REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By JOHN MILTON ADAMS,
REPORTER TO THE STATE.

MAINE REPORTS.

VOLUME XLI.

HALLOWELL:
MASTERS, SMITH & Co.
1858.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

HON. JOHN S. TENNEY, LL. D. CHIEF JUSTICE.
HON. RICHARD D. RICE,
HON. JOSHUA W. HATHAWAY,
HON. JOHN APPLETON,
HON. JONAS CUTTING,
HON. SETH MAY,
HON. DANIEL GOODENOW,
} ASSOCIATE JUSTICES.

ATTORNEY GENERAL.
HON. GEORGE EVANS.

The Act of March 16, 1855, providing that the Supreme Judicial Court for hearing and determining all questions of law, &c., should consist of four members of the Court, to be designated by the Governor and Council, was repealed by the Act of April 9th, 1856. This Act required that law terms should be held by a majority of the Court, and that opinions should be concurred in by four Justices. It also provided that, after the occurrence of a vacancy, the Court should consist of a Chief Justice and six Associate Justices. The law terms in the several Districts, for 1856, were held by the following members of the Court: —

WESTERN DISTRICT.	MIDDLE DISTRICT.	EASTERN DISTRICT.
TENNEY, *Chief Justice.*	TENNEY, *Chief Justice.*	TENNEY, *Chief Justice.*
RICE,	RICE,	HATHAWAY,
HATHAWAY, *Associate Justices.*	APPLETON, *Associate Justices.*	APPLETON, *Associate Justices.*
CUTTING,	CUTTING,	MAY,
GOODENOW,	MAY,	GOODENOW,

Hon. WOODBURY DAVIS was appointed and commissioned as Associate Justice of the Court, in October, 1855, and was removed on address of both branches of the Legislature, in April, 1856.

*** The cases *Doe* v. *Scribner*, p. 277; *State* v. *Brown*, p. 535; *Bradbury* v. *Johnson*, p. 582; *Mansfield* v. *Andrews*, p. 591; *Melcher* v. *Merryman*, p. 601; *Scarboro'* v. *Cumberland County Commissioners*, p. 604, were presented to the Court prior to the repeal of the Act of March 16, 1855.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT,

1856.

COUNTY OF CUMBERLAND.

WASHINGTON WOODWARD, *in Equity*,
versus JAMES COWING *& als.*

The parties to a voluntary association, must sustain to each other the relation of partners, and the association itself must constitute a partnership *in law*, in order to clothe the Court with equity jurisdiction in reference to its affairs.

The power of this Court to hear and determine in equity all cases of partnership, where the parties have not a plain and adequate remedy at law, is conferred by statute, and to that alone the Court must look for its authority.

An association, each member of which agrees in writing to pay the sum subscribed by him for the purpose of building a meeting-house, which, when completed, is to be the property of the subscribers in the proportions of the amounts invested in it by them respectively, is not a partnership.

If the parties are joint owners or tenants in common, having a distinct or independent interest in the property, although that interest is undivided, and neither can dispose of the whole property or act for the others in relation thereto, but only for his own share and to the extent of his own several right, they are not co-partners, and this Court has no equity power in such case.

In ordinary partnerships, and in the absence of fraud on the part of the purchaser, each partner has the complete *jus disponendi* of the whole partnership interests, and is considered to be the authorized agent of the firm.

BILL IN EQUITY. The plaintiff was one of twelve persons who became parties to the following agreement:—

"Brunswick, April 19, 1847.

"For the purpose of building a meeting-house to be occupied by the East Brunswick Baptist Church and Society, to be located where the old meeting-house now stands, we, the subscribers, agree and promise to pay the sum annexed to our individual names. We further agree and promise to pay one-fourth of the sum by us individually subscribed, on the first of July next into the hands of a committee, chosen by the subscribers, to contract for and superintend the building of said house, and the other three-fourths as it shall be wanted by said committee to meet their contract with the undertaker of said house. The subscribers shall choose a committee of three from themselves, whose duty it shall be to contract for the building of said meeting-house on the most advantageous terms practicable. The meeting-house being finished will be the property of the subscribers in proportion to the amount invested by each individual, and shall be offered for sale on such terms as the majority of the subscribers shall determine. The above shall all be null and void and of no force in law, unless one thousand dollars shall be pledged for the object by good and responsible names."

The sum of twelve hundred dollars was subscribed by them and the house erected; which cost considerably more than that sum. The plaintiff alleges, that he advanced and paid out a considerable amount over and above his subscription or his proportion of the whole expenditure, and he seeks by this bill to recover from his associates their relative proportions and to obtain an equitable adjustment of the affairs of the association. The other facts sufficiently appear in the opinion of the Court. The case was heard upon bill, answer and proof.

W. G. Barrows & S. Fessenden, for complainant, contended:—

1. The complainant and respondents constituted a limited partnership in the transaction to which the suit relates, being

jointly interested in proportion to the amount originally subscribed by each. Bouv. Law Dic., title Partnership, p. 294, Sec. 2, 3, 5, 7; Story on Partnership, § § 75, 76, 77, c. 5, p. 109.

That they sustained this relationship to each other, appears from the answer referring to the original agreement, and from the acts of the parties taking possession of the house and making sale of the pews and materials remaining as common property.

2. Being thus associated, an action at law could not be maintained by one of the parties against the others, and his only remedy to procure an adjustment of the affairs of the association, is by this process in equity. R. S. c. 96, § 10.

3. The acts and declarations of each of the respondents, in relation to the transaction, are, under the circumstances of the case, evidence against all the others; especially those acts and declarations made and performed at the meetings of the association. Greenl. on Ev. vol. 1, c. 11, § 174, 178; *Van Reinsdyke* v. *Kaw*, 1 Gall. 630, 635; *Gatchell, Adm.*, v. *Heald*, 7 Greenl. 27, 28; *Cady* v. *Shepherd*, 11 Pick. 408.

4. The defence that the contract was with A. C. Raymond, cannot avail, because the association, by taking possession of the house and making sale of the pews and the materials, without a settlement with Raymond, or recognizing his contract, annulled the contract, and took the property subject to the claims of those who had aided in the erection of the house, and thereby impliedly assumed the bills which had accrued in the erection of the house. *Van Reinsdyke* v. *Kaw*, 1 Gall. 630, 635.

It is proved here by the admission of Cowing, filed in the case, by the declaration of others of the respondents, offered in evidence, by the record of the meeting of June 24, 1848, and by their acts in relation to other demands against said house, that they expressly assumed said bills, including the complainant's, which was particularly referred to by several of the respondents as due. Collyer on Partnership, Perk. ed., book 2, c. 3, § 307, 313.

5. It appears from the answer, and the records of the sale of pews, that the amount of sales already made exceeds the amount of bills paid on account of said house, and thus that the respondents have been either reimbursed in full for all sums advanced by them on account of their subscriptions or in payment of bills against said house, or that the association is in funds for that purpose, which ought to be equitably distributed among all the members of the company, including the complainant, in proportion to their respective claims.

Shepley & Dana, for respondents, contended, among other points made by them, that the court had no jurisdiction in the case; that the complainant's claim was against one A. C. Raymond, and not against the respondents; that the claim was within the statute of frauds; and that the bill was bad for want of parties.

TENNEY, C. J.—The complainant seeks relief from this Court, as having power to hear and determine in equity all cases of partnership, when the parties have not a plain and adequate remedy at law.

That the Court may be clothed with jurisdiction, the parties before us must sustain to each other the relation of partners, and the association of the several individuals must constitute a partnership in law. If the parties are joint owners or tenants in common, having a distinct or independent interest in the property, although that interest is undivided; and neither can transfer or dispose of the whole property, or act for the others in relation thereto; but merely for his own share, and to the extent of his own several right, they are not co-partners, and this Court has no power as a Court of equity to determine their case. R. S., c. 96, § 10; Story on Part. § 89.

It is settled, that in a partnership, each partner in ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete *jus disponendi* of the whole partnership interest, and is considered to be the authorized agent of

the firm. He can sell the effects, or compound or discharge the partnership debts. 3 Kent's Com. Lec. 43; *Knowlton* v. *Reed*, 38 Maine, 246.

The parties to this bill and others associated together, for the purpose of erecting a meeting-house to be occupied by the East Brunswick Baptist church and society; and in writing they each agreed and promised to pay the sum set against their respective names. The subscribers were to choose from their own number a committee of three, whose duty was declared therein to be, to contract for the building of the meeting-house, which on being completed, was to be the property of the subscribers, in proportion to the amount invested by each individual, and to be offered for sale on such terms as the majority of the subscribers should determine.

The subscribers, having severally promised to pay each a certain sum, amounting together to the sum of twelve hundred dollars, met together, and chose a moderator, a clerk, a treasurer, and a building committee, consisting of five of their number, and the clerk made a record of the doings at that meeting, and of future meetings, which were called and held from time to time, until sometime in the year 1853. The building committee made a contract in behalf of the subscribers with A. C. Raymond to erect and finish the meeting-house above the underpinning, which seems to have been done by the subscribers themselves or others. The house was completed, so that the same was accepted at a meeting holden on June 24, 1848, by the subscribers to the contract, as appears by their records; many of the pews were sold in pursuance of authority from the subscribers, but the avails were insufficient to cover all the expenditures, in the erection and completion of the house. Several of the subscribers paid more than the sum promised, and others did not pay the full amount subscribed. The complainant alleges, that he has expended in and about the erection and completion of the house a large amount beyond the subscription; and in this bill he seeks an adjustment of the respective claims on account of payments made by him and other subscribers, more than

the sums promised by each, with each other, and with those who have paid less than the sums severally subscribed. It is insisted, however, by the defendants, that it was in furtherance of the contract with Raymond, and on his credit, that the complainant paid much of the money alleged to have been expended by him, and not on the credit of the other subscribers; and that they have never promised or in any way become liable to pay a greater amount than that severally subscribed by them.

Attempts were made by the complainant and others of the associates, to adjust their respective claims at meetings called for that purpose, but without success, many of them declining to do any thing promotive of that object, professing however to be in "readiness to pay if the others will."

On examination of the subscription contract, which is the basis of the association, and which does not appear to have been abandoned at any time after its inception, it is manifest, that the meeting-house was designed to be held by those, who should contribute funds for its erection, and for finishing the same, as owners in common, and not as a co-partnership. The building of the house was the object, which the subscribers sought; but they were to own in proportion to the amount of their investment, and the whole could be sold only on such terms as the majority of the owners should approve; therein withholding from each, the authority to act for the others. The parties have conformed to this principle, which they adopted at the beginning, and no one has attempted to act for the others, as a partner could act for the firm. But failing to unite in any measures for the purpose of reconciling their difficulties, the complainant has invoked the aid of this Court as a court of equity. We think the jurisdiction is not conferred by the statute, and it is to that alone, that it must look for its authority. *Bill dismissed with costs.*

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

SEWARD M. BAKER, *Petitioner, versus* THOMAS JOHNSON, *Treasurer of County of Cumberland.*

The Supreme Judicial Court, by the Act of 1852, c. 241, while sitting as a law court, is not a court of original jurisdiction.

It is not competent for a Judge at *Nisi Prius* to *order* the evidence to be reported, or to order the parties to agree upon a statement of facts. If the parties cannot agree to raise questions of law, the cause must be heard and determined at *Nisi Prius*, and the party aggrieved may allege his exceptions.

Mandamus is not grantable of right but by prerogative, and it is the absence of a specific legal remedy which gives the Court jurisdiction to dispense it. It cannot be granted to furnish an easier or more expeditious remedy.

So, also, the writ will be granted, if it be *doubtful* whether there be another effectual remedy, or if the Court does not clearly see its way to one.

There ought, in all cases, to be a *specific legal right*, as well as the want of a *specific legal remedy*, in order to lay the foundation for a *mandamus*.

The Supreme Judicial Court is clothed with plenary power to maintain order and decorum while in session, and may employ, for this purpose, such subordinate ministerial and executive officers as may be deemed necessary.

The law, in many instances, recognizes sheriffs as officers of the court, and establishes their compensation and that of their deputies when in attendance at its sessions.

There is, however, no statute which, in terms, requires such attendance of the sheriff, and yet so long and so universally has the custom prevailed for him thus to attend upon the Court, that an omission to do so without sufficient excuse, would be deemed an absolute dereliction of duty.

The fees of the sheriff and other executive and ministerial officers in attendance, are taxed by the Court.

These fees, thus taxed, the county treasurer is imperatively bound to pay.

The law gives no remedy by action against the county for claims of this nature which are to be paid from the county treasury; neither is there any specific or adequate remedy against a county treasurer, or upon his official bond, when he improperly withholds payment ordered by the court. Under such circumstances, a *mandamus* may be sustained.

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

The petitioner, in this case, represented in his petition that at the January and March terms of the Supreme Judicial Court of Cumberland county, A. D. 1856, he was in attendance and performed sundry services as sheriff of said county; that his fees therefor were duly certified by the presiding judge; and that, having made demand upon the respondent, as treasurer

of the county, for payment, he had refused to pay the same. He, thereupon, prayed the Court to issue a writ of *mandamus*, peremptorily commanding said Johnson to pay over to the petitioner, from the county treasury, without delay, the amount alleged to be due, with legal costs.

Upon the petition and evidence presented, the presiding Judge ordered a report to be made to the full Court for decision, and that a copy of the order be served upon the respondent, that he may appear and show cause why the *mandamus* prayed for should not issue.

The respondent, by his counsel, appeared specially before the presiding Judge and objected to the jurisdiction of the Court, and to the introduction of the evidence. He also declined agreeing to a report of the case. But if the Court should decide that the matter should stand as upon *report* from the Judge at *Nisi Prius*, then it should appear that the respondent offered evidence that Daniel C. Emery, Esq., of Gorham, in the county of Cumberland, was duly appointed and commissioned as sheriff of said county, January 17, 1856; that he duly took and subscribed the oaths of office January 19, 1856; that he, thereupon, assumed the duties and responsibilities of that office; and that, at all times and thereafter, he had been ready and willing, by himself, and also with suitable and sufficient deputies to aid him, to discharge the same as well during the sessions of the courts, as at other times.

F. O. J. Smith, for petitioner.

Howard & Strout, for respondent, contended: —

1. That the petition does not state that the Court *ordered* or directed the petitioner's bill to be paid.

2. That *mandamus* will not lie when the petitioner has another legal remedy, nor when the party has an inchoate right only.

3. Where the title to an office is in dispute, the only mode of trying it is by information in the nature of a *quo warranto*. The Court will not determine the question on *mandamus*. 5 Hill, 616.

RICE, J.—This is a petition for a writ of *mandamus*, and comes before us on a report ordered by the Judge at the April term of the Supreme Judicial Court for Cumberland county, 1856. There was a special appearance for the respondent, to object to the sufficiency of the petition and the matters therein set forth, to the jurisdiction of the Court below, and to the manner in which it has been brought into this Court.

By § 5, of c. 96, R. S., it is provided, that the Justices of the Supreme Judicial Court shall have power to issue writs of error, *certiorari*, *mandamus*, prohibition, *quo warranto*, and all other processes and writs, to courts of inferior jurisdiction, to corporations and individuals, which may be necessary for the furtherance of justice, and the due execution of the laws.

Before the passage of the Act of 1852, c. 246, "concerning the Supreme Judicial Court and its jurisdiction," petitions for any of the writs mentioned in the fifth section of c. 96, were heard by the Court when held by a majority of the Justices thereof, as well as when the Court was held by a single Justice.

The Act of 1852, above cited, modified, in very important particulars, the judicial system of the State. By it the late District Court was abolished and its business transferred to the Supreme Judicial Court. The number of Justices of the latter was increased from four to seven. Terms of the Supreme Court in the several counties for hearing and deciding questions of law and equity, by a majority of the Justices, were abolished, and the State was divided into three judicial districts, denominated the western, middle and eastern districts. Provision was also made, that the Supreme Court should annually be holden, by at least a majority of the Justices thereof, for the purpose of determining all questions of law or equity which may arise in any mode, in the several districts.

The Supreme Court, while sitting in the several districts for the purpose of hearing and determining questions of law and equity, is not a court of original jurisdiction. Its pro-

vince is to determine "motions for new trials upon evidence as reported by the presiding Justice, all questions of law arising on reports of evidence, exceptions, agreed statements of facts, cases in equity, and all cases civil and criminal, where a question of law is raised for the determination of the Supreme Judicial Court, sitting as a court of law or equity."

It was manifestly the design of the Legislature, that the Supreme Judicial Court when held in the several districts, by a majority of the Justices thereof, should be constituted a "court of law," and that all matters of fact should be heard and tried in the several counties, before a single justice of said Court, and the preliminary proceedings and interlocutory orders, judgments and decrees, necessary to prepare cases for a final hearing on the questions of law that should arise therein should be had in the Courts in the several counties respectively. While, therefore, a case remains open for further hearing of testimony, or any interlocutory motions, orders or decrees remain undisposed of, such case is not in a condition to be marked "Law," on the docket of the county court where it is pending, nor to be entered upon the docket of the law court.

Motions for a new trial, founded upon the evidence as reported by the Justice before whom the case was tried, may be properly entered in the law court. Questions of law may also be raised for the law court on reports of evidence, as well as on exceptions or agreed statements of facts. But it is not competent for a Judge presiding at *Nisi Prius* to *order* the evidence to be reported or the parties to agree upon a statement of facts. If the parties do not consent to raise questions of law by a report of the evidence, or by agreed statement of facts, it is the duty of the presiding Judge to hear the evidence when addressed to the Court, or cause it to be produced before the jury, when properly addressed to a jury, and to make such rulings, orders, or decrees thereon, as in his opinion the law of the case requires. To these rulings, orders or decrees, in matters of law, any party who is thereby aggrieved, may allege exceptions, which exceptions, when

properly authenticated, may, after all preliminary and interlocutory matters have been disposed of, be entered upon the docket of the law court for final determination.

The petition now before us was entered before the proper tribunal. All the evidence which the parties desired to produce should have been introduced in that Court, and unless the parties agreed upon the facts, or that the case should be reported, the presiding Judge should have entered such judgment or made such orders or decrees, as in his opinion the law required. If either party had been aggrieved by any of the decisions of the Judge, in matters of law, it was his right to allege his exceptions thereto. The case then would have been marked *law* on the county docket, and the excepting party would enter his exceptions on the docket of the law court, for final determination. It was not competent for the Judge to order the case to be reported without the consent of the parties. It is not, therefore, regularly before us, and must be remanded to the court of the county for further proceedings.

The case not being properly before us, we do not feel legally called upon to give it a further examination. But inasmuch as the matter in controversy directly affects the practice and proceeding in the highest judicial tribunal of the State, as well as the rights of individuals, we have, in conformity with the desire of the parties, concluded to give the case some further consideration at this time.

The facts now before us, and uncontroverted, are, that the petitioner acted, during the time for which he claims pay, as sheriff of the county of Cumberland, so far, at least, as to preside in court, under the direction of the Judge who then held the terms of that court. His bill for his own services, and those of his subordinates who were in attendance upon the court, were audited and allowed by the presiding Judge. After being thus audited and allowed, the bills were presented by the petitioner to the respondent, who is county treasurer of the county of Cumberland, for payment, and payment was by him refused. Some objection was made that the

Judge did not, in terms, order the bills to be paid; though it seems to be conceded that they were allowed in the same manner as has ever heretofore been the practice in that county. In other counties, it is the practice of the clerk of courts, acting, of course, by order of court, to draw the requisite order upon the county treasurer, for the payment of such bills as are allowed by the Judge. It is not understood, however, that this objection is relied upon.

In view of such facts, and in the absence of special and technical objections, is *mandamus* the proper remedy for the petitioner?

Mandamus is a prerogative writ introduced to prevent disorder from a failure of justice and a defect of police, and, therefore, ought to be used on all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one. Com. Dig. title Mand., A; *Rex* v. *Barker*, 3 Burr. 1265.

The writ of *mandamus* is not a writ grantable of right, but by prerogative, and amongst other things it is the absence of a specific legal remedy which gives the court jurisdiction to dispense it. It cannot be granted to give an easier or more expeditious remedy, but only where there is no other remedy, being both legal and specific. Tapping's Mandamus, 18.

If, however, there is no such specific legal remedy, the court will grant the writ. So if it be doubtful whether there be another effectual remedy, or the court does not clearly see its way to one, the writ will be granted. *Ib.* 19.

But where an action will lie for complete satisfaction, equivalent to specific relief, the Court will not so interfere. *Ib.* 20.

To found an application for a *mandamus*, there ought, in all cases, to be a specific legal right, as well as the want of a specific legal remedy.

Mandamus is a proper remedy to compel a secretary of state to deliver a commission to which a party is entitled. *Marbury* v. *Madison*, 1 Cranch, 137.

A *mandamus* will not lie against the secretary of the treas-

ury, unless the laws require him to do what he is asked in the petition, to be made to do. See WOODBURY, J., in *Reeside* v. *Walker*, 11 Howard, U. S. R., 272.

In *Kendall, in error*, v. *United States, ex. rel., Stokes & al.*, 12. Pet. 524, a *mandamus* was sustained, commanding the Post Master Gen. of the United States, to place the full amount of an award of the solicitor of the treasury, for extra services in conveying the mail, to the credit of the relatives, on the books of the post-office department. The award was made by virtue of an Act of Congress.

A writ of *mandamus* will only go where no other legal remedy exists; but when a party is entitled to relief, or can enforce his claim by action at law, he must pursue that remedy, and cannot ask the aid of a court by *mandamus*. 25 Wend. 680; 6 Hill, 243; 14 Barb. Sup. R. 52; *Ex parte Lynch*, 2 Hill, 45.

In the case last cited, the court refused to award a writ of *mandamus*, commanding the supervisors to *audit and allow* the salary of the relator, on the ground that he had an adequate remedy by action. But COWEN, J., in giving the opinion of the Court, very clearly intimated that if the right of action did not exist, *mandamus* would afford the proper remedy.

In *People* v. *Edmonds*, 15 Barb. S. C. R., 529, a writ of *mandamus* was awarded against the respondent, as treasurer of the county of New York, to compel the payment of a part of the salary of Robert H. Morris, one of the Judges of the Supreme Court of New York, upon an order of the supervisors of the county of New York. In delivering the opinion of the Court, STRONG, J., remarked, "it was not disputed by counsel for defendant, but that a *mandamus* would be an appropriate remedy, if the relator was entitled to the money, on his presenting the order of the supervisors. It is so, because he has no other adequate redress. The claim does not create a debt against the county which could be recovered in an ordinary action."

The writ of *mandamus* lies to command the treasurer and directors of a company to pay a sum of money awarded to

be due from the company, when the Act of Parliament, incorporating the company, does not authorize execution to issue against the effects of individual members of such corporation. Tapping's Mandamus, 169; *Rex* v. *St. Katharine's Dock*, 4 B. & Ad. 360.

It also lies to command an overseer to pay money under a parish contract. *Rex* v. *Beeston*, 3 T. R. 592.

In *Rex* v. *Bristow*, 6 D. & E., a *mandamus* was refused, to compel a county treasurer to pay an order of the quarter sessions, on the ground that the proper remedy, in such case, was by indictment. Lord KENYON, in the opinion of the Court, said, "this Court have no difficulty upon a proper case laid before them, in granting a *mandamus* to justices to make an order when they refuse to do their duty. But it would be *descending too low* to grant a *mandamus* to inferior officers, to obey that order; we might as well issue such a writ to a constable or other ministerial officer to compel him to execute a warrant directed to him, as to grant this application to the treasurer, to obey the order in question."

When the treasurer of the county of Surry refused to pay the expenses of a witness in a case of felony, pursuant to an order from the sessions of the borough of Southark, under the statutes of 58 Geo. III., c. 70, the proper remedy was held to be indictment or attachment, and not *mandamus*. *Rex* v. *Surry*, 1 Chit. R. 650.

So, too, in *Rex* v. *Erle*, 2 Burr. 1197, *mandamus* to a county treasurer, to reimburse constables' money expended for conveying rogues, vagabonds, and disorderly persons, was denied.

But in the case of *Com.* v. *Johnson*, 2 Binn. 275, it was held, that *mandamus* lies to the supervisors of the roads to compel them to pay an order drawn upon them by justices of the peace, under the direction of an Act of assembly. TILGHMAN, C. J., remarked, "that the point which required most consideration was, whether the case was of such a nature as called for a *mandamus;* and we think it is, because the supervisors are public officers, directed by the Act of Assembly to pay such orders as are drawn by the justices, and because the

surveyors have no other specific remedy. It is said that the supervisors may be indicted for neglect of duty. But if they were indicted and convicted, the order might still be unpaid." The rule for a *mandamus* was made absolute.

A *mandamus* is the appropriate remedy to compel the county treasurer to pay, when he refuses to pay a demand which the board of supervisors have legally audited and allowed, or directed to be paid. *People* v. *Edmonds*, 19 Barb. S. C. R., 468.

By § 7 of c. 12, R. S., county treasurers are required to apply all moneys received by them for the use of their counties in defraying the expenses thereof, as the county commissioners, the District Court, and the Supreme Judicial Court, shall, according to law, by their written order, direct.

The Supreme Judicial Court is clothed with most plenary power to maintain order and decorum while in session. Such powers are absolutely essential to the proper and orderly dispatch of business. For this purpose it may employ such subordinate ministerial and executive officers as may be deemed necessary. Such officers, when thus employed, are the immediate ministers and servants of the court.

Sheriffs are the chief executive officers of their respective counties, and as such, they are authorized and required to execute all judicial processes, both civil and criminal, which emanate from the Court; and although there is no statute which, in terms, requires them to attend upon the court in term time, yet the law does, in many instances, recognize them as officers of the court, and establishes their compensation and that of their deputies, when in attendance at its sessions. And so long and universally has the custom prevailed for the sheriff, with his deputies, to give their attendance upon the court, at its sessions, that an omission to do so, without sufficient excuse, would be deemed matter of absolute dereliction of duty on his part.

The Supreme Judicial Court are required, by § 15, c. 152, R. S., to tax and allow costs in criminal proceedings legally pending before them. In like manner they have immemorially

allowed the fees of sheriffs and other executive and ministerial officers, while in attendance at their sessions. The determination of the Court upon the amount of such costs and fees, is final and conclusive. The law provides no other mode for adjusting and determining such claims. The duty of the county treasurer to pay the amounts thus allowed by the court, on the order thereof, is imperative. That officer is entrusted with no discretionary power in this class of cases. His duties are merely ministerial. The attempt on his part to exercise supervisory power is an assumption of authority without right, and to permit him to do so, would be to consent to have the powers of the government inverted, and to subordinate that tribunal, whose duty it is to have the general superintendence of all courts of inferior jurisdiction, and to issue all processes which may be necessary for the furtherance of justice, and the due execution of the laws, to the caprice of every petty ministerial officer who should choose to withstand its mandates.

The law does not give parties remedy by action against the county for those claims which are to be paid from the county treasury, upon the order of the court. If it were so, then the remedy of all parties, such as officers, jurors, and witnesses, for their fees in criminal prosecutions, would be by action against the county. The Legislature never designed to open so fruitful a source of litigation. Nor has it so done.

Nor is there any specific or adequate remedy given to parties by action against a county treasurer, who improperly withholds payment when thus ordered by the court. The law does not give to parties thus situated a right of action upon his official bond. An action against the treasurer, personally, if it could be maintained, might prove, for various reasons, wholly inadequate. Whether an indictment would lie against such contumacious or delinquent ministerial officer, we do not now determine. But that *mandamus* may be sustained we have no doubt.

Case remanded to county court for further proceedings.

TENNEY, C. J., and CUTTING, GOODENOW, and HATHAWAY, J. J., concurred.

LUTHER DANA *& al. versus* JOSEPH B. HASKELL *& als.*

When it is attempted to reach, by process in equity, the avails of property fraudulently conveyed, it should appear that a judgment of some description has been obtained, which cannot be impeached by the party to be affected by the relief sought; and that every thing which the law requires has been done to obtain satisfaction.

Before a court of equity will interfere to afford relief, as by declaring a conveyance of real estate void for fraud, plaintiff must show that he has an interest in such real estate by levy or otherwise, or in other subject matter to which his bill relates.

The case of *Webster v. Clark*, 25 Maine, 313, examined and affirmed.

Hartshorne v. Eames, 31 Maine, 93, reviewed and reconciled with *Webster v. Clark.*

THIS was a bill in equity, filed at the April term of this Court, 1855, for Cumberland county. Service was completed in November following. The bill alleged, that during the years 1849 and 1850, the plaintiffs sold to Joseph B. Haskell, one of the defendants, merchandize to the value of $1042,82, and took in payment therefor the notes of said Haskell, amounting together to that sum; that said notes were not paid at maturity, and a suit was commenced and judgment recovered upon them at the October term of this court, 1854; upon which judgment execution issued at the same term, and was placed in the hands of an officer, who returned it in no part satisfied; and that the debt is still unpaid.

The bill further alleges that at the time said Haskell commenced trading with plaintiffs, and during nearly all the time he purchased goods of them, he was seized and possessed of a parcel of real estate in Portland, of the alleged value of $3000, and that relying upon this property and the integrity of said Haskell, they sold him goods and took his notes as aforesaid.

The bill charges that said Haskell conspired with one Joshua B. Osgood, to defraud the plaintiffs and other creditors, of their just debts; and to that end, while his said notes were maturing, (March 7, 1850,) conveyed said real estate to said Osgood for the nominal consideration of $1500; that

said Osgood, conspiring and confederating with said Haskell and one Simeon Hall, conveyed said estate to said Hall on the 12th of March, 1850; who, in pursuance of the same fraudulent conspiracy, on the 27th of April, 1853, conveyed it to Charlotte R. Marr, (now Charlotte R. Haskell,) and that it was by her, on the 11th of January, 1854, fraudulently conveyed to Washington Libby, the other defendant, who is also charged with being a party to the alleged conspiracy to defraud the plaintiffs; and that all these conveyances were made without consideration.

The prayer of the bill is, that the defendants may be required to answer on their several oaths to all the matters and things therein set forth, and that said Libby may be compelled to give up said real estate, or sufficient thereof to satisfy the plaintiffs' judgment; or that said Libby be compelled to pay said judgment against said Haskell, with interest.

Joseph B. Haskell did not appear, and was defaulted. The other defendants severally pleaded general demurrers to the bill.

Clifford & Adams, for defendants.

1. The bill does not set forth with particularity the facts, a discovery of which is desired. It contains no averment that they rest within the knowledge of the defendant alone, and are not susceptible of other proofs; nor that a discovery of them is essential to enable the plaintiffs to obtain the relief prayed for. These are material omissions in the bill. *Caswell* v. *Caswell,* 28 Maine, 233.

The bill should set forth in particular, the matters to which the discovery is sought. Story's Eq. Pl., 325.

The bill must also show, or at the least must aver, that the facts sought are material to establish the plaintiffs' case, and that their rights cannot be established by other witnesses, or without the discovery prayed for. *Ranison* v. *Ashley,* 2 Vesey, jr., 459, and cases cited; *Leggett* v. *Postley,* 2 Paige's Ch. R. 601; *Partington* v. *Hobson,* 16 Vesey, jr., 221, note and cases; *Appleyard* v. *Seton,* 16 Vesey, jr., 223; 1 Maddock's Ch. Prac. 198, and note; Story's Eq. Pl. 313, 321, 319,

and note; Mitford Eq. Pl. by Jeremy, 186; Cooper's Eq. Pl. c. 3, § 3, pp. 191, 192; Story's Eq. Jur. § § 1495, 1497; *Findlay* v. *Hinde*, 1 Pet. 244; *Seymour* v. *Seymour*, 4 Johns. Ch. R. 411; *Robert, Lord Bishop of London*, v. *Fytch*, 1 Bro. C. C. 97; *Russ* v. *Wilson*, 22 Maine, 211; *Fenton* v. *Hughes*, 7 Vesey, jr., 287.

2. This bill charges on defendants a conspiracy to defraud creditors. By R. S., c. 161, § 2, this is an indictable offence, subjecting the party to punishment by fine not exceeding $1000, and imprisonment in the county jail not more than one year. By R. S., c. 148, § § 47, 48, 49, the fraudulent debtor and his confederates are also made liable to a penalty in double the amount of the property fraudulently conveyed.

It is apparent from the date of the alleged fraudulent transaction, as set forth in the bill, that prosecutions for the offence therein charged are not barred by the statute of limitations.

These defendants, therefore, cannot be held to answer to the allegations in this bill—it being a settled maxim, fully recognized and acted on by courts of equity, "that no person shall be obliged to discover what may tend to subject him to a penalty or punishment, or to that which is in the nature of a penalty or punishment."

"*Nemo tenetur seipsum prodere*" is as much lauded a maxim of equity courts, as of those of the common law. Story's Eq. Pl., § § 575, 576, 577, and note; *Selby* v. *Selby*, 4 Bro. C. C. 11; *Williams* v. *Farrington*, 3 Bro. C. C. 40, note and cases cited; Wigram's Points Discov. 82 and 259; *Dwinal* v. *Smith*, 25 Maine, 381, 382; 2 Fonb. Eq. 495; 2 Mad. Ch. 291, margin.

3. It is a well established rule in equity, that where a bill prays discovery and relief, if the party is not entitled to relief, he is not entitled to discovery. Story's Eq. Jur. § 70; *Loker* v. *Rolle*, 3 Vesey, jr., 7; *Muckleston* v. *Brown*, 6 Vesey, jr., 63; *Baker* v. *Mellish*, 10 Vesey, jr., 553; *Gordon* v. *Simpkinson*, 11 Vesey, jr., 510; *Russel* v. *Clark*, 7 Cranch,

89; *Russ* v. *Wilson*, 22 Maine, 209; *Coombs* v. *Warren*, 17 Maine, 409.

But the case represented by this bill is not one in which this Court is authorized to grant the relief prayed for; because—

1. The plaintiffs have a plain and adequate remedy at law; and it has been repeatedly decided by this Court, that in such a case, a bill in equity cannot be sustained, either for relief or for discovery. R. S., c. 96, § 10; *Coombs* v. *Warren*, 17 Maine, 404; *Danforth* v. *Roberts*, 20 Maine, 307; *Webster* v. *Clarke*, 25 Maine, 313; *Russ* v. *Wilson*, 22 Maine, 210.

It does not appear that the possession of this estate has ever changed hands; and upon the hypothesis that the allegations in the bill are true, the successive conveyances of it are absolutely void. The plaintiffs have then only to levy their execution upon it, to obtain satisfaction of their judgment.

Should their title under the levy be contested, all the evidence proposed to be obtained by the answers of the defendants to this bill, would be equally available to the plaintiffs in a court of law, the appropriate tribunal, we respectfully submit, for the settlement of controversies in relation to the title to real estate, and one from which courts of equity are always reluctant to withdraw them.

2. A court of equity will not interpose its aid in favor of a creditor, unless he has done with diligence all that the law will enable him to do to obtain satisfaction of his debt. He must exhaust his legal remedy before he applies for relief in equity. *Russ* v. *Wilson*, 22 Maine, 211; *Webster* v. *Clark*, 25 Maine, 316 and 317; *Caswell* v. *Caswell*, 28 Maine, 236.

"Courts of equity are not tribunals for the collection of debts." SHEPLEY, C. J., 25 Maine, 314.

They will not assist parties, who have neglected or refused to pursue their legal remedy, when they might have employed it successfully; and who then apply to a court of equity for aid. This would be to afford them advantages which the law never designed to give them. 25 Maine, 316; 22 Maine, 311.

Again, it appears that the plaintiffs have by no means ex-

hausted their legal remedy. They obtained judgment, it is true, in a little less than five years after the maturity of their notes; but they have not, to this day, made any arrest of the debtor; nor have they levied their execution upon the real estate which they allege he has never legally transferred.

Under R. S., c. 148, § § 25 and 27, they had it in their power to subject their debtor, Haskell, to perpetual imprisonment unless he should make a full disclosure concerning "his estate and effects, and the disposal thereof;" by which they could have come at any notes or other securities received as consideration for the conveyance of that estate; or at any other property he might have possessed. They could have compelled him to make a full discovery of the true character of his conveyance to Osgood; and by sections 47 and 48 of the same chapter, he would subject himself to punishment by penalty in double damages if he made a false disclosure. Any parties, also, who had aided him in a fraudulent concealment of property from his creditors, would be exposed to the same penalties.

In *Caswell* v. *Caswell*, Mr. Justice TENNEY says, (28 Maine, 236,) "the plaintiff 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."

This is clearly the law of that case, and also of *Webster* v. *Clark*, in which SHEPLEY, C. J., gave the opinion of the Court; and we are unable to perceive how the correctness of these decisions can be successfully called in question, either upon principle, upon authority, or upon grounds of public policy.

3. But there is another fatal objection to the maintenance of this bill.

The plaintiffs show no title, by levy or conveyance, to the estate in controversy. They have no legal or equitable interest in it of any description whatever.

The authorities are explicit and unanimous to the point, that a plaintiff must have an interest in the subject matter, to which the discovery or relief relates, or he cannot maintain a

bill for either purpose. It will be bad on demurrer. Story's Eq. Pl., § § 261, 318, 508, 549, and authorities cited; 1 Dan. Ch. 360, 617.

The only relief which the plaintiffs ask by this bill, is that the defendant Libby may be compelled to give up the real estate, or to pay their debt.

He cannot be required to give up the land to the plaintiff, because they have acquired no right or interest in it. *Webster* v. *Clark*, 25 Maine, 316; *Sargent* v. *Salmond*, 27 Maine, 548.

The case of *Hartshorne* v. *Eames*, is not in conflict with that of *Webster* v. *Clark*. *Dodge* v. *Griswold*, 8 N. H. 427.

Neither can Libby be required to pay their debt.

They do not claim that he has in his hands the proceeds of any fraudulent sale of property, as in the case of *Gordon* v. *Lowell*, 21 Maine, 251; nor any thing in the nature of funds which the Court could appropriate to the payment of the debt.

On the contrary they allege that all the conveyances complained of, were made without consideration; nobody has received any thing from the estate. There are, therefore, no proceeds of a fraudulent sale to be reached in anybody's hands. The Court has nothing to act upon in that direction.

It cannot afford relief from the estate itself, because the plaintiffs have no right to, or interest in it, upon which the Court can act for that purpose.

We maintain, therefore, with confidence, that our demurrers are good.

H. P. & L. Deane, for plaintiffs.

1. A conveyance of property to defeat and delay creditors, constitutes a legal fraud, and as such furnishes good ground for relief in equity. *Gardner Bank* v. *Wheaton*, 8 Greenl. 373.

The Court has equity jurisdiction where the bill charges a fraudulent conveyance of land for such a purpose. *Hiss* v. *Gould*, 15 Maine, 82.

2. A court of equity will assist a judgment creditor to discover and reach the property of his debtor fraudulently trans-

ferred, although not liable to be attached on a writ, or seized upon execution. *Gordon & al.* v. *Lowell & al.*, 21 Maine, 251.

The case is similar in essential particulars to the case at bar. The principles recognized in it have been affirmed in *Sargent* v. *Salmond*, 27 Maine, 539; *Briggs* v. *French*, 1 Sum. 504.

3. The complainants allege a conspiracy between the defendants to defraud them, and set forth the acts done to effectuate the object of the conspiracy. Hence it is cognizable by a court of equity. It was so settled in *Dwinal* v. *Smith*, 25 Maine, 379.

The case is directly in point. The real estate of the debtor had been fraudulently transferred by his connivance and conspiracy (as the bill alleged,) with the other defendant. The fee was in the other defendant, and the plaintiffs brought their bill for relief without making any levy upon real estate, and it was sustained.

4. The plaintiffs have no plain and adequate remedy at law. Relief cannot be obtained without a discovery of the truth, and this can be done only by the answers of the defendants. In such case the court of equity will interfere and give aid. *Dwinal* v. *Smith*, 25 Maine, 379; *Hartshorne* v. *Eames*, 31 Maine, 93.

In 31 Maine, 93, the subject was thoroughly examined. It is a strong case, and covers the whole ground. It sustains the present bill in every particular.

Rice, J.—The bill charges that Joseph B. Haskell, during the years 1849 and 1850, became indebted to the plaintiffs for the amount of $1042,82, for merchandize sold; to recover which an action was brought, and judgment obtained in Oct. 1854, for the sum of $1323,45, debt, and $9,38, costs. On that judgment execution was issued Nov. 13, 1854, which was put into the hands of an officer, who after diligent search, was unable to find property wherewith to satisfy the same.

The bill also charges, that during the time the indebtedness of Haskell was accruing, he was seized and possessed of certain real estate, situated in Portland, and described in

the bill, of value more than sufficient to pay the debt of the plaintiffs; and that the defendant, Joseph B. Haskell, with intent to injure, defraud and delay the plaintiffs, conveyed all his said real estate to one Joshua B. Osgood, and further to conceal said estate, caused the title thereto to be transferred through the hands of several individuals until it finally vested in one Washington Libby; all of which conveyances are alleged in the bill to have been without consideration, and made with the fraudulent intent to delay and defeat the plaintiffs in the collection of their debt against Haskell.

The prayer of the bill is for general relief, and that Libby may be required to convey to the plaintiffs, said real estate, or so much thereof as may be sufficient to pay their aforesaid debt.

To this bill the defendants, Charlotte R. Haskell and Washington Libby, have filed general demurrers. Joseph B. Haskell has been defaulted.

There is no suit at law pending between the parties. No levy has been made upon the land, and no proceedings instituted by which the plaintiffs have obtained a lien thereon. The bill asks for no specific discovery; nor does it purport to be a bill for discovery.

When 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. *Caswell* v. *Caswell*, 28 Maine, 232.

Before a court of equity will interfere to afford relief, the plaintiff must show that he has an interest in the subject matter to which his bill relates. SHEPLEY, C. J., in the case of *Webster* v. *Clarke*, 25 Maine, 313, after reviewing authorities upon this point, remarks:—"But in this State, where a judgment does not create a lien upon the real estate of the debtor, the principle established in all those cases would require that the creditor make a levy upon the real estate of his

debtor, if he would have the assistance of a court of equity to enable him to obtain satisfaction from the estate itself, which has been fraudulently conveyed, and not from the proceeds of the sale. He must first do all which the law will enable him to do to obtain a title in the mode pointed out by the statute, and then the Court will assist him, and prevent his being injured by the outstanding fraudulent title." We are not aware that this case has ever been overruled or qualified. The grounds on which a court of equity will interpose in this class of cases are therein stated with much force and perspicuity, and can receive no additional strength by being restated. They receive our full concurrence, and are decisive of this case.

The case of *Hartshorne* v. *Eames*, 31 Maine, 93, has been supposed to be in conflict, to some extent, with the case last cited, and to be an authority in point, to sustain the case at bar. An examination of that case will show that it cannot bear such a construction.

Though the point, that there had been no levy upon the land, and no lien created which would give the plaintiffs an interest in the land, was distinctly taken in that case, and though from some expressions used in the opinion it may be inferred that the Judge by whom it was drawn might not have deemed such interest in the land necessary to authorize the interposition of a court of equity, the case did not turn upon that point. There is no statement of the case except what appears in the opinion. From that it appears that the legal title to the land was never in the defendant, and consequently, a levy could not have been made upon the legal estate; and further, although a decree was entered that the defendant should pay the plaintiffs the amount of their debt, that decree was based upon considerations aside from the alleged fraudulent transfer of real estate. Whether that case was well decided or otherwise, it is not necessary for us to consider.

Should any of the *dicta* in that opinion appear to be in conflict, in any degree, with the established rules of equity

proceedings in this State, or elsewhere, it may be accounted for, from the sensitiveness which the upright and learned Judge, who drew the opinion, manifested in all cases where fraud was alleged, proved, or even suggested.

Demurrer allowed and bill dismissed with costs.

TENNEY, C. J., and HATHAWAY, CUTTING, and GOODENOW, J. J., concurred.

JOHN MUSSEY, *in Equity, versus* PROPRIETORS OF UNION WHARF.

An easement may be extinguished by the lawful location and construction of a street.

No right can be acquired to an easement merely as *appurtenant* to land, the *existence* of which easement is suspended at the time the title to the land is acquired.

THIS was a bill in equity, in which the complainant alleged that a certain easement or right of way over flats to which he had right as an appurtenance to land owned by himself in common with others, situated near the head of Union wharf in Portland, had been obstructed, interfered with and interrupted by the respondents, (by constructing a wharf upon the premises over which the right of way exists,) and that they were preparing still further to interfere with, interrupt and obstruct said right. He therefore prayed for a writ of injunction under the seal of this Court, restraining and prohibiting the said proprietors, their servants and agents, from all further proceedings in interfering with, interrupting, and obstructing the way and right of way aforesaid; and that they might be held to remove all obstructions heretofore by them placed in the way of the enjoyment by the complainant of his right of way aforesaid, and to indemnify him for the damage sustained by reason of their wrongful doings in the premises, and for such further relief as equity might require.

The other facts of the case are sufficiently stated in the opinion of the Court. The case was presented upon bill, answer and proof.

Rand, for the plaintiff.

1. The right of way was reserved in the deed of Enoch Ilsley & als. to Eben Storer & als.; Ilsley & als. owning the whole lot *appurtenant* to the corner lot. The plaintiff, through sundry mesne conveyances, is the owner of Joseph Jewett's part of the corner lot, and is entitled to the right or easement.

2. "A convenient way" was not located by the deed reserving it; but was located by *user* for a long time on the southwest side of Deering's flats. *It could only be used there.* "Where a right of way is granted without any designation of the place by the deed, it becomes located by usage for a length of time. *Wynhoop* v. *Berger*, 12 Johns. 222.

3. The plaintiff then had the right. Has he lost it? If so, how? His predecessors did not *release* it, nor has he released it. They have not *abandoned*, nor lost it by *non-user*. It was used up to 1850. It could not be lost by *non-user*. The doctrine of extinguishment by *non-user* does not apply to easements created *by deed*. Only easements created by *user* can be so lost. *Arnold* v. *Stevens*, 24 Pick. 106; *Jewett* v. *Jewett*, 16 Barb. 150; *White* v. *Crawford*, 10 Mass. 183.

4. Was it lost or extinguished by the making of Commercial street? No similar case is found. The right is valuable; and the Court will not hold the easement extinguished *by act of law*, if it can be avoided. 2 Hill. Abr. 54, Easements, c. 5, § 12. Commercial street merely *suspends the enjoyment;* it does not *extinguish* the right; and it suspends it only in part. Vessels can come up to the street.

Shepley & Dana, for respondents.

1. Injunctions should be granted or continued only to prevent an immediate and irreparable injury. The case should require a preventive remedy. *Attorney Gen.* v. *Nichols*, 16 Ves. 342; *Corporation of New York* v. *Mapes*, 6 Johns. Ch. 49.

2. An injunction will not be granted or continued, when the right to be protected by it is a doubtful one. *Hart* v. *Mayor of Albany*, 3 Paige, 213; *Steamboat Co.* v. *Livingston*, 3 Cow. 713.

The respondents contend, that the passage by water to the lot described had been destroyed by operation of law. Its possible use did not exist before the bill was filed. The easement had been extinguished by the laying out and building of Commercial street. That passage by water to complainant's lot was one and indivisible. If destroyed at one point it is of necessity destroyed at all points. It had, therefore, when the bill was filed, no existence. *Corning* v. *Gould*, 16 Wend. 531; *Hancock* v. *Wentworth*, 5 Met. 446; *Ballard* v. *Butler*, 30 Maine, 94.

3. To authorize a court of equity to interpose by injunction to prevent or remove a private nuisance, it must be a strong and mischievous case of pressing necessity, or the right must have been previously established by law. *Van Bergen* v. *Van Bergen*, 3 Johns. Chan. 289; *Porter* v. *Witham*, 17 Maine, 292; *Ingraham* v. *Donnell*, 5 Met. 118.

It ought not to interpose by injunction, except when the law will not afford an adequate remedy, and when an irreparable injury will be done. *Wingfield* v *Crenshaw*, Henry & Mumf. 474.

4. When the merits, as presented by the bill, are denied by the answer, an injunction is ordinarily to be dissolved. *Poor* v. *Carleton*, 3 Sumn. 74, 76.

5. Whether an injunction shall be dissolved is a matter of judicial discretion. *Poor* v. *Carleton*, before cited.

W. P. Fessenden, for respondents, argued in support of the above propositions and commented on the power of the Court to grant injunctions in connection with the rules in restraint and limitation of that power. It is not imperative on the Court to issue an injunction, but the whole question is left to its sound discretion, in view of the facts of the case, subject to established rules. He maintained there was no such thing as the location of a right of way over water by *user*.

Rand, in reply, commented on the cases *Ballard* v. *Butler*, and *Hancock* v. *Wentworth*, showing that the facts were different, and contended, that a right resting in grant cannot be lost by *non-user*. A right of way over water can be located by *user*. There is no distinction between right of way over land and over water reserved by grant. The act of a third person cannot extinguish the right; it merely suspends or obstructs it. This case does not present a question for the discretion of the Court. If the right of way contended for exists, it is the *duty* of the Court to protect it.

HATHAWAY, J. — The deeds introduced by the plaintiff establish his title to one undivided quarter of the upland lot, bounded on the southerly or southeasterly side thereof, by the "flats," which were conveyed by Enoch Ilsley and others to Ebenezer Storer and others, by deed of December 1, 1792, as is alleged in the bill. That deed contains a reservation, in the words following, *to wit:* — "reserving to ourselves, however, forever, a convenient way on each side of said wharf when erected, a convenient way to pass and repass to and from the docks on the easterly and southwesterly side of said flats with such vessels as may float in said docks." The plaintiff claims that this reservation was an easement, to which he has title as an appurtenance to his land. It was not conveyed to him as *an easement*, by his deed from Warren and others of August 5, 1854. Nor was it transferred or mentioned *as such* in any of the mesne conveyances, through which he derived his title. Nor was it ever conveyed by the original grantors in the deed of December 1, 1792, or by their heirs or assigns, unless it passed by the general words, "privileges and appurtenances," as used in the deeds. Nor were there any words of inheritance attached to the reservation. It was, "to ourselves," only. It is not necessary, however, to consider the question whether or not, the easement, reserved in that deed, was determined by the alienation or death of the grantors therein named, for it appears, in the case, that on the 29th of March, 1850, the city of Portland located Commercial street,

one hundred feet wide, and running across the docks and wharves, about one hundred and ten feet below the plaintiff's land; which street, before the plaintiff acquired his title, was legally established and built, in a manner so substantial and permanent, that it was a perfect barrier, preventing any access to the plaintiff's land, from the docks, by water, with vessels of any description. If the easement, as claimed by the plaintiff, existed previous to the location of Commercial street, it was extinguished by the lawful establishment of that street, with its embankments and solid walls. *Hancock* v. *Wentworth*, 5 Met. 446; *Ballard* v. *Butler*, 30 Maine, 94. But if, as the plaintiff contends, the establishment of that street did not extinguish the easement, but only suspended it, such conclusion would not aid him in the matter, for he could acquire no right to an easement, *merely as appurtenant* to his land, the *existence* of which easement was suspended when he purchased the land and received his title. 2 Hilliard on Real Property, c. 60, § 12. *Bill dismissed with costs for defendants.*

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

WOODBURY DAVIS, *Memorialist, ex parte.*

The Governor having, with the advice of the council, on the address of both branches of the Legislature, removed from office one of the Justices of this Court, it is the imperative duty of the Court, the question being presented by a proper and sufficient process, served upon parties adversely interested, not only to consider the proceedings preliminary to the address, and to decide whether they are valid or otherwise, but also to pass upon the question, whether the removal of such Justice by the Governor, was in conformity to the provisions of the constitution, and has the effect to disqualify him from exercising the duties of the office, and to deprive him of the right to receive the compensation established by law for such Justice.

The right, and the duty of this Court to consider and decide questions regularly presented at its bar, are inseparable.

The Executive has no power to give a practical interpretation to laws, in conflict with legal opinions properly given by the Judiciary. The Legislature are powerless in any attempt to legislate in violation of, or in a man-

ner inconsistent with constitutional restraints. And whenever, if ever, the executive or the legislative department exercises, in any respect, a power not conferred by the constitution, the judiciary, on a proper submission of the questions arising therefrom, is not only permitted, but compelled to sit in judgment upon such acts, and to pronounce them valid or otherwise.

When statutes have not interfered to change or modify the common law, the writs and processes, which have long been in use, for the purpose of obtaining redress, have been regarded as essential modes of remedy for alleged injuries. The writs of *certiorari*, *prohibition*, *mandamus* and *quo warranto*, and many other processes at common law, have undergone no material change; and when they are respectively the appropriate remedies for wrongful acts or neglects, all their peculiar characteristics must be retained.

In a suit brought in a common law court, a service upon a party adversely interested is essential. Without such service, in some mode recognized by law, the Court cannot proceed; and if, inadvertently, a judgment should be rendered without such service, it would be a nullity, and would be reversed on proper proceedings.

The Court has no jurisdiction in the case of a mere memorial, alleging that the acts of co-ordinate branches of the government are irregular, unlawful and unconstitutional, and praying the judgment of the Court thereupon, especially when no process connected with the memorial has been served upon any one adversely interested or otherwise, and no department of the government or officer thereof has appeared voluntarily and claimed to be heard.

MEMORIAL by one of the Justices of this Court, who had been removed from office by the Governor, with the advice of the council, on the address of both branches of the Legislature, alleging that the proceedings by which he had been removed were null and void, and praying that notice might be ordered to be given him at what term of the Court his services would be required.

The memorial was as follows:—

"STATE OF MAINE.

"To the Justices of the Supreme Judicial Court, at the law term, in Portland, in the county of Cumberland, for the Western District, on the second Tuesday of May, 1856:—

"Woodbury Davis, heretofore, and still claiming to be, an Associate Justice of said Court, respectfully represents, that on the tenth day of October, 1855, and before that time, there were, according to the statute in such case provided, eight Justices of the Court aforesaid; and that on said day he was

duly appointed and commissioned by the Governor of this State, as a Justice of said Court, to fill a vacancy occurring therein on the twenty-third day of said October; and that on said twenty-third day of said October he duly took and subscribed the oaths required by the constitution of this State and the laws of the United States to qualify him to execute said trust, and thereafterwards entered upon the discharge of the duties of said office, and hath continued ever since that time to discharge the same: —

"And the said Woodbury Davis further represents that on the 19th day of March, 1856, the Senate of Maine, without any concurrent action on the part of the House of Representatives, adopted the following resolves, viz.: —

"STATE OF MAINE.

"IN SENATE, MARCH 19th, 1856.

"*Resolved*, — That the Senate, after due notice given according to the constitution, will proceed to consider the adoption of an address to the Governor for the removal of Woodbury Davis, one of the Justices of the Supreme Judicial Court, for the causes following: —

"Because the said Woodbury Davis at the terms of the Supreme Judicial Court holden by him for the county of Cumberland, in the month of January last, and in the present month of March, has refused to recognize the official authority and privilege of Daniel C. Emery, who had before been duly appointed, commissioned and qualified, as the sheriff of said county, and then held that office: —

"Because the said Woodbury Davis, in his capacity of Judge, has assumed, without legal issue or judicial trial thereof, to deny the lawful and actual validity of the commission issued to the said sheriff, under the hand of the Governor and the seal of the State: —

"Because the said Woodbury Davis, not regarding the lawful and actual custody held by the said sheriff of prisoners confined in the jail of said county for trial at the present term of said Court, has undertaken to remove said prisoners

from jail, and has removed them by proceedings not warranted by law: —

"Because the said Woodbury Davis, at the times aforesaid, has recognized as the sheriff of said county another person who had before been lawfully removed from that office, and has undertaken to issue the orders and the precepts of the said Court to be executed by the person who has been so removed from office: —

"All of which acts and proceedings are and have been open and notorious, and are persisted in hitherto: —

"Because the continuance of such acts, proceedings and assumptions of the said Woodbury Davis tends to produce insubordination, confusion and violence; is of dangerous and pernicious example; confounds the distribution of the powers of government; and tends to the subversion of the actual, constituted, and lawful authority of the State: —

"*Resolved*, — That these resolutions and statements of causes of removal be entered on the journal of the Senate; and that a copy of the same be signed by the President of the Senate, and served upon the said Woodbury Davis by such person as the President of the Senate shall appoint for that purpose, who shall make return of such service upon his personal affidavit, without delay; and that Friday, the 28th day of the present month, at nine o'clock in the forenoon, be assigned as the time when the said Woodbury Davis may be admitted to a hearing in his defence."

"And that on the same day, (the House of Representatives having taken no part in said proceedings, and not having any notice that any such proceedings were instituted,) a copy of the foregoing resolves was delivered to the undersigned by the Clerk of the Senate; and that subsequently the Senate postponed the day for the hearing, to the fifth day of April next following.

"And the said Woodbury Davis further represents, that on the 31st day of March, aforesaid, Mark Shepard, a member of the Senate aforesaid, at the special request of the undersigned, offered in said Senate the following resolves, viz.: —

"*Resolved*,—That certain charges against Woodbury Davis, having been entered on the journal of the Senate, as causes why he ought to be removed from the office which he holds as one of the Justices of the Supreme Judicial Court, it is incumbent on the Senate, in the first instance, to establish the truth of such charges, by legal proofs:—

"*Resolved*,—That, for this purpose, there be appointed by the chair, a committee of three, with power to send for persons and papers, and take all necessary testimony relating to the case; and that said committee be instructed to summon such witnesses, at the request of said Woodbury Davis, as shall be essential to enable him to prove such facts as may be deemed by him necessary for his defence; and that said committee give the said Woodbury Davis due notice of the time and place of their meeting for the purposes aforesaid:"—

"That said resolves were referred by the Senate to a joint select committee, to report the order of proceedings for the hearing aforesaid; and that the two branches of the Legislature, upon the report of said committee, adopted the following rules for said hearing, (this being the first and only action on the part of the House of Representatives relating to this matter, previous to said hearing:)—

"1. The President of the Senate shall preside in the convention.

"2. The respondent may be heard by himself, and by counsel, if he shall so desire.

"3. Any affidavits or written statements may be read as a part of the defence, and only such testimony shall be admitted.

"4. No debate whatever shall be admitted in the convention.

"5. No motion shall be submitted or entertained, except to take a recess to a time certain, or to dissolve the convention; and every such motion shall be decided without debate."

"And the said Woodbury Davis further represents that on the fifth day of April, aforesaid, the members of the two branches of the Legislature having met in convention, and

notified him that they were ready for the hearing, he then appeared before them and presented the following protest, viz.:—

"And now the said Woodbury Davis appears and respectfully represents that this convention is not duly constituted under any provision of the constitution of this State, and that a hearing before this body is not such a hearing as he is entitled to by the said constitution:—

"*And further*, that the adoption of an address for his removal from office by the Governor and Council, for the causes aforesaid, is contrary to the provisions of said constitution:—

"*And further*, that said causes of removal have been stated and entered upon the journal of the Senate, and the day for a hearing assigned, and the notice thereof given to him by order of the Senate alone, without any concurrent action thereon on the part of the House of Representatives:—

"*And further*, that he has received no notice for any hearing before this convention, nor has this convention, nor have both branches of the Legislature agreed upon and stated the causes of removal aforesaid, upon which he is to be heard:—

"Wherefore, availing himself of the opportunity to be heard, which is now offered to him, he waives no objections to the proceedings aforesaid, but protests that they are not such as the constitution requires, and prays that this protest may be entered upon the journal of the Senate."

"And the said Woodbury Davis further represents, that after reading the foregoing protest, signed by him, and delivering the same to the President of the Senate, still reserving all the objections therein named, he read a written answer to the charges aforesaid against him, denying therein the truth of said charges; and that thereupon he offered and presented a motion in writing, requesting therein that the evidence in support of said charges should then be introduced, that he might have notice thereof, and that he might be permitted to introduce and examine witnesses on oath in his defence; that no evidence of any kind was then, or at any time during said hearing, produced to sustain said charges; that on presenting

his motion aforesaid, he was informed by the president of the convention, that the rules aforesaid, adopted for said hearing, precluded the examination of witnesses, and that his request therefore could not be granted; and that the undersigned was admitted to no hearing in his defence, except by being permitted to read affidavits and written statements, and to present his views thereupon by himself and his counsel, before said convention.

"And the said Woodbury Davis further represents, that on the ninth day of April, aforesaid, without any further hearing, the House of Representatives having made no charges against him, nor stated any causes of his removal, the two branches of the Legislature adopted an address to the Governor for his removal from his office aforesaid, for the causes enumerated aforesaid in the resolves passed by the Senate on the 19th of March; and that, on the eleventh day of said April, the Governor of this State, with the advice of the Council, upon the address aforesaid, undertook to remove him from his said office; and that no one has been and no one can lawfully be appointed in his place.

"Whereupon the said Woodbury Davis, avering and believing that all the acts and proceedings aforesaid, on the part of the two branches of the Legislature, and of the Governor, are in violation of the provisions of the constitution of this State, and are therefore null and void, and that he has still a right to exercise the privileges and discharge the duties of his office aforesaid, now claims to act as an associate Justice of this Court; and he prays the judgment and opinion of this Court thereupon; and that this memorial may be entered on record, and that notice may be ordered to be given to him at what terms of Court his services will be required during the current year.

"Dated at Portland, May 13, 1856.

"WOODBURY DAVIS."

W. P. Fessenden appeared for the memorialist, and submitted an argument in writing, prepared by the latter; the points of which are as follows:—

I.—1. It is the right and duty of the Court, being composed of several associated members, before proceeding to the regular business of the term, *to determine its own constitution and membership*. Without the possession of this right, and the performance of this duty, the Court could neither know nor proclaim itself ready to attend to the business of suitors. The power to do this is necessary and indispensable in every Court sitting *in banc*.

"When the law granteth any thing to any one, that also is granted without which the thing itself cannot be." 12 Coke's R. 130.

"Whenever a power is given by statute, every thing necessary to the making of it effectual, or requisite to attain the end, is implied." 1 Kent's Com. 464.

