and nothing exhibited in evidence suspended his right to take immediate possession, whenever he might choose to exercise that right. They were in Crowley's possession for a specific object only; and they were disposed of by the concurrent acts of the two defendants inconsistently with the purpose, for which the plaintiff permitted them to be in Crowley's possession. This was a breach of the trust reposed in Crowley by the plaintiff, and an abuse of the lawful possession of the former, and constituted a conversion by him. The purchase by Wall, made under a full knowledge of the relations existing between the plaintiff and Crowley, and his taking them in furtherance of Crowley's fraudulent intention, and exercising acts of ownership over them, were simultaneous acts of both, and the whole constituted a joint conversion.

The jury passed upon the facts presented in evidence, and if the testimony was believed, the Court cannot with propriety disturb the verdict, if the motion to set it aside had been seasonably filed.

Exceptions and motion overruled.

† HALL *& al. versus* GILMORE.

A sale of goods, even on credit, if effected through false representations of the vendee, may be treated as void by the vendor, who may maintain replevin therefor without any previous demand.

If, in replevin, the same writ is used in different counties to reclaim the *plaintiff's goods*, the error, to be available to the defendant, must be shown in abatement.

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

REPLEVIN, for sundry goods.

The defendant pleaded the general issue, with a brief statement that the goods were not the property of plaintiffs, but of one Caleb Wentworth, being attached by defendant on the several writs specified, against him.

The defendant was a deputy sheriff of both Penobscot and Waldo counties, and having sundry writs against Wentworth, for demands originating before he bought the goods, attached the goods as his, part of them being in Waldo, and the remainder in Penobscot.

Wentworth, a merchant of Stetson, purchased the goods of plaintiffs in Boston, on credit, under a representation of his solvency, which was false. He shipped the goods to Frankfort in this State, late in the season, but before their arrival he had mortgaged them, and after their arrival he sold and delivered them to one Shepley. The mortgage and sale was insisted on by plaintiffs, as having been made to defraud his creditors, which was not contested.

While Shepley was transporting the goods, the attachments were made by defendant.

On hearing of the attachments, plaintiffs sent their agent to Bangor, who first procured a writ of attachment against Wentworth, but finding nothing to attach, afterwards sued this writ of replevin, returnable to a term of the Court in Penobscot, and by the same writ, took the goods found in Penobscot, and a part of them found in Waldo county.

This appeared from the returns made on the writ by the coroners of the two counties.

This action was entered at the April term, 1854.

At the Jan. term, 1855, this cause came on for trial, when the defendant's counsel moved for a return of so many of the goods as were returned as replevied in Waldo county. This motion was not granted. And after the evidence in the case was presented, it was agreed to submit the whole case to the Court, to render a judgment according to law.

Rowe & Bartlett, for defendant, contended, that the *transitus* was at an end when the goods came into the vendee's possession, at a place where he has a right to it. That if Wentworth's purchase was fraudulent, the sale was voidable, not void. *Rowley* v. *Bigelow*, 12 Pick. 312.

That the sale was ratified and confirmed by plaintiffs after they had obtained full knowledge of the misrepresentation. PARK, J., in *Campbell* v. *Fleming*, 1 Ad. & El., 40; PARSONS, C. J., in *Kimball* v. *Cunningham*, 4 Mass. 505.

That there were no steps taken to avoid the sale, no rescinding, no claim of property in the goods, no demand, till the writ was served; but merely a request for the delivery, without any reason given therefor, and that after the writ was put into the officer's hands.

That no judgment can be rendered for plaintiffs for that portion taken in Waldo county; they had no authority by the writ. There was no pretence of any demand made on defendant for those goods in the county where he had taken and kept them. They should therefore be returned.

A. W. Paine, for plaintiffs.

1. The plaintiffs had the right to rescind the sale on account of the fraud practiced upon them by Wentworth. As between vendor and vendee this principle is undoubted. Nor can it be less certain as against an officer making attachments of them on demands which accrued before the sale. *Buffington* v. *Gerrish*, 15 Mass. 156; *Gilbert* v. *Hudson*, 4 Greenl. 345; *Hawes* v. *Dingley*, 17 Maine, 341.

2. The plaintiffs claim the right of *stoppage in transitu*. The fraudulent sales made by Wentworth cannot affect their right. *Wight* v. *Campbell*, 4 Burr. 2046; 1 Smith's Lead.

Cases, 719; *Cummings* v. *Brown*, 9 East, 514; 1 Smith's Lead. Cases, 746 and 764.

The goods never reached their destination, and the right of stoppage has always been recognized in such cases. *Whitehead* v. *Anderson*, 9 M. & W., 518; 1 Smith's Lead. Cases, 763.

The right of stoppage then existed, but if this ground fails, the fraud will be sufficient. In either case replevin is sustainable.

3. The action was not prematurely brought. No demand was necessary, though the attachment existed. *Seaver* v. *Dingley*, 4 Greenl. 306; *Ayers* v. *Hewett*, 19 Maine, 281; *Bussing* v. *Rice*, 2 Cush. 48; *Hill* v. *Freeman*, 3 Cush. 257.

4. Can any advantage be taken because the action is brought for all the goods in Penobscot?

This action is local, and any objection to it should be made in abatement. It was too late at the trial to take an advantage of such an error. *Wilson* v. *Nichols*, 29 Maine, 566.

5. But if in error on the latter point, no return of any part of the property should be ordered. The plaintiff had the right in the property, and might have seized it without an officer. When the plaintiff is shown to have the title or right of possession, the defendant cannot be entitled to a return. 2 Greenl. Ev., 562; *Ingraham* v. *Martin*, 15 Maine, 373; *Wheeler* v. *Train*, 4 Pick. 168; 1 Smith's Lead. Cases, 409; *Simpson* v. *McFarland*, 18 Pick. 427.

APPLETON, J. — When a purchase of goods is effected by means of false and fraudulent representations on the part of the buyer, the seller may treat the sale, though on credit, as void, and maintain trover or replevin for the goods sold. *Ayers* v. *Hewett*, 19 Maine, 281. No demand in such case is necessary, as the original taking, being with a fraudulent design, is tortious. *Bussing* v. *Rice*, 2 Cush. 48.

From the testimony of Tozier, which is uncontradicted, it

appears that Wentworth represented himself as solvent, and as owning personal and real estate, free from incumbrances, sufficient to meet all his liabilities, and that the sale was made upon the strength of his representations, which are admitted to have been false. Before the goods reached their place of destination, they were sold by Wentworth in fraud of his creditors. They were likewise attached by the defendant, a deputy sheriff, having various writs on demands originating prior to their purchase.

It is true, Wentworth had previously made other purchases of the plaintiffs, at which times no representations were made. But it does not therefore follow that the representations alleged to be made were not made; nor that the goods were not sold on their faith. There is nothing that would justify us in regarding the testimony of the plaintiffs' witness as perjurious, and if he be believed, the action is maintainable.

A part of the goods in dispute were replevied in the county of Waldo and a part in this county, by virtue of the same process. The law is well settled that replevin must be brought in the county where the original taking was or where the chattel is detained. *Pease* v. *Simpson*, 3 Fairf. 261. The general issue was pleaded. No plea in abatement was filed. The replevying in this county was rightful. As to the goods taken in Waldo, the defendant shows no right. The plaintiffs do show a title to them. The defendant, to entitle himself to a return, must show property in himself or in the debtor as whose property they were attached. This he fails to do, and must be defaulted. *Ingraham* v. *Martin*, 15 Maine, 373; *Wheeler* v. *Train*, 4 Pick. 168; *Simpson* v. *McFarland*, 18 Pick. 427; *Pierce* v. *Van-Dyke*, 6 Hill, 613. *Defendant defaulted.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1855.

PRESENT:

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

COUNTY OF SOMERSET.

† ROWELL, *Administrator, versus* HAYDEN *& al.*

Matters in defence, arising after the commencement of the suit, and before issue joined, cannot be pleaded in bar *generally*, but may be as to the *further* maintenance of the suit.

And where such a plea sets forth a conveyance by demandant of the premises, by a deed duly executed, acknowledged and *recorded*, it will be sufficient though it omits to allege that the deed was *delivered*.

Objection to the *time* of filing a plea *puis darrein continuance*, cannot be made upon demurrer, but through a motion to set aside the plea.

If the demandant in a real action, after the commencement of his suit, conveys, by deed, to a third person, the premises demanded, the tenant may successfully interpose a plea in bar to the further maintenance of his suit.

Rowell *v.* Hayden.

WRIT OF ENTRY, to recover possession of a farm in Madison.

This action was commenced on December 29, 1849, and tried before TENNEY, J., at the Dec. term, 1854.

On Sept. 26, 1854, the pleadings were made up and filed. The tenants separately pleaded the general issue, which was joined; and also separately pleaded in bar as follows:—

"And the said Hayden, for further plea, by leave of the Court here obtained, says, that the said demandant, his said action ought not further to have or maintain, because, he says, that since the commencement of this action, and during the pending thereof, to wit, on the twentieth day of Dec., 1852, the said demandant, by his deed of that date, duly executed, acknowledged and recorded, for a valuable consideration in said deed mentioned, to wit, the sum of nine hundred dollars, conveyed the said demanded premises to one Asa G. Holt, whereby the said demandant was wholly divested of all right, title and interest in and to the demanded premises, and this he is ready to verify. Wherefore he prays judgment if the said demandant, his said action against him ought further to have or maintain, and for his costs."

To these pleas demandant demurred generally, and there was a joinder in demurrer.

As to one defendant additional pleadings were filed, which, in the decision of the cause, became immaterial.

The cause was tried before TENNEY, J., and, under the instructions of the Court, a verdict was returned for demandant, also a *special verdict* that certain deeds of defendants under which demandant claimed title, in his replication, were not the deeds of the alleged grantors.

Exceptions to the rulings of the presiding Judge were taken by the counsel for demandant, also a motion filed for a new trial.

It was agreed, that if upon the documentary evidence under the writ and pleadings, together with the facts found by the jury under the special issue, as they appear by the

verdicts upon that issue, the demandant is entitled to recover, judgment is to be rendered upon the verdict returned on the general issue. But if the tenants are entitled to recover by law under the pleadings, from the documentary evidence and the facts found by the jury under the special issue, the verdict under the general issue is to be amended so as to be in favor of the tenants, and judgment thereon to be entered in their favor, unless the verdict under the special issue shall be set aside under the motion therefor, or upon exceptions, in which case the verdicts upon the issue of fact are to be set aside, and the action to stand for trial; but neither party was precluded from moving to amend the pleadings, or from resisting such motion.

J. S. Abbott, for demandant.

Coburn & Wyman, for tenant.

RICE, J. — The case is presented on report and exceptions, also upon questions arising on the pleadings.

The defendants severally pleaded the general issue which was joined. They also severally pleaded, in bar, specially, that the demandant ought not further to have and maintain his action, because since the commencement of this action, and during the pendency thereof, to wit, on the 20th day of December, 1852, the said demandant, by his deed, of that date duly executed, acknowledged and recorded, for a valuable consideration in said deed mentioned, to wit, the sum of nine hundred dollars, conveyed the said demanded premises to one Asa G. Holt, whereby said demandant was wholly divested of all right, title and interest in and to the demanded premises, &c.

To these pleas the demandant demurred generally, in which the defendants joined.

In support of the demurrers the demandant contends that the pleas are defective, inasmuch as they do not allege that the deed from him to Holt was delivered. Whether, if this omission were a defect in the pleas, the demandant could avail himself of such defect on general demurrer, may

admit of doubt. He should have replied that nothing passed by the deed. *Howard* v. *Chadbourne*, 5 Maine, 15; *Walcott* v. *Knights*, 6 Mass. 418.

But the pleas are not defective. The fact that a deed is recorded is *prima facie* evidence that it has been delivered. *Chess* v. *Chess*, 1 Penn. 32; *Jackson* v. *Perkins*, 2 Wend. 308; *Gilbert* v. *N. A. Ins. Co.*, 23 Wend. 43.

But it is further contended, that if the deed is properly pleaded, the defendants cannot avail themselves of it in defence.

The writ is dated Dec. 29, 1851. The deed set out in defendants' plea bears date Dec. 20th, 1852. The pleas were filed, as appears by agreement of demandant's counsel, Sept. 26, 1854.

The rule is, that when matter of defence has arisen after the commencement of the suit, it cannot be pleaded in bar of the action generally, but must, when it has arisen before plea, or continuance, be pleaded as to the further maintenance of the suit; and when it has arisen after issue joined, *puis darrein continuance*. *Yeaton* v. *Lyman*, 5 Peters, 224; *LeBret* v. *Papillon*, 4 East, 502; *Covell* v. *Weston*, 20 Johns. 414; *Bank of U. S.* v. *Merchants' Bank of Baltimore*, 7 Gill. 415; *Bailey* v. *March*, 2 N. H. 522; *Semmes* v. *Naylor*, 12 Gill. & Johns. 361.

These pleas appear to have been filed before issue joined, and therefore fall within the principle of the authorities above cited.

If, as the demandant suggests, they are to be treated as pleas, *puis darrein continuance*, the result cannot be changed, because an objection to such a plea, that it was not pleaded in proper time, cannot be taken advantage of on demurrer; it should be on a motion to set aside the plea. *Ludlow* v. *McCrea*, 1 Wend. 228.

Whether a plea of *puis darrein continuance* shall be received, after a continuance has intervened, is in the discretion of the Court. *Morgan* v. *Dyer*, 10 Johns. 161.

If the plaintiff neglect to plead matter which has arisen

since the last continuance, at the next term, he cannot claim a right to plead it at a subsequent term. But the Court, in its discretion, may grant leave to plead it *nunc pro tunc*, and when it thus exercises its discretion, may impose the payment of costs. *Stevens* v. *Thompson*, 15 N. H. 410; 1 Chit. Plead. 659.

It is in the discretion of the Court to receive the plea or not, even after more than one continuance has intervened, and this discretion will be governed by circumstances extrinsic, and which cannot appear on the face of the plea. *Wilson* v. *Hamilton*, 4 S. & R. 238; *Tufts* v. *Gibbons*, 19 Wend. 639; *Rangely* v. *Webster*, 11 N. H. 299.

That the defendant had by his deed to Holt divested himself of all right, title and interest, in and to the demanded premises, is admitted by the pleadings, as a demurrer admits all the facts which are well pleaded. And that the defendants may avail themselves by proper pleas of the fact, that the demandant has divested himself of all right, title or interest in and to the demanded premises, after action brought, is well sustained by authorities. *Howard* v. *Chadbourn*, 5 Maine, 15; *Walcott* v. *Knight*, 6 Mass. 418; *Bailey* v. *March*, 2 N. H. 522.

Under the pleadings, we think it clear that the action cannot be maintained in the name of the demandant. It therefore becomes unnecessary to consider the questions raised by exceptions during the progress of the trial. According to the agreement, the verdict for the demandant under the general issue is to be set aside, and judgment entered for the defendants under their special pleas in bar against the demandants' right further to maintain the suit.

COUNTY OF KENNEBEC.

† PINKHAM *versus* MORANG, & MONMOUTH MUTUAL FIRE INSURANCE COMPANY, *Trustees.*

A policy by a mutual company in which a lien is reserved on the property insured, granted upon an application materially false in the representation of the title, is void.

Thus, where the insured, in support of his representation of title, claimed under a sale for unpaid taxes, assessed in the year 1841, but offered no evidence that the collector made return of his particular doings in the sale, within thirty days thereafter, such title is fatally defective.

Nor is such representation supported where the assured holds a deed of release of the premises from one who foreclosed a mortgage thereon, but who, in fact, had the title of only *one* of *two* joint mortgagees.

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

ASSUMPSIT. The defendant was defaulted.

The question was as to the liability of the trustees, a Mutual Fire Insurance Company. On March 12, 1850, they issued a policy to the plaintiff upon his dwellinghouse and barn, in accordance with his application wherein he represented himself as the owner. This policy, with the consent of the company, he transferred to the defendant. In March, 1850, the house was burned.

By § 6, of the charter of the company, it was provided that they should have a lien against the assured on all buildings insured by them, during the continuance of the policy, to the amount of the deposit note, and no more.

By art. 4, of their by-laws, it was required that every applicant for insurance shall, by himself or his agent, make out and subscribe, according to the forms prescribed by the directors, a written description of the buildings to be insured, with every circumstance material to the risk, and of the land to be included in the lien.

The premium note in this case was $6,00.

After the evidence was out, it was agreed to submit the cause to the decision of the full Court. The evidence of title, on which the case turned, is stated in the opinion. The tax, under which was made a claim of title, was assessed in 1841.

May, for defendants.

Stinchfield, for plaintiff.

APPLETON, J. — By the charter of the Monmouth Mutual Fire Insurance Co., it is provided, that "the company shall have a lien against the assured on all buildings insured by them" to the amount of his or her deposit note. It is material, therefore, that the party should truly represent his title to the premises insured. It has been held, that when a mutual company is entitled to a lien on all property insured by them, and when one of the conditions is, that if the representation made by the applicant is materially false, the policy should not cover the loss; it will operate as a fraud upon the members of the company, if the applicant calls the property proposed to be insured his own, when it is not or when his title is defective, and, thereupon, obtains an insurance upon it. Angell on Fire and Life Insurance, § 188; *Brown* v. *Williams*, 28 Maine, 252; *Smith* v. *Bowditch Mutual Fire Ins. Co.*, 6 Cush. 448.

The applicant for insurance, in the present case, called the property his own, in his application, and upon the faith of this, his policy was issued.

An attempt is made to show title to have been in the assured, at the date of the policy, in two ways. —

First, by a tax title. The Act of March 6, 1826, c. 337, § 8, requires the collector to make a "return of his particular doings in the sale, within thirty days after it was made." His return is not before us. His testimony does not show when it was made. It is not shown to have been done within the time prescribed by the statute. The tax title must be regarded as fatally defective. *Shimmin* v. *Inman*, 26 Maine, 228; *Andrews* v. *Senter*, 32 Maine, 394.

Second, by the foreclosure of a mortgage. It would seem that Goodale & Nason, at one time, had a mortgage upon the premises; that Nason assigned his interest therein to one Emerson, who entered and claimed to have foreclosed the mortgage. The assured dervies his title from Emerson after his foreclosure. But there is no evidence that Goodale has ever parted with his interest in the mortgage. The title, therefore, of the assured, fails as to one-half of the premises, and, in accordance with the authorities already cited, we must regard the insurance as void.

Trustees discharged.

† KIDDER *versus* ORCUTT.

The interest acquired by a judgment creditor in his levy on land, is not attachable during the year allowed by law for its redemption, nor will a levy of it as his property, during that time, prove available, although it may not be redeemed.

ON FACTS AGREED.

WRIT OF ENTRY.

One Lucius Doolittle having recovered a judgment against the demandant, on Dec. 24, 1852, levied the same on the premises, and seizin and possession were delivered to his attorney.

On March 9, 1853, the tenant having recovered a judgment against said Doolittle, levied the same on the premises as his property, and seizin and possession were then delivered to his attorney.

Both of the levies were duly returned and recorded.

On Oct. 17, 1853, Doolittle conveyed the same to one Drummond, who, on Sept. 1, 1854, conveyed the same to demandant.

The premises were not redeemed from either levy.

If the demandant, on these facts, is entitled to recover, a default to be entered; otherwise, a nonsuit.

Smith, for tenant.

Drummond, for demandant.

RICE, J. — All the real estate of a debtor, in possession, reversion or remainder, or fraudulently conveyed, or of which he had been colorably or fraudulently disseized, for the purpose of defrauding his creditors, and all right of entry into land, and the right of redeeming land mortgaged, may be taken in execution for his debts, *in the manner mentioned in this chapter.* R. S. c. 94, § 1.

All real estate which is liable to be taken in execution by the provisions of c. 94, may be attached on mesne process, and held as security, to satisfy the judgment, for damages and costs, which the plaintiff may recover. c. 114, § 30. The lien created by such attachment is continued thirty days after rendition of judgment, within which time the land may be seized in execution, to satisfy the judgment.

Where lands are taken in execution, the debtor may redeem the same at any time within one year after the levy, by paying or tendering to the creditor the sum at which they were appraised, and interest from the time of the levy, with the reasonable expenses incurred in improving the same, or in repairs, after deducting the rents and profits received by the creditor, or which he might have received, and with which he is chargeable. c. 94, § 25.

The facts in this case raise the question whether an execution creditor has an interest in the lands upon which he has levied his execution, before the expiration of a year from the date of his levy, which is subject to be levied upon, as his estate.

The demandant contends that he has not, but that his interest in the land, during the year following the levy, is precisely like that of a mortgagee, before foreclosure.

It is well settled that land under mortgage cannot be levied upon as the estate of the mortgagee, unless he shall have first entered upon the same. *Blanchard* v. *Colburn,* 16 Mass. 345; *McLaughlin* v. *Shepard,* 32 Maine, 143; *Coombs* v. *Warren,* 34 Maine, 89. Nor until the mortgage is finally foreclosed. *Eaton* v. *Whitney,* 3 Pick. 484; *Smith & ux.* v. *Peoples' Bank,* 22 Maine, 185.

All the title or interest which any manufacturing corporation or bank has in lands which have been mortgaged for security for any debt due, or assigned to such corporation or bank, may be seized and sold on execution, under provision of § 34 of c. 94. But this provision only applies to banks and manufacturing corporations.

That there is some analogy between lands under mortgage and those under attachment is apparent. Before levy that analogy is very strong. Until that time the land is held as security to the judgment which may be recovered upon the debt. But subsequent to the levy, the analogy is less striking. Though the right to redeem exists for a specified time, the legal title passes, at once, to the judgment creditor. By the levy the land is appropriated, at its appraised value, in *payment* of the debt. The creditor ceases to hold it as security for his debt, but holds it *instead* of his debt. He cannot, after seizin is delivered by the sheriff, under a lawful levy, waive that levy, and again resort to his judgment. *Lawrence* v. *Pond*, 17 Mass. 437.

When an execution is regularly levied on lands liable by law to this extent and duly returned and registered, and possession delivered by the sheriff to the creditor, he is to be considered as in the actual seizin and possession, and may by virtue thereof either maintain a real action, declaring on his own seizin, or he may maintain trespass against the tenant who shall continue his possession without the creditor's consent, or he may re-enter on him after the levy is completed. *Gore* v. *Brazier*, 3 Mass. 523; *Blood* v. *Wood*, 1 Met. 528; *Nickerson* v. *Whittier*, 20 Maine, 223.

A levy of an execution on lands, accepted by the creditor, is a statute purchase of the debtor's estate. *Crafts* v. *Ford*, 2 Maine, 414; *Gorham* v. *Blazo*, 2 Maine, 232; *Peabody* v. *Minot*, 24 Pick. 329.

This estate however, is not indefeasible, until the expiration of one year from the levy. During that time the debtor may, at his election, revest the title in himself, under the provisions of the statute.

From these distinctions between levies and mortgages, it is contended, that different results must follow, and that the rule which has been applied to real estate in the hands of mortgagees, before foreclosure, should not be applied to levies.

We do not find any case in which this question has been directly considered and judicially determined, though in the case of *Warren* v. *Ireland*, 29 Maine, 62, it was involved in the issue. In that case it did not, however, elicit any discussion, if indeed it attracted the attention of the Court.

Whether the same inconvenience would be experienced in levying on this species of property, as was found in attempts to levy on a mortgagee's interest in land, before foreclosure, it is not important to consider. But that very serious difficulties would be encountered is apparent.

A title to real estate by "statute purchase," can only be acquired by following strictly the provisions of the statute. Without statute provisions, title to real estate cannot be acquired by "statute purchase." Our statute gives no process by which real estate situated as was that in dispute, when levied upon by the tenant, can be taken in execution by levy. Consequently the proceedings, by the tenant, against Doolittle, were wholly unavailing, and gave him no rights as against the demandant.

According to the agreement, a default must be entered.

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† STATE OF MAINE *versus* BURGESS *& al.*

By § 2, c. 162, R. S., it is provided, that any person shall be punished who shall maliciously or wantonly, break down, injure, remove or destroy any dam, reservoir, canal, trench, or any of the appurtenances thereof.

An indictment under this section, charging that the act was done maliciously *and* wantonly, is supported by proof that the act was done maliciously *or* wantonly, and describes but one offence.

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

INDICTMENT against defendants, charging them that "at

Belgrade, in said county of Kennebec, on the eighth day of June, in the year of our Lord one thousand eight hundred and fifty-four, did maliciously and wantonly break down, injure, remove and destroy a certain portion of a stone dam, then and there erected on Chandler stream, so called, the property of one Marcellus Chandler and of one Samuel Goodridge, of the value of five hundred dollars," &c.

The defendants moved the Court to quash the indictment, because it charged two offences in one count. But the Judge ruled that the indictment was sufficient, and instructed the jury that if satisfied the acts were done maliciously *or* wantonly, they would return a verdict of guilty; that the meaning of the word "wantonly," as used in the statute, was that the act was done recklessly, without regard to the rights of the owners of the property injured.

The defendants were found guilty, and excepted to the rulings.

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

1. The count is double.

Malicious mischief is one thing; *wanton* mischief is another thing. The ruling that the indictment was sufficient, therefore, was erroneous.

2. Government having alleged that the act was done maliciously, was bound to prove it so done.

Proof it was wantonly done, is not enough.

Malice in the statute is revenge against owner. 2 East's P. C., 1073; 1 Leach, 527; *Com.* v. *Walden*, 3 Cush. 558.

Malicious mischief consists in the willful destruction of personal property, from actual ill will or resentment towards its owner or possessor. *State* v. *Robinson*, 3 Dev. & Bat. 130.

Under the instruction the jury may have found defendants guilty, though the act was done without any feeling of revenge or hostility against owner. Even if they did not know who were the owners.

The verdict establishes malice, while the jury may have found no such thing.

Abbott, Att'y Gen., contra.

RICE, J. — By § 2, of c. 162, R. S., it is provided that if any person shall maliciously or wantonly, break down, injure, remove or destroy any dam, reservoir, canal, trench, or any of the appurtenances thereof, he shall be punished, &c.

The respondents were indicted under this section. The indictment charges, that the defendants did "maliciously *and* wantonly break down, injure, and destroy a certain portion of a stone dam." At the trial, the Court instructed the jury that, if they were satisfied the acts charged were done maliciously or wantonly, they would return a verdict of guilty.

It is contended that the indictment charges two distinct offences in one count, and is therefore bad for duplicity; and that the instructions were consequently erroneous.