"The general rule is well established, that when a general power is given, or duty enjoined, every particular power necessary for the enjoyment of the one, or the performance of the other, is given by implication." *Heard* v. *Pierce*, 8 Cush. 338.

2. The power to determine who are its members is as necessary, as indispensable for the transaction of business, as the power to punish for contempt of authority. The first is the more imperative, because, until it is done, nothing can be done.

"Courts, like legislative bodies, possess authority to punish for contempts in the transaction of the business entrusted to them." "It is considered an authority inherent in such bodies,—appurtenant and indispensable." *United States* v. *New Bedford Bridge*, 1 Woodbury & Minot, 401.

3. Usually courts take judicial notice of their own members. 1 Greenl. on Ev. 8. And where there is no cause for doubt, there is no necessity for inquiry. But where there is doubt, there must be examination of evidence; and when the question is settled, there must be a decision. A commission is only one kind of "evidence" of official authority. *Marbury* v. *Madison*, 1 Cranch, 137. It may be conclusive, or it may not. But whenever one brings into court a commission, as an

associate member of it, if there is any further doubt of his authority, he is entitled to have the question determined; and his associates have authority to decide it. Until that is done, the court is not properly organized. Standing in this position, I ask the judgment of this Court upon the validity of my commission.

4. Nor is it any objection that here are no pleadings and no issue. Questions of this nature, which come before the Court *ex parte*, or where the Court itself may, perhaps, be said to be a party, are always decided summarily, and without technical issue. Thus, for a contempt committed in the presence of the Court, judgment may be entered up at once, without arraignment, examination, pleading, or issue. See Thacher's Criminal Cases.

5. As no one can be appointed in my place, the question must, of necessity, be presented *ex parte*. There is no adverse party to be present, or to suffer by not being present.

The public have a right to a decision, not only for their own convenience, but because, if the proceedings against me are invalid, I shall be entitled to receive my salary, and I ought to perform the duties for which it is designed as a compensation.

And I ought to be informed if the duties which I have sworn to discharge are still incumbent upon me, for the reason given by Lord Mansfield for a speedy decision on an application for a writ of prohibition,—that I should not be "delayed in the exercise of a lawful jurisdiction." 1 Burrows, 198.

II.—1. The charges against me, on which my alleged removal was based, were all of them for *official acts*,—for "misdemeanor in office." The remedy provided by the constitution for this is by *impeachment*. Art. IX, § 5; Blount's impeachment, Wharton's State Trials, 291; Story's Com. on Const. § § 793, 794; Chase's impeachment, 237; Prescott's Impeachment; 2 Wooddeson, § § 596, 612; 4 Bl. Com. 261.

2. The constitutional remedy for *official misconduct*, being a removal by "impeachment," *this excludes all other modes. Expressio unius est exclusio alterius.* This has long been an estab-

lished principle of interpretation. Smith's Stat. and Const. law, § 677; 1 Bishop's Cr. Law, § 150; *Dudley* v. *Mayhew*, 3 Comst. 9.

3. As well might the Legislature undertake to remove a military officer, for *disobeying the orders of his superior*, by address, instead of leaving him to be tried by a court martial, as to attempt the removal of a civil officer for any *misconduct in office*, by address, instead of impeachment.

4. The provision for removing Judges on address of the legislative body had its origin in the act of settlement of William III, *and was designed to make them independent in the discharge of their official duties.* 1 Kent's Com. 292, 294; Debates in Mass. Conv.

III.—But even if, for such causes, the Legislature had authority to pass an address for my removal from office, they have attempted to do this in a manner which is in violation of the provisions of the constitution.

"Before such address shall pass either house, *the causes of removal shall be stated*, and entered on the journal of the house in which it originated, and a copy thereof *served* on the person in office, that he may be admitted to *a hearing* in his *defence*." Constitution, Art. 9, § 5.

This provision of the constitution was disregarded. The *causes of removal* were not stated as required; nor was I admitted to any *hearing in defence*, such as the constitution contemplates. 1 Bouv. Law Dic. 424, 633; 3 Bl. Com. 296; Rev. Stat. c. 110; Stat. 1847, c. 33; *Van Courtland* v. *Underhill*, 17 Johns. 405.

IV. The proceedings against me, being in violation of the constitution, are utterly void. They are not, like an erroneous judgment of court, of force, until reversed. They are like an illegal decision of a court martial, — of no force or validity whatever. *Brooks* v. *Adams*, 11 Pick. 441.

The proceedings are no more valid than would be an impeachment by the Senate, when no proceedings had been commenced by the House. 1 Kent's Com. 449; 1 Bishop's Cr. Law, § 51; Federalist, No. 78; 1 Kent's Com. 450.

TENNEY, C. J.—The memorialist represents to this Court that, in October, 1855, he was duly appointed and commissioned by the Governor, a Justice of the Supreme Judicial Court; that afterwards he took and subscribed the oaths required by the constitution of this State and of the United States, to qualify him to execute the trust conferred by the commission, and that he has continued in the discharge of the duties required under said commission since the time of his qualification; that after certain proceedings, which are fully set forth in the memorial, the two branches of the Legislature adopted an address to the Governor for his removal from his said office for causes specifically described in certain resolves, passed by the Senate on March 19, 1856, which make a part of the proceedings aforesaid, and on the eleventh day of April, 1856, the Governor, with the advice of the Council, upon the address of the two branches of the Legislature, undertook to remove him from said office; and that no one has been appointed in his place. Whereupon the memorialist, averring and believing that all the acts and proceedings referred to in his memorial, on the part of the two branches of the Legislature and of the Governor, are in violation of the provisions of the constitution of this State, and are, therefore, null and void, and that he has still a right to exercise the privileges and discharge the duties of his office, now claims to act as an associate Justice of the Court, and he prays its judgment and opinion thereupon; and that this memorial may be entered of record, and that notice may be ordered to be given to him, at what terms of the Court his services may be required during the current year.

It appears from the commission of the Governor, and the certificate of the oaths taken by Judge Davis, that he was duly appointed and authorized to act as a Justice of this Court; and from copies, from the office of the Secretary of State, introduced by him, that after he was duly informed of the resolves aforesaid, and the charges therein contained, and he was heard by his counsel before both branches of the Legislature, but in a manner which he alleges was entirely un-

authorized, and which was prejudicial to his rights; and after both branches aforesaid had presented an address to the Governor for his removal from his office of Justice of the Supreme Judicial Court, for the reasons set forth in the resolves and in the address; the Governor, professing to act under the authority of the constitution which declares that "every person holding any office may be removed by the Governor, with the advice of the Council, on the address of both branches of the Legislature," caused him to be informed that, "believing that there is a strong necessity for the act, that the peace and security of the citizens of the State, and a due regard to the execution of the laws demand it, in pursuance of the address of both branches of the Legislature, and with the advice of the Council, I do hereby remove Woodbury Davis, and he is accordingly removed from the office of Justice of the Supreme Judicial Court of the State of Maine."

This Court is, therefore, called upon, not only to consider the proceedings preliminary to the address of the two branches of the Legislature, and decide whether they were valid or otherwise, but also to pass upon the question, whether the attempted removal by the Governor was in conformity to the provision of the constitution in art. 9, § 5, and has the effect to disqualify him from exercising the duties appertaining to the office of a Justice of the Supreme Judicial Court, and to deprive him of the right to receive the compensation established by law for Justices of the same.

An important question is presented, whether under a proper and sufficient process, served upon parties adversely interested, this Court have the power to examine and conclusively decide the constitutional propositions stated in the memorial, to be supported or not; and if it has the power to do so, whether it is under *obligation* to take jurisdiction and pronounce a final judgment thereon.

Assuming that a constitutional question is so presented to the Court that it *can* take jurisdiction of it, and *may* decide it conclusively, and effectually, the obligation to entertain

jurisdiction, and to decide the question is imperative. The right and the duty to consider and decide are inseparable.

What was said by Chief Justice Marshall of the power and the duty of the Supreme Court of the United States is equally applicable to this Court. "It is most true that this Court will not take jurisdiction, if it should not, but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the Legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts or whatever difficulties, a case may be attended, it must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction, which is given, than to usurp that, which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid, but we cannot avoid them." *Cohens* v. *Virginia*, 6 Wheat. 404.

In *Fullerton* v. *Bank of United States*, 1 Peters, 614, it is said by Mr. Justice JOHNSON, "What is the course of prudence and duty, when these cases of difficult distribution, as to power and right, present themselves? It is to yield rather than to encroach. The duty is reciprocal, and no doubt it will be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our many peculiar relations, cases occur, in which the maintenance of principle and the constitution according to its innate and inseparable attributes, may require a different course, and when such cases do occur, our courts must do their duty." As a commentary upon the remark quoted, Judge STORY says, "The judiciary has no authority to adopt a middle course. It is compelled when called upon to decide whether a law is constitutional or not." 3 Com. on Constitution, § 1573, note 1.

Every government must be, in its essence, unsafe and unfit for a free people, where a judicial department does not exist. This power in every government must be coextensive with the power of legislation. Were there no power to interpret, pronounce and execute the law, the government would either

perish through its own imbecility, or other powers must be assumed by the legislative body to the destruction of liberty. 1 Kent's Com., Lect. 14, p. 277. The will of those who govern will become, under such circumstances, absolute and despotic, and it is wholly immaterial, whether power is vested in a single tyrant or in an assembly of tyrants. 3 Story's Com. on Con., § 1568.

"There is no liberty, if the judiciary power be not separated from the legislative and executive powers," is a principle stated by Montesquieu's Spirit of Laws, book 11, c. 6.

"Personal security and private property rest entirely upon the wisdom, the stability and the integrity of the courts of justice." 1 Kent's Com., Lect. 14, p. 273.

If that government can truly be said to be despotic and intolerable, in which the law is vague and uncertain, it can but be rendered still more oppressive and more mischievous, when the actual administration of justice is dependent upon caprice or favor, upon the will of rulers, or the influence of popularity. When power becomes right, it is of little consequence, whether decisions rest upon corruption or weakness, upon the accidents of chance or upon deliberate wrong. In every well organized government, therefore, in reference to the security both of public and private rights, it is indispensable, that there should be a judicial department, to ascertain and decide rights, to punish crimes, to administer justice, and to protect the innocent from injury and usurpation. Rawle on the Constitution, c. 21, p. 199.

Laws, however wholesome or necessary, are frequently the object of temporary aversion, and sometimes of popular resistance. It is requisite, that the courts of justice should be able at all times to present a determined countenance against all licentious acts. 1 Kent's Com., Lect. 14, p. 275.

"The complete independence of the courts of justice is peculiarly essential in a limited constitution. By limited constitution, I understand one, which contains certain specified exceptions to the legislative authority; such for instance, as that it shall pass no bills of attainder, no *ex post facto* law, and

the like. Limitations of this kind can be preserved in practice in no other way, than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." Federalist, No. 78.

Judge STORY remarks, "the independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures sometimes disseminate among the people themselves; and which, though they give place to better information and more deliberate reflection, have a tendency in the meantime to occasion dangerous innovations in government, and serious aggressions on the minor party in the community." Story on Con., § 1596.

Doctor PALEY says, "The great security for the impartial administration of justice, especially in decisions, to which the government is a party, is the independence of the judges. As protection against every illegal attack upon the rights of the subject, by the servants of the crown, is to be sought for, from these tribunals, the judges of the land become not unfrequently, the arbitrators between the king and the people; on which account, they ought to be independent of each other."

De Tocqueville remarks of the Supreme Court of the United States, that it summons sovereign powers to its bar. When the clerk of the court advances on the steps of the tribunal and simply says, "The State of New York versus the State of Ohio, it is impossible not to feel, that the Court which he addresses is no ordinary body; and when it is recollected, that one of these parties represents one million and the other two millions of men, one is struck with the responsibility of the judges, whose decision is about to satisfy or disappoint so large a number of their fellow citizens. The peace, the prosperity and the very existence of the Union are vested in the hands of these judges. Without their active coöperation, the constitution would be a dead letter. The executive appeals

to them for assistance against the encroachments of the legislative power; the Legislature demands their protection from the designs of the executive; they defend the Union from the disobedience of the States, and the States against the exaggerated claims of the Union; the public interests against the interests of private citizens, and the conservative spirit of order against the fleeting innovations of democracy." Democracy of America by De Tocqueville, p. 146.

With a view to these principles, which are so essential to the government of a free people, the framers of the constitution of this State provided therein that the powers of the government shall be divided into three distinct departments: the legislative, executive and judicial. And it is provided, that no person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, excepting in cases in the constitution expressly directed and permitted. Con. of Maine, art. 3, § § 1 and 2.

"The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the constitution." 3 Story's Com. on Cons., § 1584.

Each of the three departments being independent, as a consequence, are severally supreme within their legitimate and appropriate sphere of action. All are limited by the constitution. The judiciary cannot restrict or enlarge the obvious meaning of any legislative act, although they are bound to give construction to acts which are properly submitted to them, and to apply them, provided they do not transcend the bounds fixed by the constitution. The executive have no power to give practical interpretation to laws, in conflict with legal opinions properly given by the judiciary. The legislature are powerless in any attempt to legislate in violation of, or inconsistent with, constitutional restraints. And when, if ever, the executive or legislative departments have exercised in any respect a power not conferred by the constitution, on a

proper submission of the questions arising thereon, we have seen that the judiciary is not only permitted but compelled to sit in judgment upon such acts, and bound to pronounce them valid or otherwise.

These principles, which have been adverted to and which are really fundamental, carried out in practice by a judiciary, educated in a manner suited to qualify it for the discharge of its high trust, conscientiously determined to fullfil all the duties devolving upon it without invading the province of any other department, possessed of that firmness which disregards the temporary security which may falsely be supposed to be obtained by an undue submission to legislative or executive power, and fearlessly meeting every official call uninfluenced by the clamors of popular complaint, or ephemeral supremacy of a political party, will do much to render permanent the landmarks of the constitution and to promote the great ends of the government of a free people.

When a statute of the legislature, or any act of the executive is brought to the test of the constitution before the judiciary, it is not upon the hypothesis, that because the latter have the power to pronounce void the doings of the former, it is therefore superior. It is said in the Federalist, No. 78, "Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and when the will of the legislature stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

When the acts of the legislative and the executive departments are found upon full consideration to be inconsistent with this fundamental law, and are so pronounced by that department entrusted with the power and compelled in duty to do so, these acts are simply void. The law, which operates upon all from the highest to the lowest, is made known, and all affected thereby, submit, not to the court, which announces the

result of the question presented, but to the majesty of the law which is omnipotent.

We are now to inquire whether the matter of the memorial is presented to this Court in such a form and manner that it has the authority to pronounce a judgment upon the constitutional question involved.

By R. S., c. 96, § 2, cognizance is given to this Court, of pleas, real, personal and mixed, and of all civil actions between party and party, and between the State and any of the citizens thereof, or other persons, resident within it, which may be legally brought before it by original writ, writ of error, or otherwise; and may render judgment, and award execution thereon, as is or may be provided by law.

By section 3, of the same chapter, the Court has jurisdiction of capital crimes, and all other offences and misdemeanors, which shall be legally prosecuted before them.

By section 5, of the chapter referred to, the court have power to issue writs of error, certiorari, mandamus, prohibition, quo warranto, and other processes and writs, to courts of inferior jurisdiction, to corporations and individuals, which may be necessary for the furtherance of justice, and the due execution of the laws. And by section 7, the court may exercise jurisdiction, power and authority agreeably to the common law of this State, not inconsistently with the constitution, or any statute.

From these provisions of the statute, the Court derive authority to exercise jurisdiction in civil and criminal matters only when they are brought *legally* before it. And it is manifest, that in ascertaining whether legally brought before it or not, reference must be had to the common law of the State.

The common law of this State in its great principles is similar to that of England, excepting so far as it has been changed by statute, or as those principles of the law itself not being applicable to our altered condition and wants, have never been adopted here.

The forms of proceedings, before judiciary tribunals, are borrowed from the country, in which the principles of the law

had their origin, and they have been confirmed or modified, from time to time, as the Legislature have considered it necessary or expedient.

It is understood by all, having knowledge of proceedings in criminal matters, that the greatest accuracy and technicality is required, and a material error therein, is an immunity to the accused.

In pleadings in civil cases, less strictness is required, and if the parties, and the frame of the original process are correct according to well settled rules, amendments are allowed in the discretion of the Court. But in these, very important distinctions are essential, in relation to the remedies attempted to be enforced for the redress of alleged wrongs. And it is proper to look at some of the doctrines appertaining to this subject as bearing upon the question before us.

"Now since all wrong may be considered as merely a privation of right, the plain and natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived; or if this is impossible, by making to the sufferer satisfaction in pecuniary damages." 3 Black. Com. 116.

The instruments whereby this remedy is obtained, are a diversity of suits and actions, which are defined to be, "the lawful demand of one's right." *Ib.*

Bracton, in speaking of original writs, upon which all our actions are founded, declares them to be fixed and immutable, unless by authority of parliament. "*Sunt quœdam brevia formata super certis casibus de cursu, et de communi concilio totius regni approbata et concessa, quæ quidam nulla tenus mutari poterint absque consensu et voluntate eorum.*" *Lib.* 5, *de exceptionibus, c.* 17, § 2.

"The laws adapt their redress exactly to the circumstances of the injury, and do not furnish one and the same action for different wrongs, which are impossible to be brought within one and the same description; whereby every man knows what satisfaction, he is entitled to expect from the courts of justice, and as little as possible is left to the breast of the

judges, whom the law appoints to administer and not to prescribe the remedy." 3 Black. Com. 266. And the commentator remarks, "I may venture to affirm, that there is hardly a possible injury, that can be offered to the person or property of another, for which the party injured may not find a remedial writ, conceived in such terms, as are properly and singularly adapted to his particular grievance."

Certain remedies are provided by statute, either as additional to those existing at common law, or as a substitute therefor. Complaints for the flowing of lands, for the purpose of raising a head of water for the operation of mills; petitions for the partition of real estate, and the peculiar proceedings, criminal in form, but civil in substance, by which the mother of an illegitimate child may obtain against the father a judgment of filiation and for contribution to the support of such child, are examples. The statutes prescribe the forms of these proceedings in substance at least for such cases, and provide for the notice to the parties, who may be interested, and the judgment to be awarded in each, and the means by which such judgment may be made effectual.

Where the statute has not interfered to change or modify the common law, the different writs and processes, which have long been in use for the purpose of obtaining redress, have been regarded as essential modes of remedy for alleged injuries. The writs of *certiorari*, *prohibition*, *mandamus* and *quo warranto* have undergone no material change; and when they are severally the appropriate remedies for wrongful acts or neglects, in order to secure the object sought, all their peculiar characteristics and averments must be retained.

The actions, by appropriate writs, of assumpsit, of debt, of account, of trespass upon personal property and upon the person, of trover for the conversion of property, of replevin, of the case, of trespass *quare clausum*, and writs of entry to obtain possession of real estate, have undergone few modifications by statute, and are now remedies in legitimate use and generally resorted to, according to the nature of each alleged injury. And upon trials of the actions so commenced,

if the allegations in the respective writs are sustained by proof or admission of the defendants, the proceedings become a matter of record, and the redress sought is secured by a judgment made in the proper form, as a necessary consequence; or if the proof is insufficient, a judgment in favor of the defendant is awarded, which is generally security against another suit for the same cause.

The general, and therefore the orderly parts of a suit are the original writ, or other process, with the declaration; the service upon the party adversely interested; and if there be an appearance, the pleadings in defence; the issue or demurrer; the trial, the judgment and its incidents; the proceedings in the nature of appeal, when such is allowable; and the execution. 3 Black. Com. 272.

It is under the forms established by common law or by statute, in their essential features, that these various steps are to be taken, and become legitimate, and terminate in judgments which are decisive of the rights of the parties thereto and their privies, and are followed by an execution in some form, which is designed to give effect to the judgments in favor of the party prevailing.

Unless the Legislature have provided another remedy than those which had previous existence, a party cannot adopt for himself a new mode before unknown to the law, by which he can obtain from a court of common law a binding judgment, which can be enforced, as by an execution duly issued upon a judgment recognized by the common law.

The remedy by forms of proceedings, which are of themselves legal and in common use, will fail, unless they are appropriate to the injury alleged. Much more certainly must they fail, when they are entirely novel, and not provided for in any code of binding authority upon the courts. For the recovery of damages arising from the non-fulfillment of certain classes of promises, the actions of *debt* and *assumpsit* may either be proper; but in other cases, where assumpsit is a suitable remedy, a suit in a plea of debt could not be maintained.

An action of trespass *de bonis asportatis*, when the injury designed to be proved was merely that of a breach of the close, would be regarded an absurdity. An action of trover would be improper and ineffectual, for a tortious invasion of the plaintiffs' chattels without a conversion.

A petition to a court of common law, having jurisdiction of the subject matter, if properly presented, alleging that the petitioner's personal property had been wrongfully taken, and praying that the court would adjudge him to be the owner, the caption unlawful, and order its restoration, would not be entertained. A memorial to the Court, representing that the memorialist had been wrongfully deprived of the lands of which he had been seized within twenty years by the unlawful possession taken and retained by the party named in the petition, which should pray the court, after an examination of pertinent testimony to be adduced, to render a judgment in favor of the petitioner against the respondent, touching the seizin of the former and the disseizin by the latter, and an order of restitution of the lands, is a process unknown to the law; no proceedings would be had thereon, and it could be an authority to no court under the laws of this State to take jurisdiction of the matter.

We have already seen, that, in a suit brought in a court of common law, a service upon the person or persons adversely interested is essential; without this, in some mode recognized by law, the court cannot proceed; and if, inadvertently, a judgment should be rendered, it would be a nullity or would be reversed as erroneous on proper proceedings. Before a conclusive judgment can be rendered, which can in any manner affect another party, in the most trivial suit, that party must have legal notice of its pendency.

A judgment in defiance of the maxim, *audi alteram partem*," was said by LIVINGSTON, Justice, in the case of *Hitchcock* v. *Fitch*, 1 Caines, 460, not to deserve the name of judgment, but must be treated as a nullity, and could have no validity.

The Legislature and the Executive of the State are charged in the memorial as having done illegal and unconstitutional

acts, to the injury of the memorialist. By the proceedings and the documentary evidence presented, these departments claimed to have undertaken and performed those acts by the authority of the constitution. If the Legislature exercised a constitutional power, and in a constitutional manner, to address the Governor for a removal of Judge Davis, and the executive made the removal, in pursuance of a right conferred by the constitution, he is without remedy, and must submit to the exercise of that power, possessed under the fundamental law of the land; notwithstanding he may believe that the removal was most indiscreet and oppressive. If the removal shall at any time be decided, under proper proceedings by the tribunal vested with the authority to entertain jurisdiction of the matter, to have been properly made, other and important results must follow, beside those interesting to Judge Davis personally. Instead of a Chief Justice and seven associate Justices of this Court, there are only a Chief Justice and six associates. All acts attempted by the memorialist as a Justice of this Court would be without effect. Orders, decrees or judgments made or pronounced by him would be *coram non judice.* The decisions of questions of law, by the law court in which he should participate as one of its members, would not differ in effect from the judgments and decrees made by members of the court, aided by a private citizen of equal qualifications in attainments and general ability, in their deliberations.

On the contrary, if the constitution under the charges made against Judge Davis, gave no right to the Legislature to address the Governor for his removal, and consequently none to the Executive to make it, the power exercised by each was usurped, and their acts were really ineffectual. The people themselves, in their own fundamental law which is proclaimed in the constitution, had set bounds, which, if transcended in this and kindred matters, the servants of the people constitutionally and legally appointed remain undischarged, and their rights unimpaired; and the attempt of the people's other servants to remove them is abortive.

It is manifest that in a conclusive judgment upon the question, whether Judge Davis is still required to perform the duties devolving upon a Justice of this Court, so long as he insists that the removal is a nullity and claims to be entitled to the privileges and emoluments pertaining thereto, very important public and private rights are involved. Under such a judgment, the action of the Legislature and of the Executive might in some measure be very different, according as this Court should sustain their action in causing the removal, or otherwise.

To entertain jurisdiction of this memorial, and to proceed to a consideration and decision of the questions embraced, is one of the highest and most responsible trusts, which can be executed by this Court. A judgment under legal proceedings, fully authorized between the parties to a suit, wherein such questions are necessarily involved, would be conclusive upon such parties. It would be equally so, under such authorized proceedings and such issues, if the State and a Judge attempted to be removed, were the parties before the Court.

This Court is informed, in the memorial and by the documents in the case, of all the acts of the coördinate branches of the government, alleged therein to be irregular, unlawful and unconstitutional. This representation is made in no form or process known to the common law, or the statutes, by which we can be bound, or which will enable us to act in the premises. The memorialist has caused no process connected with the memorial to be served upon any one, whether adversely interested or otherwise. No department of the government or officer thereof has appeared voluntarily, and claimed to be heard. The memorialist is the only party before us. It may not be his fault, that it is so. On the contrary, it is evident, that in an attempt to cause another party to be brought before the Court, difficulties would have met him. But this inability on his part, under the circumstances which are presented, will not of itself confer a jurisdiction upon the Court. In what form or by what authority, either of law or precedent, a judgment under the memorial, having the material charac-

teristics of a judgment favorable or adverse to the claim of Judge Davis, can be rendered and duly recorded, is not apparent.

Whether the acts of the Senate, House of Representatives, and the Governor, complained of, were illegal or unconstitutional, or not, for reasons already given, is a question which we cannot regard as before us, so as to authorize any judgment, which can have the effect to place Judge Davis in the situation which he insists he is entitled to hold, or to compromit in the slightest degree any right which he or any other party may now possess. The question is so important, affecting so many interests and to such extent, that an opinion of this Court thereon, as it is now presented, can be attended with no useful results, inasmuch as the opinion can but be regarded by us as ineffectual, and not concluding the rights of any. We abstain from all consideration of the great matter attempted to be brought before us for adjudication, wholly for want of jurisdiction, which we are fully satisfied we cannot entertain, under the process, and the case generally, as presented. And for reasons just mentioned, it is equally our intention to withhold all intimation of what the decision would be, touching the rights of the memorialist, if presented under appropriate legal proceedings, which would at the same time give the Court the right, and require the exercise of it, in the discharge of a duty, to make a decision upon the same questions, which would of necessity be binding as well upon the coördinate branches of the government, as upon other parties, who might be parties to the controversy.

When a case shall come before this tribunal, involving these important inquiries, whether between a Judge of this Court, attempted to be removed, and the State, or the branches of the government which made the attempt, under a writ of *quo warranto* or other process recognized by law, which will confer jurisdiction; or in the more usual forms of law between private parties, where the removal of such an officer of the government is a matter at issue; it is believed, that the Court will, as it should do in the discharge of all its official du-

ties, have a single eye to discern the right as it exists, and when seen satisfactorily, to make declaration thereof in its final judgment. If it should, on a full examination of the subject, come deliberately to the conclusion that the coördinate branches had not transcended the limits fixed by the framers of the constitution, and the people who adopted it, it should not hesitate to record its convictions in the judgment to be pronounced, notwithstanding the disappointment of honest minds, which might differ from that of the Court, or the feelings of others, who might look upon the result as a triumph or a defeat in a partizan warfare. On the other hand, if the acts resulting in the removal of Judge Davis, should be held a violation of constitutional restraints, or otherwise invalid, it would be only the declaration of the fundamental law of the land as applicable to that question, as it should on examination be found to be, that the removal was inconsistent with its true construction. Such declaration would not imply in the least degree a superiority over coördinate branches, but would be simply the discharge of an imperious duty, required under the constitution of the judiciary alone, and which cannot be divided with, or surrendered to another department, equally independent in its own sphere of action. A hesitation to pronounce such a decision fearlessly, would disclose a weakness, which is totally inconsistent with juridical capacity.

RICE, HATHAWAY, APPLETON, CUTTING and MAY, J. J., concurred. GOODENOW, J., dissented.

GOODENOW, J. — Judge DAVIS, in his memorial, claims to be a member of this Court, notwithstanding the proceedings of the Senate and House of Representatives and of the Governor and Council in relation to his alleged removal.

If these proceedings are unconstitutional, he is still a member of this Court, unless he waives his objections to them. He does not waive his objections, but claims to be recognized by this Court as one of its members, and to have his share of its duties assigned to him. In my opinion, it is the right and the duty of the Court to determine who are its members.

The Senate and the House do this, and I see no reason why this Court must not do it. It is a question in which the public is interested as well as the Court. It is a case not within the reach of a writ of *quo warranto,* or of *mandamus.* It would hardly be respectful to a coördinate branch of the government, for Judge Davis to do any act as a Justice of this Court, in order to lay the foundation for a writ of *prohibition.* His rights should not be made to depend upon the decision of questions between other parties. He is entitled to a direct decision of the question on his own claim.

It may be an *ex parte* proceeding from necessity, because there is no other party to be summoned to answer to him. Neither the Senate or House, or Governor or Council can be considered as a party. It is analogous to "*monstrans de droit.*"

"When the right of the party as well as the right of the crown appears upon record, then the party shall have *monstrans de droit,* which is putting in a claim grounded upon facts already acknowledged and established, and praying the judgment of the Court, whether upon these facts the king or the subject hath the right." 3 Black. Com. 256, c. 17.

In this case, there is no controversy about the facts. One who has been a member of the Court and still claims to be a member, upon these facts raises a question of constitutional law, and asks the Court to declare its opinion upon that question, as one in which he is deeply interested, and one in which this Court and the public are interested.

I think it suitable and proper for the Court to entertain the memorial and to express an opinion upon the question.

GEORGE FICKETT *versus* FREDERICK SWIFT.

The declarations of a party to the record, *or of one identified in interest with him*, are, as against such party, admissible in evidence.

The law, in regard to this source of evidence, looks chiefly to *the real parties in interest*, and gives to their admissions the same weight as though they were parties to the record.

In an action against one partner, the declarations of another partner are admissible.

A nonsuit ought not to be ordered, though the presiding Judge may have drawn proper inferences from the testimony, and arrived at a correct result, if the facts were such as might justify a jury in coming to a different conclusion without danger of their verdict being set aside as against the weight of evidence.

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

ASSUMPSIT, to recover a balance claimed to be due the plaintiff from the defendant as part owner of the ship Knickerbocker.

The facts sufficiently appear in the opinion of the Court.

Willis & Son & W. P. Fessenden, for defendant.

The nonsuit was rightly ordered, because:—

1. From the evidence, no contract ever existed between the plaintiff and defendant.

2. If any contract existed on the part of the defendant to pay the claim of the plaintiff, it was a contract to pay the debt of another, and not being in writing is therefore invalid. R. S., c. 136, § 1.

3. The purchaser or mortgagee of a chattel is not liable to pay the bills which may have accrued on its account before the purchase. 15 Mass. 477; 17 Pick. 441; 6 Maine, 474; 18 Maine, 132; 20 Maine, 213.

4. The letters of George H. Blanchard, signed with the firm name of "F. Swift & Co.," are inadmissible in this action against F. Swift alone, and also the bills of sale to F. Swift and George H. Blanchard, they having been delivered long after the contract was made between Ambrose Scammon & Co., and the plaintiff.

Shepley & Dana, for plaintiff.

1. This cannot be considered as a contract to answer for the debt of another, and as such required by the statute of frauds to be in writing. It was an original agreement with Scammon & Co., and constituted a part of the consideration to be paid for the ship. *Hargreaves* v. *Parsons*, 13 M. & W., 570; *Eastwood* v. *Kenyon*, 11 A. & E., 446; *Thomas* v. *Cook*, 8 B. & C., 728.

2. The whole course of conduct of Swift & Co., shows that they assumed this contract in terms, and adopted its provisions.

3. The declarations of the co-partner of the defendant were clearly admissible.

CUTTING, J. — The plaintiff claims a balance to be due him "on account of blocking the defendant's ship."

It appears from the testimony of George W. Cutter, *that* he was engaged by the owners to superintend the building of the ship in 1853 and 1854; *that* her keel was laid in June of the former, but the vessel was not completed until the latter year, and after her arrival in New York; *that* Ambrose Scammon & Co. commenced building, who hypothecated her to the defendant in July, 1853, and in November of that year, transferred one half to the defendant and one George H. Blanchard, and in January, 1854, the other half, by bills of sale, the purchasers giving bonds to re-convey upon certain conditions; *that* after this the witness continued, as *agent for those interested*, in making contracts for the work to be done and materials to be furnished and had the general oversight; *that* while so acting, *he received directions from those interested* in the ship; *that* sometime in the spring or summer of 1853, he made a contract with the plaintiff to furnish the blocking, which was received the latter part of 1853, and first part of 1854; *that* the defendant and Blanchard had given him directions as to the manner of completing the ship after their interest in her was acquired; *that* the defendant wanted witness to draw on him for as small amounts as he could towards paying the bills at the eastward against the ship, before getting her to New

York, where he said he could more readily obtain money, and promised then to let him have money to settle some bills which were to be paid as soon as the ship was ready for sea, among which was the plaintiff 's; *that* when he made the contract with the plaintiff, in 1853, he was the agent for the owners and was acting in such capacity; *that* it was a part of the agreement on the part of the defendant and Blanchard, when they took the bill of sale, that they were to furnish what money was wanted to settle the bills against the ship; *that* all the bills, except those in New York, were contracted in the name of Scammon & Co.; *that* he don't know as Swift & Co. authorized him directly to make contracts with any one; *that* after they became interested in the vessel, they knew he was acting as agent for her, and dealt with him as such, giving directions as to the manner in which they wished her to be completed.

The plaintiff then produced the bills of sale testified to by Cutter, which were made to Frederick Swift and George H. Blanchard, "composing the firm of Frederick Swift & Co."

Also the letter of Swift & Co. to the plaintiff of Dec. 9, 1853, of which the following is an extract: —

"We have wrote you in regard to sending us some blocks, which our Mr. Blanchard was speaking to you about when in Portland, and a short time since sent you an order for the same, and have not heard that you were in the land of the living."

Stephen C. Munsey testified, that he made the sails for the ship under contract with Cutter, acting as the agent for Scammon & Co. on June 28, 1853; *that* in August of that year, he gave a schedule of what he wanted to Swift & Co. who were represented by Blanchard; *that* after he got through, he asked Blanchard, if Swift & Co. owned any part of the ship, who replied, "We own the top of the ship;" said they were going to furnish the top, the out-fit, and every thing beyond the hull.

The foregoing is the substance of the evidence introduced by the plaintiff, and which the presiding Judge ruled insufficient to maintain the action and ordered a nonsuit. A pre-

liminary question arises as to the admissibility of Blanchard's acts and declarations. The letter of Dec. 9, 1853 was admitted to be in his handwriting, and that he was the co-partner of the defendant. And whether the copies of the bills of sale were admissible or not becomes immaterial, since their contents were disclosed by Cutter without objection. We assume it then to be proved that Blanchard was the partner of the defendant. And the general doctrine is, that the declarations of a party to the record, or *of one identified in interest with him,* are, as against such party, admissible in evidence. The law, in regard to this source of evidence, looks chiefly to *the real parties in interest,* and gives to their admissions the same weight, as though they were parties to the record. 1 Greenl. on Ev. § § 171, 180.

Upon the evidence legally admitted, there arose a question of fact within the province of the jury to ascertain and determine, under proper instructions in matters of law, whether the defendant was liable for the price of the articles furnished. He would be so liable, if there was any contract express or implied between him and the plaintiff. This may depend upon the fact, whether Cutter was acting as the agent of Scammon & Co. solely, in making the contract, or as the agent of the defendant as one interested in building the ship, or whether the defendant, as owner and furnisher of "the top," was not responsible for all necessary tackle and appendages. The presiding Judge may have drawn the proper inferences, and conclusions, and arrived at a correct result; but in so doing he encroached upon the province of the jury, who might have found the facts to have justified a different conclusion, without much danger of their verdict being set aside as against the weight of evidence.

The evidence presents another question which might possibly have authorized a verdict for the plaintiff. We refer now particularly to the letter of Dec. 9, 1853.

Assuming, as the defendant contends, that the original agreement to furnish the blocks was made with Cutter as the sole agent of Scammon & Co., still, inasmuch as it was for the *de-*

livery, and not for the *manufacture* and delivery of blocks which may have been manufactured at the time, it was a contract of sale, and is within § 4 of the statute of frauds, as was decided in *Hight* v. *Ripley*, 19 Maine, 137.

Now, were the articles delivered before the date of that letter, or were they delivered subsequently and in pursuance of the request therein contained? If the latter, then the defendant might have been liable under an implied contract. The evidence upon this point, as to the time of delivery, is somewhat conflicting. The account annexed purports to have been made on Sept. 25, and for a balance then due, which probably was at the date of the writ, Sept. 25, 1854. Cutter testifies that "the blocking was received in the latter part of 1853 and the first part of 1854;" and the letter implies, that at its date, it had not then been received.

Exceptions sustained. The case to stand for trial.

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

JOHN STORER *versus* WILLIAM D. LITTLE.

Where a party claims title to real estate by statute provisions, he must show, in order to succeed, a strict compliance with such provisions.

The right of redemption of property mortgaged cannot be foreclosed, under the second mode provided in the statute of 1821, c. 39, without an *actual* entry by the mortgagee.

The Act of 1839, c. 372, additional, makes provision only as to the manner of authenticating notice of such entry and its registry.

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

WRIT OF ENTRY.

The facts sufficiently appear in the opinion of the Court.

C. C. Wells & Gerry, in support of the exceptions, contended: —

1. That it appeared by defendant's evidence and other testimony in the case, that the mortgage had not been foreclosed.

2. That the plaintiff, although he received the consent of the mortgager to enter, yet never took actual, personal possession, which being continued three years following, would operate to foreclose the mortgage. To this point were cited, *Thayer* v. *Smith*, 17 Mass. 429; *Dunning* v. *Comings*, 11 N. H. 472.

Fessenden & Butler, for plaintiff, insisted:—

1. That the transaction of the 12th June, 1841, amounted to a legal entry for the purpose of foreclosure.

2. That, if the mortgager still continued to occupy the premises, he did so under the plaintiff, and as his tenant at will, and his possession was the possession of the mortgagee. Whether rent was paid or not, is immaterial. *Swift* v. *Mandel*, 8 Cush. 357.

3. If actual possession was necessary, the defendant, by his writing on the back of the mortgage, is estopped to deny the mortgagee's possession. *Lawrence* v. *Fletcher*, 10 Met. 344.

4. The law of 1821, c. 39, where the expression "actual possession" occurs, has been altered by the law of 1839, c. 372.

5. If *actual* possession is requisite to foreclosure, how, when a first mortgagee has actual possession, can a second mortgagee foreclose in the second and third mode provided by the statute? That a second mortgagee can so foreclose, has been decided in *Palmer* v. *Fowby*, Law Reporter, May No., p. 46.

CUTTING, J.—The plaintiff, having introduced the mortgage deed from the defendant and shown himself to be the assignee thereof, together with one of the notes secured thereby, is entitled, under the general verdict, either to a conditional or unconditional judgment.

The plaintiff claims the latter, and contends, that on June 12, 1841, he made a legal entry for the purpose of foreclosure; and to show that fact, introduces the defendant's indorsement

on the mortgage of that date, duly recorded, which is in these words —

"I hereby give to John Storer, assignee of the within mortgage, peaceable and open possession of the within described premises for breach of the conditions of the within mortgage, and for the purposes of foreclosing the same."

This transaction was a short time prior to the operation of R. S. of 1841, and must be controlled by the statute of 1821, c. 39, and the additional Act of 1839, c. 372, then in force.

Section 1, of the former statute, provides, that when any mortgagee has lawfully entered and obtained the actual possession of mortgaged lands for condition broken, the mortgager shall have the right to redeem the same within three years, and not afterwards, "*provided*, that the entry above described, shall be, by process of law, or by the consent in writing of the mortgager, or those claiming under him, or by the mortgagee's taking peaceable and open possession of the premises mortgaged, in the presence of two witnesses."

The Act of 1839, additional, makes provision only as to the manner of authenticating notice of such entry, and its registry.

The statute of 1821, required an actual possession to be taken for the purposes of foreclosure, and pointed out specifically the three modes, by which such possession could be taken: —

First. It "shall be by process of law," which could be accomplished only by an officer, under a writ of possession, who shall go upon the land, and, if necessary, expel the mortgager, and deliver actual possession to the mortgagee; and such officer's return would be conclusive as to the fact of such entry and possession, and bind the parties and their privies in estate.

Secondly. "Or by the consent in writing of the mortgager." This consent in writing was manifestly intended as a substitute for the writ of possession, and the action of the parties for that of the officer.

Thirdly. "Or by the mortgagee's taking peaceable and

open possession in the presence of two witnesses," which mode was only a substitute for the two former, and could be perfected only in cases where no opposition to an entry was manifested; but neither dispenses with the necessity of taking actual possession. We have said, that the consent in writing is only a substitute for the writ of possession, and since the writ, without possession taken under it, constitutes no part of a foreclosure, so neither would the consent without an actual entry.

This brings us to the consideration of the legal effect to be given to the writing upon the back of the mortgage. Does it imply any thing more than a consent for the plaintiff to enter according to the second mode named in the statute? If not, then clearly, as we have seen, it is not sufficient without actual possession taken under it.

But this is not *res non adjudicata* in this State. In *Pease* v. *Benson*, 28 Maine, 336, this Court had occasion to consider the force and effect of a writing very similar to the one now under consideration, in which they remark, "In this case no such actual entry has been proved; on the contrary, it appears that none was made. The words contained in the paper signed by the mortgager, "I hereby give possession," do not prove the fact, that an actual entry was made and possession obtained. If, as contended in argument, it was the intention of the parties to admit that an actual possession had been taken, they could not cause a foreclosure in a manner not authorized by statute; could not substitute a fiction for the actual entry into possession required by the statute and make it as effectual as the act required."

Again, in *Chamberlain* v. *Gardiner*, 38 Maine, 548, it was held, that a consent of the mortgager, that the mortgagee might enter for the purposes of foreclosure, and that *possession* was thereby given, did not dispense with proof of an actual entry.

The R. S., c. 125, § 5, which was a reënactment of the Act of 1838, c. 333, § § 1, 2, provides for a foreclosure by publication, or by a copy of a notice duly served, when "the

mortgagee, or any person claiming under him, is not desirous of taking and holding possession of the premises;" thus clearly indicating that the other modes of foreclosure were only by taking and holding possession. This Court have repeatedly held, and by a series of decisions running through all the reports, that where a party claims title to real estate by statute provisions, he must show, in order to succeed, a strict compliance with such provisions; and a doctrine, which has proved to be so salutary in its effects, we are not now disposed to overrule or disturb.

But it is contended by the plaintiff's counsel, that if an actual entry be necessary, the certificate on the back of the deed is conclusive evidence of that fact, and, in the language of the Court in *Oakham* v. *Rutland*, 4 Cush. 172, "it is not competent for the defendant to avoid the effect of it, by proof, that he did not actually go upon the land." In that case, the mortgager had certified on the mortgage, among other things, that he was then "owning and living on the within-named premises," and the certificate being then and there indorsed, when the parties were upon the premises, perhaps it would not be unreasonable to infer that an actual entry was made, and more especially since it appears that the mortgagee immediately leased the premises to a third person, who did *enter upon and occupy* the same. If no actual entry was made by virtue of the indorsement, and at the time it bears date, still, as we have held, such a writing would amount to a licence to enter, and the occupancy under the lease shows an actual possession taken. Consequently, we concur in the result to which the Court, in that case, arrived, but not in the reason by them assigned for their conclusion.

In the case at bar, there are no such words as "owning and living on the within named premises," and no proof that at that time the parties were on or within sight of the premises, or that any possession was subsequently obtained by the mortgagee, but, if admissible, the evidence is, that the fact is otherwise. From such an instrument, we apprehend, no inference is to be drawn, that the plaintiff went upon

the land, but rather the inference is that he did not. The expression "I *hereby* give," indicates the mode and manner by which possession was attempted to be obtained by a legal fiction. I, hereby, that is, *by placing my signature to this certificate*, give possession. Such language implies the exclusion of any other act. It can as well be done at a distance from, as upon, the premises. The burden of proof is upon the plaintiff to show that he foreclosed the mortgage by an actual entry; his certificate is not sufficient for that purpose, and in our opinion there was no foreclosure.

The exceptions are sustained, and
the conditional judgment awarded.

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

ANDREW MCGLINCHY *versus* WORTHY C. BARROWS *& al.*

An officer is not justified in entering a dwelling-house for the purpose of seizing intoxicating liquors, by a warrant issued under the statute of 1853, c. 48, § 11, unless it is alleged in the warrant, either that a shop, for the sale of such liquors, is kept *in* the house, or a part of it; or that the preliminary testimony, prescribed in said section, has been taken.

It is not sufficient to allege in the warrant that such liquors are kept, &c., "in the shop and the premises and dwelling-house connected therewith," unless it appear that such testimony has been taken.

It must also be alleged that the liquors were intended by the owner for sale, in violation of the statute.

A warrant to search the dwelling-house of a person, only authorizes the officer to search the house in which such person lives; and if he searches a house hired and occupied by another, though owned by such person, he is guilty of trespass.

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

TRESPASS *quare clausum.*

The defendants justified as officers, acting under a warrant for entering and searching the shop and the premises and the dwelling-house connected therewith, "of Edward Gould, otherwise called Edward Goulding, and a person or persons

unknown," for the purpose of seizing intoxicating liquors, alleged to be kept and deposited there by said Gould, otherwise called Goulding, or by a person or persons unknown, and "intended for sale within said State, in violation of law."

The warrant was issued May 3, 1854, and was served the 13th of the same month.

The plaintiff called Edward Gould, who testified, among other things, that, on May 13, 1854, and for about a year previous, he had occupied a store on Fore street, Portland, numbered 277; that he occupied the first story alone, and that the plaintiff and his family lived in and occupied the second story; that there was an entrance from Fore street to plaintiff's residence over Gould's store, separate from the entrance to the store; that there was also a back entrance to plaintiff's house, distinct from any entrance to the store; that there was also a stair-way and stairs from the back part of the store to the house above; that Gould had, however, no access by the same; that the plaintiff had lived in the house, occupying at the same time the store; but, in the spring of 1853, sold out the goods to witness, and leased him the store; that the articles taken by defendants were all taken from plaintiff's part of said building, with an unimportant exception, were in plaintiff's possession, and his property.

There was other testimony tending to show, that the articles taken under the warrant were taken from the dwelling-house occupied by plaintiff, and not from the store occupied by Gould.

It was also admitted, that upon the trial of the case *State* v. *Gould*, upon the complaint and warrant in this case, Gould was acquitted, upon the ground that the liquors were not seized on his premises, and on proof that they were owned by this plaintiff.

It appeared, that no order having been made in regard to the liquors and vessels seized, they still remained in the custody of the defendants.

Upon the evidence, or so much as is admissible, the Court

is to render judgment, and make such disposition of the case as the rights of the parties require, being authorized to draw such inferences as a jury might draw.

S. & D. W. Fessenden, for defendant, argued:—

1. The justice by whom the warrant was issued, under which the defendant acted, had jurisdiction of the subject matter of the complaint. Statute of 1853, c. 48, § 1; *State* v. *McNally & al.*, 34 Maine, 210.

2. The defendant, being a ministerial officer, and having a warrant to execute, issued by a court having jurisdiction of the subject matter thereof, is by law protected in executing said warrant. *Sanford* v. *Nichols & al.*, 13 Mass. 288; *Wilton Manufacturing Co.* v. *Butler*, 34 Maine, 440; *McDonald* v. *Wilkie*, 13 Ill. 22; *Tifft* v. *Ashborough*, 13 Ill. 602; *State* v. *Weed*, 1 Foster, (N. H.) 262; *State* v. *McNally*, 34 Maine, 210; *Savacool* v. *Boughton*, 5 Wend. 170; *Parker* v. *Walrood*, 16 Wend. 514; *Black* v. *Foreman*, 9 Johns. 229; *Nichols* v. *Thomas*, 4 Mass. 232; *Portland Bank* v. *Stubbs*, 6 Mass. 422; *Earl* v. *Camp*, 16 Wend. 562; *Pierson* v. *Gale*, 8 Vermont, 512.

3. Mr. Barrows, the defendant, being a constable, in the exercise of his official duties at the time of the alleged trespass, in the service of a warrant, committed to him to be executed by a justice having jurisdiction, is by law protected from this action.

Howard & Strout, for plaintiff.

1. An officer is not protected, when a warrant issues from an inferior tribunal, if the process is irregular upon its face, and the jurisdiction does not appear. *Savacool* v. *Houghton*, 5 Wend. 170; *Parker* v. *Walrood*, 16 Wend. 514; *Nichols* v. *Thomas*, 4 Mass. 232.

2. When the process is void, the officer is liable. So if his acts are clearly against law. *Pearce* v. *Atwood*, 13 Mass. 324; *Tracy* v. *Swartout*, 10 Peters, 80; *Sanford* v. *Nichols*, 13 Mass. 286; *Morse* v. *James*, Willes, 122.

3. The warrant was irregular and void, because it was in the alternative.

4. There is no allegation that a shop was kept *in* the dwelling-house; nor that the testimony of witnesses was taken, as required by § 11 of the liquor law of 1853.

5. The warrant directed a search of a dwelling-house, without reference to the occupant.

APPLETON, J.—The statute of 1853, c. 48, § 11, prescribes when and on what conditions a warrant may issue for the search of "any dwelling-house in which or a part of which a shop is not kept," &c. It is not alleged that the preliminary testimony, prescribed by this section, has been taken, or that a justification has been made out by virtue of its provisions.

The warrant, under which the defendants justify, like the complaint, alleges that "spirituous and intoxicating liquors were, and still are kept and deposited by Edward Gould, otherwise called Edward Goulding, or by a person or persons unknown, of Portland, in said county, in the shop of the said Edward Gould, otherwise called Edward Goulding, in Fore street, in said Portland, and the premises and dwelling-house therewith connected." It will be perceived that in this complaint there is no allegation that a shop or other place for the illegal sale of liquors is kept *in* the dwelling-house directed to be searched. The case is directly within the decision of *State* v. ~~Sanborn~~, 38 Maine, 32.

The dwelling-house to be searched was at the time in the occupation of the plaintiff. It was held, in *Homes* v. *Taber*, 1 R. I., 464, that a warrant to search the dwelling-house of a person, only authorized the sheriff to search the house in which such person lives; and if he searches a house hired and occupied by another, though owned by such person, he will be guilty of trespass.

It does not appear whether the liquors belonging to the plaintiff, which were seized by the defendant Barrows, were or not intended by the owner for sale, in violation of the statute. The ascertainment of that fact may be important for the just decision of this cause. *Preston* v. *Drew*, 33 Maine, 558; *Black* v. *McGilvery*, 38 Maine, 287.

By the agreement of parties a default is to be entered and damages are to be assessed by a Justice of this Court.

Defendants defaulted.

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

GEORGE T. BLAKE *& al. versus* JACOB C. BAKER.

By R. S., c. 114, § 38, provision 6, a debtor's corn and grain, necessary and sufficient for the sustenance of himself and his family, not exceeding thirty bushels, are exempted from attachment and execution.

This exemption does not extend to those species of grain which may, by sales or exchanges, *indirectly* contribute to the same end, when they are, by their nature and the general custom of the community, not suitable to be used in the making of bread, and are not so designed by the owner.

Hence, to entitle a debtor to the exemption, the corn and grain in themselves must be *necessary* for the object expressed in the statute.

If the debtor is unmarried, or has no family depending on him for support, but is a boarder, or in such a situation that he can have no design to use corn or grain as food for himself or his family, these articles are not *necessary* for the sustenance of himself and his family, and are not exempt.

ON FACTS AGREED, from *Nisi Prius*, DAVIS, J., presiding.

THIS was an action of TRESPASS, brought by the plaintiffs, for taking and carrying away oats and wheat, the property of the plaintiffs, and alleged to be exempt from attachment and execution.

The writ is dated March 25, 1854.

It was admitted by the parties that the defendant, when the wheat and oats were attached, was a deputy sheriff of the county of York, and that he, by virtue of a writ duly signed by the clerk of the Supreme Judicial Court, took and carried away forty-two bushels of oats, and three bushels of wheat, the property of the plaintiffs; and that the oats and wheat were sold on execution issued on a judgment obtained on said writ, before the Supreme Judicial Court, and the proceeds thereof were applied in part payment of the execution.

After the evidence was in, it was agreed by the parties to

refer the case to the full Court, and that if the articles taken were exempt from attachment, and plaintiffs were entitled to the wheat alone or the oats alone, damages should be assessed accordingly. If not entitled to recover, plaintiffs were to become nonsuit.

E. Gerry, for plaintiffs.

1. Trespass is the proper remedy in this case. *Foss* v. *Stewart,* 14 Maine, 312.

2. The wheat and oats attached by defendant were all the grain or corn the plaintiff had, as appears by the case. 1 Greenl. on Ev. 78.

3. The wheat and oats were *necessary* for the sustenance of the plaintiffs and their families.

4. The wheat and oats attached, in this case, were exempt. Grain, in its philological and popular meaning, includes oats. Corn means any kind of grain fit for man or beast. Webster's Dict; R. S., c. 114, § 38; *Ordway* v. *Wilbur,* 16 Maine, 263; *Gibson* v. *Jenney,* 15 Mass. 204; *Wentworth* v. *Young,* 17 Mass. 70.

Waterman, for defendant.

1. In order to recover, the plaintiffs rely upon and must bring themselves strictly within the provisions of R. S., c. 114, § 38.

The case should show that the property attached was "*necessary for the sustenance of the debtor,*" &c., and that the plaintiffs had only the amount of grain exempted, at the time of the attachment, the fact being one peculiarly within their own knowledge. *Daily* v. *May,* 5 Mass. 313.

2. The wheat and oats attached were *not* exempted, because *not* "*necessary for the sustenance of the debtor,*" &c. This statute, being in derogation of the common rights of creditors to secure their debts out of the property of their debtors, should be construed strictly. 4 Bac. Abr., tit. statute, 1, 6.

What is "necessary" is to be determined by the peculiar circumstances of each case. *Howard* v. *Williams,* 2 Pick. 80, 83.

3. The wheat and oats were not such grain as was intended by the statute to be exempt.

4. But if, by any liberality of construction, the wheat can be considered exempt, the oats, not being an article of food, and not "necessary" as "sustenance," in this State, are not exempted.

TENNEY, C. J.—A debtor's corn and grain, necessary and sufficient for the sustenance of himself and his family, not exceeding thirty bushels, are exempt from attachment and execution. R. S., c. 114, § 38, prov. 6.

Such a construction must be given to the statute referred to, as is consistent with, and in furtherance of the object of its authors. The obvious purpose of this exemption was to prevent the taking from the debtor of those articles which he had provided, and which were suitable as food for himself and family; and not to extend the exemption to those species of grain which may by sales or exchanges indirectly contribute to the same end, when, by their nature and the general custom of the community in which the debtor lives, they are unsuitable to be used in the making of bread, and are not so designed by the owner. Hence, to entitle the debtor to the exemption, the corn and the grain in themselves must be necessary for the object expressed.

If the debtor is unmarried, or has no family depending upon him for support, but is a boarder, or in such a situation that he can have no design to use corn or grain as food for himself or his family, these articles do not become necessary for the sustenance of himself and his family, and are not exempt.

The wheat and the oats mentioned in the writ were the joint property of the plaintiffs. They had obtained this grain as payment for their labor in threshing with a machine. It does not appear that the oats were designed to be used as human food, or for purposes differing from the general use of that kind of grain in this State. This portion of the

property attached by the defendant cannot, therefore, be treated as falling within the exemption of the statute.

It is satisfactorily shown that, at the time of the attachment, the plaintiffs were the owners of no other grain than that which is now in controversy. George T. Blake, one of the plaintiffs, had a family, and he was entitled to hold, exempt from attachment, one undivided half of the wheat. The other plaintiff is not proved to have had a family, or to be in a situation which made it necessary that he should have any corn or grain for the sustenance of himself or others, and, therefore, is not brought within the statute provision. The defendant not having invaded the rights of this plaintiff, a joint action, in favor of the two owners of the wheat, cannot be maintained. *Plaintiffs nonsuit.*

RICE, HATHAWAY and CUTTING, J. J., concurred. GOODENOW, J., dissented, and MAY, J., did not sit.

DANIEL FOX *versus* EBEN COREY.

The legal liability of a lessee to pay rent to his lessor continues until their relation as landlord and tenant ceases; and this, notwithstanding notice by the landlord to the tenant that he was to pay the rent to a third party.

Whether the provisions of the statute of 4th Anne, c. 16, by which a tenant, having notice of a conveyance of the premises to a third party, is liable to pay rent to the latter without attornment, have been adopted in this State; *quære.*

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

ASSUMPSIT. The defendant was tenant under the plaintiff, paying rent quarterly on the first days of January, April, July and October. On the first day of July, 1853, the plaintiff presented a bill to the defendant for "two month's rent, and tax of store to June 1, 1853," which was paid. The plaintiff at the same time notified defendant that he did not claim rent for June; that he had leased the premises to Lyman & Richardson, who would collect the rent from June 1st. To this the defendant made no reply, but occupied the

premises to Sept. 2, 1853, and refused to attorn to Lyman & Richardson. This action is for rent to Sept. 2, and is prosecuted by Lyman & Richardson, in the name of the plaintiff, with his consent.

It was also in the case that the lease to Lyman & Richardson was dated May 18, 1853, "to hold for the term of ten years from the first day of July, 1853."

If, upon the facts, the plaintiff is entitled to recover, the defendant is to be defaulted; otherwise, a nonsuit to be entered.

Shepley & Dana, for plaintiff.

1. The defendant, not having paid rent to Lyman & Richardson, nor attorned to them, nor given them possession, was not, in point of law, in privity with them. The suit, therefore, was properly brought in the name of Fox. *Bancroft & ux.* v. *Wardwell*, 13 Johns. 491; *Porter* v. *Hooper*, 11 Maine, 170; *Patch* v. *Loring*, 17 Pick. 337; Taylor's Landlord and Tenant, § 636.

2. If a month's rent was given to Lyman & Richardson, no damage was thereby occasioned to the defendant, it being immaterial to him to whom the rent was to go.

3. The refusal to attorn rebuts the presumption of a contract to hold under Lyman *et al.*

4. This action is assumpsit, and, by the statute of 1853, c. 39, § 4, this is the remedy provided, the occupation of the defendant having ceased.

Rand, for defendant.

1. The defendant was tenant at will under Fox. Fox's alienation determined the estate at will, and without notice to quit. The doctrine is discussed in *Howard* v. *Merriam*, 5 Cush. 563. The grantee can bring forcible entry and detainer, but there is no intimation of such suit as this. See also *Wheeler* v. *Wood*, 25 Maine, 287.

2. The plaintiffs never attempted to enter.

3. As to liabilities of tenants at sufferance, see Greenleaf's Cruise, vol. 1, title 9, c. 2.

RICE, J. — Assumpsit for use and occupation. To maintain this action the relation of landlord and tenant must subsist between the parties, founded on agreement express or implied. Taylor's Landlord and Tenant, 294; *Bancroft & ux.* v. *Wardwell*, 13 Johns. 491.

On the 18th of May, 1853, the plaintiff executed a lease of the premises occupied by the defendant to Lyman & Richardson, "To hold for the term of ten years from the first day of July, 1853," &c.

Before that time the defendant had been tenant at will of the plaintiff, and had paid rent to him for the premises. On the first day of July, 1853, the plaintiff presented the defendant a bill for rent for the months of April and May, which was paid, and informed defendant that he had leased the premises to Lyman & Richardson, who would collect the rent from June 1st.

As a lease for years is a mere chattel, it may be made to commence either presently, or at a future period, at a day to come, or at Michælmas next, or at three or ten years after, or at the happening of a certain event in the future. Taylor's Landlord & Tenant, 33; Woodfall's Landlord & Tenant, 71.

The term of Lyman & Richardson commenced on the first day of July, 1853. The relation of landlord and tenant subsisted between the plaintiff and defendant until that time, but not afterwards. The fact that the rent from the first of June was to be paid to, or was to go to the benefit of Lyman & Richardson, by an arrangement between them and the plaintiff, did not affect the legal liability of defendant to pay to the plaintiff until he ceased to be tenant of the plaintiff.

In England, since the statute of 4 Anne, c. 16, § § 9 and 10, if the lessor sells or transfers his legal estate and interest in the demised premises to a third party, and the lessee receives notice of the transfer, and is required to pay his rent to the transferee, and refuses, he is liable to an action for use and occupation, at the suit of the latter, though he has not attorned to him. *Lumby & al.* v. *Hodgdon*, 16 East, 104; *Birch* v. *Wright*, 1 T. R., 383; *Rennie* v. *Robinson*, 7 Moore,

531, (1 Bing. 147); Addison on Contracts, 710. Whether this same rule prevails in this State, it is not necessary for us now to determine.

The defendant must be defaulted, and judgment entered for the amount of rent accruing during the month of June, as per agreement.

TENNEY, C. J., and CUTTING, HATHAWAY and GOODENOW, J. J., concurred.

CHARLES H. HUDSON *versus* RICHARD T. CARMAN.

The *acceptance* of a charter creating a company must be proved by the best evidence in the power of the party relying upon it. The *books* of a corporation are the regular evidence of its doings.

If its records cannot be produced, an acceptance of the charter may be proved by implication from the acts of the company.

In an action to recover from an individual stockholder the amount of a creditor's execution against the corporation, the organization and existence of the corporation, if denied, must be proved. The judgment obtained may not be conclusive evidence of those facts.

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

This was an action of the case, claiming to recover against the defendant, under the provision of the 76th chapter of the Revised Statutes, as a stockholder in the Boston & Portland Telegraph Company.

The writ is dated August 7, 1854.

The general issue was pleaded with brief statement.

Plaintiff offered in evidence, writ *C. H. Hudson* v. *Boston & Portland Telegraph Company*, dated July 3, 1852. Record of judgment in same case rendered at S. J. C., Cumberland, October term, 1853. Execution issued on said judgment dated November 26, 1853; and an alias execution, for balance of $1704,33, dated August 1, 1854.