There is no principle of criminal law better established, than that which requires that a person charged with a crime shall be entitled to have that crime distinctly set out in the indictment. This is necessary to the end that he may not be embarrassed in his defence by uncertainty, or a multiplicity of charges, commingled, and that the record may exhibit, for his subsequent protection, the specific offence for which he may have been tried. If, therefore, it be doubtful whether the facts as charged constitute an offence against law, the indictment will be bad for uncertainty. Or, if two substantive offences are charged in one count, the indictment will be bad for duplicity, because it will leave the accused in doubt as to the specific charge against which he is called to defend.

There are many substantive acts which, in and of themselves, may not be unlawful, but which are made so by statute, when done in a particular manner, or from particular motives. Thus, cruelly to beat *or* torture any horse or ox or other animal is unlawful, so too it is unlawful willfully, maliciously, *or* cruelly to kill, wound, maim, or disfigure the horses, cattle or beasts of another. It is also unlawful, willfully *or* maliciously, without the consent of the owner, to cut away, let loose, injure or destroy any boom or raft

of logs or other lumber, &c. Now, if a person was charged with the substantive offence of killing a horse, the property of another, could it be said that three crimes were charged, if the pleader should allege in his indictment, that the act was done willfully, maliciously and cruelly? Or, if a person were indicted for cutting away a raft, that two offences were charged, if it were alleged that the act was done willfully and maliciously? Or, that two offences were charged, if a person were indicted for cruelly beating and torturing a horse? Clearly not. There would be but one substantive act charged, in each case; the expletives only give criminal character to that act, and whether one, or more are used, the act remains single, and the penalty the same. If, by increasing the number of expletives, the legal character of the substantive act were changed or the penalty increased, there might be some foundation for the assertion, that more than one offence was charged.

The charge against the defendants is, that they did maliciously *and* wantonly break down, &c. If the act were done maliciously, the offence was complete; and so too if it were done wantonly. If done both maliciously *and* wantonly, the substantive act remained single, its legal character was not changed, the penalty was not enhanced. Proof of either was sufficient.

It is a general rule, that runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified. 2 Camp. 586, 646; 1 Burr. 399.

It was held in *Hinckle* v. *Cone*, 4 Dana, 518, that setting up a gaming table may be an entire offence. Keeping a gaming table and inducing others to bet upon it, may also constitute a different offence; for either unconnected with the other an indictment will lie. Yet when both are perpetrated by the same persons, at the same time, they constitute but an offence, for which one count is sufficient, and for which but one penalty can be inflicted.

In the case of *State* v. *Barnes*, 29 Maine, 561, a similar

principle was involved, though it does not so distinctly appear in the case, as reported.

The R. S., of Mass. c. 126, provides, that any person who shall willfully and maliciously destroy *or* injure the personal property of another person, shall be punished, &c. In *Com.* v. *Soule,* 2 Met. 21, the charge in the indictment was, that the defendant "did willfully, maliciously and secretly, in the night-time, destroy *and* injure two lobster cars," &c. The Court held, SHAW, C. J., giving the opinion, that it was sufficient to bring the case within the statute that the property was injured *or* destroyed.

In *State* v. *Kuns,* 5 Blackf. 314, it was held, that an indictment charging that the defendant unlawfully, maliciously, and mischievously destroyed *and* caused to be destroyed a certain quantity of potatoes, &c., cannot be objected to on the ground that it charges two distinct offences.

The statute of 7 & 8 Geo. 4, c. 30, § 3, provides, that if any person shall unlawfully, and maliciously, cut, break, *or* destroy, or damage with intent to destroy, or to render useless any article of silk, woolen, linen, or cotton, &c., he shall be punished.

The precedent for an indictment under this statute, given by that most accurate criminal pleader, Mr. ARCHBOLD, is as follows:—"The jurors, &c., present that A. B., &c., unlawfully, maliciously, and feloniously did cut, break *and* destroy twenty-five yards of woolen cloth," &c.

We think the indictment in the case at bar well sustained both on principle and authority.

Exceptions overruled and
Judgment on the verdict.

INDEX.

ABANDONMENT.

See SHIPPING, 7.

ABATEMENT.

1. A party cannot plead a matter in abatement of the writ, which affects only *one of his co-defendants*. *Bonzey* v. *Redman*, 336.

2. Thus, where the writ is served by the sheriff on defendants, one of whom is his deputy, and one *not* the deputy pleaded this fact in abatement, such plea cannot prevail. The *deputy* may well plead it in abatement, but when pleaded by *another*, it neither avails *him* nor the deputy, and the objection is considered as waived. *Ib.*

3. A plea in abatement, *defective* in not being verified by *affidavit*, when of facts *not* apparent of record, or for not being *seasonably* filed, or for not being *entitled* of the term when the writ was entered, may be objected to on *general* demurrer. *Whidden* v. *Seelye*, 247.

4. By a rule of Court, pleas in abatement, and motions to dismiss for defects in service, must be filed within the first two days of the term the writ is entered. *Snell* v. *Snell*, 307.

5. And it forms no exception to this rule, that at the first term no appearance was entered for defendant, except by his counsel "specially." *Ib.*

6. It is no ground for abating a writ, brought before a magistrate, for *trespass quare clausum fregit*, that in the declaration matters of aggravation in the destruction of plaintiff's property are alleged, and three times the value are claimed; or that it omits to state that the trespass was committed willfully and maliciously, and contrary to the form of the statute. *Fogg* v. *Cushing*, 315.

7. Whether a plea in abatement for a misnomer, setting forth only the omission of the initial letter of the middle name, is sufficient? *quere*. *State* v. *Homer*, 438.

See REPLEVIN, 5. WAIVER, 5.

ACCOUNT.

1. The action of *account* is a form recognized by our statutes, and maintainable in our Courts, where the relations of the parties authorize the one to demand of the other to render an account. *Closson* v. *Means*, 337.

2. In such action two judgments are rendered, one *interlocutory*, determining that defendant shall account; the other *final*, as to the amount found due by the auditors. *Ib.*

3. Pleas in *bar* of the action must be filed *before* the interlocutory judgment. *Ib.*

4. Where no issues of fact are made before the auditors, and no charge of misconduct or partiality, their report is conclusive. *Ib.*

5. Auditors appointed under § 49 of c. 115, R. S., are the proper tribunal in all actions of *account*. *Ib.*

6. And although they refuse or neglect to report the facts by them found, when requested by one of the parties, no exceptions lie. The law requires of them no such action. *Ib.*

7. Where no issues are made up before the auditors, none can afterwards be made on the presentation of their report for acceptance by the Court. *Ib.*

ACCOUNT ANNEXED.

1. Where the writ alleges the indebtment of defendant to be according to the *account annexed*, and for services performed for defendant, at his request, and the account annexed is "for your proportion of costs and expenses of suit W. *v.* N." the plaintiff may recover under that count, for the *service* of the writ. *Nutt* v. *Merrill*, 237.

2. And, although the plaintiff omitted to state such a claim in the opening of his case, it is within the *discretionary* power of the Court to allow him to claim it, where the writ and return have been used in the trial, even after the evidence is all out, and the counsel for defendant is about addressing the jury. *Ib.*

ACTION.

1. An action, against the maker of a note payable at a bank, commenced on the last day of grace, without evidence of a prior demand at a reasonable hour on that day, or that the suit was commenced *after* the business hours at the bank, is *premature*. *Veazie Bank* v. *Winn*, 62.

2. An action may be commenced on a note, on the same day it is legally protested for non-payment. *Veazie Bank* v. *Paulk*, 109.

3. Defendant quitclaimed to plaintiff his interest in a township of land, after there had been contracts to sell certain lots to settlers, and the plaintiff gave a bond to save him harmless from his obligations and contracts pertaining to the lots sold, and was to receive the sums then due, or what might be due from the settlers on their contracts; and the bond also recited that one of the settlers owed *about* $130, when in fact he owed only $30:—*Held*, in an action to recover the difference, that the bond showed no undertaking on the part of the defendant that such sum should be collected, but that the parties left the sum due from settlers as uncertain, and that no action would lie against defendant for money by him received prior to the contract. *Larrabee* v. *Woodman*, 120.

4. Towns furnishing necessary supplies to persons falling into distress, who have their legal settlement in another town, may recover for such supplies, in

an action commenced within two years after the expiration of two months, from the giving of said notice, where no answer is returned.
Robbinston v. *Lisbon*, 287.

5. But if an answer, denying their liability, is returned by the overseers of the town called upon, within the time prescribed by statute, then the action must be commenced within two years from the return of the answer, or it is barred. *Ib.*

6. For the official misconduct of the directors of an incorporated company, and fraud in the discharge of their duties, they are responsible to the corporation. *Smith* v. *Poor*, 415.

7. An individual corporator, who has suffered damage in a contract made with such company, through the fraudulent acts and votes of its directors, under color of their office, can maintain no action against *them* to recover compensation. His remedy is against the company. *Ib.*

See EXECUTORS, &c., 1. PLANTATIONS. SALE, 6. TOWNS.

AGENT.

See INTOXICATING LIQUORS, 1, 2.

AGREEMENT IN RESTRAINT OF TRADE.

1. No consideration is required to be stated in a contract under *seal.*
Whitney v. *Slayton*, 224.

2. A bond binding the obligor not to exercise a trade is void, but where the inhibition is for a limited time, and within certain limits, it may be obligatory. *Ib.*

3. And the *exceptions* to the common law rule should receive a *liberal* construction. *Ib.*

4. Thus, where the defendant sold plaintiffs an iron foundry, in Calais, and agreed not to engage in the business of iron casting within sixty miles of that place for ten years, it not being a part of the State densely inhabited, and containing but few places of much business; *it was held*, that the agreement was binding. *Ib.*

5. And such bond is broken, if the obligor become a stockholder in an incorporated company, carrying on that business within those limits, or an employee of such corporation. *Ib.*

6. In a suit on such a bond, damages are recoverable, sustained even after the date of the writ up to the time of *trial.* *Ib.*

ALTERATION OF A DEED.

See CONVEYANCE, 7.

APPROPRIATION OF PAYMENTS.

1. When a creditor receives a partial payment of a debt not due, he is bound to apply it according to the wishes of his debtor. *Witherell* v. *Joy*, 325.

2. Partial payments by the debtor on a runniug account, without special appropriation, are to be applied in discharge of the earliest items.
Thurlow v. *Gilmore*, 378.

3. And this rule is applicable where such payments are made by one of *full age*, upon an account commencing *before* and terminating *after* the debtor's majority. *Ib.*

ASSESSMENTS.

See CORPORATIONS, 5, 6, 7.

ASSETS.

See EXECUTORS, &c., 2.

ASSUMPSIT.

1. Assumpsit, by one tenant in common against his co-tenant, for use and occupation of the common property, will not lie on an *implied* promise.
Gowen v. *Shaw*, 56.

2. But when a tenant in common has received more than his share of the rents of the common property in money, or as bailiff of the other, assumpsit to recover it may be maintained by his co-tenant. *Ib.*

3. For a creditor's proportion of a sum of money found due from an executor on the settlement of his account with the Judge of Probate, under the decree of that Court, *assumpsit* will not lie. *Wass* v. *Bucknam*, 289.

ATTACHMENT.

1. A mortgagee of a vessel who gives an accountable receipt therefor, to an officer attaching it as the property of the mortgager, cannot avoid his liability, by showing that his claims exceed the value of the vessel.
Drew v. *Livermore*, 266.

2. And in an action on such receipt he is precluded from showing any informality or invalidity in the attachment or judgment, while the latter is in force. *Ib.*

See LEVY OF LAND, 3.

AUDITORS.

See ACCOUNT, 4, 5.

AWARD.

1. An award under a submission as to the ownership of a yoke of oxen, in which three persons claimed separate interests, that one of them should pay a certain sum of money to each of the others, is sufficient evidence that the ownership of the oxen is adjudged to be in him who is to pay the money.
Hanson v. *Webber*, 194.

2. And where the award thus settles the title of the property, and the other claimants are to receive their just proportions of its value, no objection can be made to it for want of *mutuality*. *Ib.*

3. Nor is an alternative mode of payment therein set forth, conferring a privilege upon the party, if he should accept it, but otherwise to pay a sum certain, any objection to the validity of the award. *Ib.*

4. In a submission at common law containing no stipulation as to *costs*, the referees have no power over them, and if they award costs, so far it is void. *Ib.*

5. A rule of Court submitting to an arbitrator an action of replevin and all suits, claims and demands of the parties, with an agreement that the referee shall treat the action, as if it were assumpsit, and award accordingly, will authorize him to award a specific sum in damages. *Merrill* v. *Gardner*, 232.

6. And a judgment on such an award may be entered and upheld, although the arbitrator also award a *lien* upon the property replevied to secure the payment of the damages and costs. *Ib.*

BAIL.

Bail taken on mesne process is discharged by a subsequent increase of the *ad damnum*. *Langley* v. *Adams*, 125.

BAILMENT.

See CONTRACT, 1.

BANKRUPTCY.

1. Where the decree of a court of another government is interposed to judicial proceedings in this State, the jurisdiction of such court may properly become a matter of inquiry. *Long* v. *Hammond*, 204.