The plaintiff also introduced Stephen Berry, who testified that he had acted as clerk of the company, and identified its book of records. The book itself was then offered for the

purpose of showing from the records the first meeting and organization of the company, and the fact that defendant was a stockholder. But the presiding Judge ruled that the existence and organization of the corporation must first be proved by evidence *aliunde*, before the books of the corporation could be introduced in evidence, and that the records offered of the corporation itself, upon the proof offered, were not admissible to prove the fact of its own organization, in an action against the person alleged to be a stockholder.

Whereupon the plaintiff submitted to a nonsuit, subject to the opinion of the full Court, whether the above rulings were correct. If the evidence should have been admitted, or the rulings were erroneous, the nonsuit is to be taken off and the case stand for trial; otherwise, the nonsuit is to stand, and judgment to be entered thereon.

G. F. Shepley and Anderson & Harmon, for plaintiff.

The rule appears to be well settled, not only that the books of a corporation are the best evidence of the existence and organization of such corporation, but that the books are the only proper evidence of those facts. This rule is plainly founded in reason.

In Angel & Ames on Cor., c. 14, § 12, p. 471, "The books and minutes of a corporation, if there is nothing to raise a suspicion that the corporate proceedings have been irregular, will, of course, be treated and referred to as evidence of the legality of the proceedings. Thus the books are admissible to prove *the organization and existence* of the corporation." Again, c. 18, § 2, p. 573, "To prove the acts of a corporation, necessary to be done in order to their corporate existence, the books of the corporation, proved by the clerk or secretary, are competent evidence."

In *Coffin* v. *Collins*, 17 Maine, 442, WESTON, C. J., says, "The acceptance of the charter creating that company, (the Narragaugus Log Driving Company,) like every other controverted fact, is to be proved by the best evidence in the power of the party who relies upon it. The books of the corpora-

tion *are the regular evidence of their doings. Owings* v. *Speed & al.*, 5 Wheat. 420.

In *Owings* v. *Speed & al.*, 5 Wheat. 424, Chief Justice MARSHALL says, "There was also an exception taken to the opinion of the Court, in allowing the book of the board of trustees, in which their proceedings were recorded, and other records belonging to the corporation, to be given in evidence. The book was proved by the present clerk, who also *proved the handwriting of the first clerk* and of the president, who were dead. The trustees were established by the Legislature for public purposes. The books of such a body are the *best evidence* of their acts, *and ought to be admitted* whenever those acts are to be proved. There was no error in the opinion admitting them."

In *Sumner* v. *Sebec*, 3 Greenl. 223, it was decided that a book found in the hands of the acting town clerk, and purporting to be a record of the births and marriages in the town, is *prima facie* evidence of the facts it contains, though it may have no title or certificate or other attestation of its character.

In the case of *Ryder* v. *Alton & Sangamon Railroad Co.*, 13 Ill. 516; U. S. Dig. vol. 13, p. 141, § 161, it is said, "The books of a corporation are admissible for the purpose of showing the regularity and legality of its proceedings. They are sufficient to show *prima facie* that the pre-requisites of a statute have been complied with so as to give a corporation an existence."

F. O. J. Smith and *E. F. Hodges*, for defendant, contended that the plaintiff did not (as he might have done) offer any other proof of the organization than the book of records. It is admitted that the books of a corporation are admissible to show its organization, when they come before the Court exempt from suspicion, and are proved to be its records. But the defendant insists that the books offered at the trial were properly rejected by the Court, because before books are received "as the books of the corporation, there must be proof that they are the books of that corporation; that they have been

kept as its records; and that the entries made therein have been made by the proper acting officer for that purpose." *Whitman* v. *Granite Church*, 24 Maine, 236; *Coffin* v. *Collins*, 17 Maine, 442.

1. The plaintiff did not prove them to be the books of the B. & P. Tel. Co.

2. They came before the Court under circumstances of suspicion, and in such cases, even if they were the books of the company, they should have been rejected.

3. Both these are matters within the province of the Court to determine and are in no view for the jury.

TENNEY, C. J.—The plaintiff introduced the charter of "The Boston and Portland Telegraph Company," approved Aug 3, 1850, and advertisements in the Portland Argus and Advertiser, published in each three weeks successively, purporting to have been signed by Charles H. Hudson, one of the corporators, notifying a meeting of the persons named in the Act, to be held in Portland at a certain place on Nov. 5, 1850, to act upon the following matters:—1st, To choose a chairman and secretary of said meeting. 2d, To see if the persons named in said Act, will accept the same. 3d, To make choice of such officers, as may be authorized by law, for such corporations, &c.

The plaintiff then offered a certain book, and called Stephen Berry, who testified, that he was the acting clerk of the company and, as such, had the custody of the book offered and exhibited; that he had knowledge that the book was the one in which the records of the company are kept; that he received by mail the written appointment of clerk, *pro tem.*, signed by the president, which was read in the case. After this, he received the book of records from C. H. Hudson, and has since that time made entries therein, for the records of that corporation, as clerk of the same, and signed the entries as such; and has kept the book in the company's office, No. 58, Exchange Street.

After the foregoing evidence was adduced, the plaintiff

offered to introduce the book, for the purpose of showing, from the records, the first meeting and organization of the company, and that the defendant was a stockholder therein. The evidence was excluded, on the ground that the existence and organization of the corporation, must first be proved by evidence *aliunde*, before the books of the corporation could be introduced in evidence; and that the records offered of the corporation itself, upon the proof offered, were not admissible to prove the fact of its own organization, in an action against a person alleged to be a stockholder.

After a charter has been obtained by individuals from the Legislature, the acceptance thereof, from the nature of the case, must be preliminary to the process of organization. And it is not unusual at a meeting of the corporators, called and held according to the provisions of the charter, to commence their action by the choice of a chairman and secretary of the meeting; and upon that to take a vote upon the question, whether they will accept the charter or not. If the vote upon this question is in the affirmative, an organization takes place by the election of permanent officers, and other acts important to carry into effect the objects of the company, and a record thereof made.

The acceptance of the charter, creating the company, like every other controverted fact, is to be proved by the best evidence in the power of the party, who relies upon it. The books of a corporation are the regular evidence of its doings.

If books have not been kept, or have been lost or destroyed, or are not accessible to the party upon whom the affirmative lies, doubtless an acceptance of the charter may be proved by implication, from its acts, if such acts are capable of proof. *Coffin* v. *Collins*, 17 Maine, 440. The books are admissible to prove the organization and existence of the corporation. Angel & Ames on Corporations, c. 18, § 12.

In an action like the present, to recover against an individual stockholder the full amount of a creditor's execution and costs, obtained against the corporation, of which he may be a member, or a part of such execution and costs, it is necessary,

if required, that the existence and organization of the corporation should be established. The judgment obtained apparently against the company, may not be conclusive of such existence and organization, in an action to which he is a stranger. But the highest species of proof of these facts is as proper and as necessary in such action as for other purposes, where the existence and organization are required.

The existence and organization of the corporation was not required in this case to be proved by other evidence, than the records of the company.

The book does not appear to have been kept by Berry with all the care, which it is desirable that such records should be made; and it appears that he did not take the oath of clerk, yet there is nothing which renders it doubtful that he was the acting clerk of the company; that the book contained its records made before he received it; that those records touching the acceptance of the charter and the organization were sufficient; and that after it came to his hands, he made and signed the entries as records. We think the book should have been received as evidence on the question of organization of the company. 6 East, 368.

Exceptions sustained. — New trial granted.

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

DAVID DYER *versus* DANIEL BURNHAM.

The R. S., c. 148, § 47, provides that whenever a debtor shall willfully make a false disclosure, or withhold or suppress the truth, the creditor may commence a special action of the case against him, particularly alleging the false oath, and fraudulent concealment of such debtor's estate, or property, and on oath, before some justice of the peace, may declare his belief of the truth of the allegations in the writ and declaration; and the justice administering the oath shall certify the same on the writ. The debtor shall *thereupon* be held to bail.

This remedy has its foundation in the statute alone.

The required oath and certificate thereof by a justice of the peace, are necessary, to make the allegations in the writ and declaration effectual under the statute.

On Demurrer. The defendant in this action having made a disclosure of his property and taken the poor debtor's oath, the plaintiff, a creditor, commenced a special action on the case against him, under the provision of the Revised Statutes, c. 148, § 47. The declaration in the writ alleged, among other things, that the defendant had willfully made a false disclosure. The service was by summons, and no oath was taken by the plaintiff before a justice, as provided in the above chapter of the Revised Statutes, declaring "his belief of the truth of the allegations in the writ and declaration."

The defendant demurred to the writ and declaration, setting forth the following causes of demurrer:—

First.—The plaintiff did not, on oath, before some justice of the peace, declare his belief of the truth of the allegations in the writ and declaration, and no certificate of such a declaration by the plaintiff has ever been made on the plaintiff's writ by any justice of the peace.

Second.—It is not alleged in said declaration that the plaintiff was a creditor of the defendant at the time of the commencement of his said action.

Third.—Said declaration does not contain any phrase or word showing that the supposed acts of the defendant therein alleged, were committed against the statute.

Fourth.—And also that the said declaration is, in other respects, uncertain, informal and insufficient.

As the case turned upon the first assigned cause of demurrer, we omit the arguments of counsel upon the other points.

Shepley & Dana and *J. M. Hayes* for defendant contended:

1. Every material fact which constitutes the ground of the plaintiff's action, and all the circumstances necessary to bring his case within the statute, must be alleged in the declaration. Chitty's Pleadings, vol. 1, p. 255; *Drowne* v. *Stimpson*, 2 Mass. 441; *Williams* v. *Hingham Turnpike*, 4 Pick. 341; *Curtis* v. *Kidder*, 26 Maine, 97; *U. S. Bank* v. *Smith*, 11 Wheaton, 172.

2. Where a particular mode of proceeding is pointed out in a statute, that mode must be strictly observed. Oliver's Precedents, Notes, p. 527.

3. Section 47 of c. 148, R. S. points out a particular mode of proceeding, to be strictly pursued by the creditor who would maintain an action on the case based upon that section. He is required to "particularly allege the false oath and the fraudulent concealment of the debtor's estate or property, and on oath, before some justice of the peace, to declare his belief of the truth of the allegations in the writ and declaration," such oath to be certified on the writ by the justice administering it; and thereupon the writ is to be served—not in the ordinary way, by summons and attachment—but only by an arrest of the defendant, who shall be held to bail, or committed to jail to abide the judgment in the suit.

4. The plaintiff did not, on oath, before some justice of the peace, declare his belief of the truth of the allegations in his writ and declaration. The want of a legal oath has, in our practice, always been considered a sufficient cause for a demurrer, or its equivalent, a motion in arrest in criminal proceedings.

In *Fogg* v. *Fogg et al*, 31 Maine, 302, a demurrer to a plea in abatement not properly verified by the oath of the defendant, was sustained. The defendant's counsel contended that the demurrer was to the plea only, but the court decided that the verification was an essential part of the plea.

John Rand, for plaintiff, argued on the first point in demurrer, that the oath was necessary only when the plaintiff wished to *arrest* the defendant.

TENNEY, C. J.—Section 47 of c. 148, R. S., under which this action is sought to be maintained, provides, that whenever a debtor authorized or required to disclose on oath, by the provisions of the chapter referred to, shall willfully disclose falsely, or withhold or suppress the truth, the creditor may commence against such debtor a special action of the case, particularly alleging the false oath, and fraudulent concealment of such debtor's estate or property, and on oath, before some justice of the peace, may declare his belief of the truth of the allegations in the writ and declaration, and the

justice administering the oath, shall certify the same on the writ; and thereupon the debtor shall be held to bail, &c.

This remedy has its foundation in the statute alone. The kind of action, the substance of the declaration and the verification of the truth of the allegations therein touching the false oath, to be certified upon the writ, and the mode of service of the same upon the debtor, are prescribed. In the following section, it is provided what judgment shall be rendered, and how execution thereon shall be enforced, if the creditor prevail in such suit. The word "thereupon" in the section invoked, to sustain this action, following immediately the requirement of what shall be the allegations in the writ and declaration, and the oath of the belief of their truth by the creditor certified thereon, according to grammatical construction and rules of punctuation, refer equally to the allegations and the required evidence of their truth, as essential to the suit to be instituted under the statute. A writ must conform to this requirement of the statute before the debtor can with propriety be called upon to answer thereto, by a mode of service which is imperative, and for which no substitute is provided.

It is insisted in behalf of the plaintiff, that the oath required by the provision is intended only as authority to hold the debtor to bail. On this construction, the whole design of the Legislature herein was, that in a writ, charging the debtor in effect with the crime of perjury, the creditor by the arrest might secure the body, to be taken on execution, and that too, without any declaration of a belief that a departure from the State was apprehended, and when in every other action, not founded upon a contract, &c., and in which no moral wrong might be certainly involved, the power to arrest and hold to bail was unlimited. Same chapter, § 9.

The language used in the statute was most manifestly designed not to have this limited application. But the purpose undoubtedly was, that the creditor should not institute the suit against his debtor under this provision, to be followed by such consequences if maintained, when the disclosure, sworn

to by the latter, until met by the oath of the former that he believed it untrue, might be presumed to be founded in truth.

The oath required is necessary to make the allegations in the writ and declaration effectual, under the statute. Opposed as they are to the oath of the debtor, without the verification required, they are a nullity. They become material only in the mode specified.

In the case before us, there is no oath of the creditor certified upon the writ by a justice of the peace, of his belief of the truth of the allegations in the writ and declaration, and the declaration is fatally defective in this respect. The admission of all the facts well pleaded by the demurrer, does not give the plaintiff a right of action under the statute relied upon. The case of *Fogg* v. *Fogg*, 31 Maine, 302, is in point, and the want of the certificate of the oath upon the writ, is similar to a want of verification of the facts alleged in a plea in abatement.

Other causes of demurrer are stated, but the result to which we come upon the cause renders consideration of the others unnecessary, and no opinion is indicated thereon.

Demurrer sustained.—Declaration adjudged bad.

RICE, CUTTING, and HATHAWAY, J. J., concurred. GOODENOW, J., dissented, and gave the following opinion:—

GOODENOW, J. — This is an action on the case. The writ is dated, the 22d day of October, 1851, and was returnable on the second Tuesday of November, 1851. The action was duly entered and continued from time to time until the January term, 1856, when the defendant put in a demurrer to the declaration, and alleged, "that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, &c.," and prays judgment, "by reason of the insufficiency of said declaration in this behalf," and "that said plaintiff may be barred from having and maintaining his aforesaid action," &c.

"And the said defendant states and shows to the Court

here the following causes of demurrer to the said declaration —that is to say—that, *First*, the plaintiff did not, on oath before some justice of the peace, declare his belief of the truth of the allegations in the writ and declaration, and no certificate of such declaration by the plaintiff, has ever been made on the plaintiff's writ by any justice of the peace.

Second, It is not alleged in said declaration that the plaintiff was a creditor of the defendant at the time of the commencement of his said action.

Third, Said declaration does not contain any phrase or word showing that the supposed acts of the defendant, therein alleged, were committed against the statute.

Fourth, And also that said declaration is in other respects, uncertain, informal and insufficient." To this demurrer there is a joinder.

For ought that appears there was a general appearance entered for the defendant at the term at which the writ was returnable. This is to be presumed. No plea in abatement, or motion in abatement for matter apparent on the record, was ever filed. The return of the officer of service upon the writ has not been furnished to us; but it was admitted at the argument, to have been a service made by summons and attachment, and not by arresting the body of the defendant.

When there has been no legal service of a writ, and the defect is apparent on the record, the Court will abate it *ex officio;* or when it appears on the record that the Court has no jurisdiction of the case, or that there is a substantial defect in the writ.

The original writ may be framed either to attach the goods or estate of the defendant, and for want thereof to take his body; or it may be an original summons, either with or without an order to attach the goods or estate. R. S., c. 114, § 23. When goods or estate are attached on either of said writs, a separate summons in form by law prescribed shall be delivered to the defendant or left at his dwelling-house or place of last and usual abode, fourteen days before the sitting of the Court, to which the said writ is made returnable,

which shall be sufficient service of the writ or original summons. § 24.

The writ, in this case, commanded the officer to attach the goods or estate of the defendant, and to summon him to appear, &c. It is not denied and cannot properly be denied in the discussion of this question, that such service was made.

But it is contended, on the part of the defendant, that the defect goes deeper and destroys the foundation of the action. It may well be doubted whether this question can properly arise upon the demurrer, and whether the defendant should not have pleaded the fact, instead of demurring, or have made his motion to the Court to abate the writ for matter apparent upon the record.

But it may be for the interest of both parties to know the opinion of the Court upon this question, and others which have been made.

The action is founded on § § 47, 48, of c. 148, of the Revised Statutes; which are as follows:—"Whenever a debtor authorized or required to disclose on oath by the provisions of this chapter, shall willfully disclose falsely, or withhold or suppress the truth, the *creditor* may commence against such debtor, whether otherwise criminally prosecuted or not, *a special action on the case, particularly alleging the false oath and the fraudulent concealment of such debtor's estate or property*, and on oath before a justice of the peace may declare his belief of the truth of the allegations in the writ and declaration, and the justice administering the oath shall certify the same on the writ; and thereupon the debtor shall be held to bail, or in default thereof, committed to jail to abide the judgment in the suit."

It is contended, on the part of the defendant, that this oath must be made by the plaintiff, and certified on the writ; and that the service of the writ must be made in this way, by holding the defendant to bail, or in default thereof, committing him to jail, to abide the judgment in the suit; *and that legal service can be made in no other way.* If this is the law, the plaintiff must ultimately fail in the suit, as it is not pretended that this was, in fact, done; and the writ itself does

not allow it to be done. It does not command the officer to arrest the body of the defendant. If this is a defect, it is a fatal defect, apparent upon the record, incurable by an amendment.

But is such the law? Is it to be presumed that it was the intention of the Legislature to take from the creditor any of the means of collecting his debt? Why should they not permit him to proceed still, if he prefers to do so, against the property of his debtor, in this special action on the case, and after recovering a judgment, and failing to obtain satisfaction of it, from the property, proceed against the body of the debtor? Section 48 provides, "If the creditor prevail in such suit, judgment shall be rendered against such debtor for double the amount of the debt and charges on the former judgment; and the *debtor may be arrested and committed to prison* on any execution issued on the judgment last recovered, without any privilege of release or discharge, except by payment or the consent of the creditor."

What was the object of requiring the oath of the creditor to be made, and certified on the writ? Simply to allow him, if he chose, to arrest the body of the debtor on the writ, instead of attaching property. But it is said that he had this power before; that the ninth section, c. 148, provides, 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, and he may be thereon arrested or imprisoned, or he may give bail.

It will not be contended that *shall* here means *must*. This Court has decided that by virtue of this section, a plaintiff's writ in any action, not founded on contract or a judgment on such contract, may run against the body of the defendant, and be served by his arrest, or not, at the pleasure of the plaintiff.

The Legislature may have considered this as a remedial statute, substituting a new process to collect a debt, instead of an action of debt upon the judgment, and therefore questionable whether it did not grow out of a contract, or a judgment

on such contract; and to remove all doubt on that question, they may have provided specially that the body of the debtor might be arrested on the writ, if the preliminaries of an oath, by the creditor, and a certificate of the same upon the writ, were complied with. Or they might have intended, if the action was "not founded on contract, or upon a judgment on such contract," for good reasons, to make it an exception to the general rule; and not allow the debtor to be arrested in this special action of the case, after he had sworn to the truth of his disclosure, unless the plaintiff would first make oath "and declare his belief of the truth of the allegations in the writ."

In a trial of this action upon a plea of not guilty, it cannot be well doubted that something more than the testimony of a single witness would be necessary in order to authorize the jury to find a verdict for the plaintiff.

No one will question the soundness of the doctrine contended for, and the authorities cited by the counsel for the defendant, on this point. 2 Greenl. Ev. § 426; *Cook* v. *Jackson*, 6 Vir. 40; *Langhear* v. *Kelley*, 8 Cush. 199; *Page* v. *Smith*, 25 Maine, 256. But we do not consider it applicable to the question under consideration. The oath of the plaintiff, if duly made and certified upon the writ, could not have been used by him in a trial before the jury, or have had any weight, or have been considered by the jury, as furnishing a scintilla of evidence in proof of the allegations in the writ.

The whole proof necessary must have come from other sources, or the plaintiff must have failed in his suit to have obtained a verdict in his favor. Where the reason ceases the law ceases. And when we take into view the object of the provision which authorizes the plaintiff to declare his belief of the truth of the allegations in the writ and declaration, and to have the same certified upon the writ, we cannot regard the same as indispensable to the maintenance of the action.

In the case of *Fogg* v. *Fogg*, 31 Maine, 302, cited by the counsel for the defendant, the plea in abatement was not

verified by affidavit, as required by a rule of the Court, and was, for this cause, adjudged bad. We regard that case as entirely different from this.

The right to arrest the body, is a privilege given to the *plaintiff*, and not to the *defendant*. It is to be presumed, that the defendant would always prefer that the plaintiff should adopt that course, in enforcing his claim, which would be least oppressive. The policy of the law is to encourage this. The law is not vindictive. An officer is obliged to take sufficient bail when it is tendered. The personal liberty of the citizen is not to be wantonly or unnecessarily invaded. He is entitled to his liberty unless he has forfeited it by crime or fault of some kind. The law will not presume he has sworn falsely or made a false disclosure, or fraudulently concealed his property. And although it gives the plaintiff an additional remedy of an action on the case, it will not allow the plaintiff to cause the defendant to be arrested, unless the plaintiff will first neutralize by his own oath, the presumption which arises in favor of the defendant from his oath. What is accomplished by the arrest of the defendant in a case like this? Simply the security of his appearance to respond the judgment which may be recovered.

He does not necessarily go into close confinement. He can give bail as in other cases. The bail have the same rights to be discharged upon performing the conditions of the bond, as bail have in other cases. And when the judgment is rendered, if it is rendered for the plaintiff, execution will run against the goods and estate of the defendant, and for want thereof against the body, as in all other cases, and can be satisfied by money or other property, and will not absolutely and imperiously require the imprisonment of the defendant, as if he had been convicted of a crime. If he has committed a crime, he is still liable to be punished for that by a public prosecution. This is not a substitute for that.

It may as well be contended, that the *execution* can run only against the body, as that the *writ must* run *only* against

the body. It is not easy to perceive, why one proposition does not follow from the other. If the Legislature could have intended such an entire change of the process from beginning to end, to favor not liberty but oppression, we think they should have declared it most unequivocally.

2d. "It is not alleged in said declaration that the plaintiff was a creditor of the defendant at the time of the commencement of his said action."

The declaration alleges that the plaintiff recovered judgment against the defendant, and that execution was issued on that judgment, and that the defendant was arrested on that execution, and gave bond to disclose; and that he did disclose; and that upon such disclosure he did willfully disclose falsely, and withhold and suppress the truth; and that upon said disclosure the said justice allowed the said Daniel Burnham the poor debtor's oath required by law, and then and there administered the same to him, and then and there discharged him from his arrest and imprisonment.

And the plaintiff avers that, by reason of said willfully false disclosure of said Burnham, and his willfully withholding, suppressing and concealing the truth upon such disclosure, concerning his estate, an action hath accrued to him to have and recover of the said Burnham double the amount of the debt and charges on the former judgment; yet the said defendant, though requested, has not paid the same, but neglects to do so. The statute gives this action to the creditor, and only to the *creditor in the execution* upon which the defendant has disclosed. It is unlike the case in § 49, which gives an action "to *any creditor who may sue for the same*, in double the amount of the property so fraudulently conveyed." The Court might well hold, as they did hold, that, in a case under this last named section, the plaintiff must be a creditor at the time of the fraudulent concealment and transfer, and that he must continue to be a creditor up to the time of bringing his action, &c. *Thacher* v. *Janes*, 31 Maine, 528.

The writ and declaration allege that another writ of execution was sued out by the plaintiff against the defendant

and Fields, on the 2d of April, 1851, on which the defendant was arrested, &c. The presumption of law is, that the debt was unpaid at that time; otherwise, the execution could not properly have been issued; and that it was unpaid at the time of the arrest, and also at the time of the disclosure of Burnham.

On the 6th of June, 1851, the defendant made an application to a magistrate to issue a citation to the plaintiff, as his *creditor*, to appear, &c. And the return of the officer upon the citation shows that service was made upon Wm. Willis, as one of the attorneys of record of the said David Dyer. And the declaration alleges that the defendant was discharged from his arrest and imprisonment, not by paying the debt, but by taking the poor debtor's oath, &c.

The wrong then done by the defendant, in taking the false oath and by the fraudulent concealment of his property, as alleged in the declaration, was a wrong done to the *plaintiff, and to him alone, and vested in him, and in him alone,* a right of action under this 47th § of the statute. The statute qualifies him to sue, and him alone, and instantly.

The cases cited, of *Eustis* v. *Kidder*, 26 Maine, 97, and *Williams* v. *Hingham Turnpike Co.* 4 Pick. 341, are essentially unlike the case at bar.

It was held, in *McGee* v. *Barker*, 14 Pick. 216, not necessary to aver that by force of any law of the Commonwealth, the indorsee of a writ became liable; "the statute is a general law, to be taken notice of without being specially pleaded. It is sufficient to aver the facts which bring the indorser within the operation of the statute, without stating in terms the liability, which is an inference of law."

There is nothing in the case on which to found a presumption that the demand has been assigned, either before or since the alleged false disclosure.

Whenever one person sues and recovers judgment in his own name, for the benefit of another, he, being plaintiff on the record, is regarded in every respect as the judgment

creditor, unless it is otherwise provided by statute. *Follansbee* v. *Bird & al.* 8 Cush. 291.

If it appeared in fact that the demand had been assigned, we are of opinion that the assignment would carry with it all the remedies, with the right to pursue them, one and all, in the name of the assignee: "because the legal interest in such chose in action is still in him, and the assignee has only an equitable interest in it."

3d. It is not alleged in the declaration, that the action is founded on any statute. We do not regard this statute as technically a penal statute, but as remedial, providing for giving to the plaintiff double the value of his demand, for the aggravation of the injury done him, by the wrongful oath and concealment of the defendant. *Reed* v. *Northfield*, 13 Pick. 101; 16 Pick. 541; 16 Pick. 128; *Mansfield* v. *Ward*, 16 Maine, 435, and cases there cited by SHEPLEY, J.; *Quimby* v. *Carter*, 20 Maine, 218; *Philbrook* v. *Handley*, 27 Maine, 53; 31 Maine, 532. When the sum to be recovered, is given to the *party grieved* only, the statute is remedial. 2 T. R. 148. No indictment shall be quashed, now, in this State, by reason of the omission of the words "contrary to the form of the statute," unless the defendant has been thereby prejudiced. R. S., c. 172, § 38. We are of opinion that a recovery of judgment in this action would extinguish the right of the plaintiff to an action of debt on the original judgment, and might be pleaded in bar of such action, if one should be commenced. The fourth alleged cause of demurrer does not seem to have been at all relied upon by the defendant at the argument. The writ is adjudged good.

This judgment must be final, (unless the defendant can or will avail himself of relief from it, under the provisions of a recent statute of this State,) and for the amount claimed by the plaintiff, being "double the amount of the debt and charges on the former suit."

THOMAS SHAW *& al. versus* ISAAC L. USHER.

In an oath by a creditor, on mesne process, under the Revised Statutes, c. 148, § 2, it is insufficient to declare that the debtor is about to depart, &c., "with property or means," &c., omitting the declaration required by the statute, that he is "to *take with him* property," &c.

When an arrest has been made on such insufficient oath, the action should be dismissed for want of legal service.

The motion for dismissal must be made in season.

The objection may be made to appear by a plea in abatement.

But the defendant must be considered as waiving his objection after a general appearance and a continuance of the action to the next term.

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

This was an action of assumpsit. There was a general appearance for the defendant at the return term. At the next succeeding term, the defendant's counsel moved to have the writ dismissed for want of a sufficient affidavit for arrest. The Court overruled the motion, to which the defendant excepted.

The affidavit declared, that the alleged debtor was "about to depart and reside beyond the limits of this State with property or means exceeding the amount required for his own immediate support," &c.

Rand, for plaintiffs.

Shepley & Dana, for defendant.

This was an action of assumpsit. The writ was a capias, founded on the 2d § of c. 148, of the Revised Statutes.

The writ was insufficient and improper for the trial of the cause.

Chapter 148, § § 1 and 2, R. S., points out the only case in which the defendant may be lawfully arrested in actions founded upon contract, and the steps necessary to be taken before such arrest can be made; namely, when he is about to leave the State, and carry with him means and effects of his own, exceeding the amount required for his immediate support. But this arrest is always contingent upon the proviso in the 2d § of the same chapter, that "the creditor, his

agent or attorney shall make oath before a justice of the peace, to be certified by such justice on the said process, that he has reason to believe, and does believe that such debtor is about to depart and reside, and to take with him property or means as aforesaid; and that the demand in the said process, or the principal part thereof, amounting to at least ten dollars, is due to him."

This affidavit is the foundation of the action. Without it, the capias has no validity, and the writ is, in effect, no writ at all, neither a summons, a summons and attachment, nor a capias.

The affidavit made upon the writ in this action is insufficient, because it does not state in express terms that the property which the debtor intended to take with him beyond the limits of the State was his own. *Furbish* v. *Roberts*, 39 Maine, 104; *Bramhall & al.* v. *Seavy*, 28 Maine, 45.

The motion of defendant's counsel was proper. The defect, being apparent upon the record, could be taken advantage of at any time upon motion, before pleading to the action. *Clapp* v. *Balch*, 3 Maine, 216; *Cook* v. *Lathrop*, 18 Maine, 260.

An omission to take advantage of matters in abatement, within the time limited by the rules, is no waiver of objections to defects in the process not amendable. *Bailey* v. *Smith*, 12 Maine, 196; *Tibbetts* v. *Shaw*, 19 Maine, 204.

CUTTING, J. — According to the decision in *Bramhall* v. *Seavey*, 28 Maine, 45, the oath, as certified by the justice on the process, was clearly insufficient to have authorized the arrest of the defendant. It omitted one of the essential requirements imposed by the 2d § of R. S., c. 148, to wit, "*and to take with him property or means*," exceeding the amount required for his own immediate support.

And, according to the decision in *Furbish* v. *Roberts*, 39 Maine, 104, the action should have been dismissed for want of legal service, had the motion in this, as in that case, been seasonably made.

But it was decided, in *Cook* v. *Lothrop*, 18 Maine, 260, that, although the writ run against the body of the defendant, which was not warranted by law, yet the objection should be made to appear by a plea in abatement, or, appearing on the face of the writ, by a motion made in season. It is an objection that the defendant may waive, which must be considered as done, after a general appearance and a continuance of the action to the next succeeding term.

Exceptions overruled.

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

MELVILLE B. C. FILES *& ux.*, *versus* HARRISON MAGOON.

An action of *trespass on the case* is maintainable by the owners of the fee against a tenant at will for acts prejudicial to the inheritance.

ON FACTS AGREED.

TRESPASS ON THE CASE, for injury by the tenant to premises during tenancy.

Anderson & Harmon, for plaintiffs, contended that, at common law, *trespass on the case* was the right form of action, and cited numerous and pertinent authorities to the point; but, if not at *common* law, the Revised Statutes, c. 115, § 13, had fully authorized such form.

S. & D. W. Fessenden, for defence.

CUTTING, J.—The question presented is, whether the plaintiffs, the owners of the fee, can maintain this action of *trespass on the case* against the defendant, their tenant at will, for acts prejudicial to the inheritance.

In *Starr* v. *Jackson*, 11 Mass. 519, it was decided, that trespass *quare clausum fregit* was an appropriate remedy in such cases. That opinion has called forth very able and learned discussions in relation to its accuracy, among which is that of the distinguished Orr, in our own Reports; and

there are numerous authorities, ancient and modern, tending to establish a contrary doctrine.

But the same Court, in *Lienow* v. *Richie*, 8 Pick. 235, upon a similar state of facts, sustain an action *on the case*, remarking that the case of *Starr* v. *Jackson* affirms this doctrine, and *only* decides that trespass *may* be maintained by the landlord, when the lessee is only tenant at will; not that case, even under those circumstances, would not lie.

The distinction is acknowledged by its most learned advocates to be merely technical; and it is not denied that equal justice may be done to the parties, under either form of action.

Action to stand for trial.

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

CHARLES W. FREELAND *& al. versus* JAMES H. PRINCE *& al.*

A deposition taken out of the State, by a person lawfully empowered to take it may be admitted or rejected by the Court at its discretion, though it may not, in all respects, conform to the technical requirements of the statute.

The extent of this discretion has never been defined; but the practice has been to admit such depositions when the presiding Judge is satisfied that there has been a substantial compliance with the statute.

Such a deposition may be admitted or otherwise, at the discretion of the Court, though it does not appear by the caption, that the deponent was duly sworn before deposing.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL, from *Nisi Prius*, DAVIS, J., presiding.

This was an action of the case against the defendants as common carriers. The defendants excepted to the ruling of the presiding Judge admitting a deposition, the caption of which did not show that the witness was sworn before giving his testimony.

J. H. Williams, for plaintiffs, contended that the deposition was admissible.

R. S., c. 133, § 22; *Wight & al.* v. *Stiles*, 29 Maine, 164; *George* v. *Nichols*, 32 Maine, 179.

Shepley & Dana, for defendants.

The deposition of Horsley was inadmissible.

R. S., c. 133, § 15, prescribes the manner of administering the oath to witnesses. It provides that they shall be sworn to testify the truth relating to the cause or matter for which the deposition is to be taken.

In *Parsons* v. *Huff*, (in Boston Law Reporter, Dec., 1855,) the Court decided that the omission of the magistrate, to certify that the oath was to testify relating to the cause or matter for which the deposition was to be taken, was a fatal defect; that the omission deprived the other party of all the safeguards intended to be provided by an oath; that the witness so sworn could not be indicted for perjury, &c.

The caption in this case shows indeed a defect, which, as it might properly come within the discretion of the Court, was not objected to, and yet it is not a compliance with our statute.

The provision in § 22, that depositions taken out of the State may be admitted or rejected by the Court at their discretion, is intended to further justice by allowing depositions taken out of the State to be read, even though the captions do not show that all the requisites in depositions taken here have been complied with.

But this discretion is not intended to be unlimited or unbounded. There are some things which the Court has not power to overlook or overrule. To come within the statute, there must be some kind of a *deposition*. Bouvier defines the word as the "testimony of a witness reduced to writing in due form of law," and on turning to *testimony* we find it to be "the statement made by a witness under oath or affirmation."

Now the Court have decided, in the case above cited, that an oath like that administered to this deponent is not such an oath as is required by the statute. It was not a deposition, but the mere statement of the witness.

RICE, J.—The case comes up on exceptions and motion to set aside the verdict on the ground that it was rendered against the evidence, &c. The motion is not relied upon, and not being accompanied by a report of the evidence, certified by the presiding Judge, cannot be considered.

The defendants objected to the admission of the deposition of J. J. Horsley, taken in Boston, Mass., before a justice of the peace and commissioner of the State of Maine. The adverse party was duly notified to attend the taking of said deposition, and did attend. The objection to the deposition, relied on, is that the caption does not show that the deponent was sworn to testify the truth, the whole truth, and nothing but the truth, *relating to the cause or matter for which the deposition was to be taken*, before giving his deposition. To show that this is essential, the case of *Parsons* v. *Huff*, 38 Maine, 137, is relied on.

This deposition was taken out of the State. R. S., c. 133, § 22, provides, that depositions taken out of the State, by a justice of the peace, or notary public, or other person lawfully empowered to take depositions, may be admitted or rejected by the Court, at their discretion.

When depositions are taken within the State, the law requires certain facts to be stated in the caption, and gives the Court no discretionary power by which depositions may be admitted in which the caption is defective. Magistrates living within the State are presumed to know the law, and are expected to conform to its requirements.

But the Legislature, acting upon the supposition that magistrates living without the State, may not be as well acquainted with the technical requirements of our statutes, entrusted the Courts with discretionary power to admit depositions taken out of the State, though the caption may not be, in all things, in conformity with the statute requirements.

The extent of this discretion is undefined. Under it the practice has been to admit depositions taken out of the State by competent persons, in all cases where the presiding Judge is satisfied that there has been substantial compliance with

the statute; where the deposition was fairly taken, and the adverse party was present, or had reasonable notice, and an opportunity to be present, and where there is no reason to believe that the party taking the deposition, the magistrate or the deponent have conducted improperly in the matter, though the caption may not be, in all respects, technically correct.

In the case of *Parsons* v. *Huff*, 38 Maine, 137, the caption recited that the deponent was "first sworn to testify the truth, the whole truth, and nothing but the truth," but the words "*relating to the cause or matter for which the deposition is to be taken*," were omitted, and the omission was held to be fatal.

So too in *Brighton* v. *Walker*, 35 Maine, 132, a deposition was held inadmissible, because the caption did not show, that the deponent was duly sworn *before* giving his deposition. In those cases, however, the depositions were taken within the State.

But it has been decided that a deposition taken out of the State may be admitted, at the discretion of the Court, though it does not appear by the caption, that the deponent was duly sworn before deposing. *Wight & al.* v. *Stiles*, 29 Maine, 164; *George* v. *Nichols*, 32 Maine, 179.

We think the case at bar, like the cases cited, falls within the discretionary power of the Court, and there being no suggestion that the defendants have suffered from the defect in the caption alluded to, or that the deposition was not fairly taken, we are of the opinion that the Judge exercised a sound discretion in admitting it.

Motion and exceptions overruled.

TENNEY, C. J., and GOODENOW, HATHAWAY, and CUTTING, J. J., concurred.

YORK & CUMBERLAND RAILROAD CO. *versus* JOHN G. MYERS.

The equity powers of this Court are limited to those conferred and enumerated by statute.

The wrongful possession and conversion of the property of a corporation does not differ from any other trespass or tort, for which the sufferer has a remedy at law.

Where a mortgagee advertises to sell and convey the mortgaged property, "to the full extent of the powers derived to or by him under and by virtue of said deed, and *not otherwise*," he proposes only to exercise a legal right.

If his deed does not authorize him to sell, then he can convey nothing, and no injury could be sustained by the mortgagers.

In such case this Court will not grant an injunction to restrain the mortgagee.

BILL IN EQUITY. The plaintiffs allege that the defendant has, under pretence of authority under a certain deed of mortgage held by him, attempted to take possession of the railroad of the corporation, the plaintiffs' personal property pertaining to the same, and all the corporate franchise, and that he now claims that he has possession, and has divested the corporation of its corporate powers, putting an end to its corporate existence, and that he has interfered with the management of the trains, and removed officers appointed by the directors; that he has advertised the railroad and all the other property, with certain exceptions, for sale at auction.

A description of the mortgage deed, with other facts in the case, sufficient to make clear the points decided, are found in the opinion of the Court.

The bill prays that the defendant may be enjoined from attempting to make any sale of the property mentioned in the mortgage, until his right to do so, and the extent of his rights are established by judgment of Court; that he be required to give sufficient security to apply any income of the road which may come to his possession to the payment of the bonds, and interest thereon, and to indemnify the corporation and the stockholders from any damage by his negligence, and the negligence of his servants, before he take or attempt to take any possession of the property of said corporation, and also to indemnify the corporation against the contract to carry

the mail, and the payment of the first issue of bonds and coupons.

The case was heard on demurrer to the bill.

J. C. Woodman, for plaintiff.

I. It appears by the bill, that defendant is a trustee for the bondholders, and that the bonds have been alienated by defendant, and separated from the mortgage. That in such a case, the mortgagee becomes trustee for the holders of the personal securities so sold and separated, is well settled. 2 Story's Eq. 1016; *Haines* v. *Wellington,* 25 Maine, 458; *Johnson* v. *Candage,* 31 Maine, 30; *Parsons* v. *Wells,* 17 Mass. 425; *Cram* v. *March,* 4 Pick. 131; *Smith* v. *Kelley,* 27 Maine, 240.

II. The case finds Myers in possession. The mortgagee in possession is trustee for the mortgager. 2 Story's Eq. § § 1013, 1015, 1016.

III. If the Court is satisfied that there is danger of a misapplication or waste of the trust property, it can intervene by the appointment of a receiver, or by requiring sufficient security for the protection of the trust funds. 2 Story's Eq. § § 827, 828, 829, 831, 835, 845, 846, 847; R. S., c. 96, § 10 and 11.

IV. The mortgagee is trustee for the bondholders primarily, and secondly of the corporation, who have an interest in various points of view. 4 Kent's Com. 140; 2 Story's Eq. § § 1024, 1025.

V. The Court favors the right of redemption. 2 Story's Eq. § 1019; 4 Kent's Com. 252, 253; *Seton* v. *Slade,* 7 Ves. 273; *Heldridge* v. *Gellespie,* 2 Johns. 30; 2 Cow. 324, 331.

The bill alleges, and it is admitted, that the president and directors had not authority to mortgage the property to secure the construction contract; that Myers has recovered judgment against the corporation for more than $170,000 for breach of construction contract; and that defendant threatens to sell the whole property, and apply the same to pay his own private debt. In such case, it is the duty of the corporation to interfere. *Kingsley* v. *Ames,* 2 Met. 30.

VI. It is alleged and admitted, that the corporation is

obliged to carry the U. S. mail, by contract and by law. See charter of the company, § 12. There is nothing binding on defendant to carry the mail, and the Court should not allow him to take possession of the road till assurance is given that the mail will be carried.

VII. The injunction prayed for ought to be granted.

1. The bill alleges, and the demurrer admits, that the construction contract of Aug. 5, 1850, as modified Feb. 6, 1851, was not embraced in the mortgage. The clause, "and if said contract shall also be fully performed in all other respects, then this deed," &c., it is alleged in the bill, and admitted by the demurrer, was inserted in the mortgage without authority.

The clause referred to is inconsistent, also, with all the remainder of the deed, and should be rejected for repugnancy. See rules for construction of deeds, 1st to 8th, 1 Shep. Touch. pp. 86 to 88; *Vose* v. *Handy*, 2 Greenl. 332; *Keit* v. *Reynolds*, 3 Greenl. 393; *Wing* v. *Burgess*, 11 Maine, 111.

2. Myers had no authority to take possession under the actual conditions of the mortgage. There was no breach of those conditions. The bonds themselves were never presented for payment, and the certificates, called coupons, were not negotiable, were issued without consideration and without authority, and are not payable at all.

It is alleged in the bill, that the railroad bed, &c., are real estate. The property in the mortgage is partly real and partly personal estate. The mortgage cannot be foreclosed in less than three years after breach, and the mortgagee has no power under the deed to sell.

Most of the personal property was purchased after the mortgage, and has been mortgaged to other persons, who have taken possession. Of this there is no doubt, and the demurrer admits it. *Jones* v. *Richardson*, 10 Met. 481; *Barnard* v. *Eaton*, 2 Cush. 294; *Codman* v. *Freeman*, 3 Cush. 306.

Every thing that springs out of the land in this case is real estate. R. S., c. 1, art. 10, § 3; R. S., c. 81, § § 2, 3, 6, 7;

Charter of Y. & C. Railroad, § § 1, 2, 5, 15; Stat. 1845, c. 159, § 3; *Ib.* c. 165, § 1; R. S., c. 1, art. 10, § 3; 2 Kent's Com. 275; *Boston W. P. Co.* v. *Worcester Railroad Co.*, 23 Pick. 392, 393.

3. It is alleged, and admitted by the demurrer, that the charter is inalienable without the consent of the State. Mr. Woodman cited and commented on the following statutes: — The charter, § § 1 to 19; R. S., c. 81, § § 1 to 21, 24; Stat. of 1842, c. 9, § § 1 to 6; Stat. of 1845, c. 165, § 3; Stat. of 1846, c. 197, § 4; Stat. of 1849, c. 145, § § 1, 2; Stat. of 1845, c. 171, § § 1, 2; Stat. of 1852, c. 220, § 1; *Ib.* c. 247, § 1; Stat. of 1853, c. 44, § § 1 to 5; *Ib.* c. 41, § § 1 to 4, 9, 10, 11, 18, 19, 20; Stat. 1854, c. 93, § § 1, 2; *Ib.* c. 107, § 1; Stat. of 1855, c. 161, § § 1 to 7; R. S., c. 117, § § 20 to 23.

VIII. The deed conveys no legal estate to any bondholder, and no more to Myers than to any other bondholder. It gives him a legal estate in trust for the bondholders. If one bondholder could sell, all could, and all could sell on the same day.

IX. The defendant having no right of entry, and no power to make the sale, the injunction ought to be made perpetual, to prevent litigation, to prevent waste, and contingently, to avoid an irreparable injury, and for various other causes. R. S., c. 96, § § 10, 11; 2 Story's Eq. § § 901, 928, 905, 906, 907, 908, 977, 978, 1225, 1287, 826, 954, 914, and authorities there cited. Mr. Woodman examined these authorities, and enforced his views at length.

F. O. J. Smith, for defendants.

I. The plaintiffs are estopped of all rights to the relief prayed for, by their deed of mortgage and trust to the defendant.

II. The operation of the deed so made, vested the legal title of the property it describes solely in said Myers, subject only to two conditions of defeasance; but for the benefit of himself and "his assigns, who shall become the holders of the bonds and coupons."

III. The stipulations and covenants of the deed reserve

specially "the possession and uses of said premises," to the grantors, so long as payment shall be made of the bonds and coupons; but, upon failure thereof, for the term of sixty days, the holder of said bonds, or any one or more of them, is authorized to take possession, for the common benefit of the holders of all the bonds.

Under this power, while it is competent for any unpaid bondholder to take possession, &c., the *legal* title, being in defendant, must proceed from him.

The plaintiffs claim to enjoin the defendant in the execution of a trust he is now endeavoring to execute, for the benefit of himself and the bondholders.

Equity will not interpose an injunction upon a mortgagee in possession, if he can swear that any thing is due to him upon the mortgage. Eden on Injunctions, 1st Am. Ed. p. 219; *Quarrell* v. *Bickford*, 13 Ves. 378; *Cholmondely* v. *Clinton*, 2 Jac. & Walk., 1 to 189; 2 Story's Eq., § 1013, note 3; *Parsons* v. *Welles & als.*, 17 Mass. 419.

IV. It is denied, that defendant has any rights as mortgagee, except in his fiduciary capacity.

Our answer is, that the deed to defendant is conditional, (1) to pay bondholders, and (2) to perform the contract "in all other respects."

As to the principles governing in the construction of contracts, we cite Willes' R. 332; 2 Comyn on Contracts, 534; *Patrick* v. *Grant*, 14 Maine, 233; *Chase* v. *Bradley*, 26 Maine, 531.

V. The plaintiffs' rights are not free from reasonable doubts, to say the least. In such case a court of equity does not interfere. *North River Steam Co.* v. *Livingston*, 3 Cow. 755; *Livingston* v. *VanIngen*, 9 Johns. 585; *Snowden* v. *Noah*, Hopkins' R. 347; *Akrill* v. *Selden*, 1 Barb. 316; *Olmstead* v. *Lewis*, 6 Barb. 182; *Society* v. *Holsman*, 1 Halst. Ch. 126; *Warne* v. *Morris Canal & Bank. Co.* 1 Halst. 410; *Webster* v. *S. E. Railway Co.*, 1 Eng. Law & Eq. Rep. 204; *Doughty* v. *Railroad Co.*, 7 Halst. 51; *Chesapeake & Ohio Co.* v. *Young*, 3 Md. 480.

VI. The defendant does not assume to sell an absolute title, but only to the extent of the powers in the plaintiffs' deed to him, and "not otherwise." This remark is an answer to all the objections raised to the power of defendant to sell.

VII. It is insisted that the vote of the stockholders, referred to in the mortgage, did authorize the execution of such a deed. The attention of the Court is called to the language of the vote itself.

But the directors were fully empowered by the fifth section of the charter, without such a vote. The better opinion is, that the directors have *sole* power to do such business. Angel & Ames on Corp. § 279; Corporation By-laws, Art. 14.

VIII. The plaintiffs' denial, that the non-payment of the coupons, executed upon a separate sheet of paper from the bonds themselves, constitutes a breach of the covenants in the mortgage, if not a captious objection, is certainly one of strict law, having no pretence to equitable relief, much less to interposition by injunction. See Act of Legislature of April 4, 1856.

IX. The plaintiffs' case presents this most remarkable absurdity;—they claim the benefit of an injunction, not for any wrongs perpetrated or threatened to themselves, but to the bondholders, and this without any request of the injured parties.

X. Let the plaintiffs pay the bondholders and the defendant, and they at once disarm him. Let them do equity, and they will receive equity. 2 Story's Eq., § 771; Story's Eq., § 959, a; Baldwin's C. C. R. 218.

Evans, for plaintiffs, in reply.

I. The power to grant injunctions is broad and comprehensive. R. S., c. 96, § 11. The case is one of equity jurisdiction, either as one of mortgage or trust.

II. The question is, does the bill on its face show a case. 3 Eq. Dig. 438, c. 8; *Rose* v. *Hamilton*, 1 Des. 137. The bill shows a case where great wrong or injustice may be done, and is likely to be done.

III. We maintain that, upon the facts stated, Myers has no

right to possession, no right to sell; and it is no answer, that if so, no wrong is done that may not be redressed at law.

IV. The effect of the contemplated proceedings is to be noticed.—1. Dissolution of corporation. 2. Stoppage of construction. 3. Injury to public. 4. Release of obligations.

V. The instances in which this power of the Court is obtained are various and difficult to be enumerated. 2 Story's Eq. § § 826, 827, 853, 854, 862, 872, note 2, 954; *Osborne* v. *Bank*, 9 Wheat. 841.

VI. The jurisdiction in granting injunctions is a wholesome one, and to be liberally exercised, in the prevention of irreparable injury, and depends on much latitude of discretion in the Court. *Kane* v. *Vandehuger*, 1 J. C. R. 12; Fonb. Eq. 52, note; 2 Johns. C. R. 222; 2 Eq. Dig. 64, 68; Observations of MARSHALL, C. J., in *Osborne* v. *U. S. Bank*, 9 Wheat. 841; 6 Curtis' Con. R. 268; Eden on Injunctions, 1, 12; *Waters* v. *Randall*, 6 Met. 483.

VII. Precedents, it is said, are not to be found. Equity does not consist of precedents, but of principles. *Simmons* v. *Hannover*, 23 Pick. 194.

VIII. Regarding the deed to Myers as a mortgage, there is no power to foreclose in the manner proposed, by sale. 7 Johns. 25; 7 Johns. 50; 7 Johns. 46, 48, 49; 2 Cowen, 195, *Willson* v. *Trout*; 1 Greenl. Cruise, Title Mortg. c. 1, § 42, p. 97, note on p. 98; Ib. (cites 3 Pick. 484; 2 Wheat. 29; 6 Met. 483; 10 Johns. 185;) 1 Greenl. Cruise, 217, Title Mortg. c. 6, § 2, Title 15.

IX. The cancellation of an instrument may be decreed, though it has become a nullity, on the ground, (among others,) that it may subject the party to litigation when the facts are forgotten. 2 Halst. 522, 627.

X. The relief sought is perpetual injunction. Same as in *Moore* v. *Veazie*, 31 Maine, 366; *Moore* v. *Veazie*, 32 Maine, 345.

XI. As for the argument, that in doubtful cases injunctions will not be granted, see 31 Maine, 378. But there is no doubt of plaintiffs' right under the charter. If defendant

sets up a right which controls it, this must be shown; statute granting possession, equivalent to judgment at law.

The R. S., c. 117, § § 20, 21, 23, provides how franchises may be sold *on execution*. No inference can be drawn, that a railroad franchise is susceptible of such or any other alienation. But, it is asked, is *no* security afforded by the deed? Is it wholly void? What is granted? I answer, all that can be, the beneficial interest, the income, by analogy to the R. S., c. 117, the right to tolls. This right may be secured by appointment of receivers.

CUTTING, J. — The demurrer admits the truth of all the material allegations in the bill, but the defendant, notwithstanding, denies that the plaintiffs have assigned sufficient cause to give this Court jurisdiction, or to entitle them to relief.

The bill refers to the mortgage of February 6, 1851, which we are authorized to consider as a part thereof, and to give it a construction so far as it may become necessary, under the present pleadings. It conveys in substance all the corporate property, real and personal, "unto the said Myers and his assigns, who shall become the holders of the bonds and coupons hereinafter mentioned, *each in the ratio of the bonds so held by him.*" — "To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof to the said Myers, his heirs and assigns, and to the holders of said bonds and coupons, to their use and behoof forever."

And the plaintiffs covenant that they have "good right to sell and convey the same to the said Myers, and the holders of said bonds in manner aforesaid." "*Provided*, they pay to said Myers, or his assigns, who shall become the holder or holders thereof, the amounts specified in the several bonds and coupons pertaining thereto," &c. "And if said contract shall also be fully performed by said corporation in all other respects," then said deed is to be void.

Then follows that clause in the deed, out of which it seems

this controversy has mainly arisen. It is this:—"And it is further provided and a condition of this deed, that the possession and uses of said premises shall at all times remain in said grantors, so long as payment shall be made promptly, and in good faith, by said grantors of said several bonds, and the coupons pertaining thereto, as the same shall become due or payable; but upon failure thereof, for the term of sixty days, the holder of said bonds, or any one or more thereof, shall be, and hereby is, authorized and empowered to take full and complete possession of said premises and mortgaged property, personal and real, rights of way and corporate franchise, without hindrance or process of law, for the common and joint *benefit and use of the holders of all the bonds,* so previously issued, and whether payment then be due or not, and in satisfaction thereof; *and such holders* shall share, and share alike, *in the disposition and sale* of the same for that purpose, by public vendue, on reasonable public notice thereof to the grantors aforesaid, first deducting from such proceeds all costs and expenses incident to such possession and sale."

The plaintiffs allege that the defendant, claiming authority by virtue of the foregoing provision, has taken possession of the corporate property, and advertised to sell the same, and reference is had to his advertisement of April 3, 1856, in which the defendant notifies the corporation that, "By virtue of the deed to me, executed by said company of the trust powers therein named, and by the concurrence of several of said bondholders, as well as in my own behalf, as grantee and bondholder, pursuant to the terms of said deed, that for breaches of the conditions and covenants in said deed contained by said company, to and with the undersigned, *as contractor*, and to and with the bondholders described in said deed, I did, on the thirty-first day of March, last past, and for the purposes of the deed and trust aforesaid, take full and complete possession of the premises and property therein described," &c., "and that I shall dispose and sell the same for the purposes aforesaid, by public vendue," &c., "to the

full extent of the powers derived to or by me, under and by virtue of said deed, and not otherwise."

It may perhaps become important, at some future time, should all the parties interested come properly before us on bill, answer and proofs, or by due process of law, to ascertain what the defendant's interest is in the mortgaged premises, whether it be any thing more than as a *bondholder*, and whether, if there should ever be a sale, as contemplated by the condition named in the deed, it could be perfected except by means of a process in chancery, when, as in cases of trust, all parties interested may be duly represented, and their several interests protected; and whether the whole property, including the franchise, or only the right to take toll, can be legally sold; but none of these considerations are now presented, except incidentally.

The bill alleges that the clause in the proviso of the mortgage, viz.:—"And if said contract shall also be fully performed by said corporation in all other respects," was fraudulently inserted, or was done without the plaintiffs' authority, which the demurrer admits to be true; and if so, then for any damages for the non-performance of the construction contract, it may be questionable whether the mortgage will afford the defendant as "*contractor*" any security.

As a bondholder, has the defendant the power under the mortgage to sell? If so, he must derive his authority solely by virtue of the condition in the deed, which provides that "the possession and uses of said premises shall at all times remain in said grantors so long as payment shall be made promptly and in good faith by said grantors of said several bonds and coupons pertaining thereto as the same shall become due and payable." The bill sets forth in substance, that all the bonds and coupons, legally issued by the plaintiffs, have been so paid, that certain bonds and coupons, subsequent to the date of the mortgage, have been illegally issued, and for which they are not legally liable, and consequently, have been justified in withholding payment.

And the bill further asserts, that the whole condition in

the deed is void and inserted without authority, all of which the pleadings admit. Under such circumstances, it is somewhat difficult to perceive by what authority the defendant can be justified at present in any interference with the mortgaged property. But with respect to the various questions herein before referred to, we wish distinctly to be understood as giving no opinion, because we cannot but be aware, from the arguments of the learned counsel, who were permitted, to some extent, to travel outside of the record, that both parties and such as may be hereafter associated with them, if any, have great and important interests, which hereafter may be presented in a more formidable shape, and that the present issue was only designed, and now by us to be considered, as to jurisdiction in the matter, as to the relief prayed for, which, if not entertained, must operate to dissolve the injunction.

The equity powers conferred by statute upon this Court, are therein enumerated, beyond which to chancery, in this State, is all forbidden ground; which circumstance is not sufficiently considered by counsel in their arguments and citations from English and American decisions, pronounced by Courts of more enlarged equity jurisdiction.

What is really the subject matter of complaint in the plaintiffs' bill? It is, first, that the defendant has unlawfully taken possession of their property, and secondly, that he threatens to sell it, or in other words, of an illegal interference with their just and legal rights.

It is admitted, that the defendant has obtained possession, and the plaintiffs contend that such possession is wrongful. Let the inference be drawn, and how does the alleged wrongful conversion differ from any other trespass or tort, for which the sufferer has a complete and ample remedy at law?

It is further admitted, that the defendant proposes to sell, and in his advertisement has signified his determination to convey the mortgaged property, "to the full extent of the powers derived to or by him under and by virtue of said deed *and not otherwise.*" Suppose the defendant should exe-

cute his threat, and should sell and convey to the extent of his authority, and he proposes to do nothing more, he would then be in the exercise of a legal right. But the plaintiffs say, that the deed gives him no such authority. If so, then the defendant's deed would convey nothing, and no injury could be by them sustained. Again, the plaintiffs apprehend that some innocent purchaser may be ruined. It may be so, but such anticipation does not enlarge our equity powers and it is not to be presumed that the maxim of "*caveat emptor*" has lost its force and influence.

The plaintiffs' allegations, therefore, do not disclose to us any such unjustifiable interference with their rights, as to authorize us as a Court of Equity, at present, to interfere. Consequently the demurrer is sustained and the injunction dissolved.

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

JEREMIAH DEARBORN *versus* JOSEPH R. W. HOIT.

An action cannot be maintained in this State, under the law of 1851, "for the suppression of drinking-houses and tippling shops," for the price of intoxicating liquors.

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

This was an action brought by the plaintiff, who resided in Massachusetts, against the defendant, who resided in Brunswick, Maine, to recover a balance of account for intoxicating liquors sold the defendant.

The writ was dated December 25, 1854, and contained one count on account annexed. The items of the account annexed were as follows:—

1853, Feb. 19.	—Keg 85 c. 10 Galls. Cog. Brandy, *a.* $2,	$20,85
Mar. 1.	—1 Blb. Whiskey, 41½ galls. *a.* 80.	33,20
" 1.	—Keg 85 c. 10 Galls. H. Gin, *a.* $1,25,	13,35
" 23.	—Keg 85 c. 10 Galls. Brandy, *a.* $2,	20,85
		$88,25

The plaintiff proved, that sometime before the suit was commenced, the bill was presented to defendant for payment, who then "said it was all right, and that the next time plaintiffs' agent called, he would hand him the money for it." The bill was afterwards presented a second and a third time; the second time defendant said he would pay it; the third time he said he would pay fifteen dollars for it. The witness by whom the last named facts were proved, stated on cross-examination, that he did not know who delivered the liquor to defendant, or when it was left at his house.

The plaintiffs offered a copy of a license given by the mayor and aldermen of the city of Boston, to S. Dearborn & Co., the 26th of April, 1852, and in force till April 26th, 1853, in which said Dearborn & Co. were licensed to sell "at No. 6, Foster's wharf, and at that place only," in the city of Boston, "intoxicating liquors in less quantities than 28 gallons, at retail, said quantities so sold to be delivered and carried away all at one time."

The defence was, that the sale was made in violation of the laws of Maine and Massachusetts, and that the action could not be maintained on the proof adduced by the plaintiffs.

If the action could be maintained on the facts, a default was to be entered, otherwise plaintiffs were to become nonsuit.

O'Donnell, for defendant.

1. The contract declared upon being in violation of a penal statute, at its inception, cannot be enforced. *Cobb* v. *Billings*, 23 Maine, 471; *Ellsworth* v. *Mitchell*, 31 Maine, 247; *Jones* v. *Knowles*, 30 Maine, 402; *Buxton* v. *Hamblen*, 30 Maine, 450.

2. No action of any kind is maintainable in the Courts of Maine for liquors sold in any other state or country. Act of 1851, § 16; Act of 1855, § 23; *Deering* v. *Chapman*, 22 Maine, 488. The same interdiction exists in Massachusetts. Stat. 1852, c. 322, § 19; (Sup. to R. S., p. 921;) Stat. 1855, c. 215, § 37.

3. It was incumbent on plaintiffs to prove their license. 25 Maine, 171.

4. A license to sell at a particular place in Boston is relied upon. No testimony is offered to justify under this license. On the contrary, the statement of the witness on cross-examination, tends to establish the sale at defendant's house at Brunswick, in this State, where the sale was clearly illegal.

5. The provisions of law in Massachusetts in force in Feb. and March, 1853, when the sale took place, prohibited all such sales, and took away all remedies.

6. The proof of promise to pay on the part of defendant, could have no effect to increase his liability.

Simmons, for plaintiffs.

1. The defendant is proved to have promised to pay the bill.

2. The liquors are shown to have been purchased in Massachusetts, and the plaintiffs were licensed to sell in that State. Every man is presumed to be innocent of transgressing the penal code, in the absence of proof to the contrary. Here there is no evidence to repel such a presumption. 1 Greenl. Ev. § § 34, 40.