2. And where a person residing in this State, petitions a court of bankruptcy in the Province of New Brunswick, and obtains a discharge from all his debts, under the decree of that court, such discharge is invalid and can have no effect even upon a contract entered into in that Province. *Ib.*

3. But when such court of bankruptcy has jurisdiction of the person applying for the benefit of the bankrupt Act of that Province, and a decree is made in conformity with the requirements of their law, it operates to discharge the contracts of the applicant, and cannot be *impeached* in a subsequent action upon such contracts prosecuted in this State by a citizen of that Province. *Ib.*

4. The laws of a foreign country, in their effect upon contracts made under them, are recognized, not as having any binding force in our Courts, but on the principle of international comity. *Ib.*

5. As the bankrupt Acts of New Brunswick give no *liens* upon property attached, the attachment of the property of a petitioner for their benefit, *before*

his petition is filed, cannot operate to hold the property after he has obtained his discharge from the contract on which the seizure was made. *Ib.*

See EVIDENCE, 15. TROVER, 2.

BANKS.

1. No action can be maintained by a creditor against a bank, after its effects have been placed in the hands of receivers. *Leathers* v. *Shipbuilder's Bank*, 386.
2. Section 8, c. 164, of Acts of 1855, is constitutional. *Ib.*

See USURY, 1, 2.

BANK CHECKS.

See CHECKS.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. An indorsee may maintain an action against the indorser (payee) of a promissory note, without notice of its dishonor, where the note was made for the accommodation of the *payee*, and *he* agreed to take care of it, although at the time it was made and when it fell due, the maker was indebted to the payee. *Torrey* v. *Foss*, 74.
2. Upon a *lost* note the owner may maintain an action at law without furnishing indemnity to the defendant, if it appear at the time of trial that the limitation bar may be interposed to prevent a recovery by any *bona fide* holder. *Ib.*
3. A note given by two persons as part payment for a mare, containing these words: — "said mare to be holden to J. S. G., (one of the signers,) for the amount he may pay for the same," is not a mortgage, and consequently need not be recorded. *Gushee* v. *Robinson*, 412.
4. A note given for interest above the rate of six per cent. per annum for the forbearance of payment of a sum of money, is without legal consideration. *Goodrich* v. *Buzzell*, 500.
5. An indorsee of such a note cannot claim the character of an *innocent* purchaser, whose agent was cognizant of all the circumstances under which the note originated. *Ib.*

BILL OF SALE.

A bill of sale made in good faith, for a valuable consideration, of a certain quantity of pickets, a portion of which were manufactured, and the remainder to be manufactured, with a delivery of those made, and a place fixed for the delivery of the balance, and a delivery accordingly, vests the title of such pickets, so set apart, in the vendee, as against the creditors of the vendor. *Veazie* v. *Holmes*, 69.

BOND.

1. A bond for the conveyance of real estate, on the conditions being performed within ten days, which provides that it shall be void in case of the accidental

non-reception of the deed of the premises from certain persons in whom the title is supposed to be, is binding, although at the time of its execution, the title to the land is not held by the persons supposed.

Haynes v. *Fuller*, 161.

2. And such a bond is valid, although the agent of the obligors, holding the title, is unable to make the conveyance to the defendants, within the time allowed, through pressure of business. *Ib.*

See ACTION, 3. AGREEMENT IN RESTRAINT OF TRADE, 2, 5, 6. CONTRACT, 6. EVIDENCE, 16, 17. MORTGAGE, 4. POOR DEBTORS, 1, 3.

BOUNDARIES.

See CONVEYANCE, 4, 5, 9, 10, 11.

CERTIORARI.

1. Where, on an appeal from the County Commissioners, a jury is impanneled to view and award damages for land taken by railroad companies, the presiding officer has no authority to give instructions to them in matters of law.

McKenney v. *County Commissioners*, 136.

2. But where this assumption of power is exercised at the request of one of the parties to the proceedings, *he* cannot complain, even if the instructions are erroneous. *Ib.*

3. If the presiding officer gives erroneous instruction to such jury, whether the party suffering thereby without fault, may not obtain relief by *certiorari*, *quere*. *Ib.*

CHARTER CONSTRUCTION.

See TOLL BRIDGE.

CHECKS.

1. To charge an *indorser* of a check drawn upon a bank, it must be presented for payment within a *reasonable time;* and the holder is allowed until the next day after receiving it, for that purpose. *Veazie Bank* v. *Winn*, 60.

2. Where a check is dated at, and drawn upon a bank in *Boston*, and there is no evidence in the case, that before presentment it was held by any one residing out of that city, a presentment of it for payment three days after it was drawn, is too late to charge the indorser. *Ib.*

COLLECTOR OF TAXES.

1. A collector of taxes legally qualified, acting within the scope of his powers, under a *warrant* from competent authority, may justify thereby the seizure and sale of the property of such delinquents as refuse to pay the taxes assessed against them. *Caldwell* v. *Hawkins*, 526.

2. His justification will not fail by reason of any errors in the assessment or in the proceedings of the town, at the meeting at which he was chosen. *Ib.*

3. And the return of his doings, upon the warrant, is *prima facie* evidence of the facts therein stated. *Ib.*

COLLISION.

See HIGHWAYS, 2.

COLONIAL ORDINANCE.

See CONVEYANCE, 1.

COMMON CARRIER.

To charge a carrier with the loss of personal ornaments packed in a trunk with the baggage of the owner, it must satisfactorily appear that the trunk was not rifled *after* it was so packed and *before* it reached the possession of the carrier. *McQuesten* v. *Sanford*, 117.

COMPLAINTS AND INDICTMENTS.

1. *The offence* to which the accused, in a criminal proceeding, is called upon to answer, must be distinctly alleged. *State* v. *Moran*, 129.

2. But a complaint, that the respondent kept or deposited certain intoxicating liquors intended for unlawful sale, in a certain place, *or by some other person with his consent*, is insufficient and void. *Ib.*

3. An indictment against a receiver of stolen goods, knowing them to be stolen, which contains no allegation of the ownership of the property, or that the principal has been duly convicted, is fatally defective. *State* v. *McAloon*, 133.

4. An indictment alleging that defendant, on a day certain and divers other days, &c., at &c., "kept a certain house of ill fame, then and there resorted to for the purpose of prostitution and lewdness, by the consent and with the knowledge of the said defendant," contains a sufficient description of the statute offence, on which judgment may be rendered. *State* v. *Homer*, 438.

5. In an indictment for keeping a *house* of ill fame, it is unnecessary to describe the *street* where it is situated. *State* v. *Stevens*, 559.

6. And as the keeping of such a house is made a statute offence, it is not necessary for the indictment to conclude, that the act was to the *common nuisance* of the public. *Ib.*

7. By § 2, c. 162, R. S., it is provided, that any person shall be punished who shall maliciously or wantonly, break down, injure, remove or destroy any dam, reservoir, canal, trench, or any of the appurtenances thereof.

An indictment under this section, charging that the act was done maliciously *and* wantonly, is supported by proof that the act was done maliciously *or* wantonly, and describes but one offence. *State* v. *Burgess*, 592.

CONSTITUTIONAL PROVISIONS.

See MILLS, &c. RAILROAD CORPORATIONS.

CONSTRUCTION OF CONTRACTS.

See CONTRACT, 6.

CONTEMPT OF COURT.

A party to a bill, who, in his answer, professes himself ready to pay a note which he had given, when it could be done with safety to himself; and after the decree that the same should be paid to a receiver appointed by the Court, sets up a prior *part payment* of the note, and refuses to pay the same in full, and the accumulated interest thereon while the suit was pending, is liable and punishable for a contempt of Court. *Gilmore* v. *Gilmore*, 50.

CONTRACT.

1. If a contract in writing for the bailment of property, signed by the bailee, contains a recital that the same, for a valuable consideration, was previously sold, transferred and delivered by him to the bailor, it is evidence that such previous contract was *executed*, and the *title* to the property passed to the bailor, although portions of it were crops not harvested.

Bryant v. *Crosby*, 9.

2. In the construction of a contract, reference must be had to the intention of the parties, as ascertained from their situation, and the whole scope of the contract. *Ricker* v. *Fairbanks*, 43.

3. Thus, where a railroad company agreed to pay a contractor ninety per cent. monthly, of the estimated amount of the work done and materials procured in the construction of their road, under the report of their engineer, and another clause in the contract authorized the engineer to declare the contract abandoned, and any sum due the contractor to be forfeited to the company, whenever he should find that the covenants of the contractor were not performed; *it was held*, that where the engineer had put an end to such contract, it did not operate to discharge the company from the payment of the ninety per cent. found to be due from them, *prior* to such determination. *Ib.*

4. A distinction between *masts* and *logs* is recognized by the laws of the State; but under some circumstances the latter term may include the former.

Haynes v. *Hayward*, 145.

5. But where a contract in writing is made to sell certain "logs," and the scale of a designated surveyor is agreed upon as the basis of the settlement between the parties, the "logs" described in the scale bill are the only articles sold, notwithstanding the surveyor enumerates a "mast" as scaled in the same bill. *Ib.*

6. The plaintiff gave defendants a bond, in which was recited a contract, wherein plaintiff agreed to keep amended and repaired, agreeably to c. 25, R. S., certain roads, &c., as laid out on a plan in the city of Belfast, for the term of four years, together with all new highways which might, within the time,

be built by defendants, at and for the sum of $2250, for each and every year, to be paid in equal quarterly payments; and the bond further stipulated that if plaintiff should perform said contract as defendants were bound to do by law for the time specified, and to the acceptance of the road commissioners for the time being, and to their satisfaction and approval, and should save the defendants harmless from and against all claims for damages and costs arising from any obstruction or want of repair of any of the roads or bridges therein, then the bond to be void; otherwise, to remain in full force: — the bond further provided that if plaintiff should at any time fail to perform his contract to the satisfaction, approval and accceptance of the commissioners, it should be in their power and at their option to put an end to said contract by giving plaintiff written notice of their decision, and allowing him *pro rata* pay, as above, to the time of said notice, and saving to defendants all rights and remedies by virtue of the condition of the bond: —

The commissioners would not approve of the plaintiff's alleged performance of his contract for one year of its continuance, and defendants refused to pay him for that time. In an action to recover for such quarterly payments, and for extra repairs on new *roads*, not properly completed, *it was held*: —

1st. That the mutual stipulations in this contract were *independent*; —

2d. That for any failure on the part of plaintiff to comply with his contract the defendants' remedy was upon his bond; —

3d. That for new roads not properly constructed, but which *were accepted* by the selectmen, the plaintiff was entitled to no extra allowance.

Allard v. *Belfast*, 369.

7. The defendant agreed to purchase a cargo of southern pine lumber at a certain price per M., and *pay the freight;* when it was delivered, he refused to pay the freight, and the plaintiffs told him that if he took it he should pay $40, a thousand, unless he paid the freight: —

Held, that defendant, by his refusal, repudiated the contract, and by keeping the lumber was chargeable for it at the price fixed by plaintiffs.

Patten v. *Hood*, 457.

8. But *such demand* would not carry *interest* from the time it was made; *that* could only be cast from the date of the writ. *Ib.*

See EQUITY, 3.

CONTRACTS UNDER SEAL.

See WAIVER, 3.

CONVEYANCE.

1. Where the upland, on the shore of a river subject to the flux and reflux of the tide, has been run out into lots, the flats appurtenant, when not otherwise settled by the owners, must be divided, under the operation of the Colonial Ordinance of 1641, according to the principle recognized in the case of *Emerson* v. *Taylor*, 9 Greenl. 42. *Call* v. *Carroll*, 31.

2. And where such original lots are *subdivided*, without any stipulations as to the flats, the division of the latter, as between the vendor and vendee, must

be governed by the same rule, but in no event to affect the flats of adjacent proprietors. *Ib.*

3. In the deed of the Land Agent of this State was this reservation: — "Reserving however to actual settlers thereon the right to perfect their titles to such lands in the same manner as if this conveyance had not been made": — *Held*, that such reservation was designed only for those who had contracts in writing by which titles could be perfected. *Rogers* v. *McPheters*, 114.

4. Where a lot of land is conveyed, within which is fenced a portion of the street, and the monument called for by the deed is described as standing in the line of the street, there being no uncertainty in the location of the monument or street, and no reference to the *fence*, no part of the street is embraced in the deed. *Walker* v. *Pearson*, 152.

5. Where an administrator sells at public auction his intestate's right to two contiguous *lots* of land, and a third person, at his request, points out the line *between* them, to which *boundary* no objection is made by the purchasers; one of them is not estopped thereby from claiming to the *true line* of his *lot*, beyond the one thus pointed out, unless at the time of the sale he *knew* where the true line between the lots was, and the other purchaser was induced and did purchase in consequence of his *silence* or some *acts* by him done. *Titus* v. *Morse*, 348.

6. A deed purporting to convey all the grantors' real estate in a certain *town* by name, and particularly all that belongs to them as the representatives of a certain person named, deceased, is effectual to pass their title to any lands there situated. *Bird* v. *Bird*, 398.

7. And where several heirs join in a conveyance, by signing, sealing and delivering the same to the grantee, a *subsequent* addition in the body of the deed, of the names of two who had signed and sealed it, but which were not there at the time of its delivery, without the knowledge and consent of the parties to the deed, will not affect its validity as to those whose names were in the body of the deed as grantors. *Ib.*

8. But whether any title in the premises described in a deed, is passed, by merely signing, sealing and delivering it, without the insertion of the name as *grantor*, *quere*. *Ib.*

9. A deed describing the land conveyed therein by *numbers* and *range*, *according to the new survey*, will not authorize the use of a *plan*, proved to have been made according to what was called the new survey, to establish the *extent* of the lots so conveyed. *Chesley* v. *Holmes*, 536.

10. Where the limits of the premises by *numbers only* are thus left *uncertain*, reference must be had to other parts of the deed to determine them. *Ib.*

11. And where, in such a deed, reference is had to the *farm* occupied by the grantor, that is the more certain description, and will determine the extent of the *lots* conveyed. *Ib.*

12. A company was allowed five years, under their charter, to construct their railroad, by making and filing their location with the county commissioners of the counties through which it passed, on or before Dec. 31, 1850. After they had made a survey, and staked out the track across plaintiff's land, but before it was accepted and filed, the company purchased of him six rods in width of his land, and took a deed of the same, in which it was described

as "covered by the location of their said railroad, or that may finally be covered by such location." Afterwards, under the authority of the legislature, a further time was granted to the company, to file their location, and they made a different one across the plaintiff's land, and accepted and filed the same, on which the road was constructed: —

Held, that the company obtained no rights in such new location *under the deed*. *Hall* v. *Pickering*, 548.

13. By § 26, of c. 91, R. S., it is provided, that no conveyance of any estate in fee simple, fee tail or for life, and no lease for more than seven years from the making thereof, shall be good and effectual against any person, other than the grantor, his heirs and devisees, *and persons having actual notice thereof*, unless it is made by a deed recorded.

Where one in possession makes a conveyance of the premises, but in his deed inserts this clause, — "the said land is under an incumbrance of two hundred dollars, and interest from September last," and furthermore informs the grantee that they were under an incumbrance to J. L., and would be payable in September next, and interest: —

Held, that this was sufficient notice to give effect, as against said grantee, to a prior unrecorded deed to J. L. *Merrill* v. *Ireland*, 569.

14. And where *such grantee*, not being in possession, assigns the deed to demandant, and, in fact, was acting for him in the negotiation, the demandant can claim no rights as against the unrecorded deed. *Ib.*

See WAIVER, 1.

CORPORATIONS.

1. A promise in writing to take and fill a certain number of shares in a chartered company, by a subsequent organization of the company, and an acceptance of the subscription, becomes a binding contract.
Penobscot Railroad Co. v. *Dummer*, 172.

2. No legal assessment of shares in a corporation can be made, when the number, required by the charter, is not first taken. *Ib.*

3. But its records regularly kept, without any proof to destroy their effect, are competent to show its corporators, and whether the required number of shares were taken. *Ib.*

4. Where the terms of a subscription are, that not more than five dollars shall be assessed at the *same time*, if no more is required to be *paid* at one time, it is no valid objection that other assessments were voted at the same time. *Ib.*

5. Where the terms of a subscription required, that seventy-five per centum of the estimated cost of any sections of the railroad should be subscribed for by *responsible persons*, before commencing its construction, if the subscription is obtained in good faith, assessments will be valid, although some of the subscriptions, to make up that amount, should turn out to be worthless. *Ib.*

6. No other demand for payment of assessments to maintain an action, is necessary, than that prescribed in the by-laws of the corporation. *Ib.*

7. By c. 369, § 5, of special laws of 1846, delinquent subscribers or stockholders

in the York & Cumberland Railroad Company were made accountable for the balance, if their shares should sell for less than the assessments due thereon, with the interest and cost of sale.

By an additional Act of June 21, 1848, the capital stock was to consist of not less than four thousand shares.

The defendant subscribed for two shares in the capital stock of the plaintiff corporation on certain conditions named therein, none of which had reference to the number of shares subscribed for, and paid three assessments thereon; afterwards more assessments were made, their payment by him refused, and the shares were sold in accordance with the charter and by-laws for a less sum than the amount assessed: — *Held*, that defendant was liable for the balance, although the minimum number of shares had not been subscribed for. *York & Cumberland Railroad Co.* v. *Pratt*, 447.

See ACTION, 6, 7. SALE, 7.

COSTS.

See AWARD, 4. REPLEVIN, 1.

COUNTY COMMISSIONERS.

1. In exercising their *appellate* jurisdiction by County Commissioners, it must *appear* that the town had the opportunity of knowing fully what it was called upon to do, in its corporate capacity, in regard to the way in question, and with that knowledge, unreasonably refused to approve and allow the way laid out by their selectmen. *Guilford* v. *County Commissioners*, 296.

2. And the proceedings of Commissioners in approving and allowing such town way will be void, unless the petition on which they act or their record shows that the laying out of the town way, with the boundaries and admeasurements of the same, was reported to the town. *Ib.*

3. Under § 29, c. 25, R. S., the filing with the town clerk of the laying out of the town or private way, with its boundaries and admeasurements, is not alone sufficient to authorize the action of the town thereon. *Ib.*

See HIGHWAYS, 8.

COVENANT BROKEN.

See DEMURRER.

CROPS.

See CONTRACT, 1.

DAMAGES.

See AGREEMENT IN RESTRAINT OF TRADE, 6. HIGHWAYS, 2, 6. POOR DEBTORS, 2.

DEDICATION OF HIGHWAY.

See HIGHWAY, 4.

DELIVERY.

See BILL OF SALE. SALE, 4, 5.

DEMURRER.

In an action of covenant broken under a quitclaim deed, in which are no covenants against incumbrances, save those which may originate under the grantor, if the declaration does not allege the incumbrances complained of at the time of executing the deed, to have originated *from*, *by*, or *under* the *grantor*, it will be bad on demurrer. *Mayo* v. *Babcock*, 142.

See ABATEMENT, 3. NONSUIT, 1.

DEPOSITION.

If a witness be disqualified, by reason of interest, at the time of giving his deposition, and at the time of trial that disqualification is removed by statute, the deposition is admissible. *Haynes* v. *Rowe*, 181.

DESCRIPTION.

See CONVEYANCE, 10, 11.

DEVISE.

See DOWER, 1.

DIRECTORS.

See SALE, 7, 8, 9.

DISCLOSURE.

See POOR DEBTORS, 4, 5.

DISSEIZIN.

To acquire a *title* by *disseizin*, the possession of the tenant or of those under whom he claims, must be proved to have been open, notorious, exclusive, and *adverse* to the true owner for twenty years.

Chadbourne v. *Swan*, 260.

DOWER.

A testator devised one undivided fourth part of his mills and real estate connected therewith, to his executors, in trust for S. U. D. during her natural life, on the condition that they were to retain the income of that part, and pay over the same towards removing the incumbrances on the mill property, and towards the consideration agreed to be given for it, until one fourth of the incumbrance and one fourth of the consideration remaining unpaid were discharged; subject also to its proportion of the repairs: —

He also devised to his executors all his real and personal estate, excepting the fourth part for the use of S. U. D., to be held by them in trust for the payment of his debts, legacies and bequests; and to pay over the increase there-

of, subject to the support of his family, to the payment of said debts, legacies and bequests, until the same were fully paid, when said trust estate was to cease: —

Several legacies of money were given, but no provision in the will was made for his widow: —

He also bequeathed all the residue of his estate to his three children in equal shares: —

The dower of the widow in the mills was determined to be one third of the rents and profits — and after the proportional part of the incumbrances and consideration unpaid at the time of testator's death, of the fourth part of the mills devised for the use of S. U. D. were discharged, the executors withheld from the devisee one third of the net income of said fourth to discharge the widow's claim for dower: —

It was held that such *specific* devise was subject to dower, without contribution or remuneration from the *residuary* estate. *Drummond* v. *Drummond*, 35.

DRAW.

See Toll Bridge.

EMANCIPATION.

See Settlement, 1.

EQUITY.

1. In equity proceedings, where the claims set up by one of the parties against the other, are resisted on the ground of fraud, and that question is presented to the Court, and judicially determined in favor of such claims, and the case is sent to a *master* to find the amount due, *he* is unauthorized to reëxamine the question of fraud. *Gilmore* v. *Gilmore*, 50.

2. Nor can he rightfully receive any testimony bearing thereon, but all the legal evidence had at the hearing, bearing upon the question to be determined by the master, may, by him, be considered. *Ib.*

3. The specific performance of a contract in writing, concerning land, cannot be compelled in a court of equity, if the description of the land is so vague and uncertain, as to require a resort to parol evidence to ascertain its boundaries, and there is no reference in the memorandum to other description which would make it certain. *Jordan* v. *Fay*, 130.

4. Where the parties interested in a bond for the conveyance of real estate, agreed with the defendant, by parol, that he might have an interest in one half of the bond, by making the first payment, and also to hold the title of the other half of the land for security for money loaned them to make the payments for their moiety, by giving a bond to each of them to convey, by deed, one quarter of the premises on being reimbursed for his advances; and such payment was made and the title of the land transferred to defendant, in a suit in equity to compel performance of said contract, it was *held*, that the Court had no jurisdiction to enforce it; —

1st. Here was no trust expressed by any writing of the party sought to be charged.

2d. Nor did the plaintiff furnish the money whereby a trust could be implied.
3d. Nor was the title obtained by the defendant through any fraud, as he held it by consent. *Hunt* v. *Roberts*, 187.

5. The equity powers of the Court are defined and limited by express statute provisions. *Hayford* v. *Dyer*, 245.

6. A case presented, not falling within those provisions, must be dismissed. *Ib.*

7. An agreement in writing to sell certain tracts of land, signed by each party thereto, *remaining in the hands of the vendor*, with a further agreement by him to *deliver* to the other a *duplicate*, on payment of a certain sum at a time fixed, is, on payment thereof according to the terms, in equity, valid, and on fulfillment of its conditions by the vendee, or an offer so to do, specific performance may be required. *Hull* v. *Noble*, 459.

8. After the payment is made to entitle the party to a *duplicate*, no demand of it is essential to vindicate his rights under it. *Ib.*

9. It is a reasonable excuse for not fulfilling the conditions of a sale of real estate, as to the *time* of payment, by the party seeking a specific performance, that the agreement was withheld from him by the other party, after he was entitled to its possession. *Ib.*

10. Of the notice of claims to real estate which will affect a *purchaser*. *Ib.*

See EXECUTORS, &c., 1, 4, 5. MORTGAGE, 1.

ESTOPPEL.

See CONVEYANCE, 5.

EXCEPTIONS.

1. When evidence has been introduced of *representations* respecting personal property by the vendor, some of which are mere *opinions*, and others regard essential *facts* which amount to a warranty; and the Court are requested to instruct the jury that *such representations* imply a warranty to their extent, the request may properly be refused. A judge is not required to separate the matters contained in *one request*, and make a portion of it, which is pertinent, his instructions to the jury, and withhold the rest. *Bryant* v. *Crosby*, 9.

2. Suggestions made by the presiding Judge, in the course of his charge to the jury, as to any facts in the case, but which are left to their determination, are not open to exceptions. *Phillips* v. *Veazie*, 96.

3. The instructions of the Court, upon a matter wholly immaterial to the issue, if wrong, cannot avail the party excepting. *Whidden* v. *Seelye*, 247.

4. A party excepting to the rulings of the presiding Judge, in excluding evidence by him offered, must present such evidence for the consideration of the Court of law, or the presumption arises that he has no just ground of complaint. *Small* v. *Sacramento N. & M. Co.* 274.

See ACCOUNT, 6.

EXECUTORS AND ADMINISTRATORS.

1. Upon the refusal of the promisor to fulfil an agreement in writing, for a valuable consideration, to convey real estate, the *administratrix* of the promisee may maintain either a bill in equity for a specific performance of the contract, or an action at common law to recover damages for its breach.

Godfrey v. *Dwinell*, 94.

2. By § 23, of c. 120, R. S., it is provided, that no executor or administrator who has given bond and notice of his appointment, according to law, shall be held to answer to the suit of any creditor of the deceased, unless it shall be commenced within four years from the time of his giving bond as aforesaid, excepting in the cases after mentioned.

Moneys collected by an executor, of the United States, for alleged claims of his testator against a foreign government, through the medium of a treaty, are assets in his hands, belonging to the estate.

Thurston v. *Lowder*, 197.

3. And where an executor received *such moneys* within four years from his appointment, a part of which was claimed by plaintiff, and that it never was the property of the testator; it was *held*, that an action against the executor therefor, brought after the lapse of four years from his appointment, could not be maintained. *Ib.*

4. An administrator of an insolvent estate is entitled to the aid of the equity powers of the Court, to obtain property belonging to the intestate, which creditors may lawfully claim in satisfaction of their debts when the same is held in fraud of their rights. *Fletcher* v. *Holmes*, 364.

5. But *before* resorting to the Court in equity, his remedies at *law* must be exhausted.

Thus, where such administrator attempts, through the equity side of the Court, to reach the avails of property belonging to the estate, fraudulently conveyed, it must appear: —

1st, That the suit is for the benefit of all the creditors whose claims are established.

2d. That the creditors have obtained judgment, *or* that their claims have been allowed by the commissioners of insolvency, and not objected to by the administrator.

3d. That the administrator has availed himself of the provisions of law for summoning before the Probate Court, the suspected parties.

4th. That he has brought a suit at law for the recovery of the property so conveyed.

5th. That he, or those he represents, have exhausted their remedy against the parties for aiding or assisting in fraudulently concealing the property of the estate. *Ib.*

See ASSUMPSIT 1. TROVER, 2.

EVIDENCE.