3. There was no proof that the liquors were purchased or intended for unlawful use or sale in this State. *Preston* v. *Drew,* 33 Maine, 558.

GOODENOW, J. — We are of opinion that this action cannot be maintained. *Plaintiffs nonsuit.*

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

SAMUEL H. TEWKSBURY *versus* DENNIS HAYES.

An action cannot be maintained by the plaintiff on an agreement made by the defendant with a third party to pay such third party.

It seems, that such action cannot be maintained, though the consideration for the agreement moved from the plaintiff.

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

This was an action of assumpsit upon the following memorandum in writing:—

"In consideration that Samuel H. Tewksbury has this day re-conveyed to me his interest in the Woolen Brick Mill, situated in Oxford, I hereby agree to become responsible to Cornelia E. Blake, wife of Francis Blake of Harrison, for the amount of interest she has in said mill, and to pay over her part, to wit, the amount proportionally due her, when our joint interest in said mill shall be sold.

"Nov. 8, 1849." "Dennis Hayes."

The above writing was given by defendant for property of Mrs. Blake, conveyed by the plaintiff, then her guardian, to the defendant. Prior to this the plaintiff had given her a writing, dated Jan. 18th, 1848, in the following words:—

"I hold in my hands a claim against the Brick Factory, (in Oxford,) belonging to Cornelia E. Blake, to the amount of $268,11, and interest on the same, from April 15, 1847, which I agree to pay to her and the interest on the same.

(Signed) "Sam'l H. Tewksbury."

Upon this memorandum a suit had been commenced by Mrs. Blake against this plaintiff some months prior to the date of the writ in this case, but judgment was not recovered in that suit until subsequent to the commencement of this action.

The other facts sufficiently appear in the opinion of the Court.

Shepley & Dana, for plaintiff, argued:—

1. That the property, the proceeds of the sale of which formed the basis of the agreement in suit, stood in plaintiff's name. The plaintiff had, by the transaction of January 18,

paid her for it. The consideration of the agreement was, therefore, paid by plaintiff. There is nothing on the other hand to support the promise of defendant to be responsible to Mrs. Blake.

2. There would be a manifest impropriety in Mrs. Blake receiving the money twice, once of the plaintiff, and again of defendant. There can be no pretence, that in her collecting the sum of plaintiff on his agreement, defendant would still be liable to her; nor that he would have been discharged from his liability to plaintiff.

3. Mrs. Blake had no knowledge of the transaction of Nov. 8; nor did she agree to accept defendant and discharge plaintiff.

4. Plaintiff's liability to Mrs. Blake was absolute on his giving the paper of Jan. 18; and defendant's liability to plaintiff was fixed on sale of the premises, Jan. 31.

J. J. Perry, for defendant, argued —

1. That by the terms of the memorandum the plaintiff became liable to Mrs. Blake, and that the evidence in the case, in fact showed, that the consideration was paid by her, and not by plaintiff.

2. Both the memoranda introduced by the plaintiff, must be construed to have their legal effect, and neither can by the plaintiff be qualified or contradicted by other proof.

3. The plaintiff in making the contract of Nov. 8, acted merely as the agent of Mrs. Blake.

4. The plaintiff, by the negotiations of Nov. 8, undertook to make the defendant liable to Mrs. Blake, and at the same time to relieve himself from his own liability to her under the agreement of Jan. 18.

5. If Mrs. Blake subsequently undertook to hold the plaintiff under the contract of Jan. 18th, the legal character of the memorandum of Nov. 8th was not thereby changed. No collusion between plaintiff and Mrs. Blake, in the former suffering the judgment to go against him on the contract of Jan. 18, could fasten upon defendant a liability which did not

before exist by the express terms of the contract between him and Mrs. Blake.

6. If the plaintiff can maintain an action against the defendant it must be in the nature of an *indemnity* for money paid. At the time of the commencement of this suit, no such cause of action had accrued. *Ingalls* v. *Dennett*, 6 Maine, 79; *Clark* v. *Foxcroft*, 7 Maine, 348.

7. If the Court shall be of opinion, that this action can be maintained, there is no evidence in the case to show what is "the amount proportionally due her, when our joint interest in said mill shall be sold." The Court has, therefore, no means of making up judgment.

TENNEY, C. J.—The property of Cornelia E. Blake was invested by her guardian, the plaintiff, in a woolen factory, prior to January 18, 1848. On that day, he admits in his written contract with her, that he held a claim against the brick factory in Oxford, belonging to her, to the amount of $268,11, and interest from April 15, 1847, which amount and interest thereon, he promised therein to pay to her.

On Nov. 8, 1849, by a written agreement made by the defendant, in consideration of a conveyance of an interest of the plaintiff in the woolen brick factory in Oxford, he made himself responsible to Cornelia E. Blake for the amount of interest, which she then had in said mill, and agreed to pay over her part, to wit, the amount proportionally due her, when their joint interest in the mill should be sold.

The case exhibits no connection whatever between the contract of the plaintiff with Cornelia E. Blake and that of the defendant entered into on Nov. 8, 1849; and it does not appear, that the defendant had any knowledge of the previous one.

That the plaintiff was made absolutely responsible to Cornelia E. Blake for the sum named in his contract with her of Jan. 18, 1848, there can be no doubt. In the contract with the plaintiff, Mrs. Blake is treated as the owner of an interest in the mill, and the promise, upon a fair construction of

the language employed, was to pay her the avails of that interest, upon a sale of the joint interest belonging to her and the defendant.

The plaintiff may have taken the contract of the defendant, for the purpose of substituting it for his own, made to his ward. But whatever was his design, both contracts remained as they were, when given; and the plaintiff has paid a judgment recovered against him on his contract, after the commencement of this suit.

This action is upon the memorandum of the defendant of Nov. 8, 1849, to recover the portion of the avails of the sale of the mill made by him and others, on Jan. 31, 1850, belonging to Cornelia E. Blake, and we are to suppose from the report of the case, that the writ contains no other count. The contract in suit contains no promise to the plaintiff, and he cannot maintain an action thereon. *Plaintiff nonsuit.*

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

COUNTY OF YORK.

BENJAMIN LORD *versus* JOHN MOODY.

The character in which the parties to a note sign the same is presumed to be correctly exhibited by the writing itself, until the contrary be proved.

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

ASSUMPSIT brought to recover one third part of a sum of money paid by plaintiff as surety with defendant on a note of which the following is a copy:—

"$300. "Lebanon, May 5, 1845.

"For value received, we jointly and severally promise to pay the Rochester Bank, or order, three hundred dollars in sixty days and grace. "Alpheus Staples,

"William Gerrish,

"Benj. Lord.

"John Moody, surety for the above."

Evidence was offered by the plaintiff and admitted by the presiding Judge, subject to defendant's objection, tending to show that the plaintiff and Gerrish signed the note as sureties with the defendant.

The Judge charged the jury, that as matter of law, he should rule, for the purposes of this trial, that the note on its face not only indicated, but did in law show clearly, that Moody, the defendant, was surety for all the prior signers on said note; that as matter of law, the note was to be regarded as a contract by which all the signers, prior to Moody, were holden as principals to Moody, who was surety for all the above; and that there was no other construction which could be given to said note, consistent with legal principles; and also that the presumption of law was, if the jury looked at the note simply, that it was evident that Moody signed the same as a surety for Staples, Gerrish and Lord; and that no other presumption could legally be drawn from an inspection

of the note; and also that it would not be a legal presumption that said Moody signed the same as surety for Staples alone, although there was evidence that might satisfy them that said Staples received the money for said note, when it was discounted at the bank.

The Judge further instructed the jury, that if they were satisfied from the evidence that Moody, before he signed said note, did actually agree with Lord to sign with him as surety, that the jury might on such evidence, if they deemed it reliable, find for the plaintiff, whatever their impression might be as to the legal rights of the parties deducible from an inspection of the note merely.

The jury found a verdict for defendant.

Jordan, Eastman & Leland, for plaintiff.

I. It was competent for plaintiff to prove by parol the relation which Moody sustained to the preceding signers of the note. *Carpenter* v. *King,* 9 Met. 511; *McGee* v. *Prouty,* 9 Met. 155; *Bank* v. *Kent* 4 N. H. 221, 224; *Fernald* v. *Dawley,* 26 Maine, 470; *Warren* v. *Price,* 3 Wend. 397; *Shaw* v. *Burbane,* 3 Comstock, 446.

II. The presiding Judge erred in applying the principles of law to the case at bar.

From the whole tenor of the charge, the jury might suppose, that instead of the plaintiff's using the original note as an instrument of evidence, they were to be governed entirely, in making up their verdict, by the appearance of the note and inferences which might be drawn therefrom.

Particularly it is contended, that the Judge erred in charging the jury, "that as a matter of law, the note was to be regarded as a contract by which all the signers prior to Moody, were holden as principals to Moody, who was surety for all the above, and that there was no other construction which could be given to said note consistent with legal principles." Again, the Judge charged, "that the note on its face, not only indicated, but did in law show clearly, that the defendant was a surety for all the prior signers on the note."

It is a fair presumption, it is contended, to be drawn from the appearance of the note:—

1. That Moody was a surety for that one of the above signers, who should be proved to have been the principal:—

2. That he was surety for either one of the prior subscribers, or—

3. That Moody intended, whatever might be the responsibility assumed by the prior signers, that he, at least, should stand in the relation of surety and not principal, or—

4. That the words "surety for the above," afford no indication of the true and actual relation in which Moody stood to the prior parties to the note.

If this be so, the Judge was not correct in saying, "If the jury looked at the note simply, that it was evident that Moody signed the same as a surety for Staples, Gerrish and Lord, and that no other presumption could be drawn from an inspection of the note."

III. If it was competent for Moody to make himself surety for all the other makers, whose signatures preceded his, the burden of proof was on him to show by extrinsic evidence, that he did so sign the note. *Robinson* v. *Lyle*, 10 Barb. 512.

IV. The note being written, "we jointly and severally promise to pay," a fair presumption arises that Moody intended by the words "surety for the above," "*surety for one or all the preceding parties to the note.*" Bailey on Bills, Ed. of 1853, pp. 66 and 67.

For the equities of the case, the plaintiff also refers to 14 Vesey, Jr., 163; 2 Bos. & Pull. 271, 273; Leading Cases in Equity, vol. 2, part II, p. 390, and cases there cited; *Harris* v. *Brooks*, 21 Pick. 196; *Beeman* v. *Blanchard*, 4 Wend. 432; Story's Eq. Jurisp. vol. 1, p. 545, 546, and § 463; *Taylor* v. *Savage*, 12 Mass. 98; *Anderson* v. *Peirson*, 2 Bailey, 107.

N. D. Appleton, *J. S. Kimball* and *Clifford*, for defendant.

I. The instruction of the presiding Judge, that the note *on its face* indicated and clearly showed that Moody was

surety for the prior signers of the note, and that, as matter of law, the note was to be regarded as a *contract* by which all the parties, prior to Moody, were holden as principals to Moody, who was surety for all the above; and that, if the jury looked at the note simply, the presumption of law was that Moody signed as surety for Staples, Gerrish & Lord, was correct. Any other construction of the *contract* would be a forced one. *Harris* v. *Brooks*, 21 Pick. 195; *Carpenter* v. *King*, 9 Met. 511; *Harris* v. *Warner*, 13 Wend. 400; *Sesson* v. *Barret*, 2 Com. 400; *Thompson* v. *Saunders*, 4 Dev. & Bett. 404; *Fernald* v. *Dawley*, 26 Maine, 470.

II. While the jury were instructed as to presumptions deducible from the note on its face, they were carefully told, that parol testimony was to be properly considered by them rebutting that presumption, and that in fact, if they believed the testimony going to show a state of things different from what appeared by the note itself, they would find for the plaintiff.

III. The burden of proof was on the plaintiff and not on the defendant, to show in what character the signers of the note placed their names to it. 11 Met. 463; *Powers* v. *Russel*, 13 Pick. 76, 77; *Delano* v. *Bartlett*, 6 Cush. 364; 2 Gray, 529.

IV. It is said, that contribution is a fixed principle of justice, and not founded on contract. The latter part of the position is not maintainable. Burge on Suretyship, 381; *Howe* v. *Ward*, 4 Maine, 195.

The opinion of the Court was delivered by

HATHAWAY, J. — The character in which the parties signed the note is presumed to be correctly exhibited by it, until the contrary be proved. *Crosby* v. *Wyatt*, 23 Maine, 161. The instructions given were in entire accordance with this principle, and — *The exceptions are overruled and judgment on the verdict.*

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

JOHN MCMILLAN, *versus* JOSEPH HOBSON *& als.*

By R. S., c. 119, § 79, the Court may, in its discretion, for good cause shown, permit or require a trustee who has been examined in the original suit, to be examined anew in a suit of *scire facias*.

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

This was a writ of *scire facias*. These defendants, who had at the previous term been adjudged the trustees of A. Hobson, & als., in a suit brought against the latter by these plaintiffs, moved for leave to disclose further in this suit, which motion was allowed. To this ruling, exceptions were taken by the plaintiffs.

Hammons, for plaintiffs.

Swasey, Eastman & Leland, for defendants.

HATHAWAY, J. — The defendants were adjudged trustees, upon their disclosure and additional allegations and proofs, made under provisions of R. S., c. 119, § § 33, 34, and statute of 1842, c. 31.

The questions of fact, &c., were, by agreement of the parties, submitted to the Court, and on *scire facias* against the defendants, they moved the Court for permission to disclose further, which was granted; to which ruling the plaintiffs except.

By statute of 1821, c. 61, § 9, the trustee, who had been charged upon his disclosure in the original action, was not permitted to disclose further on *scire facias*, not even for the purpose of correcting a mistake. *Taylor* v. *Day & al.* 7 Greenl. 130.

By R. S., c. 119, § 79, it was provided, that "if he had been examined in the original suit, the Court may permit or require him to be examined anew in the suit of *scire facias*, and in such case, he may prove any matter, proper for his defence, on the *scire facias*, and the Court may render such judgment as law and justice require upon the whole matter appearing on such examination and trial."

The object of this provision of the statute seems to have been, to enable "the Court to render such judgment as law and justice required," and we cannot doubt that the Judge presiding had the power, on motion, for good cause shown, in his discretion, to permit a further disclosure.

Exceptions overruled.

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

PRATT *& al., in Equity, versus* JAMES C. PHILBROOK.

A contract made for the sale and purchase of property, obtained by the concealment of facts material, going to the essence of the contract, and affecting the whole bargain, will be rescinded.

Whether the omission, on the part of the defendant, to give information, the concealment of which is complained of, was the result of forgetfulness, or a positive intention to conceal important facts, may not, *it seems*, be very material.

Although the party who seeks to rescind a contract on the ground of concealment of material facts, may have confirmed the contract after acquiring knowledge of some of the facts concealed; yet, if sufficient facts were unknown to him at the time of the confirmation, to authorize a rescision, such confirmation cannot effectually operate to prevent it.

The opinion of the Court, in *Pratt & al., in Equity*, v. *Philbrook*, 33 Maine, 17, reconsidered and affirmed.

BILL IN EQUITY, to rescind an exchange of property between the plaintiffs and defendant.

The same parties had been before the Court at a previous time, when the plaintiffs' bill, as it then stood, was dismissed upon demurrer, without costs for the defendant. *Pratt & al.* v. *Philbrook*, 33 Maine, 17.

The case is now presented upon bill and answer, and proof taken by both parties.

The material facts appear in the opinion of the Court, and in the report of the case referred to as previously heard.

Eastman, Emery & Clifford, for plaintiffs.

I. The law of rescision for fraud or mistake, is this: — "Whenever *suppressio veri*, or *suggestio falsi* occurs, and more especially both together, they afford sufficient ground for setting aside any release or conveyance." *Smith* v. *Richards*, 13 Pet. 26; *Torrey* v. *Buck*, 1 Green. Ch. 12; *Shugart* v. *Thompson*, 10 Leigh, 436; *McAdoo* v. *Tublett*, 1 Humph. 105.

II. Whether the party representing a fact knew it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial. *Smith* v. *Richards*, 13 Pet. 26; *Harding* v. *Randal*, 15 Maine, 332; Story's Eq. Jur. § 193; *Read* v. *Walker*, 13 Ala. 799; *Bradley* v. *Chase*, 22 Maine, 511; *Daniel* v. *Mitchell*, 1 Story, 173; *Glassel* v. *Thomes*, 3 Leigh, 113; *Hammond* v. *Allen*, 2 Sum. 387; *Harrison* v. *Stowers*, Walker, 165.

III. The misrepresentation must be of something material. It must be not only something material, but that in regard to which the one party places known trust and confidence in the other. *Smith* v. *Richards*, 13 Pet. 26; *Whaley* v. *Eliot*, 1 A. K. Marshall, 343; Story's Eq. Jur. § 195; *Halls* v. *Thompson*, 1 S. & M. 443; *Ayers* v. *Mitchell*, 3 S. & M. 683; *Pringle* v. *Samuel*, 1 Litt. 43; *Perham* v. *Randolph*, 4 How. Miss. 435; *Stiles* v. *Sherman*, 34 Maine, 344; *Smith* v. *Babcock*, *& al.*, 2 W. & M. 206, 207; *Tucker* v. *Woods*, 12 J. R. 190; *Mitchell* v. *Sherman*, 1 Freem. Ch. 127; *Beckwith* v. *Kouns*, 6 B. Mun. 222.

IV. As to ratification of the contract after knowledge of facts concealed. *Warren* v. *Daniels & al.*, 1 W. & M. 111, 112; Per WOODBURY, J., in *Mason & al.* v. *Crosby*, 1 W. & M. 363; Per STORY, J., in *Hammond* v. *Allen*, 2 Sum. 387; *Tripp* v. *Tripp*, Rice's Ch. 84; *Carr* v. *Callaghan*, 3 Litt. 365.

V. Though there may be no fraud in fact in making a contract, yet a total inability in one party, produced by his own neglect, to fulfil his part of the contract, is in contemplation of law, equivalent to fraud. *Mitchell* v. *Sherman*, 1 Freem.

Ch. 127; *Smith* v. *Belters*, 1 Stew. & Port. 107; *Long* v. *Brown*, 4 Ala. 622.

VI. As to how far the answer is to be taken as true. *Forsaith* v. *Clark*, 3 Wend. 638; *County* v. *Geiger*, 1 Call, 191; *Gordon* v. *Lowell*, 21 Maine, 253; *Dunham* v. *Yates*, 1 Hoff. C. R. 185; Daniels' Ch. Pl. & Pr. 986, note; *Randall* v. *Phillips & al.* 3 Mason, 378; *N. E. Bank* v. *Lewis*, 8 Pick. 113; *Obrien* v. *Elliot*, 15 Maine, 127; *Vallentine* v. *Farrington*, 3 Edw. Ch. 53; *Paynes* v. *Cole*, 1 Munf. 373; *Cartwright* v. *Godfrey*, 1 Mun. 425; *Town* v. *Needham*, 3 Paige's Ch. R. 546; *Dunham* v. *Gates*, 1 Hoff. Ch. R. 185; *Mason* v. *Rosevelt*, 5 Johns. Ch. R. 534; *Farnham* v. *Brooks*, 9 Pick. 212; *Phillips* v. *Richardson*, 4 J. J. Marsh. 212; Daniels' Ch. Pl. & Pr. 984, and note.

VII. As to other evidence: —

1. Circumstances are sometimes more convincing than direct testimony, and, in the development of fraud, furnish almost the only source to be relied upon. *Gould* v. *Williamson*, 21 Maine, 273; *Farnham* v. *Brooks*, 9 Pick. 212.

2. The conversations of a defendant with other persons, on a subject of a kindred character, near the time of the transaction, and illustrating his intention, are competent evidence for the complainant. *Warren* v. *Daniels & al.*, 1 Wood & M. 109.

3. The testimony of a single witness will sustain an allegation of a bill, against the denial of an answer, when the defendant has confined himself to a literal denial of the allegation, in the words in which it is made, without meeting the real object and effect of the charge. *Amos* v. *Heatherly*, 7 Dana, 45; Daniels' Ch. Pl. & Pr. 989, and note 991, note 1.

Evans, for respondent.

This case has been before the Court on a former occasion, and the bill was then dismissed on demurrer, for want of equity. Subsequently, leave to amend the bill was granted, and the case was reinstated upon the amendments filed.

The abstracts prepared by the plaintiffs do not show what the amendments are, nor how much of the bill, as it now

stands in the abstracts, was before the Court on the former hearing.

The opinion of the Court, however, it is believed, covers the whole ground of the plaintiffs' claim, as now exhibited, and another demurrer might have been safely taken. [See the case in 33 Maine, 17.]

The plaintiffs are therefore to show some substantial grounds of equity, not embraced in the bill as originally exhibited, or it will be again dismissed summarily. None such, it is contended, are set forth.

The testimony offered by the plaintiffs goes almost wholly, if not entirely, to facts and circumstances which the Court has already pronounced insufficient to maintain the bill.

The field of inquiry is therefore limited. We contend, that the decision of the Court already given, disposes of the case as it is now exhibited, unless it shall feel disposed to re-consider the opinion then given, or to re-examine the case upon its merits as originally presented.

If so, we contend that no case is made out, calling for the interposition of the equitable powers of the Court, in the manner prayed for.

The answer is responsive throughout. It denies not only all fraud, misrepresentation and concealment, but all the material facts and circumstances as they are alleged in the bill, in which such fraud is supposed to consist, and by which it is evidenced.

In no essential particular is the answer overcome by the plaintiffs' proofs, but on the contrary, we maintain that it is supported in its material averments by the evidence offered by the defendant.

1. We contend that Emery had full knowledge that the freight on the shingles had not been paid.

2. There was no misrepresentation in regard to the charter party of the Hampton.

Emery knew that defendant was not a party to it, and that it was not in his possession, that he could only describe it from hearsay and recollection.

The testimony as to what defendant said on this matter, is not sufficient to overcome the answer.

3. Even if there were erroneous representations in regard to the shingles, the plaintiffs have suffered no injury from that cause; and if they have, their remedy at law is ample.

If the shingles had been retained 60 days, they would have been worthless.

4. The representations charged to have been made as to the ownership of the 50 M. of other lumber on board the Hampton, whether true or false, have no possible connection with this case.

That Emery never understood he had a resort to them, is apparent from his total silence in regard to them, in all his letters and instructions to his son. No inquiry, even, was suggested.

The defendant's representations were undoubtedly misunderstood or misrepresented by the witness.

5. That the shingles were worth $80 per M. in California, and that T. C. Emery would have ample time to reach there, &c. These and similar objections are so palpably matters of opinion and judgment, about which Emery could judge as well as anybody, that they require no comment. Emery acted upon his own avowed knowledge.

6. In regard to the 1-6th of the cargo of the Chief, we contend that Emery was fully informed of the title of the respondent, before the contract was entered into.

7. If Emery was deceived in the outset, which we deny, he was undeceived by the letters of Deshon & Co., of Feb. 1 & 4, 1850; and thereupon, instead of rescinding, or claiming to rescind the contract, ratified or affirmed it.

8. If plaintiffs have lost any thing by reason of defect of title in Philbrook to the 1-6th, they have a perfect remedy at law, by suit on the covenant in the bill of sale.

9. But they have lost nothing from such defect. If Philbrook's title had been perfect, how would plaintiffs have been better off than now?

The absolute owners of the residue of the cargo realized

nothing. The losses sustained are abundantly accounted for, attributable to the great depression of lumber, &c., in California, the enormous expenses attending it, &c. To some extent to the bad management of the consignees of the Chief. The same fate attended the lumber sent by other vessels.

10. A large portion of the testimony introduced by plaintiffs, is entirely inadmissible, much of it on leading questions, much of it of conversations and speculations, and correspondence between other parties, with which defendant had no connection. Plaintiffs' interference with witnesses, and manner of obtaining evidence, is objectionable, and renders the whole liable to suspicion.

The principles of law applicable to the case, are too familiar to need the citation of authorities. A few only will be named. Representations made to others, not admissible. *Bradley* v. *Chase*, 22 Maine, 527; *Crocker* v. *Lewis*, 3 Sum. 8.

Equity will not interpose where there is an adequate remedy at law. R. S., c. 96, § 10; 2 Story's Eq. § 794; *Woodman* v. *Freeman*, 25 Maine, 540.

The Court say, "the law may be considered now as conclusively settled, that if fraudulent representations have been made, respecting personal property or personal rights, relief for injuries occasioned thereby can only be obtained in an action at law, and a court of equity will not entertain jurisdiction;" citing, among other cases, *Clifford* v. *Brooke*, 13 Ves. 131; *Russell* v. *Clarke's Executors*, 7 Cranch, 89; 2 Story's Com. § 84.

Equity does not interfere when damages would be adequate relief.

In 25 Maine, *ubi sup.*, the English cases are very fully reviewed, and the result stated on page 554, that such is the rule there. So of the American cases, and on p. 560, it is declared that the jurisdiction of the Court to give relief by way of damages, cannot be sustained. *Woodman* v. *Saltonstall*, 7 Cush. 181; *Thayer & al.* v. *Smith*, 9 Met. 470.

Recovery of damages would be the adequate relief, contemplated by law. It is a case sounding in damages.

Misrepresentations of value, or of other matters, which are only of opinion, will not be relieved against. *Warren* v. *Daniels*, 1 Wood and Min. 90; *Hugh* v. *Richardson*, 3 Story, 659.

Where an injury will admit of pecuniary compensation, a court of equity will never interpose. *Ingersoll* v. *Donnels*, 5 Met. 124.

Application for rescission must be made as soon as the cause for it is discovered. *Ayers & Mitchell*, 3 S. & M. 683.

The Court have already decided that here was *affirmation*, which of course precludes rescission. 33 Maine, 17.

TENNEY, C. J.—This case has been before the Court at a previous time; and upon a demurrer by the defendant, the bill was dismissed. *Pratt & al.* v. *Philbrook*, 33 Maine, 17. Upon leave to amend, granted by the Court, the bill has been essentially changed, an answer has been filed, and proofs taken by both parties. The whole case has been argued upon its merits; many of the questions involved at the first hearing are identical with those now presented. But we think there is no occasion, to reconsider the opinion then given, so far as the principles therein settled, in relation to the facts of the case at that time, are applicable to the facts proved, as the case is now presented. But important matter is at this time exhibited, which was not then before us, and calls for an examination, and the application of equity principles thereto.

Certain facts are not disputed, which are important in their connection, with others, which are a subject of controversy. The offer made by the defendant to the plaintiffs touching the exchange of certain lumber which he claimed to own, and which was on the way to California, and then supposed by both parties to be of great value at that place, for the Thornton House, furniture, &c., in Saco, is dated Jan. 19, 1850. The letter of the plaintiff Emery, in which he accepted this offer, is dated Jan. 23, 1850, and directed to the defendant at Augusta. On Jan. 26, 1850, papers were prepared to

carry into execution the agreement, but it appears that they were not fully completed and delivered till a few days afterwards. On Jan. 23, 1850, Thornton C. Emery, the son of one of the plaintiffs, left Saco for California, for the purpose of being there to receive and take charge of the lumber for his father, as early as possible; he sailed from New York on Jan. 28, 1850, for California, and arrived at San Francisco on April 26, 1850. The ship Hampton, in which the defendant had shipped the shingles, that he undertook to sell to the plaintiffs in part consideration for the Thornton House, arrived at the same place, on Feb. 27 or 28, 1850. A power of attorney was prepared and forwarded by the plaintiff Emery, to his son Thornton; bills of sale of the lumber and other papers connected therewith were also sent at the same time, which were received by the latter, on the way or immediately after his arrival in California. A long time before his arrival, the shingles on board the Hampton had been sold, and the ship departed upon another voyage. The bark Chief had arrived, but all right of the defendant in the cargo therein, was denied by those in charge, and Thornton C. Emery had nothing to do under his agency.

It is alleged in the plaintiff's bill, that immediately after accepting the defendant's proposal, agreeably to his suggestion and advice, when he made the same, the plaintiff Emery, dispatched his son T. C. Emery to California, expressly that he might be there in season, as the agent to take the actual possession, management and disposal of the shingles and the boards, which had been shipped by the defendant.

The defendant denies in his answer, that T. C. Emery went to California by his advice for the purpose of taking charge of the shingles and the boards; but admits, that at the request of Moses Emery he did write to T. C. Emery, when in Massachusetts, and urged him to go to California, and gave several reasons therefor as his own which were suggested by said Moses Emery. It also appears by a postscript to the letter which the plaintiff Emery sent to the defendant, accepting the proposal to make the exchange of property, that T.

C. Emery would take passage to California from New York the then next Monday, and he therein expresses a wish that the defendant would consign the shingles in the Hampton to him, and let him act as the defendants' agent, until he should hear that the writings were closed between the parties. And the evidence is plenary, that the defendant knew, that it was the intention of the plaintiff Emery, that his son was to be in California, to take charge of the shingles in the Hampton, and the boards in the Chief, as soon as possible after their arrival, before the writings were finished; that he gave it as his opinion, that the time would be amply sufficient, to enable him to arrive there before there could be any disposal of the shingles, inasmuch as, by the contract, the Hampton was to remain there for sixty days after arriving in port at California, before the shingles would be disposed of.

It is alleged in the bill, that after the ship Hampton sailed on her voyage, and before the 19th day of January, 1850, to wit, about the first of December, 1849, the defendant duly authorized one Bodfish, who was then about going to California, by way of the Isthmus, to sell said shingles for him, on their arrival in California, and with the proceeds of the sale, to pay the said master the freight of the same in California. That the defendant, on Jan. 16, 1850, also wrote and sent by mail a letter to George Davis, the master of the Hampton, in effect waiving his right, if any he had, by any contract to require the said Davis to wait with said ship and shingles in California, as aforesaid, for the owner to appear and take the same, and requesting and fully authorizing said Davis to sell and dispose of said shingles, without instructing him in any manner as to the time or place of sale, or limiting the price, and that said authority to said Bodfish, and said letter to said Davis, and the waiver, request and authority therein contained, were in full force, when said proposal and supposed exchange were made, and were never afterwards revoked; all which the defendant ever fraudulently concealed from the plaintiffs. And the plaintiffs aver, that had they known or suspected that the defendant had author-

ized Bodfish or Davis, so to sell the said shingles, they would not have made the said supposed exchange.

To the foregoing part of the bill the defendant answers, that between Jan. 1 and 19, 1850, he told Emery, that he had not consigned the shingles to any one, and had no agent in California, and inquired whether some one should not have the care of them, and that Emery replied, that he thought it would be well; and the defendant thereupon said, that he had confidence in the skill and honesty of Davis, the master of the Hampton, and that he intended to write to him, and request him to take the management of the shingles, and to do the best he could with them, for the defendant, and manage them in all respects, as if they were his own property. Emery thought he could not do better as the matter then stood, and remarked that such course would not prevent him from consigning them to any other person afterwards, if he should choose to do so. That the defendant did write, and forward by mail to Davis, a letter containing a request to that effect, and at the time the letter was sent to Davis, Emery knew the contents thereof by information from the defendant, and, as he believes, Emery saw and read the letter after it was written and before it was sent.

And the defendant further answers, that he never appointed William Bodfish at any time his agent to sell and dispose of the shingles, or any part thereof, and never gave him any authority or power to sell or dispose of the same, or to advise or assist in selling them.

The letter, proved to have been signed by the defendant, contains the following: — "January 16, 1850. — Capt. Davis, Dear Sir; — As I have not consigned my shingles to any one, I wish you to take the management of them yourself, and do the best you can for me, and manage in every respect, as you would if they were your own. My bill of lading says 80 M., the man who delivered them made me pay for 82 M. You may possibly find as many on board, as the bill I had to pay for." (Signed,) "J. P. Philbrook." This letter is shown to

have been mailed on Jan. 16, 1850, and received by Davis at San Francisco.

It is shown that Bodfish had in his hands a bill of lading signed by Albert Ballard, dated Sept. 7, 1849, of 80 M. of shingles, shipped by the defendant, which he exhibited to Davis, the master of the Hampton, at San Francisco. It does not appear in what mode Bodfish obtained the bill of lading, but it appears in the defendant's letter of Jan. 16, 1850, to Davis, that he had received a bill of lading of the shingles.

It was proved, that by the custom of merchants and shipmasters, the bill of lading of merchandise in the possession of a person, at the port of discharge of the vessel in which it is shipped, is taken as evidence of that person's authority from the owner to receive and dispose of his cargo.

The shingles on board the Hampton, shipped as the property of the defendant, were sold by Bodfish about the 20th of March, 1850, within three weeks of their arrival at San Francisco, for the sum of $7 a thousand, by the consent of Davis, the master of the Hampton, and the proceeds paid to Robinson, Arnold & Sewall, the ship's agents in San Francisco.

Was the plaintiff Emery informed in any mode, that the defendant had authorized the master to take the management of the shingles shipped by him, in the Hampton, in every respect as he would do, if they were his own? The answer alleges, that before the proposal was made by the defendant in writing to Emery, to exchange the property therein referred to, he had written to Davis, and, he believes, that the letter was read by Emery. This may be, perhaps, responsive to the bill, though it was before the defendant's proposal to exchange, and consequently did not enter into the contract made by the acceptance of the proposal. But, we think, from the evidence in the case, it is abundantly proved, that at the time the writings were about being prepared, and afterwards, that Emery was advised of no such fact; and that the proof is of that character, which overcomes the answer according to established principles in equity proceedings, if the answer,

standing uncontradicted, could be regarded as notice to Emery, that such authority had been given.

S. V. Loring deposes, that on Jan. 26, 1850, when the defendant and Emery talked over the bargain with a view to have the writings prepared, it was said among other things by the defendant, that the Hampton was to lie sixty days after her arrival at California, for the owner of the shingles to take them, before which time they could not be landed or sold. No letter to Davis or bill of lading delivered to Bodfish was mentioned.

T. C. Emery testifies, that defendant said, there would be plenty of time for him, as his father's agent, to arrive in California, and receive the shingles, as the Hampton could not leave under sixty days, after her arrival.

John Fenderson, who witnessed the bills of sale of the shingles, and who was present at the time referred to by Loring, deposes, that the understanding was, that Thornton C. Emery was to go to California, and receive the lumber. Defendant said the shingles were to remain in the ship, quite a length of time, before they could be sold; the defendant does not recollect the time mentioned. But defendant said Thornton would have ample time to get there and receive the lumber. Defendant told Emery there was no claim on the shingles for freight, and that they could not be sold for freight. The testimony of S. W. Sawyer is corroborative of the statements of the foregoing witnesses, upon this point. And that of A. J. Walker is of similar import. After the news of the sale of the shingles in California had been received in Saco, the defendant is proved to have said, that the captain had no right to sell the shingles under sixty days after the arrival of the ship in California; that he had sold them within that time, and that Emery was dissatisfied about it; but that he would have been no better off if they had not been sold till the arrival of Thornton C. Emery in California.

The evidence, which has been adverted to, is totally inconsistent with the answer of the defendant, that Emery had notice of the authority given by the former to Davis to do

with the shingles in all respects as he would do, if they were his own, and is satisfactory, that the authority given to Davis, under the letter to him of Jan 16, 1850, and that to Bodfish, arising from his possession of the bill of lading made to the defendant, without explanation as to the manner in which that possession was obtained, was wholly unknown to Emery till after the sale of the shingles.

Whether the omission on the part of the defendant to give this information was the result of forgetfulness, or a positive intention to conceal important facts, may not be very material; the effect was the same. But it is somewhat remarkable, that in the various conversations between the defendant and Emery, which took place in a very few days after the letter of the former was sent to Davis, that he should not have referred to it, but on the other hand, should have made statements, and given opinions, contradictory to that, which might well be supposed to take place by his authority, if his purposes were honest.

The defendant sold to Emery the shingles on board the ship Hampton, by bill of sale, dated Jan. 26, 1850, "to be delivered to said Emery or his authorized agent on the arrival of said ship, at her place of unlading in California, as specified in the contract between the shippers of the cargo, and owners of said ship and master." In the contract referred to, the master and owners agree "to lade said lumber on board said ship, and transport the same with reasonable dispatch to the bay of San Francisco, and deliver the same to such person, and at such accessible point, as the shippers may direct, allowing to said shippers sixty running lay days, at said point. If, within forty-five days from the arrival and notice to the consignee, the freight be not settled, the master is authorized to sell lumber enough to pay his freight as aforesaid."

It has already been held, when this case was previously before us, that this contract being referred to in the defendant's bill of sale to Emery, and it being stated in the defendant's offer to exchange, dated Jan. 19, 1850, that he was to pay the freight on the shingles and the sixth part of the cargo

of the Chief, the contract could not be rescinded, notwithstanding the defendant made representations inconsistent therewith. And the sale of the shingles having been made within forty-five days after their arrival in California, in violation of that contract between the master and owners and the shippers, without the fault of the defendant, he could not be responsible. But the facts now before us, in this respect are unlike those stated in the original bill.

Emery had a right to suppose, and must have believed, that he purchased the shingles, subject only to the contingent lien for freight, (which the defendant represented he would pay) not to be enforced, if not discharged, till forty-five days after their arrival, and then so far only as to raise enough to cover the freight, and the balance to be secure from sale, for fifteen days longer. In fact, at the time of the exchange, the defendant had given unqualified power, under which all the shingles could be sold, on the day of their arrival, if that was thought proper by the person or persons who had the authority from him. This authority he had then recently given; it was unrevoked when he took the conveyance of the Thornton house and other property. He never revoked it, or attempted to do so; and it was unknown to Emery; and nothing was disclosed, by which he could, in the exercise of the greatest care have ascertained, that the stipulation on the part of the master and owners had been waived by the defendant.

The concealment was material, and went to the essence of the contract, and affected the whole bargain. The shingles and the sixth part of the cargo of the Chief was the consideration of the property conveyed by Emery. The conveyance by each party was entire; if null in part, it was so altogether. The contract was indivisible, and so intended to be by the parties.

It is true, that the plaintiffs' agent, contrary to the expressed opinion of the defendant, and the hopes of Emery, did not arrive at California within forty-five days after the arrival of the Hampton, and could not have prevented the sale of the shingles for the freight, under the contract with the master

and owners, if they had insisted upon their extreme rights. It appears also, that the shingles were sold for as large a sum as they would have brought after the agent was ready to take them in charge, if they had been unsold. But the ground for a rescindment of the contract lies deeper. The purchase of the shingles was made by Emery under a belief of the existence of facts, which were untrue. The defendant knew their want of truth, and he could not have been ignorant of the erroneous belief of Emery, into which he had been instrumental in leading him.

If Emery had known, that the defendant had given a power, by which the shingles could be sold at any time after their arrival in California, instead of being secure from a sale, even for their freight, (which both parties must have supposed very insignificant, when compared with the entire value,) for the term of forty-five days afterwards, he might well have hesitated to convey the valuable real estate and personal property, which was the consideration of the shingles and a sixth part of the cargo of the Chief. If the agent should not arrive as soon as the ship, in the place of the shingles themselves would be perhaps substituted the personal claim of their value against the defendant; and in the place of the agent, sent out at great expense, to make sale of the property in small quantities, if found more advantageous, after ascertaining at different places the state of the market, would be under the power, persons having other and perhaps paramount engagements, and desirous to dispose of the lumber as soon as possible for such prices as were offered.

The plaintiffs aver in their bill, that if they had known that the defendant had waived the right to have the shingles secure from sale, as stated in the contract with the master and owners of the Hampton, or had suspected it to have been so, they would not have made the exchange of property. The facts shown, authorize the conclusion, that this averment was true, and the actual state of the matter was such, that had it been known to the plaintiffs, the contract of exchange would not have been made.

Have the plaintiffs ratified the contract of exchange of property, after they became possessed of all the facts, of which they now complain? When the case was before the Court at a former time, it appeared by the bill, that dissatisfaction was expressed by the plaintiffs on account of alleged concealment of material facts. But it appeared that new negotiations resulted in new arrangements between the parties, and the plaintiffs were thereby precluded from making an effectual claim for a rescindment of the contract. But the ground on which the plaintiffs would be entitled to the decree, which they seek, is that which could not have been known and understood at the time, when the mutual arrangements were made, and the transfers by one and the other allowed to stand. And facts unknown to the plaintiffs, when they affirmed the contract, if sufficient to authorize its rescission, cannot effectually operate to prevent it.

Some transactions, which according to the testimony may have transpired after the plaintiffs had knowledge that the shingles were sold by authority of the defendant, long before they could have been disposed of by virtue of his contract with the master and owners of the Hampton, are relied upon as evidence of a ratification. This relates to a division of some beds, which were in the Thornton House, in July, 1850, after the plaintiffs had advices from T. C. Emery, in relation to the sale of the shingles. This evidence is a recital of some conversation between Emery and the defendant. It is quite indefinite, and nothing indicating with certainty that it had reference to the property, which was a subject of the exchange in January, 1850. No facts are mentioned showing that the witness, who states it, had any occasion to recollect the conversation; and there is nothing which is satisfactory, that it is correctly reported. Other evidence exhibits a conversation, which may have been the same, very differently. And it appears, that not far from the same time, the plaintiffs had deliberately concluded to institute the present suit, and had previously presented the defendant his bills of sale and

all other papers received from him, and demanded a reconveyance of the property, which he had received.

We are of opinion, that the contract of exchange of property entered into by the parties, in January, 1850, should be set aside, as founded in the concealment of material facts by the defendant, from the plaintiffs, which were an essential portion of the facts in the case; that the conveyance of the real estate from Emery to the defendant should be rescinded, and that the personal property or its avails, should be restored and paid to the plaintiffs, after deducting from the avails, if the property or any part thereof has been sold, the expenses attending the sale, &c.

It appears that the Thornton House was burnt in January, 1851, and that certain amounts of money due upon policies of insurance, or already in the hands of a receiver, are awaiting the final decision of the suit, to be paid to the person or persons to whom they belong, according to the decree to be made; and that the defendant had the use of the Thornton House from the time of the conveyance to the time it was destroyed. And it is the opinion of the Court, that the defendant should pay a reasonable rent for the same, deducting whatever is reasonable for repairs, if any were made.

The plaintiffs are entitled to a decree in conformity with the foregoing views. But some matters growing out of the policies of insurance upon the property and the destruction of the same by fire, and the rent thereof, must be submitted to a master, before a final decree can be made.

HATHAWAY, APPLETON, MAY, and GOODENOW, J. J., concurred.

SAMUEL WHITE *versus* ISRAEL CHADBOURNE.

In an action of trespass brought against an officer for attaching goods claimed by the plaintiff under a sale from the debtor, the officer claiming to hold the goods on the ground, that the sale to the plaintiff was in fraud of the rights of creditors, the declarations and acts of the plaintiff's vendor, made or done prior to the sale, and introduced by the defendant to show, that the sale was made with a fraudulent design, are admissible in evidence.

Such declarations and acts made or done long after the completion of the sale are not admissible.

The presence of the vendor in Court, when such evidence is offered, is no objection to the testimony, nor is it to be excluded by the subsequent call of the vendor as a witness by the defendant.

The presence or absence of the party to whom the goods were sold, when the declarations were made is immaterial.

It is always the privilege of a party to offer testimony to repel that of his adversary, notwithstanding the latter may have been introduced against his objection; and it has never been understood that the introduction of such rebutting testimony was an abandonment of the right to except to the ruling.

When testimony is objected to by a party, he should present to the presiding Judge specifically the grounds of objection. If this is not done and the testimony is admitted, the ruling cannot be treated as erroneous.

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

TRESPASS against the sheriff for acts of his deputy in attaching a stock of goods, alleged to be the property of the plaintiff.

The facts sufficiently appear in the opinion of the Court.

S. W. Luques, for plaintiff.

1. The conversations with the plaintiff's vendor were inadmissible, because they were hearsay, and not assented to by the plaintiff, or in any manner brought home to his knowledge. The rule admitting the declarations of the plaintiff's vendor in cases of this kind has limits. 2 Phillips on Ev., Cowan & Hill's notes, part II, pp. 657, 658.

If, on the suggestion of fraud, the Court should limit the admissibility of testimony in proof of it to those declarations and acts of the vendor which were known to, and participated in, by the vendee, the rights of the vendee would be protected. *Clark* v. *Waite*, 12 Mass. 439; *Bridge* v. *Eggleston*, 14 Mass. 245.

The declarations and acts of the vendor ought to be admitted *de bene esse*, to be rejected, if the vendee was not shown to be a participator in the fraud. Such was the rule adopted in a previous trial of this case, and such seems to be the rule in *Clarke* v. *Waite*, before cited.

2. The defendant was allowed to introduce testimony to declarations of the plaintiff's vendor, made subsequently to the sale and attachment. This testimony was clearly inadmissible. *Bridge* v. *Eggleston*, before cited; *Edgell* v. *Bennett*, 7 Verm. 537; 2 Phillips Ev. 655, 656, 662, and cases there cited.

Some part of this testimony, it is said, was inadmissible, because the plaintiff's counsel waived his objection by calling for *all* the testimony, if any was to be admitted. Such a call was no waiver of the objection already made. It was proper to have all of a conversation, or all the testimony given, stated, if any was introduced.

3. It is said the documentary evidence the plaintiff objected to, was properly admitted, because the reasons for objection were not specifically stated by the plaintiff. It seems to us, that all that a fair and healthful practice requires, is the statement in the exceptions, that the testimony was objected to, and then the Court, *on examination*, will say whether the objection was well taken, especially when the testimony is *documentary*. *Comstock* v. *Smith*, 23 Maine, 210; *Emery* v. *Vinal*, 26 Maine, 295.

The statute does not contemplate that the *whole discussion* had before the Judge should be reported, or that all the reasons for objections shall be reduced to writing. The exceptions are to be reduced to writing in a "summary way."

4. It is said, that some of the testimony admitted and objected to by plaintiff, was immaterial. But the rule is, that where evidence as to matter of fact, although appearing unimportant, is admitted but objected to, and the Court have no means of ascertaining that it did not have an influence on the minds of the jury, exceptions to such admission must be sustained. *Warren* v. *Walker*, 23 Maine, 453.

Eastman and *Leland*, for defendant.

1. The objection made to the declarations of one of the vendors of the plaintiff, goes the length of insisting, that it was not competent for the defendant to show *any declarations* by one of the vendors, unless made in the *bodily presence* of the vendee.

To maintain the defence, it was necessary to establish two propositions: 1. That the vendors fraudulently intended, &c. 2. A participation in a fraudulent intent on the part of the vendees.

To prove the fraud of the *vendors*, their conduct and declarations before the conveyance may be the best evidence. Fraud on the part of the vendee being thus established, a knowledge of the intent of the vendor on the part of the vendee, is to be shown by other circumstances tending to show such knowledge. The first kind of evidence affects the vendor only, unless the defendant succeeds in connecting the vendee with it, and so the course of proof affecting the one or the other, is entirely distinct.

As to the position taken, that defendant should have called the vendors of the plaintiff themselves, we have only to say, that the declarations are facts, and not evidence of facts, and may be testified to as well by a third party as by the party who made them. *Howe* v. *Reed*, 12 Maine, 518; *Bridge* v. *Eggleston*, 14 Mass., cited by plaintiff; *Parker* v. *Merrill & als.*, 6 Greenl. 41; *Foster* v. *Hall*, 12 Pick. 99, 100, and particularly at p. 99.

2. As to the second exception, it is not sufficient for counsel when he objects to the testimony as *illegal*, *irrelevant* or *improper*, to state to the Court, that "he objects" merely. He must inform the Court and the opposing counsel *why* he objects. This rule is a salutary one in practice and is well settled. *Waters* v. *Gilbert*, 2 Cush., last clause in the opinion, at bottom of page 31; *Emery* v. *Vinal*, 26 Maine, 303; *Comstock* v. *Smith*, 23 Maine, 203; *Holbrook* v. *Jackson & al.*, 7 Cush. 154, 155.

3. Some of the testimony objected to was immaterial. It

is well settled, that the admission of immaterial testimony furnishes no cause of exception. *Flint* v. *Rogers*, 15 Maine, 67; 5 Pick. 219; 13 Maine, 439; 14 Maine, 201; 14 Maine, 141; *Smith* v. *Richards*, 16 Maine, 200; 30 Maine, 31.

4. It was competent for the defendant to show the declarations of Wm. White, one of the vendors of plaintiff, *about the time* of the pretended sale. Those made by him as a witness in 1853, were made while the plaintiff was in Court. These declarations, if made to Gilpatrick the judgment creditor, or to Hooper, his clerk, would have been admissible, even if not made under the solemnity of an oath.

These declarations were offered to prove the participation of the vendee in the fraud of the vendor.

The declarations of a party to a record, "or of one identified in the interest with him," are, as against such party, admissible in evidence. The case shows a complicity between the father and the sons, prior to the sale, and that after the sale the father employed the sons as his agents.

This evidence was legally admissible as the declarations of Wm. White, made by him "against his interest," and because of the privity between him and the plaintiff, the vendee. Where "an unity of design and purpose" has once been established, it may be fairly and reasonably presumed, that the admission of either one, with a view to the prosecution of that purpose, conveys the meaning and intention of all.

But the plaintiff waived his objection to this testimony by putting in himself further testimony of the same witness, to rebut that produced by the defendant. The question is not what counsel intended to do, but what was the practical effect of what he did do.

5. Where substantial justice has been done the parties by a verdict of a jury, the Court will not examine with a "critic's eye" to see whether some irregularity has not taken place at the trial justifying a new trial. *Baker* v. *Briggs*, 8 Pick. 126.

6. In reply to what is said by plaintiff's counsel upon the last exception, the defendant's counsel cited, in addition to

cases above, the following:—1 Stark. Ev. (ed. of 1830,) pp. 37, 38, § 21; Ib. p. 31, §§ 31, 33; Ib. pp. 50, 51, § 32; 1 Greenl. Ev. p. 229, § § 207, 208; 1 Greenl. Ev. p. 228, § 196; 1 Greenl Ev. p. 212, § 180; *B. & W. Railroad Corporation* v. *Dana*, 1 Gray, 102, 103; *Wheeler* v. *Rice*, 8 Cush. 208, and the cases referred to by BIGELOW, J., p. 208.

TENNEY, C. J. — The plaintiff claims to be the owner of the property in question, under a bill of sale dated Dec. 11, 1851, in consideration of an indorsement on a promissory note, which he held against the vendors, (the indorsement being for the agreed price of the goods,) and a delivery of the goods at the time of the execution of the bill of sale.

The defendant claims the right to hold the goods against the plaintiff, by virtue of an attachment made by his deputy, on Dec. 13, 1851, upon a writ in favor of John Gilpatrick, upon the ground, that the previous sale to the plaintiff was in fraud of creditors' rights.

Several questions arise on the rulings of the presiding Judge, in admitting evidence in defence, against the objection of the plaintiff, the verdict having been for the defendant.

The deposition of Stephen L. Hooper was introduced by the defendant, and he testified therein, to conversation with Samuel P. H. White, one of the plaintiff's vendors, prior to the time of the sale, not in the presence of the plaintiff, the said Samuel P. H. White then being in Court, and subsequently called by the defendant. It is well settled, that the declarations and acts of a debtor, respecting property, alleged by an attaching creditor thereof, or one representing him, to have been fraudulently conveyed to the party claiming it, made or done before the supposed sale, is admissible in evidence, if such declarations and acts have a tendency to show, that the sale was made with a fraudulent design. *Bridge* v. *Eggleston*, 14 Mass. 245; *Howe* v. *Reed*, 3 Fairf. 518. Such evidence becomes no less admissible, when the declarations and acts are in the absence of the party, to whom the sale is made. The one who alleges the fraudulent sale, must estab-

lish two propositions; one, that the vendor conveyed the property for the purpose of defrauding or delaying his creditors; and the other, that the vendee participated in the fraud. The former proposition, being distinct from the other, may be proved by statements and conduct of the vendor, unknown to the vendee. The presence of the vendor in Court, when such evidence is offered, is no objection to the testimony, which is not to be excluded by the subsequent call of the vendor as a witness by the same party.

The bill of merchandize sold to Lincoln Waterhouse, by the firm of S. P. H. & W. White, was objected to, but received in evidence. The ground of the objection does not appear to have been presented to the Judge. He may not have been advised of the contents of the bill, in any respect; and unless his attention was brought to something upon the bill, which was legally objectionable, by the authorities cited by the defendant, his ruling cannot be treated as erroneous.

The same answer is properly made to the admission of the books of the firm. No specific objection was presented to the Judge; and it was not his duty without such specification, to examine either the bill or the books, in search of matter which might be incompetent as evidence.

The testimony given by William White, one of the firm of S. P. H. & W. White, at a trial between these parties, at the January term, 1853, was admitted against the plaintiff's objection. If this testimony was for the purpose of showing that the sale to the plaintiff was in fraud of creditors' rights, it does not become competent evidence by being under oath, if the statements are objectionable without being so verified. We are not aware, in cases like the present, that the declarations and acts of a vendor, long after the completion of the sale, have been held admissible, for the purpose of defeating the title, which, by a solemn contract, he had passed to, and perfected in, another. If this evidence was erroneously received, the plaintiff was thereupon entitled to exceptions. It is always the privilege of a party to offer testimony, to repel that of his adversary, notwithstanding the former may have

been introduced against his objection. And it has never been understood, that the introduction of such rebutting evidence was an abandonment of the right to except to the ruling; and no reason is perceived, why it should be so.

The introduction of the testimony of Eliza F. Jamerson, it is insisted, was not a ground for disturbing the verdict, because it was wholly immaterial. When the question, which elicited the answer that is the ground of exception was put, the plaintiff made objection thereto. This objection was insisted on at the trial. We think the answer had some tendency to show a relation between the plaintiff and his vendors of the property, touching the intention of one and the other in the transfer, unfavorable to the plaintiff's claim.

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

RICE, CUTTING, and GOODENOW, J. J., concurred.

MOSES BRADBURY *versus* SACO WATER POWER COMPANY.

A motion to set a verdict aside as against evidence, must be supported by a report of the *whole* testimony.

If not accompanied by such report the motion will be overruled.

MOTION FOR A NEW TRIAL, from *Nisi Prius*, HOWARD, J., presiding.

This was an action on the case for damages. The verdict was for the plaintiff; and a motion to set aside the verdict and for a new trial was filed.

S. W. Luques and *Hayes*, for plaintiff, opposed the motion for a new trial, on the following grounds:—

First. Because the defendants have not complied with the law, and their motion is not now properly before the Court, and cannot be considered by it.

Second. The case, even as now reported and presented, justified the jury in returning the verdict they did.

Upon the first point, we say that this action was tried at

the September term, 1855, and a verdict rendered for the plaintiff, and thereupon the defendants made a motion for a new trial. The first, second and third reasons for the same, and only these, were filed in conformity with the rule of Court. The fourth reason, (and we now have reference to these words,—"Because the damages rendered were excessive,") was "inserted" subsequently and long after the time allowed by rule of Court; plaintiff's counsel objecting. The report of the case was drawn some six weeks after verdict, as we are informed, and the plaintiff's counsel did not have any proper and sufficient time or opportunity for examining the same, and did not in any manner assent to its correctness; and now find, on examination, that only a part of the testimony has been reported, and only two deeds, out of eleven that were in the case, are copied and made a part of the same. It will also be noted, that the report in this case was not filed in the clerk's office until the sixth day of May, as appears by his certificate on the bottom of the writ. And it was not until after that time, that we had any opportunity of seeing or knowing the contents of the report.

In this case, the Court is requested to set aside the verdict, because the evidence did not authorize the jury to find the verdict which was rendered. It is perfectly apparent, that for this Court to judge of that fact, the whole case, all of the testimony, must be reported. Such is not the fact.

The certificate of the presiding Judge is as follows:— "The foregoing, though not a full and complete statement of the evidence, is substantially correct, as I find by comparison with my minutes taken at the trial."

This certificate of the presiding Judge amounts in fact to a certificate that the statute regulations, by force of which a new trial is sought, have not been complied with.

"When a motion is made and filed in the Supreme Judicial Court, that a verdict may be set aside, as being against law, or the direction of the Court, or against evidence, the whole evidence shall be drawn up in the form of a report, and

signed by the presiding Judge," &c. R. S., c. 115, § 101, and amendment in 1841; R. S., pp. 784 and 785.

The case itself finds that "plaintiff introduced several deeds which may be referred to, but only two are to be copied," &c. Can your Honors know, *ex officio*, the contents of these deeds that are not copied, nor to be copied, so that you can judge whether they in fact authorized the jury to render the verdict they did? To this point, we cite the case of *Rogers* v. *Kennebec & Portland R. R. Co.* 38 Maine, 227.

J. M. Goodwin and *Eastman & Leland*, for defendants, (on the first of the two points raised by the plaintiff,) contended:

1. That if the Court will examine the minutes made by the clerk and annexed to the motion, they will perceive that this 4th reason was inserted by leave of Court, at the adjourned term in November following the trial in September. By referring to the Rules and Orders of the Supreme Judicial Court, adopted July, 1855, and to Rule No. 17, we find the following:—"Motions for new trials must be made in writing and assign the reasons thereof, and must be filed within two days after verdict, unless the Court, for good cause, by special order, shall enlarge the time." Here the time was enlarged. The rule does not require that a motion for enlargement of time, should appear of record. If the clerk's entry shows that the defendant was permitted to file his 4th reason, it is to be presumed that permission was granted on such a state of facts, as would authorize the Court, in the exercise of a reasonable discretion, to grant the motion.

2. The plaintiff contends in his answer, that it is not competent for the Court to entertain the motion filed for a new trial, because the case shows that a full and complete report of the evidence is not presented, or certified by the "presiding Justice." By referring to the 18th Rule of Court, as found on page 10th of Rules and Orders, adopted July, 1855, it will be seen, that "when a party shall file a motion for a new trial, upon evidence, as reported by the presiding Judge," such party shall "report the evidence, and give due notice

thereof to the adverse party or his counsel, and present the same to the Judge, within six days after the verdict shall have been rendered, and before the adjournment of Court, if that shall sooner take place; and unless that be so done, the Judge shall not be required to sign the same."

Now, although it appears by the certificate, that the report was not filed in the clerk's office until the 6th of May, 1856, yet it does not appear but that the report might have been made up prior to the adjournment of September Court, and duly presented to counsel; and as the certificate of the presiding Justice has no date affixed to it, the fair and legal presumption is, that the forms of law had fully been complied with, otherwise the presiding Justice would not have made the certificate.

The Court will perceive that the opinion in Rogers' case, referred to by plaintiff's counsel, was delivered probably in 1854. If so, then it was prior to Rule 18, as adopted in July, 1855, by the Supreme Court; and we contend that Rule No. 18 changed the practice, in regard to the manner and mode whereby "motions for a new trial" were to be prepared and presented to the Court.

But we say further, that there is a material difference in the certificate as made in Rogers' case and the certificate made by the presiding Justice in the case at bar.

In Rogers' case, the certificate of the Justice does not profess to give a full or substantial report of the evidence, but only so much of the evidence as had a bearing on one point of the case. In the case at bar, the certificate of the presiding Justice is, that "The foregoing, though not a full and complete statement of the evidence, is substantially correct."

In Rogers' case, the certificate purports simply to state only a portion of the testimony. In our case, all the evidence having any bearing on any one of the several reasons assigned for a new trial is fully reported.

In Rogers' case, it does not appear that Gilbert, counsel for plaintiff, ever saw the report, (as is now required by the

18th rule,) whereas, in the case at bar, the counsel did see it and examine the same.

In Rogers' case, it does not appear, "that all the evidence on which the verdict was found" was presented for the consideration of the Court. In the case at bar, no such inference can fairly be drawn.

CUTTING, J.—Motion overruled and judgment on the verdict, on both grounds taken by plaintiff's attorneys.

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

ISAAC WORCESTER *& al. & ux. versus* GREAT FALLS MANUF'G CO.

In actions *ex delicto*, the award of the jury is to be for the amount of the *actual* damages received by the plaintiff.

A party cannot recover damages for being deprived of the use of his real estate so that he could not appropriate it for a certain imaginary purpose, when he has no design so to use it. He may have damages for the injury actually sustained, but no further.

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

This was an action on the case to recover damages caused by the overflowing of the plaintiffs' land and mill-site, situated on the Great Falls river.

It appeared in evidence, that one Horn built, in 1842, a dam above that of the defendants', which flowed out the plaintiffs' site and land, which dam, plaintiffs contended to be on their land at one end. At this time plaintiffs did certain acts indicating an intention to assert their rights to the site thus overflowed.

In 1848, the defendants built the dam complained of across the Great Falls river, which is there the boundary between this State and New Hampshire.

There was evidence tending to show, that the plaintiffs' land and site was overflowed by the defendants' dam. The defendants' dam flowed out the Horn dam and the plaintiffs' privilege at the same time.

The instructions given, as to the measure of damages, were not the subject of exception.

As the plaintiffs claimed all damages which might justly be found under the third question to the jury, they were directed, besides their general finding, to find specifically the damages arising under the first and second questions submitted to their consideration. Judgment was to be rendered for such sum as the Court should determine under the several findings of the jury. These were as follows:—

"Verdict.—The jury find that the defendants are guilty in the manner and form as the plaintiffs have declared against them, and assess damages for the plaintiffs in the sum of one hundred and three dollars and sixty-seven cents.

"W. M. Bryant, Foreman."

1. What damages to the plaintiffs, in consequence of their land having been overflowed by the defendants' dam, during the time it has been thus overflowed prior to the date of plaintiffs' writ? Eight dollars.

2. What damages to the plaintiffs, in consequence of their mill privilege having been overflowed during that time, regarding it in the condition it was at the time it was erected? Two dollars.

3. What damages the plaintiffs may sustain, by having been deprived of the use of their privilege, for any purpose for which it might have been used as a privilege, from the time of the erection of defendants' dam to the date of plaintiffs' writ, or of its sale? Ninety-three dollars, sixty-seven cents.

4. The jury are to find whether the plaintiffs, at the time defendants' dam was erected, did intend in good faith to use and occupy their close as a mill privilege, by making and erecting suitable and proper dam or dams and mills or other erections, when defendants' dam was erected, or since. No.

J. & R. Kimball, for plaintiffs, cited, in support of their argument, the following authorities:—*Worcester* v. *G. F. M. Company*, 39 Maine; 17 Mass. 289; 8 Burr. 13; Davis' Abr., ch. 28, articles 7 and 8; 2 Greenl. Ev. § 254 and 265.

N. Clifford, J. W. Leland and *N. Wells,* for defendants.

"Damages are given as a compensation, recompense or satisfaction to the plaintiff, for an injury already received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less; and this, whether it be to his person or estate." 2 Greenl. Ev. p. 250, § 253; *Longfellow* v. *Quimby,* 29 Maine, on p. 205, per TENNEY, J.

The writ is made a part of the report, by which it appears, that no claim is made for special damages.

General damages are those which necessarily result from the injury alleged, and the law will in such cases award nominal damages, if none greater are proved. 2 Greenl. Ev. § 254, p. 258; *Whittemore* v. *Caller,* 1 Gall. 433.

Special damages are never implied, and if a party intends to make such a claim, he must see to it that his allegations and proofs correspond with his intent. Ang. on Wat. Cour. § 415, a, p. 489; *Boyden* v. *Burke,* 14 How. 575; *Furlong* v. *Polleys & al.* 30 Maine, 491.

Perhaps nominal damages will be presumed, after proof of the flowing by the act of the defendants, and nothing more. *Hodges* v. *Hodges,* 5 Met. 205; Ang. on Wat. Cour. § 432, p. 505.

It may be so, although it is well settled that a prescriptive right to flow cannot be acquired in this State, without proof of actual damage to the land overflowed. *Wood* v. *Noyes,* 30 Maine, 47; *Wentworth* v. *Sanford Manuf. Co.* 33 Maine, 547.

The damages to be recovered, must always be the natural and proximate consequence of the act charged and proved upon the defendant. 2 Greenl. Ev. § 256, p. 267; 2 Greenl. Ev. § 266, p. 280; 3 Am. Jurist, pp. 292, 293.

"Both parties," says Mr. Greenleaf, "must be confined to the principal transaction complained of, and to its attendant circumstances, and natural results, for these alone are put in issue." 2 Greenl. Ev. § 268, p. 282; 1 Chitty's Plead. 338.

The rule is, that in all actions brought for injuries to real property, the quality should be shown, as whether it consists

of houses, lands, or other hereditaments. Steph. on Plead., (1st Amer. ed.,) Rule III, p. 296; 1 Chitty's Plead. on p. 376, (*p. 377); *Davis* v. *Jewett*, 13 N. H. 88; *Whitney* v. *Gilmore*, 33 Maine, 273.

The declaration in this case contains no allegation that the close embraced either dam, mills or machinery, and of course no damages can be recovered for any such erections, especially, as the report shows, that none such ever existed on the premises.

General damages are such as necessarily result from the injury complained of, and may be recovered without a special averment in the declaration.

Special damages are such as are the natural, but not the necessary, result of the injury, and therefore must be stated in the declaration. *Vanderslice* v. *Newton*, 4 Comst. 130; *Crain* v. *Petrie*, 6 Hill, 522; *Dickinson* v. *Boyle*, 17 Pick. 78.

Damages, which do not result from the grievance alleged, are not proximate, and can never be allowed. Sedgw. on Damages, 75.

Nor is it possible to say that any damage resulted from the act of the defendants to the dam, mills or machinery on this close, because none such existed. *Lambard* v. *Pike*, 33 Maine, 145.

It is therefore a claim for speculative damages, which the law every where disowns. *Thompson* v. *Crocker*, 9 Pick. 60; *Fitzsimmons* v. *Inglis*, 5 Taunt. 534; *Inhabitants of China* v. *Southwick & al.*, 12 Maine, 238.

It is worse than speculative, it is imaginary and unreal. No injury was sustained beyond the nominal one which is admitted, and the plaintiffs would not have been relieved from any other than an imaginary loss, if the water had been withdrawn. *Nichols* v. *Valentine*, 36 Maine, 324.

Counsel fees are not allowable. *Day* v. *Woodworth & al.* 13 How. 363; *Barnard* v. *Poor*, 21 Pick. 378; *Lincoln* v. *The Saratoga & Schenectady R. R. Co.* 23 Wend. 425; *Shaw* v. *Hayward*, 7 Cush. 170.

The true rule of law respecting the measure of damages is,

that where an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurable with the injury sustained. *Rockwood* v. *Allen*, 7 Mass. 254; *Swift* v. *Barnes*, 16 Pick. 194; *Newhall* v. *Ireson & al.*, 8 Cush. 599; *Jones* v. *Lowell*, 35 Maine, 540.

But a possible injury is not a subject of damages. *Boston Manuf. Co.* v. *Inhab'ts of Newton*, 22 Pick. 22; *Mussey* v. *Crain*, 1 McCord, 489; *Read* v. *Hatch*, 19 Pick. 47.

TENNEY, C. J.—The plaintiffs were the owners of certain land, bordering on Salmon Falls river, where it is the dividing line between the States of Maine and New Hampshire, with a mill site and waterfall thereon, in the same river. In Sept., 1848, the defendants erected a dam across that river, below the land, mill site, and waterfall of the plaintiffs, and thereby wrongfully flowed out the same. The jury, in their verdict for the plaintiffs, assessed damages, according to the injury, which the plaintiffs had sustained, and which they might have sustained on their different grounds; which verdict, by the agreement of the parties, is to be amended, to accord with the rule of damages which shall be determined by the Court.

The damages sustained by the plaintiffs on account of the flowing of their *land* by the defendants, was the sum of eight dollars; and for the flowing out of their mill site and waterfall, the additional sum of two dollars; and the sum of ninety-three dollars and sixty-seven cents was found as damages for the injury which the plaintiffs might sustain, by being deprived of the use of their mill privilege, for any purpose for which it might have been used as a privilege, or for sale. And the jury found further, that neither at the time when the defendants' dam was erected, nor at any time since, did the plaintiffs intend, in good faith, to use and occupy their close as a mill privilege, by making and erecting suitable and proper dams and mills or other erections.

In actions *ex delicto*, the damages to be awarded by a jury, are a compensation, recompense, or satisfaction to the plain-

tiff, for an injury actually received by him from the defendant. Co. Litt. 257; 2 Bl. Com. 438 and seq.; 2 Greenl. Ev. § 253.

When the circumstances are ascertained, a compensation and satisfaction are to be awarded. The remedy is to be commensurate to the injury sustained. *Rockwood* v. *Allen, Ex'r*, 7 Mass. 254; 4 Dall. 207. All damages must be the *result* of the injury complained of. 2 Greenl. Ev. § 254. The damages to be recovered must be the natural and proximate consequence of the act complained of. Ib. § 256.

No rule has ever been recognized as having existence in law, that a party can recover damages for being deprived of the use of his real estate, so that he cannot appropriate it for a certain *imagined* purpose, which might be attended with profit to him, when it is proved, that he did not design so to use it; he may have damages for the injury actually sustained, by being deprived of his land, but no further.

Damages, as we have seen, are given as a compensation for something the owner has lost, previous to the commencement of his action, and not for that which he might have lost, if he had devoted the property to a purpose which he never contemplated. The doctrine contended for by the plaintiffs' counsel, would often make it advantageous to an owner of real estate, capable of being beneficially improved, that he should be obstructed in his occupation of the same by a wrongdoer, when he had no design whatever of so improving it.

The sum of $93,67, found by the jury, was for an injury purely hypothetical, having no basis in fact. No evidence was introduced for the purpose of showing, that the plaintiffs wished to make sale of the mill site and waterfall, or that they could have done so, to be occupied by mills and other erections, and there is no foundation for damages on this account.

The damages which the plaintiffs actually sustained by the alleged injury to their land, mill site, and privilege, have been

found to be the sum of $10, and this sum they are entitled to recover, and the verdict is to be amended accordingly.

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

STATE *versus* ELDEN.

A. was indicted, tried and convicted of the crime of forgery. He took exceptions to certain instructions by the presiding Judge to the jury, which were allowed. At the succeeding term, by leave, he withdrew his exceptions; whereupon, on the suggestion of the county attorney, the indictment was dismissed, and the defendant discharged without day. A year afterwards, A. was again indicted for a forgery, and the allegations were in all respects similar to those in the first indictment, to which he pleaded a previous conviction in bar.

The Court *held*, that it was a second indictment for the same offence on which he had been already convicted; and that the plea of *autre-fois convict* was good.

ON DEMURRER from *Nisi Prius*, GOODENOW, J., presiding.

The facts in this case are fully stated in the opinion of the Court.

Evans, for State.

Bourne & Son, for defendant, contended,—1. That the common law doctrine, that no person "should be twice put in jeopardy of life or limb, for one and the same offence," had been held to apply to minor offences, and mean that no man should be twice tried for one and the same offence. Story on the Con., vol 3, § 1781; *Commonwealth* v. *Robie*, 12 Pick. 502. It was adopted as a part of the Constitution of the United States, and of our own State. The facts in the case show that the defendant has been "in jeopardy" for the same offence charged in the second indictment.

2. Whether a discharge on the first indictment by a *nolle pros.* is a bar to a second prosecution for the same offence, depends upon the time when the order of discharge is given. If before trial, as in the case of *Commonwealth* v. *Wheeler & al.*, 2 Mass. 172, it is no bar, because the prisoner has not been put "in jeopardy;" but if after conviction, as in this

case, it is a bar, for the prisoner has in that case been in jeopardy.

If the Court sees fit to discharge a prisoner, at the suggestion of the prosecuting officer that he does not wish to prosecute further, even after conviction, it is clearly in its power to do so. 20 Pick. 356.

In *Commonwealth* v. *Wade*, 17 Pick. 396, after the attorney general had introduced all the evidence on behalf of the government, the counsel for the defendant objected that the allegation in the indictment was not supported by the proof, and the Court so decided. The attorney general then moved to enter a *nolle pros.*, and contended that he might do so as a matter of right, and cited the case of *Com.* v. *Wheeler & al.*, before mentioned.

But the Court said, "It is a case where there is no necessity, no unforeseen cause of delay, no accident, no mistake, no extraordinary exigence. It is an ordinary case of a good indictment in point of form, but a failure in the proof; and we think, therefore, that the prisoner is entitled to a verdict of acquittal."

The prosecuting officer was not allowed to interfere with the rights of the prisoner by entering a *nolle pros.* *People* v. *Barrett*, 1 Johns. 75.

3. It may be argued, that in this case there was no regular judgment on the verdict.

We answer first, that there was a judgment that the prisoner "go without day," which is precisely the same as judgment on an acquittal; and although the *nolle pros.* might have induced this judgment of *acquittal*, yet that does not affect the prisoner's rights at all.

But we do not consider that the rights of the prisoner can be at all affected by the entry or non-entry of a judgment. We are well supported by decisions when we say, that the *verdict* alone is sufficient to support this plea. It is not material, that it should be followed by a judgment. 4 Black. Com. 336; Greenl. Ev., vol. 3, § 38.

4. It appears that all the proceedings in the former trial

were legal, and in accordance with the usual course of trials until after verdict. This, according to the decisions, is all that the prisoner need show to entitle him to a discharge, *provided*, that the charge is the same in both indictments.

The only question, therefore, is upon the applicability of this plea to this particular case.

In determining whether or not this plea is sufficient, the true test is, whether the evidence necessary to support the second, would have been sufficient to procure a conviction on the first. *Rex* v. *Emden*, 9 East, 437; 3 Greenl. Ev., § 36 and note.

"If the prisoner could have been legally convicted upon *any* evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second, and it is immaterial whether the evidence was adduced or not." *Rex* v. *Sheen*, 2 C. & P. 635.

The question of the identity of the offence is set at rest by the papers in the case, which show that the second indictment is a verbatim copy of the first.

It appears from the records of this Court, that the prisoner has once been tried and convicted upon a good and sufficient indictment, for this identical offence, and that the jury returned a verdict of guilty. That verdict, the Court say, in *State* v. *Norval*, "is of itself an eternal protection against all other prosecutions for the same offence." It is unaffected by the *nolle pros.* which follows it, and it is immaterial to the rights of the prisoner whether or not a judgment was entered upon it.

TENNEY, C. J. — The defendant was indicted for the crime of forgery, at a term of this Court begun and holden in and for the county of York, on the first Tuesday of January, A. D. 1855. At the following term in that county, upon a plea of not guilty, he was tried on the same indictment, and found guilty of the charge therein contained. Exceptions were taken by him to certain instructions, given to the jury by the Judge who presided at the trial, which were duly

allowed. The matter was then continued, and marked "law," upon the docket of that term. At the succeeding term in that county, the defendant, by leave of Court, withdrew his said exceptions. And the attorney of the State for the county of York suggested to the Court, that he would no further prosecute the said indictment. It was therefore considered by the Court, that the indictment be dismissed, and that the said defendant go thereof without day.

At a term of this Court, begun and holden at York, on the first Tuesday of January, A. D. 1856, the defendant was indicted for a forgery, and the allegations in the indictment are, in all respects, similar to those in the former indictment, and, under the pleadings, it is to be treated as a second indictment for the same offence, found after conviction on the first.

At the same term of the Court, when the second indictment was found, the defendant appeared, and to this second indictment pleaded the former conviction in bar, in due form, to which the government, by the county attorney, filed a general demurrer, which was joined.

The Court overruled the defendant's plea, and adjudged the demurrer good. To which adjudication the defendant excepted.

It is certainly very doubtful, whether the Court was called upon to judge of the sufficiency or insufficiency of the defendant's plea. By R. S., c. 96, § 22, all questions on demurrer shall be heard and determined by the Court, holden by a majority of the Justices thereof. Same c. § 12. This provision does not seem to have been changed by the statute of 1852, c. 246, § 8, requiring that all cases, civil or criminal, when a question of law is raised for the determination of the Supreme Judicial Court, sitting as a court of law or equity, shall be respectively marked "law" upon the docket of the county, where they are so pending, and shall be continued on the same until the determination of the questions so arising shall be respectively certified, by the clerk of the district, to the clerk of the county, where they are pending.

If, however, the question raised by the demurrer was sus-

pended in the Court of the county, without further action, that question upon the pleadings alone is properly in this Court; and it is before it, either thereon, or upon the exceptions.

In the amendments to the Constitution of the United tates, art. 5, it is declared, "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." This protection will extend to persons, brought to rial in the courts of the individual States, in the same manner as to those who are charged in the federal courts. The sixth article of the Constitution of the United States declares, that that constitution shall be the supreme law of the land, and the Judges in every State shall be bound thereby; any thing in the constitution or laws of any State to the contrary notwithstanding. And the constitution of this State contains in the Declaration of Rights, Art. 1, § 8, a similar clause. This is equivalent to the declaration of the common law principle, that no person shall be tried twice for the same offence. *Commonwealth* v. *Roby*, 12 Mass. 496, 502.

The plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. 4 Bl. Com. 335. The declaration in the constitution embraces offences not comprehended in the maxim referred to, but the construction to be given to the latter in other respects, will equally apply to ofences less than capital.

"Jeopardy of limb" refers to crimes which were formerly punished by dismemberment and intended to comprise the offences denominated in law felonies. *People* v. *Goodwin*, 18 Johns. 187, 201.

The pleas of *autrefois acquit* and of *autrefois convict*, depend on the same principles, that no man shall be more than once in peril for the same offence. 1 Chit. Cr. Law, 452, 462. The form, the requisites and consequences are very nearly the same. Ib. 63; 4 Bl. Com. 336; *United States* v. *Gilbert & al.* 2 Sumner, 19.

In order, however, to entitle the defendant to either of these pleas, of former acquittal, and former conviction, they must be upon a prosecution for the same identical act and crime, 4 Bl. Com. 336; and also that the former indictment as well as the acquittal or conviction was sufficient. And neither plea will be of any avail, when the first indictment was invalid, and when on that account, no judgment could be given, because the life of the defendant was never before in jeopardy. 1 Chit. Crim. Law, 452, 463.

If in the former trial the Court had no jurisdiction of the offence; if the indictment was insufficient in form or substance; or if, after the jury was impanelled and the trial had proceeded, by sudden death or sickness of a juror, the extreme illness of the prisoner, or other case of pressing necessity, the course of the trial is interrupted, the prisoner has not been put in jeopardy, in the sense of the law. *Commonwealth* v. *Roby*, before cited.

The offence charged in the two indictments must be the same in *law* and in *fact*. But it is sufficient if the acquittal from the offence charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree. When a party is charged in an indictment with the crime of murder, the felony actually committed is the same, whether it has all the elements of murder in the first or second degree, or whether it is wanting in the intention of murder, and is therefore manslaughter only. The two lower degrees of felonious homicide, are embraced in the charge of the higher offence. *Commonwealth* v. *Roby*, before cited; *State* v. *Conley*, 39 Maine, 78.

That the plea *autrefois acquit* or *autrefois convict* constitute a bar to the second indictment, is it necessary that a judgment be rendered in the former case? It is very clear, on principle and authority, that this question should be answered in the negative. After a trial and an acquittal upon an indictment in all respects sufficient, found by a grand jury in attendance upon a court having jurisdiction of the offence, and the result of due and legal proceedings, so that there is a

perfect foundation for a judgment, the jeopardy of the accused has terminated. If the trial upon the same indictment, on the same proceedings, had terminated in a conviction, it was undoubtedly in the power of the prosecuting officer, to enter a *nolle prosequi*, in the exercise of his own discretion. *Commonwealth* v. *Wheeler*, 2 Mass. 172. But the peril, to which the accused was exposed, before and during the trial, ceased upon his conviction. It was then the right of the attorney for the State to move for sentence, and no power, in the least effectual could the convict claim, as his right under the laws of this State, to interpose a valid objection thereto. The jeopardy had passed and was merged in certainty. If he is liable to be tried again for the same alleged offence, under an indictment in all respects similar to the former, he is certainly in the same peril in which he stood before his former trial; for in the case supposed, his position at one time and the other is precisely identical, and the trial may be often repeated.

It is no answer, that he is exposed again only to the like conviction, with the chance of an acquittal. The expense of another trial, with perhaps little or no hope of greater success; the excitement and vexation, which is the almost necessary consequence of such proceedings; the ignominy of a repeated exposure to the public, as one suspected of an infamous crime, may so influence him, that he may regard it as a great misfortune to be again obliged to go through the forms of a trial for a crime of which he has been charged by the grand inquest of the body of the county, and of which he has been convicted by a jury of his peers, who were sworn well and truly to try the issue between the State and himself. But we are not discussing what benefit he may derive from a trial on an indictment, for a charge of which he has been convicted, when he asks for no such benefit; and when it is not easy to perceive that any benefit was intended by others, who were the instruments to bring him to the second trial; but whether he is protected from the jeopardy under constitutional declarations, arising from repeated trials for the same offence.

"The plea of *autrefois convict*, or a former conviction, for the same identical crime, though no judgment was ever given, or perhaps will be, is a good plea in bar to an indictment; and this, for the reason that no man ought to be twice brought in danger of his life for one and the same crime." 4 Bl. Com. 336.

Hawkins, (P. C. b. 2, c. 35, § § 1, 8, 9, 10,) says, "the plea of *autrefois acquit* is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offence more than once. From whence it is taken in all our books as an undoubted consequence, that when a man is found once not guilty on an indictment or appeal, free from error, and well commenced before any Court which hath jurisdiction of the cause, he may, by the common law, in all cases plead such acquittal in bar of any subsequent indictment or appeal for the same crime." Lord HALE recognizes the same doctrine. 2 Hale's P. C. 181, 220, 249, 250. Mr. Justice STORY says, "the like doctrine, founded on the like maxim, will be found to apply to cases of conviction. And here, to avoid any ambiguity, it may be proper to state, that conviction does not mean the judgment passed upon a verdict; but if the jury find him (the party) guilty, he is then said to be convicted of the crime, whereof he stands indicted." "For there is, in point of law, a difference between the plea *autrefois convict*, and *autrefois attaint*, of the same offence; the former may be where there has been no judgment; the latter is founded upon a judgment." "Thus we see that the maxim is imbedded in the very elements of the common law, and has been uniformly construed to present an insurmountable barrier to a second prosecution, where there has once been a verdict of acquittal, regularly had upon a sufficient indictment." *United States* v. *Gilbert & al.* 2 Sum. 19. And in the case last referred to, it was held, that the prohibition in the constitution of the United States, art. 5, which we are considering, means that no person shall be tried a second time for the same offence, after a trial by a competent and

regular jury, upon a good indictment, whether there be a verdict of acquittal or conviction.

Authorities to the same effect might be adduced further in support of the validity of the plea in bar of the defendant. But they are not found to impugn the doctrines of those which have been referred to, touching the question before us, and they become unnecessary.

Demurrer overruled; — Plea adjudged good.

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

JAMES B. SHAPLEIGH *versus* GEORGE ABBOTT *& al.*

A verdict in favor of one of two defendants, and silent as to the other, may be received and affirmed; and this in assumpsit as well as in tort.

Whether a note has been altered or not, after it has passed out of the hands of the promisor, is a question for the jury.

ON MOTION FOR A NEW TRIAL, from *Nisi Prius*, WELLS, J., presiding.

This was an action of assumpsit on a negotiable promissory note, purporting to be given by defendants Abbott and Frederick B. Fernald to Charles O. Lord, and by him indorsed over to the plaintiff. The defendants severally pleaded the general issue. The verdict was in favor of one of the defendants, Fernald, and silent as to the other. After the rendition of the verdict, the plaintiff moved that it be set aside and a new trial granted, for the following reasons:

1. Because the verdict is against evidence and the weight of evidence, and against law, and the ruling and directions of the Court upon the law applicable to the case.

2. Because the action was brought against said Fernald and Abbott, who each pleaded, that he never promised as alleged in the writ, and issue was joined by the plaintiff upon said pleas, and the action submitted to the jury; but the jury have only found, that said Fernald never promised as alleged, and have not found upon the issue tendered by said Abbott,

nor does it appear by their verdict, that they acted upon or considered the same.

N. D. Appleton and *A. Low*, for the plaintiff, contended as matter of law,—1. That a new trial should be granted in this case because the verdict, (if it may be called a verdict,) was void, the jury having found only part of the issue. A verdict is insufficient for the whole, if it finds only part of the issue and says nothing as to the residue. 5 Com. Dig. Pl. § 19; 2 Cro. 627; 2 Ral. 722, l. 5 and 35.

2. The jury in this case find that the defendant, Frederick B. Fernald, never promised, &c., but they are silent in their verdict in relation to George Abbott. Therefore, we contend the verdict is imperfect, and finds only part of the issue before them, and is incomplete, and was not entitled to be received. *Thatcher* v. *Jones*, 31 Maine, 528; *Lanesboro'* v. *County Commissioners of Berkshire*, 22 Pick. 281, 282; *Anthony* v *same*, 14 Pick. 189; *Ward* v. *Taylor*, 1 Penn. 238; *French* v. *Hanchett*, 12 Pick. 15; *Bay & Livingston* v. *Gunn*, 1 Denio, 108; *Milne* v. *Huber*, 3 McLean, 212; *Patterson* v. *United States*, 2 Wheat. 221; *Bicknell* v. *Dorion*, 16 Pick. 478.

John H. Goodenow and *J. S. Kimball*, for Fernald.

The defence, as to Fernald, was, that the note was given to compound a felony; that it was signed by Fernald to be used for that purpose, and no other, and the plaintiff had knowledge of that fact, or purchased it after it was overdue and dishonored, or that he is only a nominal party, and that the note had been materially altered since it was given, without the consent of Fernald.

It was the plaintiff's own fault if he did not have a verdict against Abbott. He did not ask for it. No point was made for Abbott by his counsel, and no argument had for him. As counsel for Fernald, we did not wish to burthen his defence, by taking upon us the defence of Abbott.

The defendants pleaded severally and by different counsel. No questions were asked, or evidence introduced or discussions had at the trial in defence of Abbott, or on his account.

In regard to the effect of the alteration and illegal consideration of a note, the defendant's counsel cited *Porter* v. *Rumerey*, 10 Mass. 64; *Daimouth* v. *Bennett*, 15 Barb. S. C. 541; Story on Contracts, 489, 490, 569, 545; Chitty on Contracts, 470, 582; Douglass, 696; Cowper, 790; *Swan* v. *Chandler*, 9 B. Munroe, 97; *Kingsbury* v. *Ellis*, 4 Cush. 578; *Unger* v. *Boas*, 13 Penn. (1 Harris,) 601; *Gardiner* v. *Maxey*, 9 B. Munroe, 90. Also see *Plummer* v. *Smith*, 5 N. H. 553; *Noyes* v. *Day*, 4 Verm. 384; 14 Maine, 225, 284 and 457; 16 Maine, 453; 5 Munroe, 25.

TENNEY, C. J.—The action is assumpsit against the defendants as makers of a promissory note. They severally pleaded the general issue, and filed a brief statement, alleging that the note had been materially altered after it was signed, and without the consent of the makers. The jury found, that one of the makers did not promise, &c., and no verdict was returned for or against the other. The plaintiff filed his motion to set aside the verdict, on the ground that it was incomplete; and also on the further ground that it was against the evidence of the case.

In the case of *Thatcher* v. *Jones & al.*, 31 Maine, 528, a verdict was returned in favor of one of the defendants only, the jury being unable to agree as to the guilt of the other. The verdict returned was received and affirmed, to which exceptions were taken. That case differs from this only in being an action of tort. No good reasons are perceived for a distinction on this account. The exceptions were overruled in that case, the Court having cited, in support of the result to which they came, analagous cases in actions of assumpsit as well as of tort.

It is a familiar principle, that generally, in actions in form *ex contractu* against two or more defendants, to entitle the plaintiff to judgment, the verdict must be against all. 1 Chit. Pl. 31–33.

A verdict was rendered for the defendant Fernald, upon a full hearing of the evidence. This was decisive of the rights

of the parties in this action, as a verdict could not have been returned against the other defendant, and have been effectual; and Fernald cannot with propriety be subjected to the risk and expense of another trial, on account of the informality of the verdict, or the failure of the jury to agree as to the defendant Abbot.

Whether the note had been altered or not, was a question for the jury. The note was presented and much evidence adduced on one side and the other, as to the condition in which it was, soon after it was signed, and at the time of the trial. Some light might be expected to be thrown upon the question by an inspection of the note itself; and herein the Court might entertain a different opinion from that of the jury, but of this the latter were the judges in connection with the other evidence; and it is not a case, where the verdict can be disturbed. *Motion overruled* —

Judgment on the verdict.

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

COUNTY OF OXFORD.

MOSES HAMMOND *versus* GEORGE W. WOODMAN *& als.*

A manufacturing corporation conveyed certain property to A., with the following exception: — "Excepting also and reserving the right at all times to take and use water sufficient to drive the factory and machinery attached," &c.* Afterwards, the corporation conveyed to B., certain other real estate, with their factory, machinery, &c., which conveyance A. joined in by separate deed. A. had attached to the factory flume, spouts through which he drew water to run his own mills, which B. cut off. — *Held*, that the reservation in the deed to A., of the right "at all times to take and use water sufficient to drive the factory and the machinery attached," as between the parties thereto, is as effectual to secure to the company the right reserved, together with the easement and servitude, so as to charge the lands of A., as by a deed from the owner of the land to be charged granting the same as appurtenant to other estate of the grantee.

And this especially when A. himself conveys by his own deed the whole interest reserved.

The grant of a principal thing carries with it all that is necessary for the beneficial enjoyment of the grant, which the grantor can convey.

* Know all men by these presents, That we, the South Paris Manufacturing Company, doing business at South Paris, in Paris in the county of Oxford, in consideration of the sum of four thousand five hundred dollars paid by Moses Hammond, of said Paris, Gentleman, the receipt whereof we do hereby acknowledge, do hereby give, grant, bargain, sell and convey unto the said Hammond, his heirs and assigns forever, all the real estate belonging to us, the said company, that lies on the northerly side of the road leading over the bridge at South Paris as traveled at the present time, and on the east side of Little Androscoggin river, viz.: the grist-mill, saw-mill, factory store, shingle machine, and all the apparatus and utensils thereto belonging. Said land is bounded southerly on said road; easterly by the lot formerly owned by Abijah Hall, now occupied by Jonas Hamilton; on the north by Stony brook including a point of land sometimes overflowed or made an island by high water; and on the west by Charles H. Crocker's mill privilege and his rights; excepting and reserving the large wool building and wood-house attached to the store, one small dry house, one storehouse and wool form, but not the land on which they stand, which buildings are to be removed from the land in a reasonable time after request by said Hammond: *excepting also and reserving the right at all times to take and use water sufficient to drive the factory and machinery attached. Said Hammond is to maintain one quarter part of the dam across the said river, and the bulkhead at the head of the grist-mill and one quarter part of the protection wall, and said company are to maintain the bulkhead at the head of the factory flume, and one half of the dam across said river. Said Hammond is to use the water to drive*

If the attachment of spouts to the factory flume, disturbed the right of B. "at all times to take and use water sufficient to drive the factory," &c., then he had authority to cut them off.

A., in an action against B., cannot be permitted to prove that his own deed to B. was without consideration, when it purports to be for consideration.

Persons who have been many years engaged in building and carrying on mills are experts in their business and their testimony as such is admissible.

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

This was an action of trespass on the case for cutting off the spouts to the plaintiff's shingle machine, corncracker, &c. and for preventing and obstructing him from replacing them, and thus depriving him of the use of the water to operate the same.

The facts are fully stated in the opinion of the Court.

The verdict was for the defendants. The plaintiff excepted to certain rulings and instructions of the presiding Judge, which are stated in the opinion, and also moved, that the verdict be set aside as against evidence, and the weight of evidence, &c. He also moved that judgment be entered for the plaintiff "notwithstanding the verdict," for the following reasons:

1. Because it appears by the title deeds of Woodman, True & Co., under which the defendants attempt to justify, and by the title deed of the plaintiff, and which said several deeds form a part of the case, that the plaintiff by the true

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his mills and any machinery, at all times, until it comes down to the lowest place in the dam, as ascertained by the measurement of John Howe in the year 1848, *and then the saw-mill is to stop. But he is also to have the right to use the water after that, so long as he can do it without impeding the speed and usefulness of the factory.*

To have and to hold, the aforegranted and bargained premises, with all the privileges and appurtenances thereof, to the said Hammond, his heirs and assigns, to their use and behoof forever. And we do covenant with the said Hammond, his heirs and assigns, that we are lawfully seized in fee of the premises; that they are free of all incumbrances; that we have good right to sell and convey the same to the said Hammond to hold as aforesaid; and that we and our successors and heirs, shall and will warrant and defend the same to the said Hammond, his heirs and assigns forever, against the lawful claims and demands of all persons.

In witness whereof, we the said South Paris Manufacturing Company, by William Deering, our agent and attorney for this purpose, have hereunto set our hand and seal corporate the 29th day of June, in the year of our Lord one thousand eight hundred and forty-nine.

South Paris Manufacturing Company,
by WM. DEERING, Agent. [L. S.]

legal construction thereof is entitled and was then and there entitled to have and enjoy the rights of the water according to the allegations of his writ.

2. And he further moves the Court, that judgment may be entered for the plaintiff "notwithstanding the verdict," because, he says, that it appears by the justification set up by the said defendants, and each of them, in their brief statements pleaded in said case, that the acts complained of in the plaintiff's writ and declaration are admitted, and that the said brief statements, or either of them, do not contain any legal answer or justification to the plaintiff's claim aforesaid.

3. Because it appears by the pleadings, and the said several deeds aforesaid, that the plaintiff and not the defendants or either of them is entitled to judgment.

N. Clifford and *W. K. Kimball*, for plaintiff.

The words of the reservation, in the deed to the plaintiff, are as follows:—"excepting also, and reserving, the right at all times to take and use water sufficient to drive the factory and machinery attached."

Other portions of the deed must be considered in order to understand the limitations and qualifications annexed to that reservation, and to ascertain the intention of the parties to the grant.

Each of the three clauses next succeeding are important in this point of view.

The first clause describes in general terms the burdens incident to the entire estate, and distributes and apportions to each of the parties his proportion of the same, leaving one fourth part of the dam to be maintained by the owner of the western bank of the stream.

It is impossible, we think, to collect the intention of the parties without giving particular attention to this clause of the deed, and especially to that portion of it imposing the obligation upon the plaintiff to maintain one quarter part of the protection wall. That wall commences in the pond, above the dam, just east of the factory flume, and extends southerly across the highway to the factory, running parallel

with the flume its whole length, and constitutes the eastern foundation on which the factory rests.

It is inconceivable that any portion of the burden of maintaining that wall should have been imposed upon the plaintiff, unless it was within the contemplation of the parties that he was interested in the preservation of the factory flume.

The next clause in the deed is the one in respect to which the Judge instructed the jury that "it had reference to the use of the water by the grantee, from the dam and not from the factory flume."

It reads as follows: — "Said Hammond is to use the water to drive his mills and any machinery, at all times, until it comes down to the lowest place in the dam, as ascertained by the measurement of John Howe in the year 1848, and then the saw-mill is to stop."

1. We insist that it is not correct to say that this clause of the deed has reference to the use of the water by the grantee, from the dam and not from the factory flume, and if so, then clearly the plaintiff is entitled to a new trial on account of the erroneous instruction of the Judge to the jury.

There are no words in the deed to warrant any such construction, and in the absence of any such words to justify that conclusion, it is much more reasonable to conclude that the parties had reference to the use of the water, according to the then existing state of things. *Davis* v. *Muncey*, 38 Maine, 92.

The water to drive the shingle machine and corncracker was then taken from the factory flume, and the necessary apparatus for that purpose was then in existence and in constant use, and had been so for twenty years.

All the apparatus of the mills and the means of working them, such as the gates and penstocks, are as much a part of the realty as the mills themselves or the soil under them, and passed by the deed to the plaintiff as effectually as the land on which they were situated. Both in common sense and legal interpretation, a mill does not mean merely the building in which the business is carried on, but includes the site, dam

and other things connected with the freehold and necessary to its use and enjoyment. *Whitney* v. *Olney*, 3 Mason, 280; Ang. on Wat. Cour. § 156.

It is difficult therefore to see on what the conclusion is based, that "the subsequent clause in the deed had reference to the use of the water by the grantee, from the dam and not from the factory flume," unless it proceeds upon the ground that the factory flume was reserved in the deed as the exclusive property of the company, and if so, we submit with confidence that it is error.

Were it not for the clause distributing the burden of maintaining the works, there would be good reason to contend that all that part of the flume situated north of the highway passed to the plaintiff, and that the factory of the defendants, instead of the plaintiff's mills, was left dry and without any right to the use of this flume.

But it is not so, as will be seen by reference to the clause of the deed just mentioned. It is true that, according to that clause, the defendants are required to maintain but one half of the dam across the river, undoubtedly for the reason that the owner on the west side is obliged to maintain one quarter, yet we think, by a reasonable construction, the defendants are obliged to maintain three-fourths of the factory flume.

The east bank belongs entirely to the plaintiff and defendants, and it being provided that only one quarter part of the dam, and one quarter part of the protection wall, should be maintained by the plaintiff, it would seem to follow that the residue, belonging exclusively to the defendants, should be maintained by them.

The flume is as much a part of the dam as the capsill or foundation upon which it rests, and as such the plaintiff is as clearly bound to maintain one quarter part of it, as of any other part of the dam. *Kennedy* v. *Scovil*, 12 Conn. 317; Ang. on Wat. Cour. § 159, p. 194, § 185, p. 223.

It is undoubtedly proper to take into consideration the condition of the property, and the circumstances of the parties at the time of the conveyance, for the purpose of ascer-

taining what the parties really intended by a reservation in a grant of a water course. *Sumner* v. *Williams*, 8 Mass. 162; Ang. on Wat. Cour. § 185, p. 222; *Kennedy* v. *Scovil*, 12 Conn. 317; *Deshon* v. *Porter*, 38 Maine, 293.

That the plaintiff has an unrestricted right to the use of the water until it comes down to the lowest place in the dam as ascertained by the measurement of John Howe in 1848, is strongly confirmed by the last descriptive clause of the deed.

It reads as follows:—"But he is also to have the right to use the water after that, so long as he can do it *without impeding the speed* and usefulness of the factory."

When the company sold to the plaintiff, it was in fact a division of the property on the east side of the river, and some of the provisions of the plaintiff's deed may be regarded in the nature of a compact between the parties to regulate its future use. It is, in effect, an agreement that there is water enough to carry all the works until it comes down to the point before mentioned, and then the saw-mill is to stop, but the plaintiff may still use the water to drive the residue of his machinery, provided in so doing he does not impair the defendant's rights.

But if the use of the water after that will impede the speed and usefulness of the factory, then the saw-mill must stop and *perhaps also* his other mills.

We do not admit, that even then his other mills must stop, but submit that point to the consideration of the Court.

More than one-half the length of the factory flume is situated on the north side of the highway, and on the premises conveyed by absolute deed to the plaintiff, "to have and to hold, the aforegranted and bargained premises, with all the privileges and *appurtenances* thereof, to the said Hammond, his heirs and assigns, to their use and behoof forever."

Whatever rights the defendants have to the use of the water of that stream, they are all derived from the following clause in their deed from the company, to wit: "together with all the water privileges on the east side of said river, owned by said company, subject to all the duties, limitations

and restrictions pertaining to the same, as by the deeds of the same will appear, reference being had thereto."

The most that can be said of the deed is, that it conveys to the defendants the reservation to the company before mentioned in the plaintiff's deed, whatever it is, and it is expressly made subject to all the duties, limitations and restrictions pertaining to the same.

At that time, and for years before, the plaintiff's spouts and penstocks had been inserted into the factory flume, and through that means the water had been used to drive his shingle machine and corncracker, and it is difficult to see how the defendants under that deed acquired any right to deprive him of the privilege.

Some further confirmation of the unity of interest in the water and in the factory flume, is derived from the subsequent clause of the defendants' deed, which also may be regarded in the light of a compact of the defendants with the company for the benefit of the plaintiff to whom they had previously conveyed. It provides that they, defendants, shall keep reasonably tight flumes and gates to prevent the waste of water. The company having sold all their remaining interest in the premises to the defendants, it is obvious that this clause was inserted in the deed for the benefit of the plaintiff, and to carry out the intention manifested in his deed from the company.

1. We maintain, therefore, that the instruction of the Judge to the jury, that the subsequent clause in the plaintiff's deed had reference to the use of the water by the grantor from the dam, and not from the factory flume, is erroneous.

2. That part of the instruction under consideration, while it expressly denies the right of the plaintiff to use the water to drive his machinery in the way and by the means employed at the date of his purchase, seems rather to admit that he may exercise the right and use the water for that purpose in some other way till it comes down to the lowest place in the dam as ascertained by the measurement of John Howe in 1848.

3. The next branch of the instruction, however, is still more objectionable, inasmuch as it gives to the defendants "the free and uninterrupted use and enjoyment of sufficient water at all times to drive the factory and machinery attached," wholly irrespective of any right in the plaintiff to use any portion of the water at all, whether it be high or low, either from the dam or factory flume.

Considering the fluctuation of the seasons, and the liability of running water to rise and fall, it cannot be said in respect to any water power on a small stream, that a part owner of the power has the free and uninterrupted use of the water, or any part of it, while another has the right, and exercises it, to draw the water from the same common reservoir, to operate another class of machinery.

4. Whatever right the plaintiff has to the use of the water of that stream, either from the dam or the factory flume, it must be considered as an interest in real estate, and his title thereto and the extent of that interest, must depend upon the terms and construction of his title deed. It is certain that it cannot be enlarged or diminished by parol proof.

Consequently, that part of the instruction which makes it dependent upon the question submitted to the jury, whether the use of the water by the plaintiff was detrimental in any practical degree to the operation of the factory, is erroneous. *Pitman* v. *Poor*, 38 Maine, 240.

Every other question was withdrawn from the jury, so that the verdict merely affirms the fact, that the use of the water by the plaintiff was in some practical degree detrimental to the works of the defendants.

That parol testimony is inadmissible to contradict, vary or add to the terms of a valid written instrument is a rule of law universally admitted. 1 Greenl. Ev., § § 275 and 297; *Countess of Rutland's case*, 5 Co., 26; *Gardiner Manf. Co.* v. *Heald*, 5 Maine, 385; Broom's Maxims, 469; *Deshon* v. *Porter*, 38 Maine, 293.

We do not deny that the plan was admissible, and any parol proof for the purpose of showing what was the actual

state of things on the land at the time of the conveyance by the company to the plaintiff. All such testimony is properly receivable, in aid of the words of the deed, and as affording the means of ascertaining the true intent and meaning of the parties. And there, we contend, the rule stops, and all the rest of the parol evidence should have been rejected.

5. Assuming that it is correct to look at the actual state of things on the land at the date of the conveyance to the plaintiff, we do not see how it is possible to conclude that the plaintiff has no interest in the factory flume.

The great purpose of the protection wall is the preservation of that flume, and the flume is connected with the dam in close proximity to the machinery of the plaintiff, and at the time of the conveyance was actually connected with that machinery by means of spouts and penstocks, constructed for the purpose, and in daily use to drive it. Such being the facts, the conclusion seems irresistible, that the gates and spouts attached to that flume passed to the plaintiff just as fully as the machinery itself; and if so, it follows, of course, that the right to use the water from that source also passed at the same time. *Davis* v. *Muncey*, 38 Maine, 94.

Thus far we have spoken of the right of property remaining in the company on the east side of the river after the execution of the deed to the plaintiff, as a reservation, and such we believe it to be according to the well established rules of law.

6. It may be said, however, that it is an exception, and not a reservation, and therefore it becomes necessary very briefly to notice the point in order to mark with distinctness the difference between an exception and a reservation.

It is stated by Sheppard, in his Touchstone, as follows:— "A reservation is a clause of a deed whereby the feoffor, &c. doth reserve some new thing to himself out of that which he granted before. This doth differ from an exception; which is ever of part of the thing granted and of a thing *in esse* at the time; but this is of a thing newly created or reserved out

of a thing demised that was not *in esse* before." Sheppard's Touch. 80.

An incident to a grant may be the subject of a reservation. Thus, where one granted his land, reserving the streams of water and the soil under them with the right of erecting mill-dams, and all such parts of the land as should be overflowed with water for the use of mills for the grantor, it was held good as a reservation, though, considered strictly as an exception, it was void for uncertainty; and that as a reservation it was inoperative until the grantor exercised his right by erecting mill-dams, &c. *Thompson* v. *Gregory*, 4 Johns. 81; *Provost* v. *Calder*, 2 Wend. 517; 4 Kent's Com. 468; 1 Inst. 47, a.; *Case* v. *Haight*, 3 Wend. 632; *Cutter* v. *Tufts*, 3 Pick. 272; *Jackson* v. *McKenney*, 3 Wend. 233.

Where a mill site, falls and privileges were conveyed, "exclusive of the grist-mill," now on said falls, with the right of maintaining the same; it was held that this reservation included only the mill edifice, and not the fee of the land. *Howard* v. *Wadsworth*, 3 Maine, 471.

So, where land is conveyed reserving the building. *Sanborn* v. *Hoyt*, 24 Maine, 118.

Where land is conveyed, in general terms, an exception of any specific portion or quantity is valid and not repugnant. *Sprague* v. *Snow*, 4 Pick. 54; *Cutler* v. *Tufts*, 3 Pick. 272.

7. The following circumstances are necessary to make a good exception:—

I. It must be by apt words.

II. The thing excepted must be a part of the thing previously granted, and not of any other thing.

III. It must only be a part of the thing granted; for if the exception extends to the whole it will be void.

IV. It must be such a thing as is severable from the thing granted; and not an inseparable interest or incident.

V. It must be such a thing as that he who excepts may retain it.

VI. It must be of a particular thing out of a general one; not a particular thing out of a particular one.

VII. It must be certainly described and set down. 2 Greenl. Cruise, 348.

A moment's reflection will show that several essential elements of a good exception are wanting in the estate which remained in the company, after the execution of their deed to the plaintiff.

It is not severable from the estate granted.

It is merely an incident, and not the principal estate, and inseparable from the interest to which it is attached, and it is not described and set down so that it can be set apart and defined as separate property. Possessing, as it does, all the elements of a reservation, and none of the characteristics of an exception, it seems unnecessary further to argue the point.

8. The question propounded to H. R. Parsons called directly for the opinion of the witness, and should have been excluded.

There is not even a pretence that the witness is an expert, and yet he was permitted not only to express his opinion in matters constituting the very essence of the question submitted to the jury, but to state hypothetically what he would do on a supposed state of facts, which is never allowable in any case. *Palmer* v. *Pinkham*, 33 Maine, 32.

Be that as it may, what we most insist on here is, that the opinion of the witness was not admissible, for the reason that the case shows that he was not qualified to give it.

An expert, in the strict sense of the word, is a person instructed by experience. 1 Bouv. Law Dic.

Lord MANSFIELD held, in *Folkes* v. *Chadd*, 3 Doug. 157, "that it included all men of science, when called upon to speak of matters immediately connected with their especial study. The rule on this subject is stated by Mr. Smith, in his note to *Carter* v. *Boehm*, (1 Smith's Leading Cases, 544, * p. 286,) as follows:—"On the one hand," he observes, "it appears to be admitted, that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject matter of inquiry is such, that inexperienced persons are unlikely to prove capable of forming a correct judgment upon

it without such assistance, or in other words, when it so far partakes of the nature of a science, as to require a course of previous habit or study, in order to the attainment of a knowledge of it; while, on the other hand, it does not seem to be contended, that the opinions of witnesses can be received, when the inquiry is into a subject matter, the nature of which is not such as to require any peculiar habits or study, in order to qualify a man to understand it."

9. Stephen Emery's testimony was admissible, and was improperly excluded.

10. The verdict is against the evidence in the case, and against the weight of the evidence.

11. The motion for judgment, notwithstanding the verdict, ought to prevail. *Bellows* v. *Shannon*, 2 Hill, 86; *Smith* v. *Smith*, 4 Wend. 486; 2 Arch. Prac. 261; *Schermerhorn* v. *Schermerhorn*, 5 Wend. 513; *Stoughton* v. *Mott*, 15 Ver. 162; *State* v. *Commercial Bank*, 6 S. & M. 218; *Sullenburgher* v. *Girt*, 14 Ohio, 204; *Shreve* v. *Whettlesey*, 7 Mis. 473; *Snow* v. *Conant*, 8 Ver. 309; *Smith* v. *Smith*, 2 Wend. 624; *Dewey* v. *Humphrey*, 5 Pick. 187; *Berry* v. *Borden*, 7 Blackf. 384; *Pomery* v. *Burnet*, 8 Blackf. 142; *Jones* v. *Fennimore*, 1 Green, (Iowa,) 134; *Pemberton* v. *Van Rensallaer*, 1 Wend. 307; *Hale* v. *Andros*, 6 Cowen, 225; 2 Tidd's Prac. 830.

J. C. Woodman for defendants.

The jury have found that it was not necessary for the plaintiff to take side spouts from the factory flume to propel his machinery, but only a small convenience; that, for the paltry sum of fifty dollars, the plaintiff could make a permanent alteration so as to take water for his purposes, from the saw-mill flume, the grist-mill flume, or the main dam.

All the evidence and the plan are made part of the exceptions, and it appears from inspection of the plan, that the defendants could not draw the water for the factory in any other place, than through the old factory flume, while it remained; nor construct a new flume, in any other place, than substantially on the same ground as the old one.

In August, 1854, the old flume was worn out, and it was

necessary to build a new one to prevent waste of water. Woodman, True & Co. accordingly rebuilt the factory flume of the same size, and mostly on the same base, varying a trifle at the angle, with the consent of the plaintiff, to shorten the distance.

Woodman, True & Co. left no openings for the plaintiff to insert side spouts. The plaintiff cut an opening in the side of the new flume and inserted one of the side spouts. The defendant Woodman knocked it out and ordered the opening planked up; and the plaintiff insists that the other defendant was aiding and abetting.

The jury have found, that the use of these side spouts by the plaintiff, as generally used in the old flume, and as contemplated to be generally used in the new one, *was practically detrimental* to the operations of the factory.

What were the rights of the parties? Who owned the new flume? Had the plaintiff a right to cut into the new flume and insert his spouts? Or had Woodman, True & Co. a right to prevent it? What was the true construction of the deeds?

The defendants in the outset introduced a quitclaim deed from the plaintiff and his son, to Woodman, True & Co., by which they conveyed to the grantees all their "right, title and interest in and to all the estate, real and personal, conveyed by the South Paris Manufacturing Company by deed of even date," thereby "conveying to the above named grantees their joint and several interest in the premises and property described in said deed, which was given by said company to the above named grantees." Then they introduced the deed of the corporation referred to in said quitclaim deed. The effect of this reference from one deed to the other, is the same as if the descriptive words in the deed referred to were incorporated into the deed from the plaintiff and his son. *Foss* v. *Crisp*, 20 Pick. 123, 124; *Adams* v. *Hill*, 16 Maine, 219; *Lincoln* v. *Wilder*, 29 Maine, 169; *Thomas* v. *Patten*, 13 Maine, 329; *Lunt* v. *Holland*, 14 Mass. 151; *Proprietors of Kennebec Purchase* v. *Tiffany*, 1 Greenl. 223.

In the construction of the quitclaim, embracing as it does the other deed by way of description, it is first necessary to explain the phrase near the close: "*subject to all the duties, limitations and restrictions pertaining to the same, as by the deeds of the same will appear, reference being had thereto.*" "*The deeds of the same*" is plural, and cannot refer to the single deed from the corporation to the plaintiff; but it must refer to the deeds which conveyed the same property to the corporation, and it subjects said property to the same services to which it was subjected by those deeds. The deed to Hammond made the property conveyed to him subservient to the estate remaining. So it would be absurd to suppose the estate remaining in the corporation and conveyed to Woodman, True & Co. was made subservient to his.

The defendant Woodman, then, holds his title by deed directly from the plaintiff. It conveys a parcel of land, by boundaries, "with the buildings thereon, including the factory," "the grantees to keep reasonably tight flumes and gates used by them to prevent waste of water." The duties, limitations and restrictions imposed by the corporation on the defendants, could not have had any reference to the quantity or draft of the water through the flume, because in point of time they were imposed by the original owners on the corporation, prior to the construction of the factory or the factory flume.

The plaintiff's deed of the factory to Woodman, True & Co., *ex vi termini*, carried with it sufficient water power at all times to carry with full speed the wheels of the same; the right of way to conduct it; the existing way by which it was conveyed to the factory; and the right to enter and repair or build a new flume. All this passed as an incident without any reserve, except the obligation imposed to keep their flumes and gates reasonably tight. 1 Shep. Touch. 89; Angell on Wat. Cour. § 158; *Johnson* v. *Jordan*, 2 Met. 240; *New Ipswich Factory* v. *Batchelder*, 3 N. H. 190; *Stanwood* v. *Kimball*, 13 Met. 526, 532, 533, 534; *Blake* v. *Clarke*, 6 Greenl. 439; *Allen* v. *Scott*, 21 Pick. 29; *Elliot* v. *Shepherd*, 25

Maine, 371, 378, citing the maxim, *quando aliquis aliquid concedit, concedere videtur et id, sine quo res uti non potest. Pomfret* v. *Ricroft*, 1 Williams' Saunders, 323, note 6; *Netzel* v. *Paschal*, 3 Rawle, 76, 83; *Thayer* v. *Payne*, 2 Cush. 331; Angell on Wat. Cour. § 145.

I argue the same from the facts in the case and the nature of an easement and secondary easements, and the duties of the parties in relation to repairs. Angell on Wat. Cour. § 142; Gale & Whately on Easements, (American ed.,) 231; *Prescott* v. *Williams, Adm'r*, 5 Met. 434; *Prescott* v. *White*, 21 Pick. 341. The conveyance carried the existing flume, and the power to enter and repair or rebuild, as much as it did the water power. The easement was a privilege conferred on the defendants and forever without compensation. No obligation was imposed on the plaintiff to repair or rebuild the "factory flume." So if the defendants would occupy and enjoy the privilege of the flume, they were bound to repair or rebuild. Gale & Whately on Easements, 215; *Taylor* v. *Whitehead*, 2 Doug. 749, (reign of Geo. III.); *Prescott* v. *Williams, Adm'r*, 5 Met. 435; *Doane* v. *Badger*, 12 Mass. 69; *Jones* v. *Percival*, 5 Pick. 486. The language of the deed implies the same thing: "The grantees herein to keep reasonably tight flumes and gates used by them." The deed authorizes them to use a succession of flumes, and binds them to keep them reasonably tight. It must, then, necessarily authorize the defendants to build a flume. They did build the present flume with the plaintiff's consent. So it is their property. *Russell* v. *Richards*, 11 Maine, 374; *Hilborne* v. *Brown*, 12 Maine, 163.

Woodman, True & Co. may abandon their factory privilege for a time. In such case, they are not bound to build a flume for the plaintiff. If he would have reserved any thing in the old flume, he should have made an express reservation. If he would have bound Woodman, True & Co. to rebuild the flume for him, he should have so stipulated. *Atkins* v. *Boardman*, 2 Met. 462.

As the defendants hold their title from the plaintiff, they

hold just as much as though the description was incorporated in the plaintiff's deeds to them, and as though they had no deed from the corporation. The plaintiff cannot pray in aid his own deed, but the defendants may rely on the same. It is asserted in that deed, that "the said company shall maintain the bulkhead at the head of the factory flume." The deed is one of general warranty, and by this expression, the plaintiff is estopped to deny that *this flume*, that is to say, *the old one*, was built for the factory and reserved for the use of the factory. *Vickery* v. *Buswell*, 13 Maine, 292.

This deed to Hammond in express terms binds the corporation to maintain the bulkhead at the head of the factory flume, but does not in express terms bind the corporation to maintain the flume itself. It is therefore on their part a matter of choice. I refer to the 1st, 2d, 3d, and 6th rules for the construction of deeds. Shep. Touch. 86, 87. These rules all favor the construction of the deed from Hammond to W., T. & Co., as claimed by us. The conclusion follows, that the flume passed as an incident or easement, with a right to rebuild; but without any obligation on the part of Woodman, True & Co., to rebuild; and that as they did rebuild, the flume was their property, and the plaintiff had no right to tap it.

2. If the question must be settled on the construction of the deed to the plaintiff, the result would be the same. In the deed to him is this clause, "excepting also and reserving the right at all times to take and use water sufficient to drive the factory and machinery attached." This may be construed as an exception, if necessary to effectuate the intention of the parties. *Bowen & al.* v. *Cormer*, 6 Cush. 135; *Thompson* v. *Gregory*, 4 Johns. 82, 83.

"It is a rule that what will pass by words in a grant will be excepted by the same words in an exception, and it is another rule, that when any thing is excepted all things that are depending upon it are also excepted." 1 Shep. Touch. 100; Angell on Water Cour. § 173; *Cocheco Manufacturing Co.* v. *Whittier*, 10 N. H. 313; *Richard Lyford's case*, 11

Coke, 52; *Lord Dacey* v. *Askwith*, Hobart, 234; *Forbush* v. *Lombard*, 13 Met. 114; *Allen* v. *Scott*, 21 Pick. 25, 29; *Monio* v. *Edgerton*, 3 Taunt. 31; *Nicholas* v. *Chamberlain*, Cro. James, 121; *Bowen & al.* v. *Cormer & al.*, 6 Cush. 132; *Rackley* v. *Sprague*, 17 Maine, 285; same case, 19 Maine, 344, 346; *Pettee* v. *Hawes*, 13 Pick. 323, 326; *Sprague* v. *Snow*, 4 Pick. 54, 56; *Choate* v. *Burnham*, 7 Pick. 274, 277; *Howard* v. *Lincoln*, 13 Maine, 122, 124; *Maine* v. *Stone*, 4 Cush. 146, 147; *Farmer* v. *Platt*, 8 Pick. 338, 340. In order to ascertain what is granted in the case of an exception to a deed, it must first be ascertained what is included in the exception; for whatever is included in the exception is excluded from the grant, according to the maxim laid down in Co. Lit. 47, a. *Poterit enim quis rem dare, et partem rei retinere, vel partem pertinentiis, et illa pais quam retinet semper cum eo est, et semper fuit.* Angell on Wat. Cour. § 174; *Greenleaf's Lessee* v. *Birth*, 6 Peters, (U. S.) 310. According to all these cases, the reservation in the deed to Hammond may be considered an exception; and we must first ascertain what was included in the exception or reservation in order to ascertain what was conveyed. Moreover it is clear from them, that whatever was necessary to the most full and complete enjoyment of the right excepted or reserved, was also excepted or reserved. According to these principles the reservation or exception of the water, was a reservation of the right of way, the existing flume, and the right to enter and repair or build a new flume. Accordingly Woodman, True & Co. did build the new flume. I invoke the 4th and 5th rules upon the construction of deeds in addition to the 1st, 2d, and 3d, already cited. 1 Shep. Touch. 87. This course of reasoning shows that the reservation in Hammond's deed gives us the same as we claim by virtue of his quitclaim deed.

I now proceed to enforce these reasons upon a construction of the whole deed. The Judge instructed the jury, "that the subsequent clause in the deed [that is to say, the last two sentences in the premises of the deed, standing immediately before the habendum,] had reference to the use of the water by

the grantee from the dam, and not from the factory flume." This was strictly correct. That clause applies to the whole of the machinery, the grist-mill as well as the rest, and even any other machinery that Hammond may put on the falls; but it is not said through what flume. But this clause, in connection with the evidence and verdict, is important to show that the plaintiff was not to feed his corncracker and shingle machine from the factory flume. The jury have found that the use of the water taken by these side spouts, as generally used by the plaintiff during the continuance of the old, and as contemplated by him generally to be used from the new flume, was practically detrimental to the operations of the factory, whether the water ran over the dam or not. That is, the use of these side spouts generally impeded the speed and usefulness of the factory, when the dam was full. Then the plaintiff had no right to use them.

Again, the deed provides, "that said company are to maintain the bulkhead at the head of the factory flume." By this deed, being one of general warranty, both parties are estopped. Here is a statement of the plaintiff that this flume belonged to the factory. *Vickery* v. *Buswell*, 13 Maine, 292; *Case* v. *Haight*, 3 Wend. 362; *Stowe* v. *Wise*, 7 Conn. 220.

This deed, on the face of it, is a deed where the rights of the parties are strictly defined. The corporation has a right at all times to take and use sufficient water to drive the factory and machinery attached. The plaintiff has a right to run the saw-mill till it comes down to the lowest point of the dam and then stop. Thirdly, the plaintiff has a right to run his machinery afterwards, but not in such a manner as to impede the speed and usefulness of the factory. It being found that he cannot run it after that, nor even so long, without impeding the speed and usefulness of the factory, if he use these side spouts, it results that he cannot use them, but must get his water in some other way. The burdens are also strictly defined. In such a deed, no burden can be thrown upon either party, for the benefit of the other, unless it be stipulated in the deed. *Expressio unius, exclusio alterius.* If the defend-

ant would enjoy the flume he must keep it in repair. Being bound to repair and build it, it was his property. This consideration is strengthened by the fact that 110 feet of it was below the lower of these side spouts. Nor is there any foundation for the suggestion that the plaintiff and Woodman, True & Co. owned this flume in common. The corporation, or Woodman, True & Co., would have no cause of complaint, if Hammond removed all his mills and his flume. But if he did not maintain the bulkhead at the head of the grist-mill, or one quarter part of the dam, or one quarter part of the protection wall, they would have a right to complain. So Hammond will have a right to complain if they do not maintain the bulkhead at the head of the factory flume, or their share of the dam or the protection wall. But they may remove their factory, and that portion of the factory flume below the lower side spout, and then all the rest of it, and the plaintiff will have no right to complain.

If we are right thus far, then it is for the plaintiff to show that there was an exception out of the reservation, that was made in favor of the South Paris Manufacturing Co. of the right of way, the existing flume, and the new flumes, that the corporation should build, and that said exception was of a right to take water from the factory flume for his wheels. He should show by the deed an obligation imposed on the corporation to build and maintain the flume forever and permit him to insert his spouts and draw water in that way. This the plaintiff cannot show.

But it is said, that the water had been drawn in that way before, and therefore the exception and burden or condition arise by implication of law. We answer, that this is a deed where the rights and duties of the parties are strictly defined. The following authorities show that nothing passes or is excepted under such a deed, with rights and duties strictly defined, unless it is mentioned in the deed; or unless it exists at the time, is absolutely necessary to the enjoyment of the estate and a necessary incident thereof. Angell on Water Cour. § § 165, 166; *Holmes* v. *Giving*, 2 Bing. 76; *Howell*

v. *McCoy*, 3 Rawle, 256, 271; *Gaitty* v. *Bethune*, 14 Mass. 54; *Grant* v. *Chase*, 17 Mass. 445; *Manning* v. *Smith*, 6 Conn. 289; *Whally* v. *Thompson*, 1 B. & P. 37 and note; *Johnson* v. *Jordan*, 2 Met. 238, 241, 242; *Thayer* v. *Payne*, 2 Cush. 331, 332; *Kent* v. *Waite*, 10 Pick. 141.

The jury having found that for the small sum of fifty dollars the plaintiff could be forever accommodated, without tapping the factory flume, we say that it was not necessary for the plaintiff to draw the water for his wheels in that way. The Court are authorized to draw that conclusion as an inference of law. *Howe* v. *Huntington*, 15 Maine, 350; *Thorn* v. *Rice*, 15 Maine, 263; *Kingsly* v. *Wallis*, 14 Maine, 57; *Hill* v. *Hobart*, 16 Maine, 164; *Green* v. *Dingley*, 24 Maine, 131; *Attwood* v. *Clark*, 2 Greenl. 249. It is said in some of the cases, "that a distinction is to be taken between an easement that is merely convenient, and easements that are necessary. The latter pass by grant of the principal thing, but not the former." The same rule would apply to an exception or reservation. The right to build flumes was excepted, by the exception of the water power, because it was absolutely necessary; but the right for the plaintiff to tap those flumes was not excepted from the reservation, because it was not necessary, but only a small convenience.