1. Representations by the vendor of personal property, as to its condition, made a month before the sale is consummated, are too remote to be admitted in evidence. *Bryant* v. *Crosby*, 9.

2. *Parol* evidence is not admissible to determine the *intention* of the parties to a deed. *That* is to be gathered from the deed itself.

Rogers v. *McPheters*, 114.

3. Where a question of fact is left to the jury, whether the instructions of a client authorized his counsel to indemnify an officer in the client's name, the indemnity made by the counsel, may be read to the jury.

Nutt v. *Merrill*, 237.

4. The *effect* of deeds and contracts made in a foreign country, without any evidence before the Court of what it may be, is presumed to be the same as if made within our own jurisdiction. *Whidden* v. *Seelye*, 247.

5. In *scire facias* against a *trustee*, the plaintiff cannot recover judgment for more than *appears* to be due on the execution issued on the original judgment. *Sawyer* v. *Lawrence*, 256.

6. And where such execution appears to be satisfied in *part*, by a levy upon the property of the debtor, evidence is inadmissible to show that such property did not, in fact, belong to the debtor, and that the value of it had been refunded by the plaintiff to the real owner. *Ib.*

7. When the defendant justifies his acts as being done in the performance of his duty in removing *obstructions* in the *highway*, which acts would otherwise be a trespass on the rights of the plaintiff, the burden of proof is on him to show that the highway, where the acts were done, was built upon its location. *Weed* v. *Sibley*, 356.

8. In an action pertaining to the realty, an office copy of the plaintiff's title deed is not admissible in evidence on proof that the original was in the hands of the attorney for the defendant. To authorize the use of such copy the original must be proved to have been lost. *Bird* v. *Bird*, 392.

9. Three notes of hand, payable at different times, were secured by mortgage, and the two having the longest pay day, were sued and collected soon after they were due. In an action upon the mortgage, the note first due was not produced, nor any evidence given of its loss, or that it remained unpaid; *held*, that after the lapse of thirty years, it may be presumed to have been paid. *Mathews* v. *Light*, 394.

10. In a suit upon a note given for the conveyance of a patent right, proof that such patent was void for being an infringement of a prior one, is not admissible, without that fact has been determined by a Court of competent jurisdiction. *Elmer* v. *Pennell*, 430.

11. Nor, in defence of such suit, can a mere hypothetical proposition, containing no issuable fact, be allowed to be proved. *Ib.*

12. Upon an issue, whether the defendant is as well known by the *name* in the indictment as by *another*, a former indictment against her by the same name, to which she pleaded not guilty, is competent evidence for the consideration of the jury. *State* v. *Homer*, 438.

13. The plaintiff, being indebted to defendant, in Sept. 1834, sent him the money by mail, which he alleged he never received, and the plaintiff afterwards paid him the debt. Subsequently the plaintiff was satisfied that the money sent by mail was received by the defendant, and commenced his suit to recover it. The defendant offered to prove that, in 1836, there were found in the house where the mail carrier of the supposed lost letter lived in 1834, a

number of letters, secreted in the wall and under the floors of the house, broken open, bearing date in 1834, post marked at other places than where found, and directed to persons in another town: —

Held, that this evidence or any declarations by such mail carrier, unaccompanied by any acts, was inadmissible. *Pike* v. *Crehore*, 503.

14. In such suit, the entries in the books of a bank, made by a cashier, deceased, in the ordinary course of his business, tending to prove any fact material to the issue, are proper evidence; but where such books are rejected by the presiding Judge, the objecting party must bring the rejected documentary evidence before the Court, that by inspection or some other way, the fact of its admissibility may be determined; otherwise, the presumption is, that they were rightfully excluded. *Ib.*

15. As proof of the bankruptcy of plaintiff, were offered copies of all the papers made by the applicant to the District Court of Massachusetts, the orders and decrees of the Court, appointment, bond and account of the assignee, and the marshal's certificate, tacked together by a ribbon, to which was prefixed the certificate of the clerk of that District Court, that it contained the copies of the whole record in that case, with the seal of the Court affixed, but on several of the papers thus tacked together, was also his certificate that they were true copies: It was held, that the document thus offered, was not duly authenticated as a copy of a record, and was rightfully rejected. *Ib.*

16. Under a mortgage of real estate to secure a bond with certain conditions, in which was also this stipulation: — "that should either party be dissatisfied with the fulfilling of the above bond, it shall be submitted to certain persons, (named,) and their decision shall be final," the mortgagee may enter for foreclosure, for a *breach* of the mortgage, without resorting to the opinions of the arbitrators named in the bond. *Hill* v. *More*, 515.

17. And in an action involving the legality of the foreclosure, other evidence of the breach of the bond is admissible. *Ib.*

See Corporations, 3. Collector of Taxes, 3. Paupers, 1. Tax Title, 1. Trover, 1.

FIREWARDS.

By § 11, c. 33, R. S., it is provided that when a fire breaks out in any town, and the firewards are not present, a major part of the selectmen present, shall have the power to direct any building, to be pulled down or demolished, as they may judge necessary, to prevent the spreading of the fire.

And when, in the absence of any firewards, *one* only of the selectmen is *present* at such fire, *he* is vested with the authority contemplated by this statute provision. *Frankfort* v. *County Commissioners*, 389.

FORFEITURE.

See Levy of Land, 2.

FOREIGN LAWS.

See Bankruptcy, 1, 2, 3, 4, 5.

FRAUD.

See EXECUTORS, &c. 4, 5. MORTGAGE, 3. POOR DEBTORS, 5. REPLEVIN, 4. TROVER, 7, 8, 9.

FRAUDULENT SALE.

See SALE, 1, 2, 3.

FREIGHT.

See SHIPPING, 1.

HEIRS.

See RELEASE, 1.

HIGHWAYS.

1. A traveler, with his horse and carriage, where the highway is unobstructed, without notice of a carriage behind him, may use any part of it wrought for the public accommodation. *Foster* v. *Goddard*, 64.

2. And when such traveler, in the exercise of ordinary care, suffers damage in his person or property by a collision with another carriage, through want of such care in its driver in attempting to pass by him in the same direction, arising either from attempting to pass on the side he ought not to under the circumstances, or from having a horse unsuitable for that occasion, he is entitled to recover the same of such negligent driver. *Ib.*

3. For injuries to travelers occasioned by a necessary alteration of an highway, through want of sufficient notice or warning of such change, the town is primarily liable, although such change is being effected by a railroad company, under the authority of their charter. *Phillips* v. *Veazie*, 96.

4. A way by *dedication* of the owner of the land does not become a *public highway*, without *user* for twenty years, or an *acceptance* on the part of the town. *State* v. *Bradbury*, 154.

5. *Repairs* made upon it, by a *surveyor* of highways, do not constitute *such acceptance*. *He* has no authority to bind his town. *Ib.*

6. When by reason of snow drifts, that part of the highway prepared for travel, becomes impassable, and a passage way outside and over the gutter of the road is used instead of it, for damages sustained by travelers over such passage way, in the use of ordinary care, the town is liable. *Savage* v. *Bangor*, 176.

7. If a thaw and a rain occur prior to the accident, it is sufficient notice to the town that such passage way is unsafe. *Savage* v. *Bangor*, 176.

8. County Commissioners have no power to locate highways over creeks or arms of the sea which are navigable, and construct bridges so as to impede their use for the purposes of navigation. *State* v. *Anthoine*, 435.

9. And bridges, constructed over such waters by their authority, may be removed by any person impeded thereby. *Ib.*

See CONTRACT, 6. EVIDENCE, 7. TOWNS.

INDEPENDENT STIPULATIONS.

See CONTRACT, 6.

INDICTMENT.

See COMPLAINT, &c.

INDORSER.

See CHECKS, 1, 2.

INFANCY.

1. A minor, who voluntarily abandons his father's house, without any fault upon the part of the latter, carries with him no credit on his father's account, not even for necessaries. *Weeks* v. *Merrow*, 151.
2. For goods sold to a minor, no action can be maintained without a ratification in writing signed by him after he shall arrive at the age of twenty-one years, or by some person thereto by him lawfully authorized. *Thurlow* v. *Gilmore*, 378.

INSANE HOSPITAL.

See LUNATIC, 1.

INSANITY.

Of presumptions in cases of insanity. *Weston* v. *Higgins*, 102.

See PAUPERS, 1, 3.

INSOLVENT ESTATES.

See EXECUTORS, &c., 4, 5.

INSTRUCTIONS.

See CERTIORARI, 1, 2.

INTEREST.

See CONTRACT, 8.

INTOXICATING LIQUORS.

Chap. 211 of statutes of 1851, authorized the selectmen of towns to appoint an agent to sell intoxicating liquors, for medicinal and mechanical purposes only, who was to have a certificate of his appointment upon his giving the bond required by that Act.

1. Where a town, under this Act, institutes a suit to recover the value of

liquors sold by such agent, it is essential that they show by legal evidence, that he was in fact, the agent alleged. *Foxcroft* v. *Crooker*, 308.

2. Without proof that the bond required by law was given and the certificate delivered, that relation is not established. *Ib.*

JUDGMENTS.

1. A person, against whom judgments have been obtained, can maintain no action of trespass on the case against the parties who obtained them, the attorney who prosecuted and the officer who served the writ, for fraudulently conspiring together to injure and defraud him in those proceedings, while the judgments remain unreversed. *Smith* v. *Abbott*, 442.

2. *Judgments* cannot be reëxamined in this collateral way. *Ib.*

See PAUPERS, 1, 2.

JURISDICTION.

See COUNTY COMMISSIONERS, 1, 2, 3. EQUITY, 4.

LEASE.

A lease to one during his life, with the privilege of furnishing his daughters a home so long as they remain unmarried, gives to them no rights as tenants of the freehold. *Quimby* v. *Dill*, 528.

LEVY OF LAND.

1. A creditor who blends together his claims accruing *before* and *after* a voluntary conveyance of his debtor, and levies on the estate conveyed, has only the rights of a *subsequent* creditor. *Quimby* v. *Dill*, 528.

2. A levy of land on a judgment obtained *collusively* by the tenant of a life estate therein, does not work a forfeiture of such particular estate. *Ib.*

3. The interest acquired by a judgment creditor in his levy on land, is not attachable during the year allowed by law for its redemption, nor will a levy of it as his property, during that time, prove available, although it may not be redeemed. *Kidder* v. *Orcutt*, 589.

See WAIVER, 1.

LIENS.

1. By § 35, c. 125, R. S., it is provided that "any ship carpenter, caulker, blacksmith, joiner or other person who shall perform labor or furnish materials for or on account of any vessel, building or standing on the stocks, or under repairs after having been launched, shall have a lien on such vessel for his wages or materials, until four days after such vessel is launched, or such repairs have been completed; and may secure the same by attachment on said vessel within that period, which shall have precedence of all other attachments."

But, for materials so furnished when sold on time, which has not elapsed when the four days after the vessel is launched have expired, no lien can be secured. In such cases the lien is waived. *Scudder* v. *Balkam*, 291.

2. This right of lien extends to the employee of a contractor with the owner of the vessel, although the contractor has received his pay in full from the owner. *Atwood* v. *Williams*, 409.

3. And such lien may be secured by the employee by attachment of the vessel in a suit against his employer. *Ib.*

LIMITATION BAR.

Where a party relies upon an *offer* to prove that the cause of action was fraudulently concealed, as an answer to a plea setting up the limitation bar, such offer, in the report of it to the Court, must *clearly* appear to have embraced all the requirements of the statute in that particular. The time *when* the fraudulent concealment was discovered must not be left in doubt. *Thurston* v. *Lowder*, 197.

See ACTION, 4, 5. EXECUTORS, &c., 3. LUNATIC, 3. TENANTS IN COMMON, 1, 2.

LOST NOTES.

See BILLS OF EXCHANGE, &c., 2.

LUNATIC.

1. Where a lunatic taken up in a town in which he has no legal settlement, is committed to the hospital according to the requirements of the statute, for the expenses of his support, the town are responsible to the hospital. *Eastport* v. *East Machias*, 280.

2. But such expenses, on due notice given, may be collected of the town where such lunatic has a legal settlement. *Ib.*

3. In such cases, the cause of action originates at the time *payment* is made to the hospital; and the limitation bar then begins to run. *Ib.*

MANDAMUS.

1. Petitions for writs of *mandamus* are addressed to the judicial discretion of the Court. *Woodbury* v. *County Commissioners*, 304.

2. And where a person applies for this process to be placed in an office, filled by an *annual* election, to which he alleges he was duly chosen, but illegal y counted *out*, the writ will be denied. *Ib.*

MASTER IN EQUITY.

See EQUITY, 1, 2.

MASTER.

See SHIPPING, 1, 6.

MASTS AND LOGS.

See CONTRACT, 4, 5.

MILLS AND MILL DAMS.

1. By the Constitution of the State, it is provided that *private* property shall not be taken for *public uses* without just compensation; nor unless the *public exigencies* require it.

The authority to flow lands by maintaining a water-mill, under c. 126 of the Revised Statutes, if it were a new question, might well be doubted, as coming in conflict with the rights secured under this constitutional provision. *Jordan* v. *Woodward*, 317.