But it is said, this right to take the water by side spouts from the factory flume passed as one appurtenance to the grant, because the spouts existed at the time. The question is not applicable to our main argument, which treats the plaintiff as the bargainer of W., T. & Co.

To the objection pressed upon us at this point, while we are endeavoring to maintain the defendant's right from a construction of the deed to the plaintiff, several answers can be given. One has already been given. The plaintiff would have no right to use these side spouts, because the jury have substantially found that they impede the speed and usefulness of the factory, when the water runs over the dam.

A second answer is this. — The plaintiff does not take his mills as a principal subject of grant with incidents and ap-

purtenances. He takes a parcel of land with metes and bounds, with a certain reservation and exception. We have seen that the rule for construing such a deed, is to ascertain what is reserved. Whatever is excepted or reserved is excluded from the deed. In this case we have seen that the existing flume, and the right to build new flumes, was reserved as an incident. From that reservation there is no exception, and upon it there is no condition imposed in the plaintiff's favor. The reason why the flume, or interest in it, did not pass to the plaintiff was not because an easement in a flume will not pass as appurtenant to a corncracker or a shingle machine; but because, by a paramount rule of construction, the whole flume, free and unburthened, was included in the reservation for the corporation. The plaintiff took only that which was not reserved. Therefore, he cannot have the flume, nor any interest in it. When there are two rules of law, that in their application to a question are conflicting, the less important must give way. *Cushman* v. *Downing*, 29 Maine, 462. There remains yet one more answer. — "An appurtenance will not pass any corporeal real property." Bouvier's Law Dict. "Appurtenancy," 2d definition. Much less will it pass property that does not exist. If Hammond took a right even to draw water from the existing factory flume, it could only exist during the life of that flume. There could be no appurtenance of a right to draw water from a flume that did not exist, and might never exist. So Hammond could have no right in the new flume. *Ballard* v. *Butler*, 30 Maine, 97 and 98.

Walton replied to *Mr. Clifford.*

TENNEY, C. J. — Prior to June 29, 1849, the South Paris Manufacturing Company were seized and possessed of certain real estate, situate on the east side of the Little Androscoggin river, and on the north and south sides of the road which crosses the same in South Paris. On the north side of the road were standing and in operation, a grist-mill, saw-mill and shingle machine; and on the south side were situated the

company's factory and other buildings connected therewith, also in operation. The only dam, for the purpose of raising a head of water to work the mills and the factory, was on the north side of the road, and above the grist-mill, saw-mill, &c. There was a protection wall on the easterly side of the river, running parallel therewith, evidently regarded as useful for the security of the mills and the factory, against the operation of the water, as it flowed down the river.

At the time referred to, the factory was supplied with water from the dam, taken through a flume of considerable length, across the company's land above the road, and under the bridge across the river. In this flume spouts had been inserted, through which water had been taken to carry a corncracker in the grist-mill, and also the shingle machine, standing above the road.

On the day before named, a deed to the plaintiff, and purporting to have been executed by the agent of the company, and who, it is insisted by the plaintiff, was duly authorized to make an effectual conveyance, was given of all the real estate belonging to the company, which lay on the northerly side of the road, viz.: the grist-mill, saw-mill, factory store, shingle machine, and all the apparatus and utensils thereto belonging. Then follows in the deed a description of the land by metes and bounds, with the exception of certain buildings standing thereon, but not of the land covered thereby. "Excepting also and reserving the right at all times, to take and use water sufficient to drive the factory and machinery attached. Said Hammond is to maintain one quarter part of the dam across said river, and the bulkhead at the head of the grist-mill, and one quarter part of the protection wall; and the said company are to maintain the bulkhead at the head of the factory flume, and one-half of the dam across the river. Said Hammond is to use the water to drive his mills, and any machinery, at all times, until it comes down to the lowest place in the dam, as ascertained by the measurement of John Howe in the year 1848, and then the saw-mill is to stop. But he is also to have the right to

use the water after that, so long as he can do it without impeding the speed and usefulness of the factory."

On Nov. 20, 1852, the company conveyed to Woodman, True & Co. all the real estate owned by it, at South Paris, that lay on the east side of the river, and on the south side of the road, excepting, &c., bounded, &c., together with the buildings thereon, including the factory store, boarding house, dry houses, &c.; also all the machinery and manufacturing utensils and apparatus, of every kind, pertaining to the manufactures there carried on, and now used, together with all the water privileges on the east side of said river, owned by said company, subject to all duties, limitations and restrictions pertaining to the same, as by the deeds of the same will appear, reference being had thereto; the grantees herein to keep reasonably tight flumes and gates used by them to prevent waste of water.

On the day of the date of the deed last referred to, the plaintiff and Albert M. Hammond conveyed to Woodman, True & Co., all their right, title and interest in and to all the estate, real and personal, conveyed by the company, by deed of the same date, thereby conveying to the grantees their joint and several interest in the premises and property described in the deed of the company to the grantees.

The plaintiff alleges in his writ, that he was seized of the interest conveyed by the company on the day of its deed to him, and so continued to the day of the commencement of his suit; and also that, since June 29, 1849, he has been accustomed to use the water running in the river, by taking the same from the flume leading from the dam down stream under his grist-mill to the factory, by means of or through a penstock or water spout, extending from said flume to his water wheel, said wheel having been built for the purpose of carrying his shingle machine, said wheel and shingle machine being in use, in manner aforesaid, when the mills were conveyed to him; and he was further accustomed, since the time aforesaid, to take and use the water from the factory flume, for the purpose of driving a corncracker, circular saw and

turning lathe, being in his grist-mill and connected with a water wheel standing under the same, which wheel was driven by means of water, which the plaintiff had a lawful right to take, and has been accustomed to take from the factory flume, through a small flume adjoining thereto; and the plaintiff avers that he was lawfully seized of the right to take and use the water running in the river, in manner aforesaid, and for the said purpose, at all times without hindrance. Then follows the allegation that, on August 15, 1854, the defendants unlawfully and without right, tore away the penstock or water spout, and his said flume connected with the factory flume, and refused to permit the plaintiff to take and use the water running in the river, for the use of his shingle machine, and his machinery aforesaid, and has stopped up the passages for the flowing of said water from the factory flume upon the plaintiff's wheels, and has so kept the passages stopped to the time of the institution of this suit. The defendants severally plead the general issue, and in brief statements, with allegations in defence, deny the right of the plaintiff to insert in the factory flume the spouts and to draw water from the factory flume, which is alleged to belong to Woodman, True & Co. And it is also alleged that, before the plaintiff's spouts were cut off from the factory flume, he was requested to take the same away, but refused to do so.

Evidence was introduced by the parties upon the issues before the jury; and the Judge instructed them, that the deed of the company to the plaintiff, of June 29, 1849, conveyed to him in fee, the real estate described, subject to the reservation, "excepting also and reserving the right at all times to take and use water sufficient to drive the factory, and the machinery attached;" that the subsequent clause in the deed had reference to the use of the water by the grantee from the dam, and not from the factory flume; that the deed from the company, and the deed from the plaintiff to Woodman, True & Co., of Nov. 20, 1852, conveyed to the grantees, the fee in the real estate therein described, including the factory, together with the reservation in the first deed contained;

and the reservation secured to Woodman, True & Co., the free and uninterrupted use and enjoyment of sufficient water at all times to drive the factory and machinery attached, and for such purposes they had the right to repair, or rebuild, when necessary, the factory flume; that however convenient it might be for the plaintiff to use the water from the factory flume, for propelling the wheels attached to his shingle machine and corncracker, yet if the use of the water so taken from the flume as generally used by the plaintiff during the continuance of the old, and as contemplated by him generally to be used from the new flume, was detrimental in any practical degree to the operations of the factory, such use would be inconsistent with the free enjoyment of the reservation, and the defendants were justified in taking the spouts from the new flume, and preventing the plaintiff from inserting either spout therein. But, if such was not detrimental in manner before stated, then the defendants were not justified in so doing and would be liable to the plaintiff, &c.

The jury returned a verdict for the defendants; and they found also, that it was practicable for the plaintiff to take water for his shingle machine and corncracker wheels from either his saw-mill, grist-mill flume, or from the main dam, without interfering with the factory flume; and that such permanent alteration could be made for the sum of fifty dollars.

It is a well settled rule of construction, that the grant of a principal thing shall carry with it every thing necessary for the beneficial enjoyment of that which is granted, and which the grantor has the power to convey. *Thayer* v. *Paine & al.*, 2 Cush. 327.

"By the grant of mills, the waters, floodgates and the like, that are of necessary use to the mills, do pass." Sheppard's Touch. 89.

Where a party has erected a mill on his own land, and cut an artificial canal for a race way through his own land, and then sells the mill without the land, through which such race way passes, the right to such race way shall pass as a privilege annexed *de facto* to the mill and necessary to its beneficial

use. *Johnson* v. *Jordan*, 2 Met. 234; *Blake* v. *Clarke*, 6 Greenl. 439; *New Ipswich Factory* v. *Batchelder*, 3 N. H. 190; *Nichols* v. *Luce*, 24 Pick. 102.

Before the conveyance of the company to the plaintiff, the flume to the factory had been prepared and used as the only mode of conducting the water to the factory for the purpose of driving the machinery therein; and it is not suggested that any other mode was referred to, or contemplated by the parties; but the flume is treated in the deed as the passage-way of the water, which was to remain for the use of the factory. The dam above the plaintiff's mills, and the protection wall, were evidently designed to be for the common benefit of both parties to the deed; hence the propriety of their being kept up, and in repair, at the expense of both, though in unequal proportions, probably on account of the unequal value of the interests owned by each party, respectively. The bulkheads at the heads of the grist-mill and the factory flumes were to be maintained in severalty, clearly indicating that one was principally, if not exclusively, for the use of one party and the other for the other. The deed of the company to Woodman, True & Co., of Nov. 20, 1852, imposed upon the grantees the burden of keeping the flumes and gates used by them reasonably tight to prevent waste of water.

The factory flume, — upon the examination of all the deeds in the case, to which the plaintiff is in effect a party, and from a construction to be given from an examination of all parts thereof, — was a necessary part of the factory itself, and the right therein was reserved to the company, and passed to Woodman, True & Co., as appurtenant thereto. Co. Litt. 121, (b) and 122, (a); 1 Ven. 407.

If a lessee for years of a house and land erect a conduit upon the land, and after the time is determined, the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall take the conduit and pipes, *and the liberty to amend them*. *Nicholas* v. *Chamberlain*. Cro. James, 121.

When the use of a thing is granted, every thing essential to that use is granted also. Such right carries with it the implied authority to do all that is necessary to secure the enjoyment of such easement. *Prescott* v. *White*, 21 Pick. 341; *Prescott* v. *Williams, Adm'r*, 5 Met. 429, and cases cited; *Pomfret* v. *Recroft*, 1 Ware's Saunders, 323, note 6.

The instruction to the jury, that for the purpose of the enjoyment of sufficient water at all times to drive the factory and machinery attached, Woodman, True & Co. had a right to repair, or rebuild when necessary the factory flume, was legally correct.

The provision in the deed of the company to the plaintiff, touching his rights to the use of water at different conditions of the river, had reference to the amount secured to him, of that which should be confined for the use of the mills and the factory, and not to the manner *in* which, or the place *from* which it should be taken. The instruction therefore, that the subsequent clause in the deed had reference to the use of the water by the grantee from the dam and not from the factory flume was strictly correct.

The reservation in the deed of the company to the plaintiff of the right at all times to take and use water sufficient to drive the factory and machinery attached, as between the parties thereto, is as effectual to secure to the company the right reserved, together with the easement and servitude so as to charge the lands of the plaintiff, as by a deed from the owner of land to be charged, granting the same as appurtenant to other estate of the grantee. *Bowen & al.* v. *Cormer*, 6 Cush. 132. Especially must it be so here, where the plaintiff himself conveys by his own deed the whole interest reserved.

It is not perceived that the reservation referred to in the deed of the company to the plaintiff, is any less strong in its effect, than the right "to the free and uninterrupted use and enjoyment of sufficient water at all times to drive the factory and machinery attached." The principal thing secured is *sufficient* water *at all times* for the purpose expressed. If this

were not free and uninterrupted in its enjoyment, it cannot be said that sufficient could be taken *at all times.*

The plaintiff's counsel, however, insists, that as he had the right to drive his mills at all times until the water is reduced to the lowest place in the dam, as ascertained by the measurement of John Howe in the year 1848, the Judge erred in informing the jury that the reservation secured to Woodman, True & Co. the free and uninterrupted use and enjoyment of sufficient water, at all times, to drive the factory and machinery.

It cannot be doubted that, by the deed of June 29, 1849, it was the design of the parties thereto, that the rights of the plaintiff should in some respects be subordinate to those of the company in the use of the quantity of water. When it was down to the mark made by Howe, the saw-mill was not permitted to run; manifestly for the reason, that its running would retard the operations of the factory. And after the saw-mill had ceased to work, the plaintiff could use the water only so long as it did not impede the speed and usefulness of the factory.

But the grounds for allowing the plaintiff's mills and the company's factory to run at all times, when the water was above the mark in the dam, was undoubtedly that it had been satisfactorily ascertained that, until such reduction of the quantity of water in the dam, it was sufficient to drive all the machinery belonging to both parties, and at all times. At any rate, to give a reasonable construction to the deed, it must have been so understood by those interested, at the time of its execution; and such supposed state of facts has not been attempted to be disproved.

It does not appear that the instructions to the jury upon this branch of the case, were based at all upon any supposed controversy between the parties, that the quantity of water taken by Woodman, True & Co., was or was not greater than that which under the deeds they were entitled to use. The suit is certainly not for the defendants' having taken a greater

amount of water than was secured to them; or for preventing the plaintiff from using, at all times, the amount of water which belonged to him; but it is for preventing him from taking it from the factory flume through his spouts, and cutting the spouts off therefrom, without regard to the *quantity* of water so taken. And the instructions to the jury, that Woodman, True & Co. were secured in the free and uninterrupted use and enjoyment of sufficient water, at all times, to drive their factory, must have had reference to the question really involved, which was whether the taking of the water by the plaintiff from the factory flume, through the spouts, was inconsistent with the rights of Woodman, True & Co., under the reservation in the deed. These instructions, when taken in connection with those which follow, and applied to the issues presented, are not perceived to be erroneous.

The factory, and all the appurtenances belonging to it, were retained by the company when it conveyed the mills on the north side of the road, with the reservation touching the use of the water for the factory. The property so retained, having come to Woodman, True & Co., they stand in the place of the company, at least. The factory flume being necessary to the operation of the factory and the machinery attached for the passage of the water, and no right secured by the deed to the plaintiff to take water therefrom for the use of his own mills, any withdrawal of the water through the spouts, detrimental in any practical degree to the operations of the factory, must necessarily be unauthorized by the deed. If the plaintiff could with impunity take water in that manner, to the interruption of the rights of Woodman, True & Co., to the least practical degree, it is not perceived that any limit exists to a further use, which might be extended indefinitely, and to the destruction of the rights reserved for the operations of the factory.

But it is insisted for the plaintiff, that at the time when the conveyance was made to the plaintiff, and afterwards to Woodman, True & Co., the corncracker and shingle machine were carried by water taken from the factory flume by means

of, or through spouts; and hence it must be presumed that it was intended by the company, and the plaintiff, and by Woodman, True & Co., that the right so to take water for the purposes designed, was reserved to the plaintiff by acquiescence of other parties interested.

It is to be considered that the property in the mills, and the factory and the lands connected with each respectively, was entirely that of the company, prior to the deed to the plaintiff. The manner in which the water was taken to be applied to one part or the other, depended upon no fixed legal rights, but might be taken and used not only as necessity, but as convenience or pleasure dictated. The jury have found that the water was taken from the factory flume through spouts, to propel the shingle machine and corncracker, not from necessity, or even to save any considerable expense. And hence the manner adopted in taking and applying the water to the different parts, would not continue as matter of title, after the division, unless under some stipulation in the deed or other instrument under seal. The factory flume would be appurtenant to the factory exclusively, unless it became necessary to take water therefrom for the use of the plaintiff's machinery, which he had a right to operate, or unless, according to the instructions, it could be taken without being practically detrimental to the rights of Woodman, True & Co. The remarks of SHAW, C. J., in the case of *Stanwood* v. *Kimball & als.*, in relation to a pipe taken from the defendants' aqueduct, which they had cut off, and which cutting off was the cause of the action, are in point, it being in that case contended for the plaintiff, that it must be presumed that he designed to reserve that right, and the defendants acquiesced in it. "But it is difficult to maintain this position. There can be no right by reservation, whatever may have been the interest or expectation of the plaintiff, for there is none made in the deed, and it is not competent to prove it by parol evidence; nor by grant, for none is shown or pretended; nor by prescription, for it was used a very short time."

Several questions are presented in the exceptions on account of the rulings of the Judge in admitting and rejecting evidence offered.

The inquiry made of Stephen Emery by the plaintiff, for the purpose of showing no consideration for the deed of the plaintiff to Woodman, True & Co., was clearly inadmissible. The deed purported to be for consideration, and it could not be contradicted by the plaintiff, who was the grantor, and the deed was effectual without consideration between the parties thereto.

Alden Palmer, a witness for the defendants, was allowed to answer the following question, against the objection of the plaintiff, — "What would be the effect of opening and shutting the gates of the plaintiff's shingle machine and corncracker, upon the water in the factory flume, and upon the machinery in the factory?" The answer was, that the effect would be to produce a motion in the water of the flume, so that it would flow up towards the gate of the factory or recede from it, and give extra motion or retard the wheels of the factory for a short time. The right to put the question and receive the answer was upon the ground that the witness was an expert, or one experienced. It was in evidence, that the witness was a mill-wright and professed to be a civil engineer; had been employed in the construction of mills and factories for forty years. It cannot be doubted, from this evidence, he might well be treated by the Court as an expert and entitled to give his opinion touching a matter, so connected with his experience.

Henry R. Parsons was asked a question in reference to the place where it would be proper to take the water for the shingle machine and corncracker wheels. Objection was made, on the ground that he was not an expert. It appeared that he had carried on the fulling-mill and two carding machines for twenty years in the same place; that he had used spouts for the purpose of propelling machinery; that he has owned mills and been acquainted with them for thirty years. He

must have been experienced in business having relation to the question proposed, and the question was unobjectionable.

The evidence before the jury was such, that their verdict and special findings do not appear to the Court to have been the result in any degree of those influences, or misapprehensions of the facts, which authorize a Court to disturb a verdict. *Motion and Exceptions overruled.—*

Judgment on the verdict.

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

GEORGE W. BATTLES *versus* YORK CO. MUTUAL FIRE INS. CO.

When, by the terms of a policy of insurance, the application in writing of the assured is made part of the policy, such application is as much a part of the contract as though it were incorporated into the policy itself.

In such case, all material statements in the application are warranties.

A want of truth in the application is fatal or not to the insurance, as it happens to be material or immaterial to the risk.

It is the custom of some Insurance Companies to make inquiries of the assured in some form, concerning all matters deemed material to the risk, or which may affect the amount of premium. In such case, he is bound to make a true and full representation concerning all matters brought to his notice.

A representation made to a Mutual Fire Insurance Company, in answer to their questions, by an applicant for insurance, that there is no incumbrance on the property, is material, and, if false, avoids the policy. Nor is the result changed if the incumbrance has been placed upon the property by a party other than the assured.

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

This was an action of assumpsit upon a policy of insurance, bearing date January 17, 1854. The original application is made a part of the case, and is dated January 14, 1854.

It is admitted that the buildings insured were burned May 14, 1854, and the notice of the loss is dated May 15, 1854.

The writ bears date September 21, 1854.

At the trial, the defendants pleaded the general issue, and filed a brief statement, which makes a part of the case.

It appears by the policy, that the sum of eighteen hundred dollars was insured on the tavern stand and wood-house of the plaintiff, and two hundred dollars on his two stables.

After the evidence was all in, the case was withdrawn from the jury, and continued on report, with a view to have the opinion of the full Court. The case was submitted upon all the testimony legally admissible, with power to enter a nonsuit or default, as the full Court should find the law to be upon the testimony that is admissible, unless the Court should be of opinion that the testimony offered as to damages was admissible, and in that event a new trial was to be granted, for that purpose only.

The case is fully stated in the opinion of the Court.

F. O. J. Smith and *S. C. Andrews*, for plaintiff.

1. The case comes up on report, for the Court to order a nonsuit or default, as the law and the facts may require. The case presents no question within the province of a jury to decide. There can be no pretence of any *actual* fraud. The report raises no such question. At most it presents but a question of constructive or legal fraud, which it is for the Court to determine as matter of law.

No facts were withheld at all material, which the plaintiff had not every reason to presume were as well known to the defendants as to himself. Of this nature was the incumbrance complained of. The plaintiff supposed the defendants, through their agent, knew all about it, and had every reason to suppose so; and the insured was not therefore bound to communicate the fact. 1 Phil. on Ins. § 104; *Green & al.* v. *Merchants' Ins. Co.* 10 Pick. 402.

2. This mortgage was not a material fact to be communicated. It was not made by the plaintiff, and he was not bound to disclose incumbrances made by others. *Tyler* v. *The Etna Fire Insurance Co.* 12 Wend. 507; *The Etna Fire Insurance Co.* v. *Tyler*, 16 Wend. 385; 18 Ver. 304.

The phrase "less estate therein," means an estate less than fee simple. R. S., c. 79, § 28; *Howard* v. *Albany Ins. Co.* 3 Denio, 301; 3 Hill, (N. Y. R.) 508; *Bowen* v. *Hingham*

Mutual Ins. Co. 18 Pick. 523; *Clark* v. *Ocean Ins. Co.* 16 Pick. 289.

N. Clifford, J. N. Goodwin and *Oakes,* for defendants.

The case shows, —

1. A breach of warranty on the part of the assured.

2. Misrepresentation in matters material to the risk.

3. That the incumbrances on the property and premises insured, are not expressed in the application or policy, in compliance with the eleventh section of the charter.

4. An alienation of the property insured, within the meaning of the thirteenth section of the charter.

5. Fraud in the claim made for each loss, within the meaning of the eleventh by-law.

6. False swearing in support of the claim of loss, within the meaning of the eleventh by-law.

7. A fraudulent enlargement of the incumbrance, expressed in the application and policy, and consequent increase of the risk by a change of the circumstances disclosed in the application; contrary to the fourteenth article of the by-laws.

Legal Points. — 1. When the policy contains a clause declaring that the application forms a part of the policy, it thereby becomes a part of the contract, and statements are thereby changed from representations into warranties. *Williams* v. *New England M. F. Ins. Co.,* 31 Maine, 224. "The application in such a case," says Tenney, J., in *Philbrook* v. *N. E. M. F. Ins. Co.,* 37 Maine, 140, "is to be taken as a part of the contract of insurance, in the same manner it would be, if incorporated into the policy itself." *Burritt* v. *The Saratoga County M. F. Ins. Co.,* 5 Hill, 188; *Jennings* v. *Chenango Co. M. F. Ins. Co.,* 2 Denio, 82; *Smith* v. *Bowditch M. F. Ins. Co.,* 6 Cush. 449; *Houghton & al.* v. *Man. M. F. Ins. Co.,* 8 Met. 120; Angell on F. & L. Ins. § § 146, 147, pp. 175, 178; *Richards & al.* v. *The Protection Ins. Co.,* 30 Maine, 273; 15 Shepl. 252.

2. A representation made to a mutual company, in answer to their question, that there is no incumbrance on the property to be insured, is a material representation, even though the

charter makes no provision for a lien; and if the answer be untrue, it is no matter whether it was given by accident, mistake, or design; the plaintiff cannot be heard to say, that it was not material. *Davenport* v. *N. E. Ins. Co.*, 6 Cush. 340; *Warren* v. *Middlesex M. Assurance Co.*, 21 Conn. 444; 28 Maine, 252; Angell on Ins. § § 188, 189.

It is material for the insurers to know of the incumbrances in reference to the responsibility of the insured, and his ability to meet his engagements with the company; it is material to know who is interested in, or had any title to the estate, but particularly and especially is it material for the defendants to know what interest the plaintiff has in the premises, and whether his estate is incumbered or unincumbered. *Burritt* v. *Saratoga Co. M. F. Ins. Co.*, 5 Hill, 191.

3. When the applicant is called upon to speak by a written interrogatory, he is bound to make a true and full representation concerning all the matters brought to his notice, and any concealment will have a like effect as in a marine risk. *Burritt* v. *The Saratoga Co. M. F. Ins. Co.*, 5 Hill, 192; Angell on F. & L. Ins. § 151, p. 183; *Holmes & als.* v. *Charleston M. F. Ins. Co.*, 10 Met. 211; Angell on Ins. § 177, p. 213, § 187, p. 221.

4. "A misrepresentation or concealment by one party, of a fact specifically inquired about by the other, though not material, will have the same effect in exonorating the latter from the contract, as if the effect had been material, since by making such inquiry he implies that he considers it to be so." 1 Phil. on Ins., (4th ed.) § 542, p. 291; *Dennison* v. *Thomaston M. F. Ins. Co.*, 20 Maine, 125; 5 Hill, 188.

5. Statements in the application, where that is made a part of the policy, of the purpose for which the property insured is to be occupied, and its situation as to other buildings, are warranties, and if untrue, the policy is void, though the variance be not material to the risk. *Jennings* v. *The Chenango M. F. Ins. Co.*, 2 Denio, 81, and cases cited; Ang. on F. & L. Ins., § 187, pp. 321, 322.

6. And the omission to state what is required by the inter-

rogatories, will avoid the policy. Idem, p. 83; *Allen* v. *Fire Ins. Co.* 12 Ver. 366.

A policy of insurance is made void, by either *allegatio falsi* or *suppressio veri*. *Ingraham* v. *So. Car. Ins. Co.* 3 Brev. 522.

7. A warranty must be strictly fulfilled, otherwise the policy is void, and there is no contract. Angell on F. & L. Ins. § 147, p. 179; *Duncan* v. *Sun F. Ins. Co.* 6 Wen. 494, 495; *Glendale Woollen Co.* v. *The Protection Ins. Co.* 21 Conn. 19; 1 Arnould on Ins. § 184, p. 494; *Pawson* v. *Watson*, Cowper, 785; 7 Hill, 122; *Dehan* v. *Hartley*, 1 Term, 343.

8. The prohibition of the thirteenth section of the charter, was intended to restrain subsequent mortgages, as well as other conveyances of the property insured. *Abbott* v. *Hamden M. F. Ins. Co.* 30 Maine, 414; *Adams* v. *The Rockingham M. F. Ins. Co.* 29 Maine, 292.

Nothing is asserted in *Jackson* v. *The Mass. Mut. Fire Ins. Co.* 23 Pick. 418, inconsistent with this view.

The language of the prohibition, in that charter, is far less comprehensive than it is in this charter.

The construction of the prohibitory words adopted in that case, was necessary, in order to give effect to another provision upon the same subject, which last named provision is not to be found in this charter.

The charter of this company was approved March 30, 1852, and it is obvious, we think, from several of its provisions, that it was the intention of the Legislature to prohibit subsequent incumbrances, and to take this charter out of the operation of the doctrine laid down in Massachusetts, in the case above cited.

The eleventh section of the charter provides, that any policy of insurance issued by said company, signed by the president and countersigned by the secretary, shall be deemed valid and binding on said company, in all cases where the assured has a title in fee simple, *unincumbered*, to the building or buildings, or property insured, and to the land covered by said buildings.

Then follows the provision of that section already quoted, that "if the property or premises are incumbered, policies shall be void, unless the true title of the assured, and the *incumbrance* on the same, be expressed therein."

And the twelfth by-law declares, among other things, that the applicant for insurance shall make a true representation of his title and interest in the property on which he requests insurance.

Consequently, an alienation *in any way* was prohibited, and it was provided that in any such case the policy should be void, and be surrendered up to be cancelled. *Dadman Man'f. Co.* v. *Worcester M. F. Ins. Co.* 11 Met. 429.

And this view finds support from the language of the fourteenth by-law, which prohibits any change of the circumstances disclosed in the application, except upon the terms therein specified, and in case of a violation of the by-law, declares that the policy shall be void.

9. It is a part of the contract that in case of loss, the insured shall, as soon as possible, deliver to the secretary of the company, a particular account on oath, of the property lost or damaged, and the value thereof at the time of said loss, and shall state whether he was the sole owner of the same, at the time of said loss; and if it is now, was at the time of its insurance, or has since been incumbered by mortgage or otherwise, the claim shall be forfeited; and it is expressly agreed that if there shall appear any fraud in the claim made for such loss, or false swearing or affirming in support thereof, the claimant shall forfeit all benefit under his policy, except such as the directors see fit to allow.

10. There was fraud in the statement of the loss, and therefore the policy is void.

It is not necessary to cite authorities to confirm the doctrine that a fraud on the part of the insured renders a policy void, especially in a case where it is agreed by the contracting party that such shall be its effect.

11. False swearing also, in any matter required by the contract to be under oath, is equally fatal to the right of the

claimant. It is presumed that a principle so obvious will not be denied. The by-laws are a part of the contract, the applicant having covenanted and agreed to hold himself bound by the Act of incorporation and the by-laws of said company.

12. The whole transaction of the third of February, 1854, was an unmitigated fraud. It will be noticed that the mortgage deed, disclosed in the application, was destroyed, and a new one made and antedated, not only in respect to the time of its execution, but also as to the time of its acknowledgment, and a new note for the sum of two hundred and ninety dollars, was included in it.

13. The witness, Joseph Hutchingson, was not an agent of the company, for any purpose, except to receive applications and transmit them to the company, for the decision of the directors. See charter, § 11; By-laws, art. 7; *Jennings* v. *Chenango County M. F. Ins. Co.*, 2 Denio, 78; *Dawes* v. *North River Ins. Co.* 7 Conn. 462; 1 Phil. on Ins. (4th ed.) § 872, p. 485; *Kennedy* v. *St. L. Co. Ins. Co*, 10 Barb. S. C. 285.

14. The question of damages cannot arise, nor is it of importance if the Court comes to the conclusion that the plaintiff cannot prevail.

15. There is no other rule of damages in an action on a policy of insurance against fire, where the insured building is totally destroyed, except that of indemnity to the assured for his actual loss. *Brinley* v. *The National Ins. Co.* 11 Met. 195; Sedgwick on Damages, 257.

Such being the rule, it is obvious that the parol testimony offered by the defendants should have been admitted.

16. The valuation in a policy against fire is rather the fixing of a maximum, beyond which the underwriters are not to be liable, than a conclusive ascertainment of the value. Angell on F. and L. Ins. § 253, p. 274.

Some few exceptions exist to this rule; as for example, it is said that policies on rents or profits always are, and must necessarily be, valued policies. *Mumford* v. *Hallett*, 1 Johns. 433; *Cushman* v. *North Western Ins. Co.* 34 Maine, 487.

Policies against fire are taken to be open ones, unless oth-

erwise expressed. 3 Kent's Com. 375, note a; 2 Phil. on Ins. § § 1211, 1213.

The facts being undisputed, it is a question of law whether the defence shall prevail or whether the plaintiff shall recover. 22 Maine, 256; 11 Mee. & Welsby, 217, opinion by ALDERSON, J.; 10 Maine, 472; 18 Pick. 421; 6 Met. 295.

Smith, in reply.

We insist there is no question of actual fraud raised. That is all settled by the report. It leaves open only a question of constructive fraud, and we maintain that none such is made out. Suppose the plaintiff had stated all the facts in regard to the mortgages, would the company have refused to insure him? Not at all.

The law set up by the counsel in defence is sound; we do not question it; we raise no issue with them upon that point; but we say that law is not applicable to this case. No facts are presented upon which that law can rest or to which it can be applied.

RICE, J. — Section 11, of the defendants' charter, reads as follows: — "Said company may make insurance for any term not exceeding six years; and any policy of insurance issued by said company, signed by the president, and countersigned by the secretary, shall be deemed valid and binding on said company in all cases where the assured had a title in fee simple, unincumbered, to the building, buildings or property insured, and to the land covered by said buildings; but if the assured has a less estate therein, or if the property or premises are incumbered, policies shall be void, unless the true title of the assured and the incumbrances on the same, are expressed therein." By the terms of the policy, the application, which is in writing and signed by the plaintiff, is made part of the policy; and such application is to be taken as part of the contract of insurance, in the same manner it would be if incorporated into the policy itself. *Philbrook* v. *New England M. F. Ins. Co.* 37 Maine, 137; *Williams* v. *same,* 31 Maine, 219. In such case, all the material statements in

such application are changed from representations into warranties. *Burritt* v. *The Saratoga Co. M. F. Ins. Co.* 5 Hill, 188; 31 Maine, 219.

The 7th section of the defendants' charter, gives them a lien upon the property insured, for the sum of the deposit note and the cost which may occur in collecting the same, which lien continues during the existence of the policy and the liability of the assured therein, notwithstanding any transfer or alienation.

The 11th interrogatory in the plaintiff's application is as follows:—"Is the property incumbered? If so, how much, and to whom?" The answer is, "mortgaged for $1100 to Wm. Cressey."

A want of truth in a representation is fatal or not to the insurance, as it happens to be material or immaterial to the risk undertaken; but when the thing is warranted to be of a particular nature or description, it must be exactly as it is represented to be, otherwise the policy will be void, and there is no contract. Angell on Ins. § 147.

It is sometimes the practice of companies, who insure against fire, to make inquiries of the assured, in some form, concerning all matters which are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by conditions annexed to the policy, and sometimes by requiring the applicant to state particular facts, in a written application for insurance. When thus called upon to speak, he is bound to make a true and full representation concerning all matters brought to his notice. *Burritt* v. *Saratoga Co. M. F. Ins. Co.*, 5 Hill, 188.

A warranty by the assured in relation to the existence of a particular fact, must be strictly true, or the policy will not take effect; and this is so whether the thing warranted be material or not. It would be more proper to say that the parties have agreed to the materiality of the thing warranted, and that agreement precludes all inquiry on that subject. 5 Hill, 188.

If the application contain an interrogatory whose aim is to

ascertain whether there be an incumbrance on the property proposed to be insured, and the answer do not disclose the extent of that incumbrance, the policy will be void. *Leohner* v. *Home Mutual Ins. Co.*, 2 Bennett, 247.

The insured must represent truly his interest in the property insured or his policy will be void. *Brown* v. *Williams & Thomaston M. F. Ins. Co., Trustees,* 28 Maine, 252.

A representation made to a mutual fire insurance company, in answer to their questions, by one applying for insurance on a building against fire, that there is no incumbrance thereon, is a material representation, which if false avoids the policy, although the company be established by the laws of another State, and may not therefore have a lien on the property insured. *Davenport* v. *New England M. F. Ins. Co.* 6 Cush. 340; *Packard & al.* v. *Agawam M. F. Ins. Co.* 2 Gray, 334.

Nor is the result changed if the incumbrance has been placed upon the property by a party other than the assured. *Warren* v. *Middlesex Mutual Assurance Co.* 21 Con. 444.

The case finds, that at the time of the application the property insured was not only encumbered by the mortgage to Cressey, disclosed by the plaintiff, but was also under mortgage to Sydenham Bridgham for twelve hundred dollars, which fact was well known to the plaintiff.

But it is contended that the existence of the Bridgham mortgage is wholly immaterial, as Cressey had agreed to apply the payments from the plaintiff, as fast as made, to the extinguishment of the Bridgham mortgage, and had actually left the plaintiff's notes and mortgage in the hands of the witness Andrews, for that purpose. We think this answer cannot avail, because the mortgage of the plaintiff to Cressey was not so large by one hundred dollars as was the mortgage from Cressey to Bridgham, so that, if it had been duly assigned and appropriated in payment, it would not have discharged the Bridgham mortgage by one hundred dollars.

Should it be suggested that the Cressey mortgage, as subsequently enlarged, was sufficient to pay the Bridgham mortgage, the answer is, that increase was made in fraud of the

rights of the defendants, who occupy the condition of subsequent purchasers, or encumbrancers, and against whom that *increase* is absolutely void, if indeed it would not, of itself, avoid the policy.

At the argument much stress was laid upon the fact, that in the offer by the defendants' counsel to prove that the property was over valued, for the purpose of reducing the damages, should the plaintiff be entitled to recover, they did not contend that there was any actual fraud, but insisted that the facts show a legal fraud. This proposition was confined to the question of damages, and cannot in any way affect the questions which have already been considered.

From these considerations, being of the opinion that the action cannot be maintained, it becomes immaterial to examine the rule of damages laid down by the presiding Judge, or to determine whether the evidence upon that point was admissible or otherwise. *A nonsuit must be entered.*

TENNEY, C. J., and HATHAWAY, CUTTING, and GOODENOW, J. J., concurred.

AARON PARSONS *versus* GREENLEAF HOWE *& al.*

A railroad corporation was authorized by its charter to purchase, or take and hold, so much land of private persons or other corporations, as might be necessary for its corporate use, and also to take, remove and use for certain specified purposes, any earth, gravel, stone, timber, or other materials on or from the land so taken.

The Court *held* that this did not authorize the servants of the corporation to go upon lands *not taken* under the charter, and take materials therefrom, against the will and without the consent of the owners of the land.

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

TRESPASS for taking material from plaintiff's land. The action came into this Court, by appeal from a justice of the peace, before whom it was tried on plea of the general issue. The plaintiff introduced testimony, by which he proved the taking and conversion of the property as alleged in the writ,

of the value of twenty dollars or more, from land occupied by him, and in his possession, and that the taking was forbidden by him at the time.

In Defence. Defendants offered to prove, that the taking and carrying away of the materials described in the plaintiff's writ, was for the purpose of constructing the Buckfield Branch Railroad, and that they were used in such construction, and that defendants acted under authority from said railroad corporation, vested in Francis O. J. Smith, and as his agents and workmen, and they introduced testimony tending to establish what they offered to prove. Defendants also introduced an Act of incorporation, entitled "An Act to establish the Buckfield Branch Railroad Company," passed by the Legislature of Maine, July 27th, 1847.

The plaintiff proved, that the place from which the property sued for was taken by defendants, was from thirty or forty feet to four rods distant from the place where the railroad was in process of construction, and it was admitted by defendants that the land from which said materials were taken by them, was not land which had been purchased by said railroad company, or taken by them, otherwise than by defendants going on to the same and taking said materials, and that said land was not embraced within the limits of said railroad.

Whereupon the case was taken from the jury by consent of parties, and submitted to the Court; and if the Act of incorporation, and the facts offered to be proved by the defendants, constitute a valid defence, the action is to stand for trial; otherwise a default is to be entered, and judgment rendered for the plaintiff for twenty dollars damage and for his costs.

Ludden, for plaintiff, submitted the case without argument.

F. O. J. Smith, and *S. C. Andrews,* for defendants.

The charter, § 1, and the R. S., c. 81, § 2, alike contemplate the taking and use of land and materials without, as well as within, the located limits of the road, for its construction. Such acts, then, judiciously performed, are author-

ized by law. For acts authorized by law, no action for tort is maintainable. The remedy provided by the statute, of petition to County Commissioners, for redress is alone available to the injured party. *Mason* v. *Ken. & Portland Railroad Co.*, 31 Maine, 215, and note 1 to reprint of the same case; vol. 1, American Railway Cases, p. 166, which cites and collects in detail, the following American cases, additional to a long list of English cases, viz.:—*Stowell* v. *Flagg*, 15 Mass. 364; *Stevens* v. *Middlesex Canal Co.*, 16 Mass. 466; *Piscataqua Bridge* v. *New Hampshire Bridge*, 7 N. H. 35; *Rogers* v. *Bradshaw*, 20 Johns. 735; *Knorr* v. *The Germantown Railroad Co.*, 5 Whart. 256; *Aldrich* v. *Cheshire Railroad Co.*, 1 Foster, 359; *Hatch* v. *Vermont Central Railroad Co.*; *Hollister* v. *Union Co.*, 9 Conn. 436; See also *Dodge & al.* v. *County Com. of Essex*, 3 Met. 380, which was a petition of mandamus upon defendants to estimate damages to a building near the line but without the limits of the road, occasioned by blasting rocks. See also *Lebanon* v. *Olcott*, 1 N. H. 339; *Calking* v. *Baldwin*, 4 Wend. 667.

RICE, J.—The charter of the Buckfield Branch Railroad, under which the defendants seek to justify, authorizes that corporation to purchase, or take and hold, so much of the land of private persons, or other corporations, as may be necessary for the location, construction, and convenient operation of said railroad; and the right to take, remove and use, for the construction and repair of said railroad and appurtenances, any earth, gravel, stone, timber, or other materials on or from *the land so taken.*

This does not authorize the servants of that corporation, to go upon lands *not taken*, under the charter, and in accordance with its provisions, and take materials therefrom for the construction of their road, against the will and without the consent of the owners of such lands. The cases cited by defendants' counsel will be found, on examination, to refer to damages occasioned by operations on lands which have been

legally taken for the use of the corporations, against which damages were claimed, and are not authority for the defendants in the case at bar.

A default must be entered according to agreement.

TENNEY, C. J., and HATHAWAY, CUTTING, and GOODENOW, J. J., concurred.

INHABITANTS OF DIXFIELD *versus* JACOB NEWTON.

A quitclaim deed by a mortgagee, and the delivery of the notes secured by the mortgage to those to whom the deed is made, operate as an assignment of the mortgage.

If a person having a claim to land, and with a full knowledge of his rights, suffer another in his presence, without making known his claim, to purchase of a third party, and expend money on the land under an erroneous impression that he is acquiring a good title, he cannot afterwards be permitted, in equity, to enforce his legal rights against such purchaser.

But if a mortgager suffer such sale of the mortgaged premises, under a reasonable misapprehension that there had been a foreclosure, and that his right of redemption had expired, he does not thereby lose his rights.

Such a conveyance was made to a town by deed and the notes secured by mortgage transferred, the mortgager being present and assenting under a misunderstanding of his rights. The mortgager released certain claims he had against the town, and the town contracted to convey the premises to his son-in-law, on condition that he should support the mortgager and his wife: — *Held*, that this arrangement did not change the position of the parties in relation to the title to the land.

After the notes and deed, as above, were delivered to the committee of the town, the notes were passed by them into the hands of the mortgager: — *Held*, that such delivery did not constitute a redemption of the mortgage, no value having been paid by him therefor.

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

This was a writ of entry to recover possession of a certain farm in the town of Dixfield. The defendant pleaded the general issue, and payment of the notes mentioned in the mortgage from Jacob Newton to John C. Kidder, hereinafter referred to in this case.

The demandants then put into the case a deed of quitclaim from John C. Kidder to them, dated April 2, 1844, acknowledg-

ed the same day, and recorded May 22, 1844. They also put into the case a deed of mortgage from Jacob Newton to said Kidder of the same premises, dated January 30, 1837, acknowledged the same day, and recorded May 11, 1837, the condition of which mortgage was to secure the payment of $248, according to certain notes of hand therein described.

The points at issue in the case are stated in the opinion of the Court.

May, (with *R. Washburn*,) for plaintiff, contended —

1. That the giving of the quitclaim deed by Kidder, and the delivery of the notes, passed all the interest of Kidder in said premises and in the mortgage and notes to the town, and that if the town had not given up to the defendant his notes, its title under the mortgage would have been perfect, at least as mortgagee. *Dockray* v. *Noble*, 8 Maine, 272; *Warden* v. *Adams*, 15 Mass. 233; *Freeman & al* v. *McGaw & al.* 15 Pick. 82.

2. That the notes were surrendered to Newton, the mortgager, under a mistake, and upon the supposition of all parties, that the mortgage being foreclosed absolutely, the notes were worthless. This is no payment and no discharge of the mortgage. *Olcott* v. *Rathbone*, 5 Wend. 490; *Arnold* v. *Cram*, 8 Johns. 79.

That the giving up of the notes in ignorance of the facts, under the supposition that they had been fully paid, is not a payment or discharge. *Fowler* v. *Ludwig*, 34 Maine, 455; *Lightbody* v. *Ontario Bank*, 11 Wend. 9; *French* v. *Price*, 24 Pick. 13.

3. The defendant is estopped by his acts and declarations at the time of the conveyance from Kidder to the town, from setting up any claim to the premises, and to deny that the mortgage given to Kidder is paid, or that it is effectually and absolutely foreclosed. *Hatch* v. *Kimball*, 16 Maine, 146; *Colby* v. *Norton*, 19 Maine, 412. Such also is the rule in equity. *Mathews* v. *Light*, 32 Maine, 305; *Fay* v. *Valentine*, 12 Pick. 40, and cases there cited. This is a case directly in point; and in the case of *Hatch* v. *Kimball*, be-

fore cited, the Court say, that these principles have been adopted in the common law courts.

C. W. Walton, for defendant.

TENNEY, C. J. — At the time John C. Kidder delivered his quitclaim deed of the premises in question, to the plaintiffs, it is admitted that the mortgage to him from the tenant had not been foreclosed, the means taken to effect a foreclosure having proved abortive.

The deed of Kidder, and the delivery of the notes secured by the mortgage to him, to the committee of the plaintiffs, appointed for that purpose, operated as an assignment of the mortgage. *Dockray & ux.* v. *Noble,* 8 Maine, 278.

It appears however from the case, that the original mortgagee took measures to foreclose the mortgage, and supposed that a foreclosure had been perfected, when he delivered his quitclaim deed to the plaintiffs; and in the negotiations between him and the committee of the town of Dixfield, to which the tenant was a party, and was consenting, if the whole was not done by his procurement, the title of the mortgagee was treated by all as absolute and indefeasible. It is hence contended, that the tenant cannot set up the right under his mortgage, which he had before the conveyance to the plaintiffs, he having seen them pay a consideration for an indefeasible title.

There is no principle better established, nor founded on more solid considerations of equity and public utility, than that which declares, that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted, in a court of equity, to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel. 1 Johns. Ch. 344. And ignorance of the law, with full knowledge of the facts, cannot be set up in avoidance of this principle. 6 Johns. Ch. 166.

"But the essential ingredient, which destroys his own title, is the knowledge that the purchaser is deceived with respect to the title, and that he must suffer by it, and the neglect, when he has an opportunity to do so, to undeceive him and save him from injury." *Wilton* v. *Harwood*, 23 Maine, 131.

It does not appear from the case, that the tenant withheld any knowledge, which he actually possessed, touching the foreclosure of the mortgage. It is to be supposed, that whatever was done to cause a foreclosure, was caused by Kidder, the mortgagee, and he was a party to the conveyance. It is manifest from the case, that he believed he had an absolute title to the premises. The committee of the town, as may be well inferred from their declarations, had satisfied themselves on this point, without the least reliance upon the silence of the tenant, when it was asserted in his presence, that the mortgage had been foreclosed by a publication of a notice in some newspaper, and that the time of redemption had expired, and the mortgagee's title was absolute. The committee had the same opportunity of ascertaining fully, what had been done to cause a foreclosure, that the tenant had, and when they were about to take a deed to the town, they were as much interested to make the inquiry as he had previously been. It is very evident that the mortgagee, the mortgager and the committee fell into an error touching the means taken to foreclose, which was common to all of them, and that all were ignorant of certain irregularities and defects in those means, which prevented the result, which all honestly supposed had been accomplished. The tenant, therefore, has been guilty of no fraud meditated against the interest of the purchasers, and the principle involved for the purpose of making him the sufferer, will not apply to the facts of the case.

In the arrangement touching the conveyance from Kidder to the plaintiffs, the tenant released certain claims which he had made against the town, and the town contracted to convey the premises to his son-in-law, on condition that he should provide support to the tenant and his wife. This

arrangement cannot change the legal rights of the parties, in relation to the title in the land.

After the notes secured by the mortgage were delivered by Kidder, the mortgagee, with the deed of quitclaim, to one of the committee, the same notes were passed into the hands of the tenant. Can this surrender of the notes to the mortgager be treated as a redemption of the premises mortgaged?

It was no part of the contract between the parties to the mortgage, and the committee of the town, that the tenant was entitled to the notes. After the delivery of the deed to the plaintiffs, and the final conclusion of the arrangements which resulted in the contracts, the notes were considered by all as worthless, they having been cancelled, as they supposed, by the acquirement by Kidder of the title, which the tenant had before foreclosure held in himself. But the mortgage being in fact open at that time, the notes were unpaid, and so continued till the institution of this suit. Under the mutual mistakes, which occurred at the time of the transaction, the destruction of the notes would not have operated as payment thereof. *Davis* v. *Maynard*, 9 Mass. 247. And the mistaken surrender of them to the maker, can on no principle have a greater effect. Before the tenant can be entitled to the premises, discharged of the mortgage, full payment of the amount due thereon must be made.

The conveyance from Kidder to the plaintiffs was a transmission of his rights under the mortgage, which placed the legal title to the premises in them, subject to redemption; and they are entitled to the conditional judgment, as provided in R. S., c. 125, § § 7 and 9, and such may be entered.

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

JOSIAH BENNETT *versus* EZEKIEL TREAT, JR.

The words "duly sworn," or "sworn according to law," when applied to any officer who is required to take and subscribe the oath prescribed in the constitution, are to be construed to mean, that he has taken the oath as required; and when applied to any other person, that such person has taken an oath faithfully and impartially to perform the duties assigned to him in the case specified.

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

This was an action of debt by a collector of taxes for the town of Canton, against the defendant, under the R. S., c. 14, § 75. Plea, general issue. The verdict was for the plaintiff. Several exceptions to the rulings of the presiding Judge were taken by the defendant, but the only one relied on is stated in the opinion of the Court.

C. Andrews, for plaintiff.

The defendant objects that the assessors were not legally sworn, and offered to prove that they were sworn by the form prescribed by statute of 1821. The testimony was rejected, and properly, because the record of the town shows that they were "duly sworn," which is a compliance with R. S., c. 5, § 9. Also see c. 1, division 21. And even *presuming* that they were sworn by the form in stat. 1821, it is amply sufficient. Therefore, whether the testimony was or not properly excluded, it cannot affect the case.

Shepley & Dana, for defendant.

There is no proof that either the assessors or the collector were properly sworn.

Section 9 of c. 5, of R. S. provides that the officers therein named, among which are assessors and collector, "shall be duly sworn." The record of the meeting seems to follow the language of the statute, in regard to the oath, simply stating that these officers were "duly sworn."

The provision of the statute means something. There must be some kind of an oath. By the statute of 1821, c. 114, § 1, the mode and time of administration of the oath is prescrib-

ed. The corresponding section of R. S., (c. 9, § 5,) uses simply the language above quoted.

An oath being necessary, it is quite possible an informal and insufficient one should be taken. The word "duly" is no description, and affords no clue to the settlement of the question of sufficiency. The *oath* should have been spread upon the record. *Abbott* v. *Hermon*, 7 Maine, 118.

The like words are made use of in R. S., c. 133, § 17, and it is settled in *Brighton* v. *Walker*, 35 Maine, 132, that the mere repetition of the phrase "duly sworn" is not enough. The language should be given, that the Court may judge whether or not the oath was duly administered.

The necessity of such a rule applies with much more force in cases like the present, than where the certificate is by a sworn magistrate who is presumed to know the law, and the nature of the oath he is to administer.

RICE, J.—This case, which has been continued upon the docket for many years, for argument, has very recently come into the hands of the Court. There were many papers and documents introduced at the trial, under objection, none of which, however, have come into our hands, and they do not seem to be relied upon by the excepting party.

The only point taken at the trial, and urged in argument by the counsel for the defendant, is, that the assessors, by whom the tax against the defendant was assessed, were not legally sworn. This objection is based upon the statement of counsel that the record of the town only recites that the assessors were "duly sworn," which it is contended is insufficient; and that the oath administered should have been set out at length, to the end that the Court might determine whether it were sufficient or otherwise.

The R. S., c. 5, § 9, provides that assessors shall be "duly sworn."

Chapter 1, § 3, rule 21, provides that whenever the expression "duly sworn," or "sworn according to law," is used or applied to any officer, who is required to take and subscribe

the oath prescribed in the constitution, it shall be construed to mean, that such officer had taken and subscribed the same, as well as made oath faithfully and impartially to perform the duties of the office to which he had been elected or appointed; and when applied to any person, other than such officer, it shall be construed to mean that such person had taken an oath faithfully and impartially to perform the duties assigned to him in the case specified.

There does not seem to be any valid reason for this objection. The other exceptions taken at the trial appear to have been abandoned at the argument.

Exceptions overruled and judgment on the verdict.

TENNEY, C. J., and HATHAWAY, CUTTING, and GOODENOW, J. J., concurred.

ISAAC CHASE *versus* ALBERT D. WHITE.

In an action of ejectment to recover a lot of land, called the "Gore," proved to be bounded on the north by a lot belonging to the tenant, the only question to be determined being as to the true original location of the north line of the "Gore," the tenant introduced a deed of his lot from his original grantors, who were also the original grantors of the demandant, dated subsequently to that under which the demandant claimed, and introduced testimony tending to prove, that the original location of the north line of the "Gore" was in accordance with his claim. — *Held*, that the testimony was competent for the consideration of the jury, in connection with the other testimony in the case.

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

This was a writ of entry in which the demandant claimed Gore lot No. 11, in Buckfield, by mesne conveyances from Abijah Buck and Abijah Buck, jr., his original grantors, the deed from whom was dated June 15, 1807.

The tenant disclaimed a portion of the demanded premises. His disclaimer was accepted, and the parties joined issue on the title to the residue of the lot. It was proved that the tenant owned the land on the north side of the Gore lot, and by which the Gore lot was bounded entirely on that side, and

the only question to be determined by the jury, was where the true original location of the north line of the Gore was.

The demandant introduced testimony tending to establish the first boundary of the Gore as claimed by him, but did not prove any other monuments to have existed on the line of the Gore as claimed by him.

The tenant introduced a deed from the demandant's original grantors to Sampson Cole, dated March 27, 1818, under which, through mesne conveyances, the tenant derived title to the whole or part of his land adjacent to and bounding the Gore on the north, and introduced testimony tending to prove that the original location of the north line of the Gore lot was in accordance with his claim. The presiding Judge instructed the jury that the testimony was competent for their consideration, in connection with the other evidence in the case, in determining where the true original location of the north line of the Gore was, (that being the line in controversy between the parties.)

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

The cause was submitted without argument.

Ludden, for plaintiff.

Walton, for defendant.

GOODENOW, J.—I see no reason why the exceptions should not be overruled and judgment be entered on the verdict.

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

COUNTY OF FRANKLIN.

ISABEL CURTIS *versus* JOEL HOBART.

Dower may be demanded and assigned by parol.

Dower may be assigned by a guardian.

By the Act of 1838, c. 342, a woman is entitled to dower, though divorced from her husband on the ground that he had become "a confirmed, habitual and common drunkard;" but the statute cannot have a retro-active operation.

ON REPORT from *Nisi Prius.*

The facts appear in the opinion of the Court.

R. Goodenow, for plaintiff, contended that the defendant could not avail himself in defence, of the assignment of dower to the plaintiff and her husband, Curtis, by Russell, as guardian of the minor children of Quimby.

It is questionable whether that assignment was legally made, or binding on the parties to it. It does not appear the heirs or guardian were then in possession. However that may be, whatever right the plaintiff acquired by it, was subject to the control of her then husband, Curtis, who became entitled to the use of the same during the continuance of the marriage, *jure uxoris. Clapp* v. *Stoughton,* 10 Pick. 469.

This was in 1830, long before any of our statutes relating to the property of married women, were enacted.

As wife of Amos Curtis, the plaintiff is entitled to her dower in the remaining two-thirds. The divorce was decreed for his fault. R. S., c. 144, § 10.

S. Belcher, for the defendant.

1. The plaintiff is not entitled to dower as widow of Stephen Quimby.

The case shows, that dower was assigned to the plaintiff as widow of said Quimby, on the 23d day of November, A. D. 1830, in the same lands in which she now claims

dower. The dower having been legally assigned and accepted by her, this action cannot be maintained.

"Dower may be demanded and assigned by parol." *Baker* v. *Baker*, 4 Maine, 67; *Conant* v. *Little*, 1 Pick. 189.

"A guardian may assign dower." *Jones & ux.* v. *Brewer*, 18 Mass. 314; *Young* v. *Tarbell*, 37 Maine, 509; R. S., c. 110, § 22.

If the plaintiff is illegally kept out of possession of the lands assigned her, it affords no grounds for the maintenance of this action.

2. The plaintiff is not entitled to dower as the divorced wife of Amos Curtis.

The divorce was asked for and decreed solely on the ground of the husband's being "a confirmed, habitual and common drunkard."

Nothing was asked for, nothing assigned out of the husband's estate at the time the divorce was decreed.

The husband had no interest in the premises at the time of the divorce, nor for a long time previous thereto, to wit: not since Dec. 24, A. D. 1836.

There was no law prior to that passed by the Legislature in 1838, c. 342, making a woman divorced from her husband for the cause of his being a drunkard, dowable in his estate. The premises having been conveyed by Curtis, the husband, prior to that enactment, are exempt from its operation. *Given* v. *Marr*, 27 Maine, 212.

GOODENOW, J. — This is a writ of dower, in which the plaintiff demands dower as the widow of Stephen Quimby, deceased. The marriage, seizin during the coverture, and death of the said Quimby, are admitted; and also that dower was duly demanded, Nov. 24, 1854. But it is contended upon this branch of the case, that the plaintiff is not entitled to maintain this action, because after the decease of said Quimby, she intermarried with one Amos Curtis, and that on the 23d of Nov. 1830, her dower was duly assigned to her by the guardian of the children of the said Stephen Quimby,

and that the same was set out to her by metes and bounds; and with that assignment the parties were all fully satisfied, and it was reduced to writing and signed by the plaintiff, by said guardian, and by said Amos Curtis, then husband of the plaintiff, and said assignment was accepted by the plaintiff, in full satisfaction of her dower in Stephen Quimby's estate. The writing was not recorded. Duplicates were made and signed, and the plaintiff took one and the guardian the other. It is not known where said writings now are.

It may be a misfortune to the plaintiff, that she has lost the evidence which she once had; but that cannot change the law.

It has been decided in this State, as it has in Massachusetts, that dower may be demanded and assigned by parol. *Baker* v. *Baker*, 4 Maine, 67; *Conant* v. *Little*, 1 Pick. 189; and also that a guardian may assign dower. 1 Pick. 313; 37 Maine, 509; R. S., c. 110, § 22.

Another question made in the case is, "can the plaintiff have dower as the divorced wife of Amos Curtis?" She was married to him in 1830, and divorced from him in 1852. He had no interest in the premises at the time of the divorce; and has had none since 1836. The cause of divorce was, that he had become "a confirmed, habitual and common drunkard." The statute of 1838, c. 342, made a woman dowable, who had been divorced for this cause, but it cannot have a retrospective operation. *Given* v. *Marr*, 27 Maine, 212.

According to the agreement of the parties, a nonsuit must be entered. *Plaintiff nonsuit.*

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

COUNTY OF ANDROSCOGGIN.

ANDROSCOGGIN RAILROAD CO. *versus* LEVI RICHARDS *& al.*

An officer acting under a warrant for the search of intoxicating liquors, is justified in forcibly breaking and opening the depot of a railroad in which the liquors are stored, after the usual time for receiving and delivering goods at the depot, if such forcible entry is necessary to the execution of the warrant.

It is not necessary in such case, that the officer should first ask permission of the person having charge of the depot, to enter and search it.

Intoxicating liquors, though belonging to a town, are not protected against seizure and forfeiture, under the statute of March 31, 1853, unless the casks and vessels in which they are contained are plainly and conspicuously marked with the name of the town *and its agent.*

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

TRESPASS *quare clausum*, for breaking and entering the depot of the plaintiffs and conveying away certain spirituous liquors found therein.

The defendants justified as officer and aid, acting under a warrant, commanding the officer in the usual form to enter and search the depot and freight house and seize the liquors.

One lot of liquors seized, was marked "Town of Canton, Me., Strickland's Ferry Depot," and the other, "Town of Livermore, Me., Strickland's Ferry Depot."

It appeared, that a printed notice was posted up on the depot, that no freight would be received or delivered after six o'clock, P. M., which notice remained there when the liquors were taken; and that the person in charge, having fastened up the freight house for the night, left it at fifteen minutes after six o'clock on the evening the liquors were seized. The freight house was broken open and the liquors seized by the defendants after that time, and just before sun down.

Some question was made at *Nisi Prius* as to the admissibility of the records of the town to prove the election of the officer, but no exceptions having been made by plaintiffs to

the ruling of the presiding Judge upon this part of the case, the copies of the record introduced are not given.

The presiding Judge instructed the jury, that after the person having charge of the freight depot had fastened it up and left it locked for the night, the defendants, though they had a warrant to them directed to search it, had no right with force to break it open and enter it, and carry away the liquors, in the absence of the person having charge or care of the depot, unless they had obtained or asked permission to enter and search it, and the same had been refused, *and unless such forcible entry was necessary to enable them to execute the warrant;* that, if they did so break and enter, without permission and without the consent or knowledge of the person having charge or care of the depot, and without asking such permission to enter and search it, their warrant would furnish them no protection and they would be trespassers by so doing, and would be liable to the plaintiffs; and *that the measure of damages would be the full value of the liquors at the place and time when and where they were so taken by defendants, with the amount of damages, if any, done to the plaintiffs' building by such breaking and entering.*

The Judge further said, that he had no hesitation in instructing the jury, that if the defendants broke and entered the depot after it had been closed and fastened for the night, and left by the depot-master, without any notice or request to him, or to some person having care of it, and took the liquors sued for therefrom, such proceeding was wholly unjustifiable, and that the search warrant, under which they professed to act, would afford them no protection, and that a search commenced and conducted under such circumstances was unreasonable and illegal.

Defendants' counsel requested the Court to instruct the jury, "that the opening the door and entering, as testified to, was not a 'breaking,' in the contemplation of law," which the Court declined to do.

The cost of the liquors seized, including freight, was $191,54.

The jury, under the instructions given, returned a verdict for plaintiffs for $215,23.

Defendants excepted.

C. W. Goddard, for defendants.

1. The instructions in regard to the breaking and opening, without permission, and after the depot was locked up for the night, were erroneous.

A search warrant authorizes an officer to break and enter even a private dwelling. *Sanford* v. *Nichols,* 13 Mass. 286.

The necessity of a preliminary request and refusal applies to a dwelling alone. *Semayne's case,* Smith's Leading Cases, 142 and note.

The process under which defendants justify, issued by a competent magistrate, and being in proper form, protects defendants in a legal search. *State* v. *McNally,* 34 Maine, 210.

2. The liquors were liable to seizure and confiscation, although shown to be the property of towns, because they were not "plainly and distinctly marked with the agent's name." Liquor law of March 31, 1853, § 8.

3. The command of the State, speaking through the magistrate to the officer, was to search forthwith the place named, in the day time, without any other qualification, and any implied qualification is an exception, and as such should be strictly construed, and not needlessly admitted.

Defendants arrived at the depot "just before sundown." Their warrant commanded them to search forthwith, in the day time, and consequently they had no time to travel about in search of the depot-master, as it would have been night before they could return.

While they were so searching, parties interested might remove the property searched for, and thus the law be evaded.

Besides, plaintiffs had given notice that they would not deliver goods after six o'clock, so a demand or request would have been fruitless.

4. It was not necessary to tender the freight. The lien of

the company, given by the charter, attaches only in case of individual claimants and civil suits.

5. The plaintiffs are at any rate liable but for nominal damages. *Bagshaw* v. *Gaward*, Yelverton, (Metcalf's ed.,) 96; *Sanford* v. *Nichols*, 13 Mass. 286.

6. The defendants are greatly injured by the verdict rendered under the instructions given, having been fined in vindictive damages, $215,23, or $23,69 more than the full value of the liquors and the freight.

Morrill and *Fessenden*, for plaintiffs.

1. It does not appear by any evidence in the case, that Richards, one of the defendants, was ever legally chosen constable. R. S., c. 5, § 4; 19 Maine, 184; 13 Maine, 466.

2. The plaintiffs were obliged by law to be in readiness and prepared to convey passengers and articles, and when the appropriate tolls are paid or tendered, they are obliged to receive goods at all proper times and places, and convey the same.

Plaintiffs have a lien on all articles transported for said tolls, and proper notice was given as to the time when they would not receive or deliver freight.

Under these circumstances, the action can be maintained. 2 Greenl. Ev. § 614; Com. Dig. title Trespass, (B. 1,) (B. 2,) (B. 4); 25 Maine, 411.

3. Depots should be protected against all liability of being forcibly broken open and unreasonably searched.

The manner in which the warrant was executed was an abuse of authority, and the officer and his aid were therefore trespassers, *ab initio*. They should have first demanded or requested of the person in charge of the depot, permission to enter, especially as the plaintiffs were not named in the warrant, or parties in any manner to the proceedings. Const. of Maine, Art. I, § § 5, 6; Com. Dig., title Trespass, (C. 2); 25 Maine, 76; 14 Maine, 44; *Barton* v. *Wilkinson*, 18 Verm. (3 Washb.) 186; U. S. Annual Dig. for 1847, vol. 1, title Sheriff, V; 3 Bos. & Pul. 222; Archb. Crim. Practice and Pleading, vol. 2, p. 245, note; 1 Gray, 6.

4. The manner in which the defendants opened the door of the depot was a breaking in law. 4 Black. Com. 227; Archb. Crim. Prac. & Plead. vol. 2, p. 330; Davis' Crim. Jus. 357; *Rex* v. *Robinson,* 1 Moody's C. C. 327.

5. Trespass lies against the aid as well as the officer. Com. Dig. title Trespass, (C. 1); Phillips Ev., vol. 5, c. 14, § 1; U. S. Annual Dig. for 1848, vol. 2, title Trespass, IV.

6. It is the province of the jury to settle the amount of damages according to the natural and proximate consequences of the acts complained of. 2 Greenl. Ev. § 263; 25 Maine, 176.

GOODENOW, J.—This is an action of trespass *quare clausum* against Richards, who relies upon a justification under legal process, as constable of the town of East Livermore; and against Millett, who justifies as the aid of Richards.

There are no exceptions on the part of the plaintiffs to the ruling of the presiding Judge in admitting the records of the town as amended, to prove the election of Richards as constable; or to the sufficiency of the process under which he acted, in entering the depot of the plaintiffs and seizing the liquors named in the writ.

The Judge substantially instructed the jury, that the defendants, although they had a warrant to them directed to search the depot of the plaintiffs, had no right with force to break it open and enter it, and carry away the liquors in the absence of the person having charge or care of the depot, unless they had obtained or asked permission to enter and search it, and the same had been refused. There is a qualification in the first part of the instructions, to wit, "unless such forcible entry was necessary to enable them to execute the warrant," but in the latter part, the instructions are without qualification. The Judge said "he had no hesitation in instructing the jury, that if the defendants broke and entered the depot after it had been closed and fastened for the night and left by the depot-master, without any notice or request to him, or to some person having the care of it, and took

the liquors sued for therefrom, that such proceeding was wholly unjustifiable, and that the search warrant, under which they professed to act, afforded them no protection, and that a search commenced and conducted under such circumstances was unreasonable and illegal.

It was proved by the plaintiffs, that, after the depot-master had left the depot for the night and just before sun-down, the defendants went to the depot with a cart and oxen; that they, finding it fastened, run a bar of iron through a hole in the window pane and removed the hasp of the outer door by which it was fastened, opened the door, went in and removed the liquor and carried it away.

The defendants were acting under a warrant duly issued by a competent magistrate, commanding them, in the usual form, to search said depot and freight house for said liquor, and seize the same, and have it to await the order of the Court. This was a criminal prosecution. It was not a dwellinghouse which was to be searched. The search was to be made forthwith in the day time. It was not a case where the officer had made the complaint and procured the process by his own oath. There was no person in the depot, or around it, at the time of its entry by the officer, from whom he could have demanded admission. These are circumstances which distinguish it essentially from the cases cited by the counsel for the plaintiffs.

The case of *Ratcliffe* v. *Burton*, 3 Bos. & Pul. 222, was one where the justification was attempted under a civil process.

Lord ALVANLEY, C. J., said, "I desire to be considered as confining these observations to the case of civil process only, without in any degree extending them to the case of criminal process."

ROOKE, J., makes the same limitation to his remarks. It is laid down in 2 Hale, P. C. 151, that "upon a search for stolen goods, if the goods be not in the house, yet the officer is excused, because he searcheth by the warrant," but it seems the party that made the suggestion is punishable in such case;

"for as to him, the breaking of the door is *in eventu* lawful or unlawful, viz., lawful if the goods are there, unlawful if not there."

We are of opinion that the instructions of the presiding Judge, as above stated, were erroneous.

The case finds that the casks and vessels in which said liquors were contained were not "plainly and conspicuously marked with the name of the town, *and of its agent*," and were therefore not protected against seizure and forfeiture; and for this reason, we are of opinion the Judge erred in his instructions to the jury as to the measure of damages.

Exceptions sustained;— Verdict set aside;— and new trial granted.

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

BENJ. DUNN *versus* SAMUEL MOODY.

Exceptions cannot be sustained to instructions which are favorable to the excepting party.

Nor to a refusal to give instructions which have already been substantially given in the case.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL, from *Nisi Prius*, RICE, J., presiding.

This was an action of assumpsit to recover for services as deputy sheriff, performed by order of the defendant as an attorney.

The evidence being out, the presiding Judge instructed the jury that the plaintiff must not only satisfy them that the services charged had been rendered, and of their value, but also that they were performed for and on the credit of the defendant, and that it was so understood by the parties; that both attorney and officer were, in contemplation of law, agents of the plaintiff or party employing them; and that the fact that the defendant, as an attorney, had made writs and put

them into the hands of the plaintiff for service, would not of itself render him liable for the plaintiff's fees. To render the defendant thus liable, they must be satisfied that he had assumed the liability, and that the services had been performed by plaintiff on his credit.

The defendant requested the Judge to instruct the jury that an attorney was not liable to pay officer's fees for his services, unless he had contracted or promised so to do. This instruction the Court declined to give, stating that he had virtually given such instruction.

The verdict was for the plaintiff. The defendant excepted to the instructions and refusal to instruct, by the presiding Judge, and also moved for a new trial on the grounds that the verdict was (1,) against evidence; (2,) against the weight of evidence; and (3,) because a portion of the amount, given by the verdict, was unsupported by any evidence against the defendant.

C. W. Goddard, for plaintiff.

Record & Moody, for defendant.

TENNEY, C. J. — The instructions of the Judge were favorable to the defendant. Those requested and refused, had been given substantially before to the jury.

It does not appear from the report of the evidence, that the jury were under any improper influence, or failed to understand the testimony.

Exceptions and motion overruled.

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

ESSEC FULLER *versus* LYDIA A. BARTLETT.

In a suit against a married woman, upon a contract entered into by her while she was married, having a husband residing in this State, but accustomed to trade and do business as a *femme sole*, and living separate from her husband, the coverture of the defendant is a perfect defence.

Coverture, under such circumstances, may be proved under the general issue.

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

This was an action of assumpsit.

The jury found a verdict for the plaintiff for a given sum, but there was a question of coverture relied upon in defence, in regard to which it was agreed by the parties that the jury should return answers to three questions, and that the said questions and answers thereto should be reported to the full Court; and the parties agreed, that if the facts found by the jury in relation to the coverture of the defendant and the other matters contained in the answers to said questions, constituted a good defence to said action, then the plaintiff was to become nonsuit, otherwise judgment was to be rendered upon the verdict.

The following are the questions referred to, with the answers returned to them:—

1. Was the defendant at the time of the contract declared upon, and of the charges made in the plaintiff's writ, a married woman, and had she then a lawful husband residing in this State?

Answer. — The jury find she was a married woman at the aforesaid time, and that she then had a lawful husband residing within this State.

2. Has the defendant resided with her husband in this State, and if they do not live together as husband and wife, how long is it since they ceased to live together?

Answer. — The defendant has resided with her husband in this State, and they have ceased to live together for the space of six years.

3. Has the defendant been accustomed to trade in her own

name, and do business as a *femme sole;* and if so, for how long a time?

Answer.—The defendant has been accustomed to trade in her own name, and do business as a *femme sole,* for the space of six years.

Morrill and *Fessenden,* for defendant.

It is a well established principle of the common law, that a married woman cannot generally enter into any contract binding her to pay money. She has in legal contemplation no separate existence. Chitty on Contracts, 39; Powell on Contracts, vol. 1, c. 17, § 286; 2 Kent's Com. 150, 167; *Lane* v. *McKeen & ux.,* 15 Maine, 384; *Ex parte Thomes,* 3 Maine, 50; *Commonwealth* v. *Collins,* 1 Mass. 115; *Kirby* v. *Tead & ux.,* 13 Met. 149; *Howe* v. *Wildes & ux.,* 34 Maine, 566.

To this general rule there are certain exceptions. One of them is, when the legal existence of the husband may be considered as extinguished or suspended, when he is dead in law, as in the case of transportation for life, or a limited term. Chitty on Con. 40. So, when he abjures the realm. *Gregory* v. *Pierce,* 4 Met. 478; Parsons on Con. vol. 1, c. 17, p. 298, note, (b.); *Shaw* v. *Thompson,* 16 Pick. 198; 2 Kent's Com. 154, note (c.) 159, 160.

It is further contended, that the recent legislation in this State gives no new power to married women to enter into contracts, excepting for a specific purpose, to wit, for the purpose of prosecuting or defending certain suits. Statute of 1844, c. 117; Stat. 1848, c. 27; Stat. 1848, c. 73; Stat. 1852, c. 227; Stat. 1855, c. 120; Stat. 1856, c. 250.

These statutes, being in derogation of the common law, are not to be extended by implication beyond their express provisions. *Swift* v. *Luce,* 27 Maine, 285; *Ballard & ux.* v. *Russell,* 33 Maine, 196; *Davis* v. *Millet & ux.* 34 Maine, 429; *Howe & al.* v. *Wildes & ux.,* 34 Maine, 566; *Brown* v. *Lunt,* 37 Maine, 423; *Gregory* v. *Pierce,* 4 Met. 478; *Shaw* v. *Thompson,* 16 Pick. 198; *Southard* v. *Piper,* 36 Maine, 84.

It is said by plaintiff, that the suit at bar is brought to enforce a lien by virtue of the statutes of the State. But

there can be no lien where there is no valid contract. *Kirby* v. *Tead & ux.* 13 Met. 149.

T. & M. T. Ludden, for plaintiff.

1. The defendant did not plead her coverture in abatement, and so cannot show it. Bacon's Abr. Baron & Feme, L.; 2 Williams' Saunders, 101, E.; 2 Ld. Raym. 1525; *Corbet* v. *Poelnitz & ux.* 1 T. R. 5; *Marshal* v. *Rutton,* 8 T. R. 545; Co. Litt. 125; 2 Institutes, 390; *Tisdale* v. *The Rambler,* Bee, 9; *Dickerson* v. *Davis,* 1 Strange, 480; *Gregory* v. *Paul,* 15 Mass. 31; *Abbott* v. *Bailey,* 6 Pick. 89; *Benner & ux.* v. *Fowle & ux.,* 31 Maine, 305.

2. If defendant would avail herself of the principles of the common law, she must bring herself within its pale. If she is to be treated as a *femme couverte,* she must sign her plea of coverture; she cannot constitute an attorney. *King* v. *Jones,* 2 Ld. Raym. 1525; 4 T. R. 362; 3 T. R. 628, 629; 2 Williams' Saunders, 213; *Humphreys* v. *Vaughan,* 1 Shaw, 13; 2 Williams' Saunders, 209, B.; *Aulds* v. *Sanson,* 3 Taunt. 261; *Whitmore & ux. & al.* v. *Delano,* 6 N. H. 543, and cases there cited; *Kidderlin* v. *Meyer,* 2 Mills' Penn. R. 295. The plea too must be "in her proper person and under oath." Coke Litt. 125, 126; 2 Institutes, 390; F. W. B. 27; *Tisdale* v. *The Rambler,* Bee, 9.

In the case at bar, the defendant appeared by her attorney, and her specifications of defence are signed by her attorney.

3. The case finds that the defendant put into the case a contract, which she calls her contract. Can she at the same time declare she can, and that she cannot contract?

4. But the case shows that defendant lived apart from her husband, and traded as a *femme sole.* There is good authority for saying that, in such a case, she may contract. *Rhea* v. *Rhemur,* 1 Peters, 105. *A fortiori,* in this State, where a married woman may hold her estate separate from her husband, should she not be liable in her own engagements, made for the benefit of that estate?

The doctrine of the common law, that a married woman cannot contract, has exceptions. Where the husband has

been banished or has abjured the realm, she may contract. *Gregory* v. *Paul*, 15 Mass. 31, and cases there cited. The Court is asked to notice the reasons given in the case last cited, for the exceptions. The *necessity* of the case is as striking in the case at bar as in the cases referred to by the Court.

5. It is contended that, under our statutes, married women may in cases like this make contracts that shall bind them. *Southard* v. *Piper*, 36 Maine, 84; Stat. of 1844, c. 117; Stat. of 1852, c. 227. The operation of these statutes, and the separation of the defendant from her husband, ought to make her liable on her contracts, as much as if the husband had "abjured the realm." See also the case in 2 Espinasse, 554, cited in 15 Mass. 34.

How can the statute grant the power to a married woman to hold property in her own right, and to sell and dispose of the same as though she were unmarried, and to execute the necessary papers thereto, &c., and have all the benefit of such property to herself and posterity, and refuse the party who enhances the value of such property any remedy whatever to recover compensation?

The plaintiff does not need to contend that the negotiable note of a married woman is valid, which was the case in *Brown* v. *Lunt*, cited by defendant, but only that she is liable on contracts for the benefit of her separate property, so far as they are in fact beneficial.

The common law denies the power of contracting to married women, because they can acquire no property. It is submitted, that the reason fails in this State and under our statutes, in cases where the property of the wife is benefited by the contract. 2 Kent's Com. 149, 150.

6. The action is brought to enforce a lien by virtue of R. S., c. 125, § § 37 and 38, amended by stat. of 1850, c. 159. By these statutes, any person contracting with the "owner," has a lien, &c. If the defendant has the power to sell and convey, she must be considered the owner in contemplation of law, and may charge her estate with the claim.

If *non* lien claims are sued for, the plaintiff has the right, which he prays may be allowed, to remit so much of his claim as comes within that description. The amount is at any rate very trifling.

HATHAWAY, J.—Assumpsit on the defendant's contract of August 26, 1854, and sundry charges in the bill of particulars annexed to the writ, dated August 4, 1855.

At the date of the contract, and charges sued for, the defendant was a married woman, having a husband residing within this State, and with whom she had resided, within this State, prior to the spring of 1850, when they ceased to live together; and after that time, she was accustomed to trade and do business as a *femme sole.*

The plea was the general issue, under which plea the defendant's *coverture,* at the time when the contract was made, may be given in evidence.

The case must be decided according to the legal rights of the parties, as they existed when the suit was commenced.

Her *coverture* was a perfect defence. *Howe & al.* v. *Wildes & ux.*, 34 Maine, 566.

As agreed by the parties, *A nonsuit must be entered.*

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

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1856.

COUNTY OF KENNEBEC.

JOHN S. HAINES *versus* SCHOOL DISTRICT No. 6, IN READFIELD.

A vote to raise money to build a school-house, if not passed at a legal meeting, is void.

A tax based on such illegal vote, and paid under protest, may be recovered back in an action at law against the school district, to whose benefit it enured.

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

ASSUMPSIT for money had and received, brought to recover the amount paid in discharge of a school district tax. The plaintiff alleged that the vote passed to raise the money, was at an illegal meeting of the school district.

Some of the defects alleged were, that the meeting was convened by virtue of a warrant issued by the district clerk, he not having been authorized thereto; that the notices of the meeting were not posted up in the manner and for the period required by statute; and that no hour of the day was fixed for the meeting in the warrant by which it was called.

E. O. Bean, for plaintiff.

Bradbury, Morrill & Meserve, for defendants.

RICE, J. — The inhabitants of any school district, qualified to vote in town affairs, at any legal meeting called for the purpose, shall have power to raise money for the purpose of erecting, repairing, purchasing and removing a school-house. Ch. 193, § 11, Laws of 1850. The meeting at which the money was raised, for which the tax in controversy was assessed, was not legally called. The vote to raise the money to build a school-house, not having been passed at a legal meeting, was inoperative and void. *Jordan* v. *School District No.* 3, 38 Maine, 164. The tax was consequently illegal, having no legal basis upon which to stand. It therefore becomes unnecessary to examine the other objection to the legality of the tax. Was the tax paid by the plaintiff under such circumstances as will entitle him to recover it back in a suit at law? The action is properly brought against the district. The case clearly shows that the money has gone to the use of the district. It was paid by the plaintiff, under protest, to the legally elected collector of the town of Readfield, and the plaintiff further affirms that it was paid under duress of imprisonment.

The case shows that the collector had in his hands at the time a list of the assessments made by the assessors, but not certified by them, and a warrant signed by two of the selectmen. This warrant was, during the trial, amended by striking out the word "selectmen," and substituting therefor "assessors." This amendment could not affect the legal character of the warrant, at the time the tax was collected. The selectmen were not authorized to issue such a warrant. It was illegal.

The collector certified that the "plaintiff objected to the payment; protested against it; said he should not pay until obliged to pay; I arrested him and he paid the tax to discharge himself from arrest; also paid the costs of arrest." On cross-examination he said, "that he went to the plaintiff's

house to collect the tax; he was in the house; family present; called on him for tax; said he should not pay until compelled; I told him he must consider himself under arrest; was in the room with him; did not put my hand upon him; have no recollection that he ever said he wanted me to arrest him."

The collector made the following return upon the warrant:

"Jan'y 6, 1854. I arrested the body of the foregoing John S. Haines and he paid this tax when under said arrest.

"Moses Whittier, Constable of Readfield."

These facts show very clearly, that the money was paid by the plaintiff while held in duress by Whittier, by virtue of his warrant, and for the purpose of freeing himself from arrest. It is conceded, that the money thus collected has been received by the district. Whatever may be our own views of the policy of resorting to technical rules to recover back money which had been paid for a highly meritorious object, we are of the opinion that by an application of the strict rules of law the plaintiff is entitled to recover, and that he must have judgment for the money paid and interest thereon from the time of payment. *Defendants defaulted.*

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

IVORY LOW *versus* LUCIUS ALLEN.

L. upon dissolution of a copartnership with A., received as the consideration for his interest in the concern, the notes of the latter, with a mortgage on the late co-partnership property, "to secure L. for his liability on the partnership debts, for his liability to pay any other debts of A., and for the ultimate payment of the notes." Afterwards the property was sold, with the consent of the mortgagee, and a portion of the proceeds came into his hands, with which he paid the co-partnership liabilities. The Court *held* that, by the tenor of the mortgage, it was fairly to be inferred that the avails of that property were to be appropriated, *first* to indemnify the plaintiff against his company liabilities, and *then* any balance which might remain should be applied to the payment of the notes.

On Facts Agreed.

Assumpsit on four promissory notes of $500, each, dated Feb. 14, 1839, and witnessed. The writ was dated Sept. 12, 1851, and contained a count for money paid, laid out and expended. Plea, the general issue, with a brief statement of payment of the notes declared on, and the statute of limitations as to any claim under the money count.

The parties had been co-partners in the stage business, and at the date of said notes dissolved the company, Allen buying out the plaintiff, and giving these notes for the stage property. He then mortgaged to plaintiff the property so purchased; the material provision of the mortgage, after the recital, was as follows: —

"Now, therefore, in order to secure the said Low for his liability on said partnership debts and for his liability to pay any other debts for me, and for the ultimate payment of the above described notes, or any other debts I may be owing the said Low, I hereby sell, transfer and convey and mortgage to the said Low all the stage property, now in the line from Augusta to Anson, consisting of twenty-eight horses, [schedule of other property is omitted,] to have and to hold the same, to him, the said Low, until the above described debts and liabilities shall be paid and fully discharged."

In that same year defendant sold the mortgaged property, with the consent and approbation of plaintiff, on credit, and took notes therefor running to plaintiff, which were given to him at the time of the sale. The amount was $4000, in several notes, the last one or that on the longest time being due August 1, 1841. They were all paid to plaintiff as they fell due.

After the dissolution the plaintiff paid sundry debts of the company, which belonged to the defendant to pay.

The agreed statement set forth the mutual claims of the parties against each other, and provided that the Court should draw inferences of fact as a jury might, and render judgment by nonsuit or default as the law required.

J. H. Drummond, for plaintiff, contended that, the notes being witnessed, the introduction of them makes a *prima facie* case, and the burden of proof is on the defendant.

S. Heath, for defendant, argued, —

1. That the notes in suit had been paid. The property, mortgaged to secure the payment of these notes, was disposed of in the same year they were given, with the consent of plaintiff, and he took the entire securities therefor in his own name, and collected them as they fell due. In *law* this was a payment of so much secured by the mortgage. The four notes sued were not at that time all due, but they were treated by the parties as due.

2. No action can be maintained on the notes, as the consideration for them has failed. They were given for the property which plaintiff has taken back, or which he has sold and taken the avails.

Drummond, for plaintiff, in reply.

MAY, J.—In defence of this action, it is contended, that the consideration of the notes declared on has failed, and that they have been paid; and that the plaintiff cannot recover under the money count, because all claims under that are barred by the statute of limitations. It is conceded by the plaintiff's counsel, if he can recover at all, it must be upon the notes in suit. They bear date February 14, 1839, and were witnessed when made. There is no evidence of any dealings or promise, express or implied, between the parties within six years preceding the date of the writ. It is clear, also, that the facts in the case show no failure of consideration, which takes away the plaintiff's right to recover.

The only question is, whether the notes have been paid. The parties were, prior to the giving of the notes, partners in the business of running a stage. The co-partnership was dissolved at the time said notes were given, and they were given for the plaintiff's interest in the company property; the plaintiff at the same time taking back a mortgage of said proper-

ty, in which it was agreed that the defendant should pay and discharge all the debts due from said co-partnership and save the said Low harmless from the same. Said mortgage was made "*in order to secure the said Low for his liability on said partnership debts,* and for his liability to pay any other debts of said Allen, and for the ultimate payment of the notes in suit;" and the property was to be held by the plaintiff *until the above described debts and liabilities* should be paid and fully discharged.

The notes given to the plaintiff were four in number, of $500 each, and the last was payable in July, 1841.

Within the year 1839, the defendant, with the consent of the plaintiff, sold the mortgaged property for $4000, and took notes therefor, running to the plaintiff, the last of which fell due August 1, 1841. It appears that the plaintiff received these notes as so much in discharge of his claims against the defendant *in conformity with the provisions of said mortgage;* and they were all paid to the plaintiff as they fell due. It does not appear that the plaintiff had paid any thing towards the company liabilities when he received these notes; but after the dissolution of the co-partnership, he paid sundry such debts belonging to the defendant to pay.

On the 13th of January, 1841, the parties called on Stephen Stark, who had their papers, *to state the condition of their matters,* that they might make an adjustment. At this time said Stark drew up a memorandum, to the correctness of which the parties assented; from which it appeared that the amount of company debts which the plaintiff had then paid was $2195,75, and that the amount then due on notes in suit was stated to be $2229,67. The notes received for the mortgaged property and interest then amounted to $4209,19, of which the plaintiff had been paid $2180,78.

It appears from this statement of Mr. Stark, that no deduction was made from the amount of the notes now in suit, by reason of $400, which the plaintiff had indorsed on the first note, under date of January 10, 1840, as money collected on note against the Augusta and Anson Stage Company; but this

sum, with interest, was included in the above sum of $4209,19 which the plaintiff had received in money and notes, for the mortgaged property aforesaid. At the time when Mr. Stark made said statement no settlement between the parties appears to have been made. It was a mere looking over that they might make an adjustment. The plaintiff still retained his notes; and no receipts or obligations were given for the moneys which had been paid or received. Subsequently the plaintiff, from time to time, paid other outstanding company debts, and the parties, on July 28, 1845, again called on Mr. Stark, and he made a new statement of their affairs in writing, which was assented to by both parties as correct, and which, being made upon the basis of the balance of the first statement after correcting some slight errors therein and adding to said balance, then found in his favor, the sums subsequently paid by the plaintiff, shows that there was then due to the plaintiff, either upon the notes in suit or for moneys paid in pursuance of his liabilities, the sum of $1538,30.

The question we are now called upon to determine, is whether by operation of law, or the acts or agreement of the parties, the moneys which the plaintiff received from the mortgaged property, have been or should be appropriated to the payment of the notes in suit or of the other claims. This is a question not free from difficulties. Not but that the law in regard to the appropriation of payments is well settled, so far as regards the rights of either or both parties in making such appropriations, and where the parties, or either of them, have not made any; but because there is a want of certainty as to the intention of the parties in the present case, as developed in their agreements and acts. Considering however, that the mortgaged property was originally first liable for partnership debts, and that the plaintiff's liabilities for these debts are first mentioned in the mortgage, as secured, while the *ultimate* payment of the notes is only provided for, we think it is fairly to be inferred that the avails of that property, if disposed of by the plaintiff, or with his consent, for the purposes mentioned in the mortgage, were to be appropriated,

first to indemnify the plaintiff against his company liabilities, and then any balance which might remain should be applied to the payment of the notes. When the mortgaged property was sold and the notes therefor taken by the plaintiff, no different intention of the parties was manifested. No indorsement was made upon the notes in suit, and they were not delivered up to the defendant as paid. On the contrary, the notes so taken for the mortgaged property, as the case finds, were taken as so much in discharge of the plaintiff's *claims* against the defendant, in conformity with the provisions of said mortgage. As the notes in suit do not appear to have been then due, and as one only could have been due, and there being no evidence that any payments of the company debts had at that time been made by the plaintiff, we think it is apparent that the notes so taken, and the money to be received upon them, were to be held and appropriated in the manner contemplated in the mortgage as before stated. The fact that the $400, so received, was indorsed upon the first note in suit, would seem to indicate a different understanding; but this we think is controlled by the other considerations suggested, and by the fact that the plaintiff still holds the notes without any other indorsements thereon, and, so far as appears, without the defendant ever having claimed to have said notes given up, or any indorsement made upon them. What was done by Mr. Stark, and what took place before him, does not seem to have resulted in any thing beyond a mere exhibit of the state of affairs between the parties; and, in the reckoning made by him in January, 1841, the case finds that both parties considered that the funds then in the plaintiff's hands were to be appropriated in conformity with the provisions of the mortgage.

In view of all the facts, we are of opinion that the money received as the avails of the mortgaged property, excepting the $400, which has already been indorsed on the first note, should be applied first to the payment of the plaintiff's claims for money paid, and the residue upon the notes in suit; each party allowing interest to the other, until such appropriation

of the moneys in the plaintiff's hands had been made, as the parties seem to have contemplated. Judgment therefore must be entered for the plaintiff, for such sum as shall be found to be due upon the foregoing principles, and the

Defendant is to be defaulted.

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

GEORGE W. JONES *versus* JOSEPH H. FLETCHER *& als.*

The description in a warrant of a place to be searched should be as certain as would be necessary in a deed to convey such place. Thus, where a warrant commands an officer to search for liquors in a "*dwellinghouse,*" he is not thereby authorized to search in a *barn.*

If a complaint or warrant issued under the statute of 1853, c. 48, does not show that the justice took the testimony of witnesses as required by section 11, of that statute, the warrant is void, and cannot justify the officer serving it.

Notwithstanding the provisions of the statute of 1851, c. 211, § 16, an action at law may be maintained for liquors, when they were not liable to seizure and forfeiture, or intended for sale in violation of law.

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

The facts of the case are fully stated in the opinion of the Court.

Lancaster, for plaintiff.

The plaintiff, at the time of the alleged trespass, had in his custody as an officer, a large amount of liquors, which, if not condemned and destroyed by due course of legal procedure, he was holden to restore to the rightful owners. The law has been repealed, upon which they were taken, and he must now either return them to the owners upon demand, or pay their value in money. While he thus held them, the defendants forcibly broke open his barn where they were stored and took them away.

The defendants justify this taking by a warrant.

The plaintiff objects to the admission of this warrant:—

First. That it did not *authorize* the *searching the barn.* The authority to search was *expressly limited* to the *house.*

Second. Because the warrant was without a seal, and consequently void.

Third. It does not show that the necessary preliminary steps had been taken.

If it was bad for either of the above reasons, then it should not be admitted as a ground of justification, and both it, and all evidence under it, should be ruled out.

J. Baker, for defendants.

The taking by defendants being established, what is the defence?

Fletcher, one of defendants, was constable of Augusta, and the other defendants were his aids. Fletcher had a warrant from the municipal judge of Augusta, and by virtue of that he did the acts complained of. This is a sufficient justification, unless there are such defects in the warrant as will render it invalid. Are there any such defects?

1. It may be said that the preliminary oath, to authorize the search of a dwellinghouse, is not recited in the process. But the case finds that in fact it was made, and we contend that for the protection of the officer that is sufficient.

2. It may be said that the warrant does not authorize the search of the barn. The language is, "in a certain dwellinghouse in said city of Augusta, and occupied by George W. Jones, being situate on Winter street, so called, and being the same *premises* occupied by said Jones." The house, ell and barn are all one continuous building, and by the use of the word, "dwellinghouse," in a deed, the whole premises would pass, and the description in a warrant need not be any more certain. 17 Maine, 263; 31 Maine, 346; 33 Maine, 564; R. S., c. 81, § 5.

But if there was any doubt about the word "dwellinghouse" including the barn, there can be none about the word "premises," including all the buildings and the lot of land on which they stand, and which is used with them.

3. Since this is an action of trespass for the original break-

ing, entering and taking, the subsequent proceedings and discharge of the liquors by the Judge can have no effect. They might have had, if the action had been trover, after the refusal to deliver on the order of the Judge.

MAY, J. —This is an action of trespass *quare clausum*, in which the plaintiff claims to recover of the defendants for breaking and entering his close, being a barn, situate in Augusta, in January, 1854, and carrying away a quantity of spirituous liquors, as set forth in his writ. The general issue was pleaded and joined; and a brief statement filed, in which it is alleged that the defendant Fletcher was, at the time of the breaking, a constable of Augusta, and that he had a warrant in due form, issued by the municipal judge of said Augusta, in the execution of which, he and the other defendants, acting as his aids, did the acts complained of. That the acts alleged are proved is not denied; and the principal question is, whether the defendants are justified in what they did, by legal process.

The warrant commands the officer holding it to search for certain liquors mentioned therein, "in a certain dwelling-house in said city of Augusta, situate on Winter street, so called, and being the same *premises* occupied by said Jones." It contains no direct authority to search the plaintiff's barn. The barn does not come within the terms used as descriptive of the place to be searched. If the words used in the warrant had been used in a deed of conveyance, there is no evidence in the case tending to show that the barn which was broken into was so connected with the dwellinghouse then occupied by the plaintiff, that it could with legal propriety be regarded as passing to the grantee under such description. The description of the place to be searched should be as certain in a warrant as would be necessary in a deed to convey such place. *State* v. *Robinson*, 33 Maine, 564. The words in the warrant, "and being the same *premises* occupied by said Jones," can have no effect to include in the description any premises in the occupation of said Jones, other than

the dwellinghouse to which they apply. They would not in a deed serve to enlarge the grant.

If, however, the words of description in the warrant could properly be so extended as to embrace the plaintiff's barn, still, inasmuch as it does not appear by the complaint or warrant, that the municipal judge, before issuing said warrant, took the testimony of witnesses, as required by the statute of 1853, c. 48, § 11, the warrant, as is settled in the case of *State* v. *Staples*, 37 Maine, 228, is void, and therefore affords no justification to the officer. See also *State* v. *Carter*, 39 Maine, 262.

In the view of the case which we have taken, it becomes unnecessary to determine whether the warrant when issued was under seal or not.

It was further contended at the hearing and set forth in the specifications of defence, that the plaintiff ought not to recover, because he held said liquors with intent to sell the same in violation of law within this State. That an action at law may be maintained for such liquors, notwithstanding the provisions of the statute of 1851, c. 211, § 16, now repealed by the statute of 1856, c. 255, § 28, when such liquors were not liable to seizure and forfeiture, or intended for sale in violation of law, has been settled by this Court. *Preston & al.* v. *Drew*, 33 Maine, 558; *Nichols* v. *Valentine*, 36 Maine, 322. In the present case, we do not find sufficient evidence that the plaintiff held such liquors with any intent to violate the law, or for any criminal purpose. He did not purchase them. They came into his hands as an officer of the law; at least he was such *de facto*, and although he may have been somewhat remiss in the performance of his official duties, we cannot, considering the obligations which were upon him to act in conformity to law, regard him as having any criminal intention in relation to these liquors, without satisfactory proof. There is, therefore, no reason why the plaintiff is not entitled to recover the damages he has sustained.

The only remaining question is that of damages. The plaintiff was not, as the testimony shows, the actual owner of

the liquors taken by the defendants. His property in them was but special. He may be liable over to the general owner, and there is testimony tending to show that in one instance judgment has been recovered against him for a part of them. It cannot be doubted that a considerable portion of the liquors, before the taking, had been condemned as forfeited to the State and ordered to be destroyed in conformity to law. There was some evidence that two or three casks of them were very good liquors, and the rest of a poor quality. The quantity taken and the value of them does not clearly appear. The plaintiff should be placed in a condition so as not to suffer loss by the wrongful acts of the defendants; but he is entitled to nothing more than a fair indemnity or compensation. The burden is upon him to show the extent of his damages; and the fact that a considerable portion of the liquors had been adjudged forfeited and ordered to be destroyed, may properly be taken into consideration in the assessment of the damages, which are to be assessed by the clerk according to the agreement of the parties. *Defendants defaulted.*

TENNEY, C. J., and RICE, (except as to damages,) HATHAWAY, and CUTTING, J. J., concurred.

JOHN OTIS *versus* SETH ADAMS, *Adm'r of* JAMES ADAMS.

In an action by a partner as indorsee of notes given to another partner, upon a sale by such other partner to the maker, of partnership property, the plaintiff stands in no better position to resist a claim of set-off, than the payee of the note himself would, if the action had been brought in his name.

A defendant living out of the State, upon whom service is made, after the entry of the action in Court, may seasonably file his claim in set-off on the first day of the term next succeeding the service.

A. purchased a lot of demands of B. and gave his notes therefor, with an agreement on his part to use all proper exertions to collect them without cost to B.; A. being at liberty to return the demands, with an account at the end of two years to B., who was to repay to A. the balance of purchase money not collected: — *Held*, that the recovery of such balance by A. did not depend upon his using proper exertions in collecting the demands; *Held*

also, that in such a transaction, there was a personal trust reposed in A., which could not be executed after his death by his representative.

Whether this contract was in violation of R. S., c. 158, § 16, *quære*.

The contract being regarded as subsisting, and the defendant having in the action on the notes filed in set-off, the claim for the uncollected balance, no obstacle is perceived to exist to its allowance.

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

Assumpsit.

The suit was commenced August 10, 1852. Service was made on the administrator residing in Massachusetts, Jan. 4, 1853, who appeared at the next term and pleaded in set-off the claim hereafter named. The suit is upon two promissory notes for $63,41 each, made by the intestate Oct. 30, 1847, and payable to Argalis Pease or order, one in twelve and the other in eighteen months from date, with interest, and they were indorsed by said Pease. The notes appear to have been given as stated in the contract below.

The plaintiff and said Pease were co-partners in the business with which the agreement and notes were connected, at the time the notes were given, and have since continued to be.

If upon these facts the action is not maintainable the plaintiff is to be nonsuit. Otherwise the defendant is to be defaulted; unless it be competent for the defendant to prove that all proper exertions in collecting the demands sold, were used by said James Adams up to the time of his decease, August, 1848, and, after his appointment, by the defendant; that the amount agreed to be paid by Adams has not been collected out of the demands; that at the end of two years from Oct. 30, 1847, the defendant offered to return to said Pease, the uncollected demands, (notes and executions,) with an exact account of the money before then received; that they were produced in Court, ever have been and are still ready to be delivered to said Pease or to the plaintiff, and unless such proof would constitute a defence in whole or in part. In which event the case is to stand for trial.

The defendant, on the first day of the second term of said Court, filed in set-off the following claims, demands and agreements, viz.: —

"The plaintiff is indebted to the defendant in the sum of two hundred dollars, for the labor and services and moneys laid out and expended by James Adams, Esq., in and about the business of the plaintiff, and at plaintiff's request.

"The above amount is due from the plaintiff to the defendant as administrator of the goods and estate of James Adams, Esq.

"The plaintiff is indebted to the defendant as administrator of the goods and estate of James Adams, Esq., in the sum of two hundred and fifty dollars, by reason of the following agreement, viz.:—

"Hallowell, Oct. 30th, 1847.

"James Adams bought of Argalis Pease the demands, of which the following is a list:—

(List omitted.)

"Amounting to $380,47.

"The above notes, amounting to three hundred and eighty dollars and forty-seven cents, are sold to said Adams at fifty cents on a dollar, without computing the interest on the notes; he has paid me his notes at six, twelve and eighteen months, and interest, and it is mutually agreed, that said Adams shall use all proper exertions in collecting the demands without any cost to said Pease; and if at the end of two years the said Adams has not collected as much from the notes as he has paid, he shall be at liberty to return the said notes and those in executions to said Pease, with an exact account of all sums of money received before then, and said Pease will pay the balance to said Adams, remaining unpaid, of the said sum of one hundred and ninety dollars and twenty-three cents. And said Adams is at liberty to compromise demands, using a reasonable discretion, and is to account for the money actually received. If said demands are returned and the costs are collected, the said Pease shall account for the costs actually collected, the said Pease being at liberty to compromise the executions, and paying *pro rata* of the sum received for debt and costs.

(Signed) "A. Pease."

"I hereby guarantee the fulfilment of the above agreement on the part of A. Pease.

(Signed) "John Otis."

John S. Abbott, for defendant.

It appears, that the notes sued were given as the consideration for the contract or sale, dated Oct. 30, 1847.

At that time the plaintiff was a partner with Argalis Pease, in this very business, and so continued. He was a partner in the property delivered to defendant's intestate, which was the consideration for the note. He was a partner with Pease in the very notes sued. He, the plaintiff, had full knowledge of the contract, of the consideration of the notes, as shown by the guarantee of the plaintiff upon the contract made at the time the notes were given.

Thus, the plaintiff cannot be regarded as in any better condition than Pease would have been as plaintiff.

Whether this action can be maintained on account of the notes having originated in a contract in violation of law, and particularly in violation of R. S., c. 158, § 16, is submitted to the Court.

2d. It is claimed, that defendant is entitled to defend as to the claims filed in set-off.

The suit was commenced on the 10th of Aug. 1852. The defendant resided in Massachusetts. The writ was served on him Jan. 4th, 1853. On the first day of the succeeding term, the account in set-off was filed. This was a substantial compliance with the requirements of the R. S., c. 115, § 25.

3d. The notes and contract having been made at the same time; Otis and Pease having been partners in that very business; and Otis having guarantied the performance of Pease's contract, with a full knowledge of all the facts, it is contended, that the matters in defence are available, if not strictly in set-off.

The notes and the other contract, under the circumstances, should be regarded as one contract; and they substantially amount to the same as though there was but one contract, and that after the notes, underneath them, and on the same

paper, it was stipulated, that upon certain contingencies, just such as have happened, certain deductions should be made from the amount of the notes. In such case, surely there could be no doubt that the deductions would be made.

In the case at bar, to prevent circuity of action, to avoid a multiplicity of suits, the two papers together should receive the same construction.

In defence, it is proposed to prove all those facts necessary to constitute a good cause of action against Pease, and also against Otis.

Many of the demands proved worthless. Within the time stipulated they were tendered to Pease; every thing has been done and occurred in such way, that if the plaintiff should be permitted to recover in this action, the defendant will be entitled to recover in an action against Pease, or in an action against Otis, the same amount which Otis in this action shall recover against him.

The intestate long ago paid every dollar, which upon a view of the whole contract, the plaintiff or Pease was entitled to.

It would seem quite unnecessary to turn the defendant over to another action, or if need be to two actions, when the matters can and should be adjusted in this suit.

It may not be unsuitable to suggest, that the recent failure of Pease and Otis, makes it the more important for defendant, that this view should be sustained.

Hence, it is contended, if, on inspection of the contract, the plaintiff could maintain the action without any thing proved in defence, that in such case, the action should stand for trial, in order to let in the proposed defences.

Stinchfield and *Paine*, for plaintiff.

The action is clearly maintainable. There is no proof that intestate purchased the demands for the purpose of making a profit by suing. Therefore § 16, c. 158, R. S., is not applicable.

The contract and the facts supposed do not make a defence in whole or in part.

There was an absolute sale and transfer by Pease to the intestate. He might elect at the end of two years to return the demands, but he agreed to pay within eighteen months. Pease agreed to receive back the demands not collected at the end of two years, or rather that the intestate would be at liberty to return them. But the intestate was to use all reasonable exertions to collect during this time, and had a right to compromise, using a reasonable discretion. This was therefore a contract for the skill, knowledge and discretion of the intestate. And this skill, knowledge and discretion, the intestate was not permitted to exercise. He died within a year.

It was not provided that the administrator should use his efforts to collect. Pease did not agree to take back and pay for what should remain uncollected under the management of a stranger.

TENNEY, C. J.—The payment of the notes in suit was to be made, without reference to any right which the intestate had, under the contract, entered into at the time the notes were given, and they were payable absolutely at maturity. And the plaintiff is entitled to judgment for the amount thereon, unless the defendant can be allowed something upon his claim seasonably filed in set-off, or the notes were for illegal consideration.

The statement of facts and the agreement of parties do not authorize the Court to judge of the intentions of the intestate in making the purchase of the demands of Pease, which were the consideration of the notes in suit, and they cannot therefore determine, whether the contract under which they were purchased, was in violation of R. S., c. 158, § 16.

The plaintiff having been a partner with Pease in the transaction, of which the giving the notes was a part, stands in no better position to resist the claim in set-off, than that which Pease would hold, if he were prosecuting the suit in his own name.

To enable the defendant to test his right to the allowance

of his claim in set-off, it is agreed, that if the Court should be of the opinion that it can be allowed, wholly or partially, upon proof of certain facts, supposed, the case is to stand for trial.

We do not suppose the parties designed in their agreement, that there should be no trial, if some immaterial fact, mentioned as one of the conditions thereof, should be deemed incompetent, provided the other facts stated in the conditions, if proved, would establish the defendant's claim.

Exertions of the defendant, as administrator, in collecting the demands without costs to Pease, could not be proved, as competent evidence. A personal trust was reposed in the intestate, which could not be executed by his representative after his death. But all exertions required by the contract may have been fully made by the intestate; and no further exertions were necessary on his part, if he had lived, to secure the object of Pease. If it were otherwise, the rights of the intestate, if he had not died, would not thereby have been lost, as secured by the contract; and they are preserved to the defendant, as the representative of the estate, in the same manner as they would have been to him.

The right of the intestate to return the demands with an exact account of all sums of money, received before the end of two years, at the expiration thereof to Pease, and thereupon hold him to his promise to pay the balance to said Adams, remaining unpaid of the sum of one hundred and ninety dollars and twenty-three cents, was not made dependent upon the use of proper exertions of the latter in collecting the demands without cost to said Pease. If at the end of two years from the date of the contract, the said Adams had not collected as much from the notes as he had paid, he was to be at liberty to return them, &c. This contract is still subsisting, and if the material facts mentioned in the agreement of the counsel of the parties to the suit can be proved, it is not perceived that any obstacle exists to the allowance of the whole or a part of the claim filed in set-off.

Action to stand for trial.

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

SIDNEY M. STONE *& al., Ex'rs, versus* JAMES W. NORTH, *Ex'r.*

A. devised the "use and income" of certain lands, and the "use, income and interest" of certain personal estate to his wife during her life. — *Held*, that the estate, personal and real, vested in the wife during her life.

Her interest in the personal property was not an annuity, but an estate for life, and the income arising from it may be apportioned to the time of her decease.

The provision of the will, that the personal estate should remain in the hands of executors, only interposed a trustee in whom the legal estate vested, but did not affect the duration and magnitude of the estate.

ON FACTS AGREED.

This was an action of DEBT. Plaintiffs claim a sum of money, due to their testatrix from the defendant, as executor of Enoch Jewett's will. The case was submitted on the following agreed statement:—

Enoch Jewett made his will on the sixth day of January, 1846, in which, after providing for the payment of his debts and sundry legacies, he gives to Lucretia Jewett, his wife and plaintiffs' testatrix, the use or income of property, in terms following, viz.:—

"I give and bequeath to her, (the said Lucretia,) in addition, the use, income or interest of all the personal estate of which I may die possessed, not herein before given and bequeathed to the several legatees mentioned, to have, possess and enjoy to her absolutely, for and during her natural life, *and no longer;* and the said real and personal estate, the use, interest and income of which I have herein devised and given to my beloved wife, for and during her natural life, upon her decease, I devise and give, and direct to be paid over and delivered to" sundry persons. "I also direct that the personal estate (the use, interest or income of which I have given to my beloved wife during her natural life,) should not be subject to the disposition, control or management of the legatee for life, but should be under the control and disposition of the executors, so that at the termination of the life, the said personal property may, undiminished as far as possible, go over and vest in the persons to whom the same is given as second

takers, absolutely;" and he appointed his wife, the said Lucretia, the defendant, and one Palmer, his executors. Administration was committed solely to the defendant. On the 23d of January, 1846, the said Jewett made a codicil to his said will as follows, viz.: after reciting that he had made and published his will, he says, "and whereas no money in hand was given to my beloved wife Lucretia Jewett, I, the said Jewett, within named, do by this present codicil to my last will and testament, ordain and order my executors to pay to Lucretia Jewett aforesaid, on demand, after my decease, five hundred dollars for her own use, besides the income of the personal estate above bequeathed;" which five hundred dollars was paid her immediately after said Jewett's death. The personal property, which comprised the great bulk of the estate, consisted principally of bank and other stocks, upon which the interest was payable semi-annually. Said Jewett deceased on the last of February, 1846; the widow was paid the income to March 30, 1854, and was annually paid to the 30th of March in each year. She deceased on the 3d of September, 1854; and if the Court should be of opinion that the defendant, as executor of said Jewett's estate, is liable to pay her executors the income of the life legacy from March 30, 1854, to September 3, 1854, the time of said Lucretia's death, then the defendant is to be defaulted for the sum of two hundred and seventy-two dollars, with interest from January 1st, 1855, the time of the demand, otherwise a nonsuit is to be ordered."

The plaintiffs, having requested an amendment of the agreed statement so as to show what part of the income of the residue of the estate was from bank stock, and what part from bonds, United States stock and notes, and the defendant not objecting, they annexed the following statement:—

"There are no notes belonging to the estate. A very small portion of the income for the year 1854 arises from interest on money in the executor's hands.

"The bank dividends were payable on the first Monday in March and September, and were about equal in amount to the

interest on the bonds and United States stock, which was payable on the 1st day of January and 1st day of July. The 1st Monday in September, 1854, was the 4th day.

"Mrs. Jewett living out of the State, the property was taxed to the executor in Augusta, and from the gross income of the estate that tax was payable, also the interest of Virginie H. Fra's, Sally J. Farley's and J. T. Jewett's legacy. So that it will be sufficiently accurate for the purposes of this case to consider half the income or interest to be paid Mrs. Jewett to arise from bank dividends, and half from interest on bonds and United States stock."

M. T. Abbott, for plaintiff.

First. The interest which Lucretia Jewett had by the will of Enoch Jewett in the residue of his estate is not an annuity, or a charge of a definite annual sum upon the property, but it is an estate for her life in all the residue of the personal estate.

Second. The provision made by the testator for his wife was intended for her support from year to year, while she lived, without reference to her means of support from other sources.

It is a well established principle of law, that a provision of income for the maintenance of a wife or child shall always be apportioned. The reason is, that the expense of living continues to the last day of life. *Howell* v. *Hanforth*, 2 Wm. Blackstone, 1016; *Hay* v. *Palmer*, 2 Peere Williams, 501; 1 Williams on Executors, 710.

Third. The residue, in which a life estate was given by the will to his widow, consisted, as appears from the will, partly of bank stock, partly of United States government stock, partly of city bonds and partly of notes of hand. If any part of the yearly income is to be exempt from apportionment to the time of her decease, it should be only the dividends from the bank stock. Whether there will be a dividend of profits cannot with certainty be ascertained until the semi-annual accounts are made up, and it may in some sense be said not to have accrued until declared. But the income

from promissory notes, city bonds and government stocks is interest; they are loans to the makers of the notes or bonds or scrip on which interest is paid to the lender. But interest accrues and is due from day to day, and every day, although by the terms of the loan it may be payable at a future day, and interest, therefore, is apportionable. 1 Williams on Executors, 711.

Fourth. There was no definite period of the year at which the income of the residue was payable to the widow. She was entitled to it from time to time as it accrued and was collected by the executor.

Fifth. If any one time in the year is to be selected as the time from which semi-annual payments are to be made of the income to the widow, it must be the time of the death of Enoch Jewett, which was the last day of February. Her semi-annual payments would then be due the last day of August and the last day of February in each year. She should then, on this principle, be paid all the income that had accrued or become payable on or before the last day of August, 1854.

Sixth. If the Court should be of opinion that the dividends on the bank stock should not be apportioned to the time of the death of the widow, but that the interest on the bonds, notes and government stocks should be apportioned, the plaintiffs consent and request that the statement of facts agreed upon may be amended, so as to show what portion of the income from these different sources became payable between the last of February and the third of September, 1854, and that the sum to be found due be computed accordingly.

But if this amendment cannot be made, the plaintiffs claim that the whole amount claimed in the statement must be found due to them, because the burden of showing what part of the income is exempt from apportionment should properly fall on the executor of Enoch Jewett; and because the claim for maintenance is a favored one; and because it appears that one semi-annual payment on all the stocks must have

occurred between the last of February, 1854, and the third of September, 1854.

North, pro se.

The plaintiffs contend that the interest given to Lucretia Jewett by the will is an estate for life in all the residue of the personal estate, and not an annuity or a charge of a definite annual sum upon the property.

This cannot be, for the personal property, of which she is to have the use, income or interest, goes into the hands of the executor, and not into her possession or under her control.

The language of the will is, "I bequeath to her the use, income or interest, of all the personal estate," &c., "to have, possess and enjoy, to her absolutely, for and during her natural life, and no longer;" the obvious meaning of which is, that she should have the income during her life; she can have no other or greater interest, as the will expressly prohibits the principal from being placed in her hands, or under her control.

The first expression of "life estate," in connexion with personal property, is a negative term, as "I devise a life estate only," used in advance of the limitation in the clause making the bequest, and also used in connexion with and referring to the real estate. She was to have the real estate in possession, and only "the use, income or interest of the personal estate" without the possession.

The expression, relating to the remainder of the property he has given her, "for and during her natural life," is no stronger than the limitation of the bequest, and is here used by way of recital, and as descriptive of the property, and not to define the extent of the legatee's interest therein, so that authority to apportion cannot be drawn from the terms of the bequest, making the interest of the widow a life estate in the property itself.

The intervention of a trustee, enabling the income to be apportioned, does not authorize or make it his duty so to

do, and no stronger argument can be drawn from this, than could be from a bequest of an annuity in express terms.

Vesting the property in the executor or trustee, was necessary to preserve the remainder, and this brings the widow's interest under those rules of law, which define her rights as to the amount and times of payment.

It is attempted to take this case from the general rule by considering the provision made for the widow as one of maintenance. This construction cannot obtain, for it does not appear from the will that maintenance was contemplated.

The authorities cited by plaintiffs are exceptions to the general rule relating to apportionment of annuities; they are cases of bequest specifically for maintenance.

If the testator, in the case at bar, had said in his will, "I give and bequeath to my wife an annuity of $600, to be paid to her during her natural life by my executor," the argument of the plaintiffs in relation to maintenance and apportionment would be equally applicable and forcible. Yet this would be an annuity payable at the end of each year, and could not be apportioned.

The defendant maintains the bequest to the widow to be (if not an annuity,) in the nature of an annuity. It is not a fixed sum, but the interest or income of the residue of the property, a sum to be ascertained. The will being silent as to the time of payment, the law fixes it as annual; and this was the intention of the testator, as appears from the considerations which have been presented.

Interest or income, the Court say, in *Clark* v. *Foster*, 8 Met. 568, is the net income, after deducting the taxes and expenses incurred from the management of the property, which in this case were annual expenses. The widow living out of the State, the property was taxed to the executor in Augusta. The net income could not be ascertained till the end of the year, when the taxes and expenses shall have become known; and the amount cannot be said to be due and payable till the time arrives when the amount can be made certain. *Hall* v. *Hall*, 2 McCord, c. 281; *Pool* v.

Ward, 21 Pick. 398; 1 Williams' Executors, 527; 5 Binney, 475; 18 Pick. 123.

GOODENOW, J. — The interest which Lucretia Jewett had by the will of Enoch Jewett in the *residue* of his estate, was not an annuity, but it was an estate for her life in all the residue of the personal estate.

We cannot come to any other conclusion without disregarding the plain, unambiguous language of the will. Such as, "In the remaining property and estate which I hereby give and devise to her, I give and devise *a life estate* only. I give and devise to my beloved wife the use, improvement, income and issue of my house and lot and out-houses in Pittston where I now live, to have and to hold, *during her natural life* and no longer. I give and bequeath to her in addition, the use, income or interest of all the personal estate of which I may die possessed, (not herein before given and bequeathed to the several legatees mentioned,) to have, possess and enjoy to her absolutely, *for and during her natural life*, and no longer."

It has been decided in this State, that a devise of the net profits of land is, by legal intendment, a devise of the land itself. *Earl* v. *Rowe*, 35 Maine, 414; *Andrews* v. *Boyd*, 5 Maine, 199. If a devise of the "use and income" of land, is deemed sufficient to vest the land itself in the devisee, we can see no good reason why a bequest of the "use, income and interest" of personal estate, does not vest the estate itself in the legatee.

By the provision in the will in this case, for the protection of those in remainder, the personal estate in which this life estate was created, was to remain in the hands of the executors, "so that at the termination of the life, the said personal property may, undiminished as far as practicable, go over and vest in the persons to whom the same is given as second takers." This only interposes a trustee, in whom the legal estate is vested, and does not affect the duration or magnitude of the estate.

We cannot perceive any difficulty which should prevent the income arising from bank stocks and other stocks, from being apportioned. The case finds that the widow of Enoch Jewett was paid the income to March 30, 1854, and was annually paid to the 30th of March in each year. She deceased on the 3d of September, 1854. We are of opinion, that the defendant, as executor of Enoch Jewett's will, is liable to pay to the plaintiffs, as executors of Lucretia Jewett's will, the income of the life legacy, from March 30, 1854, to Sept. 3, 1854, the time of her death. And, according to the agreement of the parties, the defendant must be defaulted.

Damages *two hundred and seventy-two dollars*, with interest on the same from *January* 1, 1855, *to the day of rendition of judgment.*

TENNEY, C. J., concurred in the result. APPLETON and RICE, J. J., concurred. CUTTING, J., did not sit.

JOSEPH NYE, JR., *& al. (in error,) versus* FREDERICK SPENCER.

Defendants, having pleaded the general issue, have a right to a trial thereon; and special pleas in justification are not a waiver of that right.

Every plea must stand or fall by itself, and the language of one plea cannot be taken advantage of to support or vitiate another.

After an issue of law is raised upon a demurrer to a plea in bar, the case comes properly before the law court for its determination of that question, and if decided in favor of the plaintiff, the case goes back for a trial upon the issue of fact.

When, in compliance with the statute of 1852, c. 246, § 8, the judgment rendered in the law court is certified to the clerk of the county where the action is pending, its effect is limited to the question presented.

THIS was a writ of ERROR, under the law of 1852, to reverse a judgment in which Spencer was plaintiff, and the plaintiffs in error defendants.

The following errors are assigned, viz.: —

1. That on the issue of law raised on the special pleas in bar in the case, judgment was rendered for Spencer as plain-

tiff, while the general issue was pending, and when it had not been tried.

2. That final judgment was entered up, and execution issued in favor of Spencer, as plaintiff, while said issue was pending and before it was tried.

3. That final judgment was entered up, and execution issued without any assessment of damages by the Court or by a jury, but execution was issued for the amount of damages, awarded by the justice from whose decision the said case was brought to the Supreme Judicial Court by appeal.

4. That execution was issued on said judgment without any assessment of damages.

The case was submitted to the full Court upon the following agreed statement:—

The original case was commenced before a justice of the peace, and was an action of trespass.

The defendants severally pleaded the general issue before the justice, which was joined. The case came into the Supreme Court by appeal. The defendants there obtained leave to plead further and double, and severally pleaded special pleas in bar, in justification, in addition to the general issue.

The plaintiff, (now defendant,) demurred generally to the special pleas, and the demurrer was joined. The Court overruled the demurrer and sustained the pleas. To this ruling the defendant in error excepted, and the case was carried to the full Court. The case was argued, and, in July, 1855, was certified back to this Court with this order — "Exceptions sustained. Pleas adjudged bad. Judgment for the plaintiff."

During the time, the general issue had not, and it has not since been tried.

The clerk carried the action forward on the docket to the November term, when judgment was entered specially, Dec. 1, 1855, and then, without any proceedings under the general issue, issued execution under the following circumstances: — There was no writ of inquiry for the assessment of damages issued, and no assessment by the Court, but the clerk made up judgment and issued execution, at the sugges-

tion of the counsel for the defendant in error, for the amount of damages awarded by the justice, with costs before the justice, and costs on appeal.

J. H. Drummond, for plaintiffs in error.

In this case, in the court below, two issues were joined, one of fact, and one of law. The issue of law was then decided in favor of the then defendants. This, unless reversed, was a disposition of the case. 1 Saund. 80, note 1.

But the then plaintiff excepted to this decision, and in this Court it was reversed, and the pleas overruled. This issue was thus disposed of, and the case should have remained for trial upon the general issue. But this Court ordered final judgment for the plaintiff and the court below could do no otherwise than enter judgment accordingly. It could not proceed to trial of the general issue. And this, it is submitted, was erroneous and is ground for reversing the judgment.

Where there are several pleas in bar to the whole action, and the defendant succeeds in any one of them, the plaintiff does not maintain his action. 1 Saund. 80, note 1; *Cook* v. *Sayer*, 2 Burr. 749.

So also, if the issue of fact is found for defendant, and of law for plaintiff. It lies at the very foundation of special pleading, that if the defendant succeeds in any plea going to bar the whole case, the plaintiff takes nothing by his action.

The books are full of cases in which an issue of law having been decided adversely to the defendant, the case stands for trial on the general issue. One exactly in point is *Eastman* v. *Cooper*, 15 Pick. 276.

Nor can this court look into the special pleas, and thereupon determine the general issue.

One reason is, the determination of the general issue was not before them, and was not a matter for them to decide, but for a jury. 1 Chit. Pl. 562; *Alderman* v. *French*, 1 Pick. 1, is sometimes cited for the contrary doctrine. But, in that very case, the Court say, the doctrine therein contended for does not apply to cases in trespass in which the general issue and a justification are pleaded.

In the same case it is decided, that when one plea may be used to affect another, it is merely evidence for the jury, and that the Court cannot look into one plea to determine what judgment to render on another.

The first and second causes of error, therefore, show sufficient grounds for the plaintiffs in error to maintain this action.

"If judgment be given for the plaintiff and the defendant bring a writ of error upon which judgment is reversed, the judgment shall only be to reverse the former judgment." 2 Saund. note 101, *u.;* Story's Pl. 373.

This Court can only reverse the judgment below, for there is no judgment that it can pronounce, and this is in accordance with the authorities. 2 Mass. 164, 445; 3 Mass. 352; 7 Mass. 453; Story's Pl. 372.