2. Even the reasons for the policy which occasioned such legislation, have ceased to be potential, and although from the long and uninterrupted exercise of the rights of mill-owners under this Act, it must be considered constitutional, yet no extension of their rights over private property can be allowed by *implication*. *Ib.*

3. Thus, the riparian proprietor of lands overflowed by means of a dam for the working of a water-mill, may occupy the land so overflowed, by erecting piers thereon and constructing booms, and thereby exclude the mill-owner from making it a depository of lumber for his mills. *Ib.*

MORTGAGE.

1. A mortgagee in possession of real estate, for condition broken, cannot be dispossessed thereof by the mortgager, in a suit at *law*, even after payment of the mortgage debt. In such case the remedy is in equity. *Wilson* v. *Ring*, 116.

2. By c. 125, § 33, R. S., town clerks are required to record all mortgages of personal property delivered to them, "noting in the book and on the mortgage, the time when the same was received; and it shall be considered as recorded, when left, as aforesaid, with the clerk."

Although the *time* of the reception of such mortgage is *not noted* upon the records, the title of the mortgagee is protected after it has been actually recorded. *McLarren* v. *Thompson*, 284.

3. Where property is mortgaged to secure a debt, the intention of the mortgager to prevent the property from being attached by other creditors, as well as to secure this debt, will not vitiate the mortgage, unless the mortgagee is connusant of, and participant in such design. *Ib.*

4. An obligation under seal given by the grantee of real estate at the time of his deed, to re-convey the same to the grantor on the payment of a certain sum of money, operates as a deed of defeazance between the parties, although it is not recorded; and in an action by such grantee to recover the premises after the obligation is forfeited, he will be entitled to a conditional judgment only, but for no rents. *Jackson* v. *Ford*, 381.

5. It is not essential to the validity of a mortgage of personal property, that a *schedule* of the goods therein referred to, but not made a part of it, should be *recorded*. *Chapin* v. *Cram*, 561.

6. A mortgage of a stock of goods, containing a clause that goods which might thereafter be purchased by the mortgager, to replace those enumerated, as also *all additions to the stock*, should be held for the payment of the notes recited, will not transfer to the mortgagee goods afterwards purchased, and put in with the stock by the mortgager. *Chapin* v. *Cram*, 561.

See ATTACHMENT, 1, 2. BILLS OF EXCHANGE, &c. 3. EVIDENCE, 16, 17. POLICY OF INSURANCE, 7. TROVER, 3.

MOTION.

A motion to set aside the verdict as against evidence, without a full report of the evidence, certified by the Judge presiding at the trial, cannot be considered. *Nutt* v. *Merrill*, 237.

NAVIGABLE WATERS.

See HIGHWAYS, 8, 9.

NONSUIT.

1. In an action upon an order drawn upon a company and purporting to be accepted by the directors thereof, where its execution is denied, without proof of the handwriting of the acceptors, and that they were directors, a nonsuit may properly be ordered. *Small* v. *Sac. Nav. & M. Co.*, 274.

2. A declaration setting forth *no legal cause of action* should be taken advantage of by *demurrer*. *Smith* v. *Abbott*, 442.

3. But when other pleadings are filed *to such defective declaration*, and upon its being read, a nonsuit is ordered, the plaintiff not being injured by the orders the nonsuit must stand. *Ib.*

NOTICE TO PURCHASERS OF REAL ESTATE.

See EQUITY, 10.

OFFICER.

1. For damages recovered against a sheriff, and counsel fees by him incurred on account of the misdoings of his deputy, he can only obtain indemnity by a suit upon the latter's bond. *Nutt* v. *Merrill*, 237.

2. And in a suit by such *deputy* against a party who directed him to attach certain property, for which acts the sheriff was sued and held responsible, *he* may recover the damages assessed against the sheriff, and the counsel fees incurred, although they are outstanding against him. *Ib.*

OFFICER'S RETURN.

See TRUSTEES, 2.

PAROL EVIDENCE.

Parol evidence, to change or vary the meaning of a contract set forth in the condition of a bond, is inadmissible. *Whitney* v. *Slayton*, 224.

PARTIAL PAYMENTS.

See APPROPRIATION OF PAYMENTS, 2, 3.

PATENT.

The power of determining the validity of a patent is *exclusively* confided to the Circuit Courts of the United States. *Elmer* v. *Pennel*, 430.

PAUPERS.

1. In adjudicating by the selectmen upon the question of insanity, when applied to for a warrant to send a person to the insane hospital, they act judicially, and, of a case within their jurisdiction, a copy of their record is the legal evidence of their judgment. *Eastport* v. *Belfast*, 262.
2. Such judgment cannot be impeached by parol evidence. If erroneous, it may be reversed. *Ib.*
3. And where a pauper, whose settlement is in another town, is thus adjudged insane and sent to the hospital, notice given of the expenses of commitment and payment thereof, will render the town, where he has his settlement, liable to reimburse them as for any other supplies. *Ib.*

PERSONAL ESTATES.

See TROVER, 5.

PLAN.

See CONVEYANCE, 9.

PLANTATIONS.

1. When a plantation claims to support an action as a corporation duly organized under the Act in relation to elections, they must show a compliance with the provisions of that Act. *Plantation No.* 9 v. *Bean*, 218.
2. Without a return by the assessors, to the office of the Secretary of State, of certain and definite limits of the plantation, the organization is defective and of no validity. *Ib.*

PLEADING.

1. *Quere*, whether, under the plea of the general issue only, the bankruptcy of a plaintiff may be given in evidence. *Pike* v. *Crehore*, 503.
2. Matters in defence, arising after the commencement of the suit, and before issue joined, cannot be pleaded in bar *generally*, but may be as to the *further* maintenance of the suit. *Rowell* v. *Hayden*, 582.
3. And where such a plea sets forth a conveyance by demandant of the premises, by a deed duly executed, acknowledged and *recorded*, it will be sufficient, though it omits to allege that the deed was *delivered*. *Ib.*

4. Objection to the *time* of filing a plea *puis darrein continuance*, cannot be made upon demurrer, but through a motion to set aside the plea.
Rowell v. *Hayden*, 582.

5. If the demandant in a real action, after the commencement of his suit, conveys, by deed, to a third person, the premises demanded, the tenant may successfully interpose a plea in bar to the further maintenance of his suit.
Ib.

See ACCOUNT, 3.

POLICY OF INSURANCE.

1. In an application for insurance, the words, "for the benefit of captain and owners," and in a policy, "on account of whom it may concern," do not necessarily secure insurance, in case of loss, to one having an interest in the property insured. *Haynes* v. *Rowe*, 181.

2. The right of one to recover upon a policy must depend upon his interest acquired as a party to the *contract*. *Ib.*

3. Where the owner of a vessel and the master who sails her on shares, direct the same person to procure an insurance on freight, without designating the portions to each, it may well be presumed, where their interests are equal, that they are alike interested in the policy. *Ib.*

4. And where the owner became bound for the master for supplies of the vessel, and by consent of the master, his security was to be by insurance on the freight, such owner is entitled to indemnity from the insurance, although no assignment of the policy was ever made by the master. *Ib.*

5. A policy by a mutual company in which a lien is reserved on the property insured, granted upon an application materially false in the representation of the title, is void. *Pinkham* v. *Morang*, 587.

6. Thus, where the insured, in support of his representation of title, claimed under a sale for unpaid taxes, assessed in the year 1841, but offered no evidence that the collector made return of his particular doings in the sale, within thirty days thereafter, such title is fatally defective. *Ib.*

7. Nor is such representation supported where the assured holds a deed of release of the premises from one who foreclosed a mortgage thereon, but who, in fact, had the title of only *one* of *two* joint mortgagees. *Ib.*

POOR DEBTORS.

1. The neglect or refusal of a poor debtor to expose and deliver property on which a lien is certified by the justices who hear his disclosure, on a legal demand being made, is, in effect, a forfeiture of his bond.
Nash v. *Babb*, 126.

2. And the damages to be recovered, in an action upon such bond, are not necessarily determined by the disclosure, or the adjudication of the justices as to what property a lien was given, but from all the evidence in the case.
Ib.

3. By § 17, c. 148, R. S., among other things, it is provided, that the bond given by a debtor for his release on mesne process, shall be conditioned, that he

will, within fifteen days after the last day of the term of the Court, at which the judgment shall be rendered in such suit, notify the judgment creditor for the purpose of disclosure, &c.

The condition in such bond is saved by a notice, within fifteen days after the last day of the *term* at which judgment is rendered, although there had been an *adjournment* of the Court, and a *special judgment* had been entered *prior* to such adjournment. *Parsons* v. *Hathaway*, 132.

4. The decision of the magistrates, hearing the disclosure of a poor debtor, as to the *notification and return*, is conclusive. *Waterhouse* v. *Cousins*, 333.

5. Yet their proceedings may be invalid on account of *fraud*. But evidence that they knew that the judgment creditor was dead, is not sufficient to show that they acted fraudulently. *Ib.*

PRACTICE.

Of the mode of presenting questions to the Court, arising under c. 48 of Acts of 1853. *State* v. *Moran*, 129.

See EXCEPTIONS, 4.

PRESUMPTIONS.

See EVIDENCE, 4, 9. INSANITY, 1.

QUESTIONS OF LAW.

No question of law can be raised upon a point made by the counsel to the jury, where no instructions upon it were requested of the presiding Judge. *Bird* v. *Bird*, 398.

RAILROAD CORPORATIONS.

1. The constitution prohibits the taking of private property for public use without just compensation. *Hall* v. *Pickering*, 548.

2. By the provisions of c. 81, R. S., railroad companies are authorized to take a certain quantity of the land of individuals, and prescribes the mode of fixing the compensation by the county commissioners, on the application either of the owner of the land or of the corporation. *Ib.*

3. An omission, on the part of the owner of the land, to call on the county commissioners to assess his compensation, will not preclude him from maintaining an action of *trespass quare clausum* against the company, after they have *taken* his land, without making compensation. *Ib.*

4. Nor will an omission, by the corporation, to make the compensation in the way provided, after taking possession of an individual's land, work a forfeiture of their rights under their charter, to enter upon the land, and have an exclusive occupation *temporarily*, as an incipient proceeding to the acquisition of title to, or an easement in it. *Ib.*

5. While the law, under this constitutional provision, allows a *reasonable time* to the railroad company to make the compensation, after *such an exclusive*

occupation, still, when the company takes this exclusive occupation under a claim of right in fee, as by a deed from the owner, when, in fact, no such right exists, no *reasonable time* is allowed for making the compensation, and an action of trespass lies against them, by the owner, for all the damages suffered by it. *Hall* v. *Pickering*, 548.

See CONTRACT, 3. CORPORATION. HIGHWAYS, 3.

REAL PROPERTY.

1. Certain things, personal in their nature, under some conditions partake of the realty, and the title to them passes by virtue of a levy on the house where they are used; such as a wooden cistern standing on blocks in the cellar, and in use, and air tight stoves standing in the place where they are used for warming the house. *Blethen* v. *Towle*, 310.
2. But such stoves not standing in the place where they are used, but stowed away like other moveable property, at the time of the levy, do not pass under it. *Ib.*

RECEIPT.

See ATTACHMENT, 1, 2.

RECEIVERS OF STOLEN GOODS.

See COMPLAINT, 3.

RECORD.

See MORTGAGE, 2.

RECORD OF BIRTHS AND DEATHS.

See TOWN CLERK, 2, 3, 4.

RELEASE.

An heir apparent, who releases all his present and future claim and interest in his father's estate, with a covenant, that neither he nor any one through him, shall ever claim any right to the same, which release is made with the knowledge and consent of his father, and there is no fraud on the part of the grantee, is precluded from setting up, afterwards, title to any part of the estate, either as heir or devisee. *Curtis* v. *Curtis*, 24.

RENT.

See MORTGAGE, 4.

REPLEVIN.

1. Of costs in replevin actions, where there is judgment for a return of a part of the property replevied. *McLarren* v. *Thompson*, 284.
2. Goods seized upon a warrant issued in due form against their *owner*, by a

magistrate having jurisdiction under a valid statute, cannot by *him* be replevied. *Musgrave* v. *Hall*, 498.

3. Thus, the owner of spirituous liquors seized by virtue of a warrant in due form against him, under c. 48 of the Acts of 1853, cannot replevy them from the possession of the officer who executed it. *Ib.*

4. A sale of goods, even on credit, if effected through false representations of the vendee, may be treated as void by the vendor, who may maintain replevin therefor without any previous demand. *Hall* v. *Gilmore*, 578.

5. If, in replevin, the same writ is used in different counties to reclaim the *plaintiff's goods*, the error, to be available to the defendant, must be shown in abatement. *Ib.*

See REVIEW.

RESIDUARY ESTATE.

See DOWER, 1.

REVIEW.

If, in replevin, the defendant reviews the action and *reduces* the *damages* recovered against him, he is the prevailing party and entitled to costs of review. *Dodge* v. *Reed*, 331.

RIPARIAN PROPRIETORS.

See CONVEYANCE, 1, 2. MILLS, &c.

SALE.

1. To constitute a valid sale of personal property against the creditors of the vendor, the contract must be *completed*, and possession taken by the vendee, or he must be in a condition to take possession, by the consent of the vendor. *Sawyer* v. *Nichols*, 212.

2. And where the evidence of a completed sale is weak and unsatisfactory, but has a tendency to sustain it, the Court cannot weigh the testimony, and determine its insufficiency as matter of law. *Ib.*

3. In all such cases the question of the completeness of the sale is to be determined by the jury. *Ib.*

4. A sale of personal property and a receipt acknowledging payment, with delivery of a *portion*, do not necessarily transfer to the vendee title in the *whole* property sold. The intention of the parties in the delivery is to govern, and the jury must find what that was. *Pratt* v. *Chase*, 269.

5. Whether the delivery of a part, was for the whole, is a *fact* to be determined by the jury. *Ib.*

6. To maintain an action under a special statute authority, its terms must have been strictly complied with. *York & Cum. Railroad Co.* v. *Ritchie*, 425.

7. Thus, where on failure of the shareholders in an incorporated company to pay the legal assessments upon them, the statute authorized a sale of the shares at auction, under an order from the *directors to the treasurer* upon his

giving the notices required, and a right to recover of the corporators the balance of the assessment which may remain unpaid, a sale made by the treasurer, under the authority of a *committee* appointed by the directors, is illegal and void. *York & Cum. Railroad Co.* v. *Ritchie*, 425.

8. The directors cannot in such cases delegate their powers. *Ib.*

9. Nor can such a sale be upheld under an order from the directors in the *alternative*. It must be absolute. *Ib.*

See SHIPPING, 3, 4, 5.

SCIRE FACIAS.

See EVIDENCE, 5.

SELECTMEN.

See EVIDENCE, 7. FIREWARDS. PAUPERS, 1, 3.

SETTLEMENT.

1. A minor child of parents who are paupers, bound to service by the selectmen, by written indentures, until twenty-one years of age, is not *thereby emancipated*. *Oldtown* v. *Falmouth*, 106.

2. Such child follows the settlement of his father, within this State, until he acquires one of his own. *Ib.*

See LUNATIC, 2.

SHERIFF.

See OFFICER, 1, 2.

SHIPPING.

1. Whether the master of a disabled vessel has authority to sell her for the benefit of those concerned, is to be alone determined by the circumstances and condition of the vessel, at the time and place where the sale is made. *Prince* v. *Ocean Insurance Co.* 481.

2. When a survey is called upon such disabled vessel, it is presumed to be correct, but is not conclusive; it cannot *control* the rights of the parties, but is important evidence, designed generally to protect the rights of all interested. *Ib.*

3. Where the master, as such, makes sale of his vessel on account of its injury, he must show that he proceeded correctly, and that the sale was justifiable. To establish this, it must have arisen from *necessity*. *Ib.*

4. In instructing the jury as to the necessity under which a sale may be effected, no particular form of words is necessary. Any mode of expression by which the jury will clearly understand, that to justify the proceedings it must appear that the master, under the circumstances, acted for the good of all, is sufficient. *Ib.*

5. Thus, if the jury are told there must be an *apparent* necessity for the sale

existing at the time and place, such instruction will be all that is required No qualification to intensify the term *necessity*, is necessary.

Prince v. *Ocean Insurance Co.* 481.

6. A master owning a part of the vessel thus sold, is justifiable under the same circumstances as if he was not a part owner. *Ib.*

7. And where a sale is thus made of a vessel *insured*, no abandonment is required for the assured to recover for a total loss. *Ib.*

8. Where the master sails a vessel on shares, but it does not appear that he had *control* over her, the owners may recover for her freight.

Sims v. *Howard*, 276.

SPECIFIC DEVISES.

See DOWER, 1.

SPECIFIC PERFORMANCE.

See EQUITY, 7.

SPIRITUOUS LIQUORS.

See REPLEVIN, 3.

TAX TITLE.

The covenant in a collector's deed of land sold for the non-payment of taxes, that the proceedings in the assessment and sale were according to the provisions of law, are not evidence that the necessary preliminary steps were taken to pass the title to the grantee, in an action against one in possession under a recorded deed. *Phillips* v. *Phillips*, 160.

See POLICY OF INSURANCE, 6.

TENANTS IN COMMON.

1. If one tenant in common, by his agreement with a *party* having a claim against the owners of the common property, assumes the sole liability, and thereby his co-tenants are discharged by the *party*, on the principal of novation, his right to recover their proportion from his co-tenants is limited to six years from the time they were discharged from the original claim, although he did not in fact *pay* it at that time. *Buck* v. *Spofford*, 328.

2. But if such arrangement between the tenant and claimant did not operate to discharge his co-tenants from liability to the *party* holding the claim, the payment of such claim by *one* tenant in common, *after* the statute bar has attached, will not authorize *him* to recover any part of it from his co-tenants. *Ib.*

3. The *possession* of the common property by one of the tenants, will not prevent his co-tenants from making an effectual transfer to another, of their rights therein. *Bird* v. *Bird*, 398.

See ASSUMPSIT, 1, 2.

TITLE TO REAL ESTATE.

1. Where the parties to a suit claim title to the premises from the same grantor, the demandant by a mortgage and the tenant by a later quitclaim deed earliest on record, on proof that the latter, prior to the delivery of his deed, had notice of the existence of the former title, the demandant will be entitled to recover. *Paul* v. *Frost*, 293.

2. And the common grantor of the parties is a competent witness by whom to prove such notice, without being released on his covenants. *Ib.*

TOLL BRIDGE.

The charter authorizing defendants to build a bridge over tide waters, required them to build it of suitable materials, at least twenty-two feet wide, *with a draw of sufficient width for vessels to pass through*, and sufficient rails on each side, with boarding or planking three feet high from the floor of said bridge, for the safety of passengers, *and the whole should be kept in good and safe repair.*

Under this section it was *held*: —

1st. That the corporators were bound to provide all necessary apparatus for raising the draw; —

2d. That they were bound to raise the draw for the passage of vessels through it; —

3d. That for any neglect or unnecessary delay in so doing, they were liable to pay the damages sustained. *Patterson* v. *Proprietors of East Bridge*, 404.

TOWNS.

A town can maintain no action against an individual for destroying a bridge, being part of one of their highways, which they were bound to keep in repair, until they have repaired it, or incurred some expense in consequence of the wrongful act. *Freedom* v. *Weed*, 383.

See HIGHWAYS, 3, 6.

TOWN CLERK.

By c. 38 of R. S., it is provided that every town and plantation clerk shall record all births and deaths, which shall occur in the town or plantation of which he is clerk, and come to his knowledge.

1. Parents and others are required to give the information of such events; and a neglect of the duty for the space of six months creates a forfeiture, prescribed by that statute. *Lake* v. *Ellsworth*, 343.

2. The duties of a town clerk, in recording births and deaths, are not limited to the time he has exercised the office, nor to the record of those only which have occurred within six months from the time he received notice. *Ib.*

3. But when the record is *once* made, the loss or destruction of it will not authorize the clerk to demand remuneration for making a *new* one, without authority from the town. *Ib.*

4. For recording all births and deaths in the town, *which have come to his knowledge*, and which had not been previously recorded, the clerk is entitled to the statute remuneration from the town. *Ib.*

TOWN WAYS.

See COUNTY COMMISSIONERS, 2, 3.

TRESPASS.

See RAILROAD CORPORATION.

TRESPASS ON THE CASE.

See JUDGMENT.

TROVER.

1. In trover, when the property of plaintiff is once established, possession by defendant will not draw after it that presumptive evidence of ownership, which will excuse him from proving title. *Weston* v. *Higgins*, 102.

2. The plaintiff, being a bankrupt, deposited certain negotiable and negotiated promissory notes with the executor of his father's will, and afterwards procured them by giving a bond of indemnity to secure the executor against any liability to the creditors and legatees of the estate, and also against the claims of plaintiff's assignee in bankruptcy, or the assigns of such assignee; at the same time he passed over the notes to his surety on such bond, to indemnify him for signing the same. The surety transferred the same notes to the defendant taking a bond from him against his said liability. After these proceedings, the plaintiff's assignee in bankruptcy sold his right in this and other property, and the purchaser, in an action of trover against the executor, obtained a judgment for the value of the notes: — *Held*, that defendant had a right to withhold the notes from plaintiff, and that trover would not lie. *Perley* v. *Dole*, 139.

3. A mortgagee in possession may maintain *trover* against a stranger who cuts trees upon his premises and *takes them away*. When severed from the freehold, they become personal property, and for the *asportation* trover will lie. *Whidden* v. *Seelye*, 247.

4. Trover being a transitory action may be maintained in *this State* for a conversion of personal property in a *foreign jurisdiction*. *Ib.*

5. If, under a parol agreement to purchase a parcel of land, one goes on to it and erects a dwellinghouse, but leaves it unfinished and not underpinned, such house is personal estate, and liable to attachment and sale as the property of the builder. *Pullen* v. *Bell*, 314.

6. And when the owner of the land refuses to deliver it to the purchaser, and by his acts, shows an appropriation of it to his own use, he is liable in trover. *Ib.*

7. Where the *consignee* of goods sells them with the intent to defraud his consignor, and this intent is known to his *vendee*, it is a simultaneous joint conversion, for which trover will lie by the consignor against *both*. *White* v. *Wall*, 574.

8. By § 9, c. 148, it is provided, that in all actions, not founded on contract, or on a judgment on such contract, the original writ or process shall run against the body of the defendant. *Ib.*

9. Nevertheless, an action of *trover*, in the form of an original *summons*, will be maintainable, unless the objection is taken *seasonably* in abatement or by motion; otherwise, it will be considered as waived. *White* v. *Wall*, 574.

TRUSTEES.

1. If a debtor is summoned as the trustee of his creditor, and before making his disclosure, due notice is given him that the claim had been assigned to a third person before service was made on him, and he neglects to disclose such assignment, his being charged as trustee and payment of the amount in his hands upon execution, will not protect him from again paying the same to the assignee. *Bunker* v. *Gilmore*, 88.

2. The return of the officer, as to the *time* of serving the writ upon the trustee, cannot be contradicted by the *disclosure* of such trustee. *Ib.*

USURY.

By c. 69, R. S., it is provided, that if any person upon any contract, shall take or reserve, directly or indirectly, for loan of moneys, &c., above the rate of six dollars upon one hundred dollars, for one year, in an action thereon against the debtor, he may avoid such excess.

It is also provided by the Act of amendment to R. S., c. 77, § 49, that no bank in this State shall be permitted to take any greater rate of interest or discount on any note, draft or security, than at the rate of six per cent. a year; but such interest or discount may be calculated and taken according to the established rules of banking; *provided*, that in discounting drafts, bills of exchange, or other negotiable securities, payable at another place, the bank so discounting the same, may, in addition to said interest, charge the then existing rate of exchange between the place of discounting, and the place where such security may be payable.

1. Banking corporations, as to *usury*, are subject to this general law, modified in the Act relating to Banks; and when, in discounting paper, a greater rate than the legal interest is taken or reserved by the bank, such *excess* only can be avoided in an action brought by them upon the paper.

Veazie Bank v. *Paulk*, 109.

2. And when the paper discounted, on which illegal interest is taken, was made for the *accommodation* of the borrower, and this was known to the bank, the defence of usury is available by the parties to the paper, as to such *excess*.

Ib.

See Bills of Exchange, &c., 4.

VERDICT.

1. Although there was conflicting evidence upon the issue tried, yet if it so strongly preponderated against the verdict of the jury, as to produce the conviction in the Court, that their judgment was controlled by some improper bias, the verdict will be set aside. *Hunnewell* v. *Hobart*, 28.

2. Of setting aside a verdict as against evidence. *Sawyer* v. *Nichols*, 212.

WAIVER.

1. A release under seal by the judgment debtor, of land set off on execution, to the judgment creditor, is a waiver of any defects in the levy, and confirms in the latter, the title to the land. *Freeze* v. *McIntyre*, 148.

2. A waiver in writing of strict performance of a specialty, must clearly appear. It must be the act of the party having something to waive, and not of the party pleading it. *Haynes* v. *Fuller*, 161.

3. The performance of a contract under seal, cannot be waived by a parol *executory* agreement. *Ib.*

4. But where the performance of the condition of a bond is limited to ten days, by the instrument, and an agreement made on good consideration to waive the performance as to time, is proved, but no time fixed for the performance, in determining what is a reasonable time, regard must be had to the original contract, and forty days delay would be too late. *Ib.*

5. When a plea in abatement is overruled by the presiding Judge, the general issue pleaded, and the cause subsequently reported for the consideration of the whole Court upon the evidence, without any stipulation as to the preliminary plea, it is considered as waived. *Plantation No.* 9 v. *Bean*, 218.

See ABATEMENT, 2. LIENS, 1. TROVER, 9.

WARRANTY.

A warranty to be effectual must be *intended* as such by the parties; but to constitute a warranty it is sufficient, if the *words* used *implied* an undertaking on the part of the owner, that the things sold were what they were represented to be. *Bryant* v. *Crosby*, 9.

WASTE.

In a writ of entry, the question whether a life estate in the premises has been forfeited on account of *waste*, cannot be considered. *Quimby* v. *Dill*, 528.

WITNESSES.

1. An *assignee* of an unnegotiable note who has commenced a suit thereon but who subsequently assigned his interest to a third person, not having indorsed the writ, or any proceedings being had to require it of him, is not disqualified from being a witness in such suit. *Bunker* v. *Gilmore*, 88.

2. The party objecting to the competency of a witness is limited to those objections *only*, which were presented at the trial. *Ib.*

3. A stockholder in a corporation has no such interest as to prevent him from testifying to his official acts in such company.
York & C. Railroad v. *Pratt*, 447.

See TITLE TO REAL ESTATE, 2.

WRIT.

See ACTION, 1.