Bradbury, Morrill & Meserve, for defendant.

1st. The plaintiffs in error having by their special pleas in bar admitted the trespass and taking, and attempted to justify themselves in so doing, are not, after a decision against them upon those pleas, at liberty to fall back upon the general issue and deny the taking. 10 Mass. 80.

The plaintiff is entitled to judgment when he demurs to a defective plea which is not a full answer to the declaration. 11 Pick. 75.

2d. With regard to the third alleged error, it is discretionary with the Court to issue a writ of inquiry of the amount of damages, or not, as justice may require. Stephen's Pleading, 126.

Although the courts generally do issue a writ of inquiry, yet a refusal by them to do so is no ground of error. The Court will examine the whole record, and adjudge to the plaintiff or defendant, according to legal right, as it may on the whole appear, without regard to the issue of law. Stephen's Pleading, 140.

To support a writ of error, the error must be of a substantial kind. Stephen's Pleading, 142; 6 Mass. 445.

It being discretionary with the Court to assess the damages

themselves, or to issue a writ of inquiry of damages, unless some substantial error is manifest in the proceedings, they will not be set aside for error. The error here, if any, is at most only in the amount of damages. Some damage is to be presumed. There is no error alleged as to costs. The judgment for costs must therefore remain.

Where a judgment is erroneous in part, and can be set right without a reversal of the whole, it will be reversed for that part and remain for the rest. 11 Mass. 206; 7 Met. 590; 8 Johns. 111.

TENNEY, C. J.—The defendants in the original action, having pleaded the general issue, were entitled to a trial thereon. The special pleas in justification of the acts complained of by the original plaintiff were not a waiver of that right. The language of a defendant in one plea, cannot be used to disprove another plea. *Harrington* v. *McMorris*, 5 Taunton, 228. One plea cannot be taken advantage of, to help or vitiate another, but every plea must stand or fall by itself. 1 Chit. Pl. 543.

After the question of law was raised upon the demurrer to the pleas in bar, justifying the act complained of, the case was properly carried to the law court, for the determination of this question, without a trial upon the general issue. This is in conformity with the practice, as appears by the cases of *Alderman* v. *French*, 1 Pick. 1, and of *Eastman* v. *Cooper*, 15 Pick. 276.

By the statutes of 1852, c. 246, § 8, it is provided, when a question of law is raised for the determination of the Supreme Judicial Court, sitting as a court of law and equity, the case shall be marked "law," on the docket of the county where it is pending, and shall be continued on the same, until the determination of the question so arising, shall be certified by the clerk of the district to the clerk of the county where it is pending.

When judgment was rendered in the law court upon the demurrer for the plaintiff, and the same was certified to the

clerk of the county where the action was pending, its effect was limited to the question presented, as the jurisdiction of that court extended to that issue only; and it was manifestly its design to certify nothing further.

After the question of law was disposed of, the case was in a condition to be tried upon the issue of fact, which had been presented at the same time that the issue of law was raised. No judgment could be legally entered against the original defendants, excepting upon default, or a verdict against them upon the general issue. The special judgment, entered on Dec. 1, 1855, was erroneous, and should be reversed.

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

WARREN K. DOE *versus* EBENEZER H. SCRIBNER.

An assignment for the benefit of creditors, under the statute of 1844, c. 112, is not void in consequence of a clause in it, providing that the subscribing creditors for the consideration aforesaid, do severally for themselves release unto the assigning debtor all manner of actions, debts, demands and claims whatsoever, which they have against him.

A creditor, by signing the assignment, does not release any claim, which does not come within the statute of 1844, c. 112, § 1.

If a debtor, contemplating an assignment, makes conveyances of his property, with an intention to delay, defeat or defraud his creditors, the assignment will not bar an action against him by a creditor who had become a party to it.

But the assignment may nevertheless be valid for some purposes, and as to some parties.

ON FACTS AGREED, from *Nisi Prius*, SHEPLEY, C. J., presiding.

This suit was upon a conditional note made by defendant, payable to plaintiff, for $1100, with interest.

For this hearing the following facts were considered as proved: —

That the conditions named in the note had been performed before the suit was commenced.

That defendant, on Nov. 16th, 1850, made an assignment of his property for the benefit of his creditors, to Joseph Percival and David McCrillis, which may be referred to, and which contained the following clause:—"and the said subscribing creditors for the consideration aforesaid, do severally for themselves release unto said Scribner all manner of actions, debts, demands and claims whatsoever, which they have against him." The assignees accepted the trust, and complied with the requirements of the law.

That the defendant, on Sept. 14th, 1850, made a mortgage of his homestead estate to his son, B. K. Scribner, to secure the payment of $3000.

That on Nov. 4th, 1850, defendant conveyed the same to Hadassah Scribner for the consideration of $250, subject to mortgages for $3200, the estate being estimated to be worth from $5000, to $6000. On same day he conveyed in mortgage the personal property on the same estate, and his household furniture, to B. K. Scribner, to secure the payment of $1400.

On Nov. 6th, 1850, the defendant conveyed a lot of land adjoining the homestead estate, to David McCrillis for $1440.

That on the night when the assignment was made, the defendant paid to one of his creditors, Thomas Herrick, $100, cash.

That the above conveyances for this hearing may be considered as all made to defraud creditors, and in contemplation of making an assignment of his property.

The assignment was signed by the plaintiff.

If, upon these facts, the Court shall be of opinion that the assignment was illegal and void by the insertion of the clause before named, the defendant is to be defaulted. If of opinion that it is not void for that cause, or by reason of making the conveyance as before stated and paying the money before stated, the plaintiff is to become nonsuit. If of opinion that the assignment would be void upon proof of conveyances and payment of money as before stated, the action is to stand for trial.

Hinds and *Bradbury & Morrill*, for plaintiff.

The assignment containing the release relied on by the defence, is void: —

1. Because it requires of the creditors a release of "all manner of actions, debts, demands and claims," instead of a mere release of debts, which is all the law authorizes. R. S., 1844, c. 112, § 1; *Pearson* v. *Crosby*, 23 Maine, 261; *Vose* v. *Holcomb*, 31 Maine, 407; *Hadley & al.* v. *Fairbanks & Tr.* 4 Mason, 206; Ware's Rep. 232.

There is a substantial variance between "debts" and "all manner of actions, debts, demands and claims."

2. The assignment is void by reason of fraud on the part of the assignor in preferring creditors and paying debts, after he had determined on assigning.

Assignments must provide for an equal distribution of *all* the property. No preference is allowed.

The payment of a debt or conveyance of property, with a view of preference, or to withhold any part, is a fraud on the law, and withholds the privilege of its benefits. This may as well be done indirectly and by separate instruments, as if in the assignment.

It is continuity of intent that connects the transactions and makes them one.

Drummond, Abbott and *Paine*, for defendant.

1. The instrument provides for a *pro rata* distribution. It was optional with the plaintiff to release all causes of action. He should not be heard to complain.

2. The statute declares that a release of debts shall be a discharge of all claims, and the terms of the release clause under consideration are not more comprehensive.

3. The release imports a discharge of such claims only as the subscribers hold as creditors; in other words, debts.

4. The assignment is valid, notwithstanding prior conveyances made by the assignor, in contemplation of an assignment. The rights of the subscribing creditors are not to be impaired by frauds to which they were not parties. *Woodward*

v. *Marshall & Tr.*, 22 Pick. 468; *Fairbanks* v. *Haynes*, 23 Pick. 323; *Macomber* v. *Weeks*, 3 Met. 512.

5. As the assignment is valid, the plaintiff will receive all the advantages provided for, and he cannot be permitted to set aside the release, the only part of the instrument containing stipulations on his part.

GOODENOW, J. — The assignment having been signed by the plaintiff, there is no reason to presume that he released any claim, which did not come within the statute of 1844, c. 112, § 1. We are of the opinion, therefore, that the assignment is not void in consequence of the insertion of the clause providing, that "the said subscribing creditors for the consideration aforesaid, do severally for themselves release unto said Scribner all manner of actions, debts, demands and claims whatsoever, which they have against him."

But we are of the opinion, that if the defendant made conveyances of his property, with an intention to delay, defeat or defraud his creditors, before the execution of the assignment, and in contemplation of making an assignment of his property, he cannot be permitted to interpose the assignment against the plaintiff's right to recover in this action. The plaintiff may be ready to take upon himself the burthen of proving such conveyances fraudulent; while the assignees might decline to do so. He should be allowed that privilege. The case of *Woodward* v. *Marshall*, 22 Pick. 468, was an action against the assignees, as trustees, and they were discharged. Similar were the cases of *Fairbanks* v. *Haynes*, 23 Pick. 232; *Brown* v. *Foster*, 2 Met. 152, and *Macomber* v. *Weeks*, 3 Met. 512.

The assignees may be entitled to hold the property assigned to them in trust for the benefit of the creditors; while the defendant may have so conducted in making the assignment or arrangements preparatory to it, as to destroy his claim to be discharged from the plaintiff's demand. The assignment may be valid for some purposes and as to some parties, and invalid for other purposes and as to other parties.

We are of the opinion, that if the conveyances stated were made to defraud creditors and in contemplation of making an assignment of his property by the defendant, that the assignment is so far void as to him, that this action, according to the report of the Judge, should *stand for trial.*

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

APPLETON, J., dissented.

JOHN WELLINGTON *versus* HATCH MURDOUGH.

A. purchased two lots of land, by one of two plans which represented them differently, and then sold one of the lots to B. by the other plan; *Held*, that the latter plan must govern in ascertaining B's rights.

Evidence with reference to the plan by which a purchase is made, in conflict with the language of the deed itself, is not admissible.

The subsequent acts and declarations of parties to a deed, are not sufficient to destroy or vary their legal rights, as exhibited in the deed.

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

This was a WRIT OF ENTRY, for possession of a parcel of land in Albion, "being a piece off of the easterly end of the south half of the lot numbered 21, on a plan of the Nelson tract, made by Joseph Chandler," &c.

The general issue was pleaded by the tenant.

The case was taken from the jury, and the parties agreed, that the presiding Judge should report the evidence for the decision of the full Court, and that the Court should render such judgment as the evidence, or so much as was legally admissible should warrant, the Court drawing such inferences as a jury might.

The facts are sufficiently stated in the opinion of the Court.

Williams and *Cutler*, for defendant, argued in writing.

I. Plaintiff claims the demanded premises as part of lot No. 21, to which he makes title through mesne conveyances, from T. L. Winthrop, who sold it to Joel Wellington, June

29, 1822. Whatever extent that lot had for Joel Wellington it has for plaintiff and no more.

What extent, then, had lot No. 21 by Winthrop's deed to Joel Wellington? It begins with using general terms,—"lot No. 21, (and other Nos.,) on Chandler's plan,"—and then proceeds to limit and define the land conveyed by special metes and bounds. The scrivener, (R. Williams,) testifies that the "Chandler plan" he used in drawing the deed in question, was the draft of it made by Hayden, and that is the plan really referred to in the deed. Hayden's delineation of it, as his certificate on it expressly says, gives a view of the Nelson tract as surveyed by Joseph Chandler in 1806. The deed does not say Chandler's plan of 1806, but "Chandler's plan," and it was in fact made from the view of it given by Hayden's delineation.

In *Emerson* v. *Tarbox*, 7 Greenl. 61, the Court say, "Adams' plan," (a later one,) is "Hobart's plan" (of earlier date.) So here, the Hayden draft of 1822, purports to be, and is in fact, the "Chandler plan," so far as reference to a plan in the deed is concerned.

If this view be correct, it settles the case at once for defendant.

II. If required to go further, defendant next has resort to the specific boundaries, as controlling and limiting the general language, "lot No. 21, on Chandler's plan." If the monuments and distances in the deed differ from the plan referred to in it, the former must control. *Haynes* v. *Young*, 36 Maine, 557; *Esmond* v. *Tarbox*, above cited; *Allen* v. *Littlefield*, 7 Greenl. 220; *Herrick* v. *Hopkins*, 23 Maine, 219. In the last case, the Court (TENNEY, J.,) say, "if there be a precise and perfect description, showing that the parties actually located the land upon the earth, and another, which is general in its terms, and they cannot be reconciled with each other, the latter may yield to the former."

The specific description in the deed says, "beginning at the N. W. corner of No. 21," (a fixed point not in dispute,) and

by both plans the east and west lines of lots Nos. 21, 22 and 23, are straight and parallel. The deed goes on and gives the distance from the S. W. corner of No. 22, to the S. E. corner of said lot No. 22, to be exactly 160 rods.

The case finds, that Hayden, acting just before the deed was drawn and at the request of the parties to it, set up a monument which is now standing at the N. E. corner of No. 23, and both plans show that the N. E. corner of No. 23 is identical with the S. E. corner of No. 22. The call of the deed, therefore, for the S. E. corner of lot No. 22, is this very monument. This fixes the extent eastwardly of lot No. 22, by the deed, and both plans show lots Nos. 22 and 21 to be of equal length, viz., 160 rods.

Again, the deed gives particularly the exact length of lot No. 29, calling for both its north line and its south line as exactly 200 rods; and by both plans the north line of No. 29 and the south line of No. 30 are of the same length, viz., 200 rods, extending from Chandler's range line, at east end of 3d range, (a fixed point, not disputed,) to the monument set up by Hayden at N. E. corner of No 23, or S. W. corner of No. 29.

Again, the deed of Joel Wellington to John French in 1826, in which he conveys part of No. 22, shows he bought of Winthrop with reference to Hayden's monuments and plan of 1822, and that the N. E. corner of No. 22 is where defendant contends it is. It is an admission, by which plaintiff, claiming under him, is bound. And by both plans that corner and S. E. corner of No. 21 are contiguous and identical.

III. In redeeming from Winthrop's mortgage, the parties interested paid in proportion to their number of acres. R. Williams testifies, that plaintiff and he reckoned No. 21 as only 100 acres, and plaintiff paid on it as having that extent and no more.

And Libbey, who represented himself as acting for plaintiff, "looking at all the papers," had full knowledge that plaintiff paid on only 100 acres, and that defendant had paid money to redeem the land now sued for and made no objection.

The only inference is, that plaintiff then claimed No. 21 to be only 100 acres; shall he now, after defendant has, with his knowledge and consent, paid the value of the land in dispute, turn round and claim the land, and defraud the defendant of the money so paid?

A. Libby, for plaintiff, argued in writing.

Demandant claims demanded premises as the easterly part of lot No. 21, according to Chandler's plan of the Nelson tract.

Tenant claims the same premises as the westerly part of lot 30, on same plan.

Both parties claim under Joel Wellington through mesne conveyances, and it is admitted that said Joel Wellington owned both of said lots, subject to a mortgage to T. L. Winthrop. He conveyed lot 21, on said Chandler's plan, to demandant's grantor, and subsequently conveyed the excess on lot 30, on said plan, west of the east 100 acres, to tenant's grantor.

Both parties have redeemed their lands from the Winthrop mortgage according to Chandler's plan, as will appear by the deeds of release in the case.

The case finds, that between the easterly boundaries of lot 30, and the west boundaries of 21, there are 224 acres, and that there never was any divisional line or monuments between said lots; each lot is represented on said plan as containing 100 acres. And the plan is referred to in the deeds, and becomes a part thereof. The 24 acres overplus in the two lots must be divided equally between them. *Brown* v. *Gray*, 3 Greenl. 126; *Thomas* v. *Patten*, 13 Maine, 329. Hayden's plan of his re-survey is inadmissible to explain or control the deeds of either party. It is not referred to in the deeds.

And so is the evidence of Williams. There is no ambiguity or uncertainty in the deeds. They cannot be explained or controled by parol.

The deed from Winthrop's executors, dated May 3, 1855,

is inadmissible. It is given subsequent to the commencement of this suit.

The plea is the general issue. Demandant, having shown title, must prevail, unless tenant shows a better title in himself at the commencement of the suit. R. S., c. 145, § 11.

CUTTING, J.—The demandant claims the premises in controversy by deed from Nahum French to himself of Sept. 7, 1832, conveying "part of the Nelson tract, (so called,) and being divisional lot numbered 21, agreeably to Joseph Chandler's plan of said tract, containing one hundred acres more or less."

"It is admitted by the parties, that there are in said lots No. 21 and 30, east of it, about 224 acres, said lots together being 360 rods long, instead of 320, as delineated on said plan; and that there never was any line run or marked by said Chandler between said lots, nor any monuments or corners put up by him between said lots to mark the extent of No. 21 easterly, or of No. 30 westerly; said Chandler having made corners on the west end of No. 21, and east end of No. 30."

Chandler's plan represents the divisional line between lots 21 and 30 to be equi-distant from the range lines, thereby dividing the surplus of 40 rods equally between the two lots, and consequently represents the "*locus in quo*" to be within lot No. 21, and embraced in the demandant's deed.

But the demandant traces his title through mesne conveyances, from Thomas L. Winthrop, who, by deed of June 29, 1822, conveyed to Joel Wellington "part of the Nelson tract, (so called,) being lots numbered 21, 22, 28, 30, and parts of lots Nos. 27, 33 and 34, on Chandler's plan of said tract," and in the deed described the land conveyed specifically by metes and bounds. And it is contended by the counsel for the tenant, that it is to be inferred from such definite description, that lot No. 21 is only 160 rods, while the lot No. 30 is 200 rods in extent; and that the plan used by the conveyancer on that occasion, and referred to as Chandler's plan,

was Hayden's delineation of it, and introduces testimony, which, if admissible, would seem to establish that fact. *In arguendo,* we will admit the evidence. If the deed had omitted the more specific description, it might have been void for uncertainty, as to the parts of the lots, so that in order to ascertain what was conveyed, it was necessary to trace, as was done, the exterior boundaries of the tract, which boundaries correspond in every essential particular with Hayden's plan.

This brings us to the consideration of the Chandler and Hayden plans. The latter is said in argument to be only a delineation of the former. Whether it be so or not, can be determined only by inspection. By such test, it will be found that they present nothing in common, except the numbers of the lots, the range and side lines; the other lines and representations are either additional or wholly variant.

The plan by Hayden purports to give only "a view" of the lots in controversy, and "a view of a re-survey" of certain other lots "to accommodate the settlers thereon." To view, does not signify to change or reform, much less to obliterate, while a re-survey may denote the subject matter for a new plan. Consequently the Chandler plan has never lost its identity, and as an original must still be recognized as when first certified to the public in 1806.

On March 15, 1828, Joel Wellington conveyed to Nahum French, the demandant's grantor, by the same description as that contained in the demandant's deed. At that time Wellington was the owner of lots Nos. 21 and 30, "on Chandler's plan," and he deeded the former lot *agreeably to that plan,* which lot, by that plan, contains one half the space between the range lines, *to wit,* a lot 180 by 100 rods. Wellington then held the lots represented on two plans, the Chandler plan and the Hayden plan, or Hayden's "view," or "a view of a re-survey." If he purchased by the one, it by no means follows, that he could not sell by the other, and although there has been evidence with reference to the plan by which he purchased, none has been offered as to that by which he sold, and

if offered must have been excluded as being in conflict with the language of the deed. In 1825, some three years before his conveyance of this lot, he sold to John French the easterly end of lots 22 and 23, "as re-measured and marked by Charles Hayden" in 1822; then why not, if he would restrict the demandant's grantor to the re-survey, make use of the same or similar language?

The subsequent acts and declarations of the parties, as the Court say in *Chandler* v. *McCord*, 38 Maine, 564, are not sufficient to destroy or vary their legal rights as exhibited by the deed. According to the agreement of the parties the defendant is to be defaulted.

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

SAMUEL STODDARD *versus* SAMUEL C. GAGE *& als.*

A. executed to B. a bill of sale with covenants of warranty, of three-eighths of a vessel, and C. and D. executed to him a like bill of sale of four-eighths of the same vessel; *Held*, that B. would have a remedy upon the covenants in his bills of sale, for the money paid by him to discharge an incumbrance upon the vessel, existing at the time of the sale.

But no action as upon a joint promise against the three can be maintained.

The promise of one, without the authority of the others, that if B. paid off the incumbrance, "they would settle the balance with him," imposed no new obligation upon the other two, nor authorized an action against the three as joint promisors.

After the discharge of the incumbrances by B., the mere submission of his claim by all the parties to referees without any award thereon, would not change the nature of his claim, or the liability of the other parties.

A recommendation to pay a certain amount is not an award.

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

The facts in this case are stated in the opinion of the Court.

North & Fales, for plaintiff, contended:—

1. The question of joint promise was for the jury, and the

nonsuit was improperly ordered. *Wilkinson* v. *Scott*, 17 Mass. 249.

2. There was a joint promise expressed or implied. The proof under the money count is, that the money was paid by the plaintiff to liquidate a joint debt of defendants. It was a debt created by their joint bond, secured by a joint mortgage of their joint property; and slight proof would authorize a jury to find that it was paid at the request of all the defendants, if the law requires a special request to make them jointly liable.

3. Subsequent to the payment by plaintiff, the payments were ratified and confirmed by the submission to Paine and Morrill. The defendants submit the matter of payments by the plaintiff to the referees, and they, upon investigation, recommend the payment by the defendants to the plaintiff, of the sum of $1878,22, and subsequently the defendants do pay on the award the sum of $500, and this action is for the balance.

4. The nonsuit deprived the plaintiff of his right, under § 11, c. 115, R. S., of amending his writ by striking out one or more of the defendants at any time before the cause was committed to the jury. After the exhibition of his testimony to the jury in its completeness, and knowing precisely what it was, he then could have availed himself of his right to amend by striking out one or more of the defendants, upon payment of costs. This is a right conferred by statute, of which the Court could not deprive him.

This has been permitted in Massachusetts in relation to plaintiffs, when, upon exhibition of proof, there is a failure to show that all have a right to sue; one becomes nonsuit, and the cause proceeds in the names of the others. *Means* v. *Wells*, 12 Met. 355. The reason is much stronger for striking out the defendant; and as there is unquestioned evidence to bind a part of the defendants, the nonsuit should be taken off and the plaintiff be permitted to present his case to the jury, with such names as defendants as he may desire.

Bradbury, Morrill & Meserve, for Gage.

Gage, one of the defendants, conveyed to plaintiff three-eighths of the brig Abby Jones, Oct. 9, 1851, and Jones and Small, on the same day, by a separate bill of sale, four-eighths.

Gage conveyed for a specified consideration his three-eighths. To avoid the implication of a joint undertaking he did it by a separate bill of sale. If his title failed he was liable to respond in damages no more than the amount of the damages sustained on the three-eighths which he sold.

As to the liability to Nickerson, it is true, that Gage joined with the other owners in mortgaging his share of the brig; but the case does not show that the plaintiff was to step in and take Nickerson's place.

The plaintiff discharged this mortgage in order to perfect his title to the vessel. And having done so, he held and had the right to enforce the covenants of each vender to make good the share held by each.

His contract was several with the defendants, and his remedy against each separately.

As to the conversation and promises of Gage, they should be construed as referring to his liability to pay according to their liability to him.

Neither he nor the plaintiff understood that they were making any new contract.

The case shows no award, and no decision by Paine and Morrill.

MAY, J.—In this case, the presiding Judge being of opinion that the plaintiff's evidence failed to prove a *joint* promise by the defendants, as alleged in the writ, ordered a nonsuit; and the question now presented is, whether the exception taken to that ruling and order is sustained. It appears from the evidence reported, that on the 9th of October, 1851, the defendant Gage, in consideration of $3000, paid by the plaintiff, conveyed to him by bill of sale, with covenants of warranty, three-eighths of the brig Abby Jones, and on the same day the other defendants, in consideration of $4000, by a like bill

of sale executed by them jointly, conveyed to the plaintiff four-eighths of the same brig. On the 5th of July preceding, all the defendants had jointly mortgaged the same seven-eighths of the brig to one Nickerson to secure their joint bond of that date, conditioned that, if they should pay to said Nickerson $4000, in six months and all bills due to him, the same should be void, and providing that in default of payment the mortgagee might take possession of the mortgaged property and sell the same at public auction. At the time of the sale to the plaintiff he was notified of the existence of the mortgage, and it was then supposed that the debt secured by it would not exceed $4000, and as security against that it was arranged, that three of the notes given by the plaintiff in payment for the brig should be left with Lot M. Morrill, Esq., and the money when paid was to be forwarded to said Nickerson to satisfy his claim. Nickerson's debt, secured by the mortgage, turned out to be over $6000, and, after this became known, the plaintiff and the defendant Gage got the time of payment extended, each paying a part of the bonus money required for the extension.

In the spring of 1853, Nickerson having advertised the seven-eighths of the brig for sale under the provision in his mortgage, the plaintiff paid the amount then due on the mortgage which his notes had failed to pay, being more than $2000.

If the case stopped here, it is perfectly clear that the plaintiff's remedy would be upon the covenants in his bills of sale, and he might have an action upon either or both of them for the money paid to discharge the incumbrances upon the brig which existed at the time of the sale to him. No action as upon a joint promise against the three defendants could be sustained.

Does then the other evidence in the case place the plaintiff in any different posture as to his right or remedy? We think not. The fact that the defendant Gage told the plaintiff, before he paid off the mortgage, to pay it, and "we will settle the balance with you," could impose no new obligation upon

the other two defendants, certainly, if Gage was not authorized by them to make any such promise, of which there is no evidence. It would not authorize a joint action against the three defendants.

Nor could the fact, that after the payment the plaintiff and these three defendants submitted the plaintiff's claim to referees, change the nature of the plaintiff's claim, or of the defendants' liability without an award. The case shows that no award was made by the referees. They simply recommended to the defendants to pay to the plaintiff the sum of $1873,22, as of the 7th day of May, 1853, and a few days after the defendants did pay a part of said sum, the balance still remaining unpaid. What they did pay, so far as the case discloses, seems to have been paid in consequence of the recommendation of the referees, which was addressed to their discretion, and such a payment cannot properly be regarded as changing the legal rights of the parties. In view of the whole evidence, we think the plaintiff's remedy is upon the covenants in his bills of sale, which will afford him ample relief, and that there is a misjoinder of the defendants in this suit.

The exceptions are overruled
and the nonsuit is to stand.

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

JOSEPH H. UNDERWOOD, *Complainant, versus* NORTH WAYNE SCYTHE COMPANY.

At common law, an easement may be acquired upon the land of another, without proof that the owner has sustained damage.

The common law remedy for the flowing of land by the owner of a mill by means of a dam to work it, is taken away by R. S., c. 126; and a recovery against the owner of the mill for damages sustained, if any, by such flowing, can be had only in the mode and in the cases provided for by the statute.

If the owner of land thus flowed has not been injured thereby, he cannot maintain an action therefor under the statute; and in such case no prescriptive right to flow the lands without the payment of damages, can be acquired against him.

But if he has been injured, so as to enable him to maintain a complaint against the owner of the mill, such prescriptive right may be acquired against him.

In order, therefore, to maintain such prescriptive right to flow lands, it must be shown that the flowing for the twenty years and upwards, has been an injury to the owner of the lands.

Damages form the basis of the complaint for flowing, but the question of injury or no injury is not an issue to be made and tried in court, before the appointment of commissioners.

The power which was given to the jury, by the statute of Massachusetts of Feb. 28, 1798, to try the issue on the complaint as to damages, was taken away by the statute of 1821, c. 45, and given to commissioners appointed by the Court.

The exposition by this Court in its various decisions, of the statutes of 1821, 1824 and 1840, on the subject of flowing lands by the operation of mills, is correct in the doctrines established, although remarks may have been made in reference to particular facts of the respective cases, probably not understood in some respects as they were intended.

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

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

The facts appear in the opinion of the Court.

The respondents requested the Court to instruct the jury that they were by law entitled to maintain their said dam at, and to flow to, the same height at which they had maintained it and flowed, for a period of twenty years next before the filing of said complaint, and that if the said dam was no higher for the period mentioned in said complaint than it had been maintained for the last twenty years, or more, before that time, the respondents would not be liable to this complaint.

The Court declined to give such instructions, but did instruct the jury, that although the defendants should prove, that they had flowed the complainant's lands for a period of twenty years, they would thereby gain no right to flow, unless such flowing did damage; and if the jury should find that the dam of the respondents overflowed any part of the lands of the complainant prior to 1838, to do them damage, they would thereby acquire a right to flow only such lands as were so damaged; and if, since the year 1838, additional lands of the complainant had been overflowed and damaged by the re-

spondents' dam, they would be liable for such additional flowing.

Bradbury & Morrill argued in writing, in support of the exceptions, presenting an extended and critical examination of the cases in this State and Massachusetts upon the subject of the prescriptive right to flow.

1. They said, that the Courts in Massachusetts had decided at an early day, upon statutes in all substantial respects, the same as our own, that where a mill-owner has in fact exercised the right of keeping up his dam and flowing the land of another person for a period of twenty years, without payment of damages, and without claim of damages, it is evidence of a right to flow without payment of damages, and will be a bar to such claim. *Williams* v. *Nelson*, 23 Pick. 141.

This being the long settled rule in Massachusetts, if it should be asserted that a different rule has obtained in this State, under circumstances nearly similar, or precisely the same, it would seem to call for a careful revision of the cases, and an examination into the reasons for the conflict of opinions in two neighboring jurisdictions, upon the same subject matter.

If it should appear that the *reasoning* in this class of cases, in both courts, is harmonious, it may not be impossible to reconcile the conclusions, even though they may not in all respects agree.

In Massachusetts, and elsewhere out of Maine, it is held that the act of flowing carries with it a presumption of damages.

The theory upon which all the decisions are founded is, that twenty years exclusive enjoyment of the use, affords a presumption of a grant of the easement. 3 Kent's Com. 441.

In the case of *Hathorn* v. *Stinson & als.* 10 Maine, 224, it was first intimated that the right to flow could not be shown by prescription, without proving actual damage. *Tinkham* v. *Arnold*, 3 Maine, 120; *Hathorn* v. *Stinson*, before cited, and s. c. 12 Maine, 183.

The reason given for this new doctrine, unlike that given

in *Tinkham* v. *Arnold*, in which it is said that no prescriptive right can be had, is that of *statute disability* on the part of the land-owner to maintain the statute process.

An examination of the statute of 1821, c. 45, and of the R. S., c. 126, will show that that reason no longer exists, since, by the latter statute, the respondent cannot show that no damage has been done. *Stowell* v. *Flagg*, 11 Mass. 364. The cases cited from Mass. Reports in *Hathorn* v. *Stinson*, were also cited and commented upon. The doctrine of *Tinkham* v. *Arnold*, was the rule in this State up to the year 1840, although other reasons than those there given had been mentioned in *Hathorn* v. *Stinson*. In the case of *Seidensparger* v. *Spear*, 17 Maine, 123, it was still said that *damages were to be presumed*, and the position taken in *Hathorn* v. *Stinson*, that *actual* damages must be shown, was repudiated.

The Court in *Nelson* v. *Butterfield*, 21 Maine, 220, gave a new reason, to wit, that evidence of no damage is now excluded, because the question of damages is transferred to another tribunal.

It is contended that the reason assigned in the case last cited fails, and consequently the modern doctrine built upon it falls, and the old doctrine, that of the Revised Statutes, of damages presumed from flowing, revives. Stat. 1821, § 45; Stat. 1824, c. 261; R. S., c. 126, § 12.

The legislation of 1856 must have been based upon the idea of the right of complainant to maintain his process without showing actual damages; otherwise it would turn out, under the rule adopted in *Nelson* v. *Butterfield*, that the land-owner would have his land taken from him virtually without the power of submitting the question to a jury at all, as by Stat. 1856, c. 269, the report of the commissioners is not permitted to be impeached.

The case of *Nelson* v. *Butterfield*, was decided upon the ground, that it fell within a class of cases in which the Court had decided, that while the owner of land suffers no damage, and can therefore maintain no suit or process, he cannot be presumed to have granted the right to flow.

Upon a careful examination of each of the cases referred to, it is believed it will be difficult to find authority for the position taken. The doctrine was, indeed, as is contended, first distinctly announced in *Nelson* v. *Butterfield*, and upon that case the decisions in this State made subsequently are understood to hinge.

2. The Judge instructed the jury that the respondent must show damage done by the flowing. Now, in *Nelson* v. *Butterfield* the Court held, that "the presiding Judge was correct in excluding the testimony tending to prove that the complainant had not suffered damage, from the consideration of the jury."

The question, then, as to damages, should have been reserved "for the other tribunal." The Judge should have told the jury, that if defendants flowed, some damages would be presumed, until the contrary should appear by the report of the commissioners.

In *Tinkham* v. *Arnold*, the same doctrine of *presumption* of damages was also held.

3. The Court authorize the jury to make a distinction between lands "overflowed" "to do the damage," and those not "so damaged."

4. If the dam had been repaired, without so changing it as to raise the water higher than the old dam, when tight and in repair, would raise it, it is no new use of the stream. *Cowell* v. *Thayer*, 5 Met. 258.

H. W. Paine and *Bean*, for complainant.

The instruction, "that although defendants should prove that they had flowed the complainant's land for a period of twenty years, they would thereby gain no right to flow, unless such flowing did damage," is settled law. *Hathorn* v. *Stinson*, 12 Maine, 183; *Nelson* v. *Butterfield*, 21 Maine, 220.

The doctrine of these cases results necessarily from the provisions of the mill Act, which preclude the land owner from proceeding for the entire damages. *Davis* v. *Brigham & al.*, 29 Maine, 391; *Wood* v. *Kelley*, 30 Maine, 47.

The instruction, "that if the jury should find, that the dam

overflowed any part of the complainant's land, prior to 1838, to do them damage, they would thereby acquire a right to flow only such lands as were so damaged," is but a corollary of the former instruction.

The doctrine of *Cowell* v. *Thayer*, 5 Met. 253, is one of the consequences of the principle established in *Williams* v. *Nelson*, 23 Pick. 141, which is not law in Maine.

As the instructions given were correct, it is unnecessary to consider the instruction requested.

TENNEY, C. J. — The Revised Statutes, c. 126, § 1, authorize any man to 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 such conditions and regulations as are expressed in said chapter.

Any person sustaining damages in his lands, by their being overflowed by a mill-dam, may obtain compensation for the injury, by complaint. Sect. 5.

By § 9, the owner or occupant of such mill may appear, and plead in bar to such complaint certain things specified, or any other matter which may show that the complainant cannot maintain his suit, but he shall not plead in bar of the complaint, that the land described therein, is not injured by such dam.

At common law, an easement may be acquired upon the land of another, without proof that the owner has sustained damage. For the least appropriation of the land, without the consent of the owner, is an invasion of his rights, and an action can be maintained for such invasion. But the overflowing of another's land, by the owner of a mill, to work it, by means of a dam, the mill and dam standing upon his own land, being secured by the provision referred to, his common law remedy for damages, when sustained, is taken away; and he can recover against the owner of the mill, only in the mode, and in the cases provided for by the statute.

If the owner of the land flowed, has not been injured by the flowing, he cannot maintain the action under the statute,

against the owner of the mill for flowing his land; and having no power to prevent the flowing in such case, no prescriptive right to flow the lands without the payment of damages can be acquired against him. But if the owner of the land flowed, has a right to maintain a complaint against the owner of the mill for such flowing, the latter may acquire a prescriptive right to flow the land, without the payment of damages. It follows, that to maintain this prescriptive right to flow, it must be shown, that the flowing for the twenty years, and upwards, has caused damages to the owner of the land.

As a basis of a complaint for the recovery of damages for the flowing of lands by means of a dam and mills thereon, damages must have been sustained by the owner of the land. But whether damages have been so caused to the complainant, is not an issue to be made and tried in the court in which the complaint is entered, before the appointment of commissioners. If upon the issues which may be presented in pursuance of the provisions of § 9, the decision should be in favor of the complainant; or if the owner or occupant of the mill, after being notified, &c., shall not appear, or shall be defaulted, or shall not plead or show any legal objection to proceeding, the court shall appoint three or more disinterested persons, of the same county, commissioners, who shall go upon, and examine the premises and make a true and faithful appraisement under oath of the yearly damages, *if any*, done to the complainant by flowing of his lands described in the complaint, &c., § 12. And these commissioners are to determine, whether the complainant has been injured or not. The power which was given to the jury, by the statute of Massachusetts, entitled "An Act, additional to an Act, entitled an Act for the support and regulation of mills," passed Feb. 28, 1798, which authorized the respondent in his plea, to dispute the statement made by the complainant, and try the issue presented on such plea, at the bar of the court, was taken away by the statute of 1821, c. 45, and given to the commissioners. *Nelson* v. *Butterfield*, 21 Maine, 220; *Wood* v. *Kelley*, 30 Maine, 47, and cases referred to in each, on the points herein considered.

The instructions, requested by the respondents' counsel to be given to the jury, were properly withheld, not being predicated on the assumption, that the complainant sustained damages, during the time of the flowing, from which the respondents founded their prescriptive right to flow the land described in the complaint. And the instructions given were in accordance with the well settled construction of the statute.

It is not improper to remark, that we have been much interested in the able and critical examination by the respondents' counsel, of the decisions of this Court upon the subject under consideration, and the reasons given for the results to which the Court came. Some remarks may be found in these opinions, made in reference to the particular facts of the respective cases, rather than what was necessary, in giving a construction to the statute in its general application, and may not have been understood, in some respects, as they were intended by the individual Judge who made them. But the exposition of the statutes of 1821, 1824, and of 1840, on the subject of mills, and the flowing of lands, for their operation, in these decisions, is believed to be correct in the doctrines which they establish. *Exceptions overruled.*

CUTTING, APPLETON, and MAY, J. J., concurred.

WILLIAM J. L. MOULTON *versus* FREDERICK FAUGHT.

A reservation in a deed is for the benefit of the grantor and his successors, and not for that of persons claiming title to property not conveyed by the deed, and derived from other sources.

The right to maintain a dam on the land of another, must be regarded as such an interest in real estate as cannot pass by parol.

A parol agreement that a party may abut and erect a dam upon the land of another for a permanent purpose, is void by the statute of frauds.

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

This was an action of TRESPASS for an injury to a dam built by the plaintiff on the land of the defendant.

The plaintiff claimed the right to build the dam, the re-

moval of which by defendant was the trespass complained of, under a verbal license from one Cutler, who held a bond of the premises from one Pingree. Southwick, the grantor of Pingree, had conveyed the same to the defendant, with certain reservations. The plaintiff claimed, that all the interest of Southwick in said reservations were in him by force of said conveyance, bond and verbal license. It did not appear, however, that the reservation in the deed from Southwick was for the benefit of the mills occupied by plaintiff.

The reservation referred to is given in full in the opinion of the Court.

Vose, for defendant, after reciting the facts, insisted, —

1. That the Southwick deed could give no right to flow lands of which Southwick was never owner.

2. But, suppose the Southwick deed gave the right, to what extent, and to whom was it given? The purpose is expressed in the deed. The right is limited to the grantor and his successors, in order to carry on the business of a tannery, located at some distance from the plaintiff's mills, and for that purpose alone.

3. Supposing, (which is not admitted,) that Cutler holds Southwick's right under the bond from Pingree; Cutler could not transfer that right to the plaintiff to enable him to carry on his saw-mill, below the tannery.

4. The transfer, if any, from Cutler was verbal. Such a right cannot be transferred, either at common law or by statute, by parol. Angell on Water Courses, (ed. of 1824,) 63; 4 Johns. 81; R. S., c. 26, § 3.

5. The defendant was justified in removing the dam as a private nuisance. Ang. on Wat. Cour., 74, 75; *Hodges* v. *Raymond & al.* 3 Taunt. 99.

Whitmore and *H. W. Paine*, for plaintiff.

1. The defendant assisted in building the dam, and was present when it was built, and made no objection to it. From these facts, the Court may infer a license. *Doe* v. *Wilson*, 11 East, 56; 7 B. & C. 243.

2. Cutler had a right to build the dam, and to permit the plaintiff to build it for him.

3. The plaintiff had a right by statute to build the dam. R. S., c. 126, p. 560.

4. If plaintiff had the right to build the dam either by license or by statute, the defendant is a trespasser in cutting it away. *Ricker* v. *Kelley,* 1 Maine, 117.

APPLETON, J. — This is an action of trespass, for an injury to a dam built by the plaintiff on the land of the defendant.

It seems, that the defendant acquired title to twenty-three and one-half acres of land, upon which the dam in dispute was erected, by a deed from one Southwick containing the following reservation: — "Reserving to the said Southwick and his successors, the privilege of flowing, by a dam situated at the outlet of the bog, as much of the above described premises as may be useful to them for the benefit of machinery situated at the brook below; reserving likewise the privilege of digging and removing earth and stones from said premises, at all times when the same may be wanted for building, repairing and supporting said dam, and of passing and repassing across said premises for such purposes."

The title to the Southwick tannery, for the benefit of which this reservation was made, on April 1st, 1846, passed to David Pingree, who on May 23d, 1849, gave a bond to Henry Cutler to convey to him by deed of quitclaim, all his (Pingree's) right, title and interest, "in and to a certain estate situate in said Sidney, being the same now occupied by said Cutler for tanning and agricultural purposes," &c. The plaintiff claims a right to erect the dam, by virtue of the verbal permission of Cutler. If Cutler were to be regarded as the successor of Southwick by reason of his bond, and as such entitled to the benefit of the reservation, still it is difficult to perceive how the plaintiff can derive any benefit therefrom.

The reservation was for the benefit of Southwick or his

successors, and not for that of those claiming title to other mills, derived from other sources. The plaintiff is the owner of a saw-mill. It does not appear, nor is it alleged, that his title was from Southwick, or that the reservation was for the mills now occupied by the plaintiff. The reservation was for the benefit of Southwick and of the machinery owned by him, and not for that of others.

The direct interest in the premises passed to the defendant by his deed. The right reserved by the grantor was an incorporeal hereditament. It was not the land itself, but a right annexed to it, and it could only pass by grant. The grantor could only assign his reserved interest by writing, according to the express provisions of the statute of frauds. *Thompson* v. *Gregory*, 4 Johns. 83.

In the present case, Southwick conveyed to the defendant but twenty-three and one-half acres. The dam in dispute, besides flowing the land granted, flows likewise from fifty to a hundred acres of land belonging to the defendant. Southwick, by his reservation, could not and did not attempt to impose a burthen upon the other lands of the defendant. The dam cannot therefore be justified by the reservation under which it is claimed to have been built.

It is provided by R. S., c. 126, § 3, that no mill or dam shall "be placed on the land of any person, without such grant, or conveyance, or authority, as would be necessary by the common law, if no provision relating to mills had been made by any statute."

The right to erect and maintain a dam on the land of another, must be regarded as such an interest in real estate as cannot pass by parol. *Pitman* v. *Poor*, 38 Maine, 237; *Thompson* v. *Gregory*, 4 Johns. 81; *Cocker* v. *Cowper*, 1 Cr., M. & Ros. 118. The verbal license to erect, would not be legally binding on the defendant. It was held in *Mumford* v. *Whitney*, 15 Wend. 481, that a parol agreement that a party might abut and erect a dam upon the lands of another, not for a temporary, but for a permanent purpose, as the creation

of mills or other hydraulic works, was void within the statute of frauds. *Plaintiff nonsuit.*

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

TICONIC BANK *versus* JAMES STACKPOLE.

By the Act of 1841, c. 44, § 12, the protest of any foreign or inland bill of exchange, or promissory note or order, duly certified, by any notary public under his hand and official seal, is made legal evidence of the facts stated in such protest, as to the same, and also as to the notice given to the drawer or indorser, in any court of law.

The word "certificate" in the 6th section of the above chapter, is equivalent to the word "protest" in the 12th section, when it is under the hand and seal of the notary.

By common and commercial law, the certificate of a foreign notary, under his hand and notarial seal, of the presentment of a foreign bill for acceptance or payment, and of his protest, is received in all courts. Such protests prove themselves.

Drafts drawn in this State, and payable in other States, are foreign bills of exchange.

A note payable in another State, may be treated as a foreign bill, so far as to admit the protest of a foreign notary as evidence in a suit against the indorser.

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

ASSUMPSIT against defendant as indorser of five drafts and notes, all of which were payable out of the State.

The general issue was pleaded. The specifications of defence were, that the defendant had no notice of the non-payment of said drafts, and also, that the plaintiffs had taken and reserved more than the legal rate of interest on said drafts and notes.

The evidence being in, the case was withdrawn from the jury, and submitted to the full Court, by agreement of the parties, authorizing the Court to draw such inferences as a jury might legally draw from such of the testimony as was legally admissible, and to render such judgment as the law and evidence should require.

If the second specification of defence is made out, the Court are to render such judgment as to damages and costs as the case requires.

In case the plaintiffs are entitled to damages, the Court are to fix the amount.

J. H. Drummond, for plaintiffs, contended that they had introduced the protests of the notaries, under their hands and seals, stating that they presented the several drafts and notes at the places where they were payable, on the last day of grace; that payment was refused; and that they duly and officially notified the drawers and indorsers, under cover, to the address of Edward G. Hoag, cashier of the Ticonic Bank, Waterville Maine, per mail.

These protests are evidence of all the facts stated therein. R. S., c. 44, § 12; 23 Maine, 553.

Mr. Hoag testified that he delivered the notices to the defendant on the day of their arrival at the Waterville post office, when the mail arrived in season; if not, early next morning. This is using due diligence; and the defendant should be defaulted for the amounts of the notes and drafts, damages, interest and costs of protest.

The damages are three per cent. of the amount. R. S., c. 115, § 110.

S. Heath and *Stackpole*, for defendant, argued that the evidence by a notarial protest is prescribed in R. S., c. 44, § § 6, 12. By the former section his protests are required to be recorded in a book of records, and his copies or certificates shall be received as evidence of what he has done. By the latter section, "the protest duly certified under his hand and seal" is legal evidence of the facts stated in such protest.

The protest is the declaration in writing of what he has done, under his hand and seal. It requires the subscription of his name and the affixing of his notarial seal to make up the "protest." The statute appears to require something more to be done to make his official doings legal evidence.

It does not contemplate the introduction of the original protest, but a certified copy of it.

The papers introduced appear to be the original protests, and if such, then they are not the statute evidence. If it is said, if they are the original, they ought to answer equally as well as copies, the reply is, that the admission of such testimony is a mere statute regulation, and must be strictly pursued.

The protest which contains the doings of the notary, his name and seal, must be duly certified under his hand and official seal before it is legal evidence.

CUTTING, J.—In argument the plaintiff abandons his claim to damages on the draft of June 5th, 1854, and the defendant all opposition to a recovery on the note of July 22d, 1855. In relation to the other note of Sept. 14th, and the two drafts of Sept. 4th and 19th, 1854, the defendant contends, that he has received no legal notice of their being dishonored; because the evidence, by which such notice is attempted to be shown, is not that required by statute; that instead of the original protests, certified copies of them only are made admissible.

Prior to the R. S., of 1841, c. 44, § § 6 and 12, no protest of an inland bill of exchange, note or order was receivable in evidence as proof of the facts therein certified; such facts could only be established by the testimony of the notary himself taken in the form of a deposition, or elicited from him on the stand, subject to cross-examination; except in case of his decease or being beyond the jurisdiction, when his records were admissible upon the common law principle, as being the next best evidence, and by the statute of 1821, c. 101, for the same reason. *Holmes* v. *Smith*, 16 Maine, 181.

But by the common and commercial law the protest of a foreign bill of exchange was indispensably necessary, with certain exceptions, to fix the liability of the prior parties. "And the certificate of a foreign notary under his hand and official seal of the presentment of a foreign bill for accept-

ance or payment, and of his protest thereof for non-acceptance or non-payment, is received in all courts by the usages and courtesy of nations." Such protests are presumed to be in accordance with the law of the place where made; they prove themselves, and their contents are to be received as true; and the several States of our Union in this particular are considered foreign to each other. 3 Kent's Com. 93; Chitty on Bills, (ed. of 1836,) p. 642; *Townsley* v. *Sumrall*, 2 Peters, 170; *Holliday* v. *McDougal*, 20 Wend. 81.

Such was the law of this State in relation to foreign and domestic bills, until the enactment of 1841, c. 44, before referred to; when, by the 12th section, "the protest of any foreign or inland bill of exchange, or promissory note, or order, duly certified, by any notary public, under his hand and official seal, was made legal evidence of the facts stated in such protest, as to the same, and also as to the notice given to the drawer or indorser, in any court of law." This section was in affirmance of the common law relating to foreign bills, and embraced within its provisions all inland bills, notes and orders, so as to render all subjects of protests, and all protests alike receivable as evidence, a provision that should receive the approbation of the commercial community, as being a sure and expeditious mode of procuring and perpetuating testimony.

It is contended, however, by the defendant, that although the plaintiff has complied with the requirements of the 12th section, yet the original protest is not admissible to charge him, and he relies on the 6th section, which provides that "every notary public shall record at length in a book of records, all acts, protests, depositions, and other things, by him noted or done in his official capacity, and that all *copies or certificates*, by him granted, shall be under his hand and notarial seal, and shall be received as evidence of such transaction." This section refers to two species of evidence, viz., copies and certificates. A *copy* is a transcript from an original; whereas, a *certificate* is a declaration in writing, which, when under the hand and seal of the notary, becomes his protest, and is by

the 6th section denominated a certificate, and by the 12th a protest; the former before, and the latter after authentication, when they become the same thing.

Under either section, therefore, the protests were legally admissible, and, with the testimony of the cashier, are sufficient to fix the indorser.

We might, if it were necessary, come to the same conclusion upon other considerations.

The drafts being made payable in another State, are foreign bills of exchange. *Bank of U. S.* v. *Daniel*, 12 Pet. 32; *Warren* v. *Warren*, 16 Maine, 259.

A note payable at a place in another State, in a suit against the indorser, may, so far as to admit the protest as evidence, be treated as a foreign bill. *Carter* v. *Burley*, 9 N. H. 558, and cases there cited, and subsequently confirmed in a series of decisions by that court.

Consequently the protests of the notaries, residing in the State where the paper was payable, were legally admissible by the common law, independently of any statute regulation of this State.

In relation to the question of usury, we are of opinion that the testimony fails to establish that fact. And according to the agreement of the parties, the defendant must be defaulted and judgment rendered for the amount of the notes and drafts, (except the one on C. A. Blanchard & Co.,) with interest from the time they severally matured, damages at the rate of three per cent. and costs of protests.

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

INHABITANTS OF WINTHROP *versus* DANIEL A. FAIRBANKS.

An exception in a deed is always a part of the thing granted and of a thing in being.

A reservation is of a thing not in being, but is newly created out of the premises demised.

But exception and reservation have often been used indiscriminately, and the difference between them is so obscure in many cases, that it is not regarded; that which in terms is a reservation in a deed is often construed to be a good exception, in order that the object designed to be secured may not be lost.

When a reservation is construed to be an exception, no words of inheritance are necessary, in order that the rights reserved or excepted may go to the heirs or assigns of the grantor.

The words, in a deed, "reserving forever for myself, the privilege of passing with teams, &c. across the same in suitable places, to land I own to the south of the premises," confer the benefit of an exception in favor of the grantor, his heirs and assigns, as occupants of the remaining lands belonging to him, "south of the premises," the privilege reserved being appurtenant to such lands.

The grantee in a deed poll by its acceptance becomes bound by all its restrictions, limitations, reservations and exceptions; and the deed may charge other lands with a servitude, than those, which were the subject of conveyance.

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

This was an ACTION OF THE CASE for disturbing a way which the plaintiffs claimed across land of the late Elijah Fairbanks, jr., the father of the defendant.

After the evidence was out, the cause was taken from the jury by consent, and referred to the law Court, with power to find such facts and draw such inferences as a jury might. If, upon the evidence, the Court were of opinion, that the plaintiffs had a right of way, as alleged by them, the defendant was to be defaulted for nominal damages, otherwise, the plaintiffs were to become nonsuit.

The facts in the case are fully stated in the opinion of the Court.

Bradbury & Morrill, for defendants.

1. The reservation in the deed from E. Fairbanks, sen., to E. Fairbanks, jr., is "to himself," and not to his heirs and

assigns. It is a reservation *during the life of the grantor*, and at his decease, the right ceased.

The grant is general, and every thing passed except what was clearly reserved.

The instrument is to be construed most strongly against the grantor.

There are not only no words of inheritance, but there are those of limitation. The words "to myself," exclude by implication, all others at his decease. 2 Jarmon on Wills, 170; *Kirby* v. *Holmes*, 2 Wilson, 8.

In a later deed of other lands, when the grantor wished to make reservations of a similar right perpetual, he employed appropriate terms to do so. This fact shows the language to have been designedly selected, and the rest of the phrase, the "privilege of passing," tends also to show the intention that the reservation should not be perpetual.

2. The plaintiffs acquired no right of way across this piece of land, by their deed from Jesse L. Fairbanks, for the plain reason that he had none to convey. His grantor, Elijah, sen., had conveyed this tract to their grantor, Jesse L., in 1811, eight years before he deeded the plaintiffs' farm.

3. Elijah, jr.'s acts are not sufficient to enlarge the reservation.

4. No right has been acquired by adverse user. Such user, to give a right, must be under such circumstances as to give the general owner to understand that a right was being claimed.

Lancaster, for plaintiffs.

1. The reservation in the deed of 1811, was for the benefit of the grantor's land south of the pond, and was only beneficial to the grantor, as the owner of that land. So it passed to his grantees, when he conveyed the land south of the pond, as appurtenant to that land. *White* v. *Crawford*, 10 Mass. 183; *Mendell & al.* v. *Delano*, 7 Met. 176; *Bowen & al.* v. *Conner*, 6 Cush. 132.

2. The authorities cited require that this *reservation* should

be construed, if necessary, as an *exception* of this right of way for the use of the land south of the pond, and that it should in this form avail to the grantor, his heirs and assigns, as occupants of that land. The authorities also show, that the effect of such a deed is the same as if the deed had been in common form with no reservation, and the grantee at the same time had given back a deed conveying this right of way.

3. The road was as important and useful to Jesse L. and John, as it had been to their father.

The parties to the family division made in 1819, understood that they had mutual and reciprocal rights of way over each other's land, *and they always afterwards acted upon this view of the subject.*

The acts of the parties through the whole period from 1819, till after the death of Elijah, jr., furnish a contemporaneous, practical construction of the deeds. This intention, the plaintiffs claim, should be effectuated, if it can be done without violating any well established principle of law.

4. The plaintiffs contend, that the defendant is estopped to deny this right of way; — 1. By the deed of June 3, 1811, from his grandfather to his father. *Mendell & al.* v. *Delano*, 7 Met. 179; *Bowen & al* v. *Conner*, 6 Cush. 132. — 2. By the acts and declarations of his father from 1819, to his death.

5. The plaintiffs also contend, that as E. Fairbanks, jr., availed himself of the family settlement made Jan. 22, 1819, so far as a right of way was concerned over John and Jesse L's lot, then conveyed to him south of Jesse's lot, he should be estopped to deny to them the reciprocal right to cross his land for the use of theirs.

6. The plaintiffs are entitled to recover, because they and Jesse L., under whom they claim, have had the peaceable, uninterrupted, and adverse use of this way more than twenty years before the disturbance complained of. R. S., c. 147, § 14; 2 Greenl. Ev. § 539; 2 Greenl. Cruise, 87, and cases there cited; *Bolivar Man. Co.* v. *Neponsit Man. Co.*, 16 Pick. 241; *Melvin* v. *Whitney*, 10 Pick. 295.

7. John and Jesse L. did not occupy under a *mistake*,

as defendant contends, *but under a void grant*, which would be clearly a disseizin. 1 Greenl. Cruise, 52, note 3.

TENNEY, C. J. — For some years prior to the year 1811, Elijah Fairbanks, sen., owned a tract of land north and south of Narrow's pond, so called, and extending therefrom to the east and to the west. It is understood that the residence of the owner was on the north side of the pond. In order to have a convenient mode of access to the land upon the south of the pond, he constructed a way from one side to the other around the eastern end of the pond, as early as the year 1807.

On June 3, 1811, he conveyed a parcel of this land, situated upon the north side of the pond, and called the thirty-two acre piece, to his son, Elijah Fairbanks, jun., with the following clause after the description of the land conveyed: — "Reserving forever for myself, the privilege of passing with teams and cattle across the same, in suitable places, to land I own to the south of the premises."

By an arrangement between Elijah Fairbanks, sen., and his sons Elijah, John and Jesse L. Fairbanks, on Jan. 22, 1819, the father conveyed to each of the sons other portions of his estate; to John a lot next south of that which he had conveyed before to Elijah; to Jesse L. the parcels which are now owned by the plaintiffs; and to Elijah a lot still further south, and in each of these deeds was the following, after a description of the premises: — "reserving to myself, and my heirs and assigns, the privilege of a bridle road or way, in any suitable place, for the purpose of passing and repassing with creatures and teams to and from any adjoining land, owned by any of them."

The deed from Jesse L. Fairbanks to the plaintiffs, dated April 15, 1837, contains the following, after the premises are described: — "also a right of way to the said, the inhabitants of the town of Winthrop, their successors and assigns forever, for all purposes necessary and convenient, to and from the premises last described, across the land of said Elijah and

John Fairbanks, according to reservations of right of way in their deeds of said land from my late father, and as has been used and enjoyed in carrying on and managing the land hereby conveyed, in passing to and from the several parcels thereof, through and across the land of said Elijah and John Fairbanks."

The defendant is the son of Elijah Fairbanks, jun., (who died about four years before the trial,) and he forbade and prevented the plaintiffs from passing over the parcel conveyed to his father in 1811, upon the way thereon constructed, in going from one part to another of the land held under the deed of Jesse L. Fairbanks to them. And the legal question presented by the report and argument, is whether they had the right of passage attempted to be exercised.

The defendant denies the right of the plaintiffs to pass over the land conveyed to his father on June 3, 1811, on the ground that the reservation was of a right of way, *in gross* to the grantor alone, and did not pass to Jesse L. Fairbanks, and could not therefore be transmitted by the latter to the plaintiffs; or at any rate, the right could not exist after the death of Elijah Fairbanks, sen., which occurred in 1836. The plaintiffs do not admit that the reservation in the deed of Elijah Fairbanks, sen., to his son Elijah, of June 3, 1811, is one in gross to the grantor only, but that the land conveyed by that deed is charged with the easement and servitude annexed to the lands, which continued to be owned, after that deed by the grantor, as appurtenant thereto.

A reservation has sometimes the force of a saving or exception. Co. Litt. 143. Exception is always a part of the thing granted, and of a thing in being; and a reservation is of a thing not in being, but is newly created out of the lands and tenements demised, though exception and reservation have been used promiscuously. Co. Litt. 47, a. And it is well settled, that in giving construction to instruments in writing, the intention of the parties is to be effectuated, and if a deed cannot effect the design of them in one mode known to the law, their purpose may be accomplished in another,

provided no rule of law is violated. Hence, the distinction between an exception and a reservation is so obscure in many cases, that it has not been observed; but that which in terms is a reservation in a deed is often construed to be a good exception, in order that the object designed to be secured may not be lost.

If the reservation in the deed of Elijah Fairbanks, sen., is to be treated as an exception and the recognition of a way over the land described, then being made by the owner of the land for himself, while he was in the occupation and use thereof, it would confer the benefit of an exception to the grantor, his heirs and assigns, as occupants of the remaining lands belonging to him, and it would become appurtenant to these lands; and no words of inheritance would be necessary. It was a right, which, if an exception, did not pass to the grantee. This doctrine is fully recognized, in the cases cited for the plaintiffs, of *White* v. *Crawford*, 10 Mass. 183; *Murdell & al.* v. *Delano*, 7 Met. 176; *Bowen & al.* v. *Conner*, 6 Cush. 132. In the last case it is said, that the law in Massachusetts is settled by a series of decisions, that a right of way may be as well created by a reservation or exception, in the deed of the grantor, as by a deed from the owner of the land to be charged.

The evidence reported shows, that Elijah Fairbanks, sen., regarded the passage across the parcel first conveyed to his son Elijah, to his lands south of the pond, as a convenient, if not a necessary mode of having access thereto, while he was the owner of the whole; as he had prepared a road thereon for that purpose. When he conveyed the thirty-two acre piece, he retained the right to pass over the same forever to himself. When he alienated the lands south of the pond, it was equally important to those who had an interest therein, and who owned a part or the whole of his lands on the north side, that this right of passage should continue to them, as to have previously existed in him. And if there had been no reservations in the deeds given by the grantor to his sons on Jan. 22, 1819, we are entirely satisfied, that

the right of way reserved, or excepted in his deed of June 3, 1811, was intended for the benefit of his lands on the south side of the pond, and was annexed as appurtenant thereto, and would have passed by his deed to Jesse L. Fairbanks, and from him to the plaintiffs.

On other grounds, we think the right of passage over the thirty-two acre lot, clearly exists in the plaintiffs. The grantee in a deed poll, by its acceptance, becomes bound by all the restrictions, limitations, reservations and exceptions contained in it; and the deed may charge other lands with a servitude, than those which were the subject of conveyance. *Vickerie* v. *Buswell*, 13 Maine, 289; *Newell* v. *Hill*, 2 Met. 180.

On Jan. 22, 1819, Elijah Fairbanks, sen., was the owner of the whole estate, excepting the thirty-two acre lot, previously conveyed to his son Elijah. Over the portion so conveyed, it is admitted he had the right of way to his lands on the south of the pond. On that day he made several conveyances of parts of his farm, remaining, to his three sons, one of whom was Elijah, with the reservations therein contained. These deeds were accepted, and the grantees became bound by exceptions, which were for the benefit of the grantor, his heirs and assigns. The exceptions were not limited to the right of passage over lands, conveyed at that time, but they extended it to and from any adjoining lands, owned "by any of them." Elijah Fairbanks, jr., was then the owner of the land conveyed to him on June 3, 1811, and the land was adjoining a part of that conveyed to Jesse L. Fairbanks, the plaintiffs' grantor. This reservation or exception would therefore apply to the lot of land over which the defendant denies to the plaintiffs the right of passage; and the interruption of this right was a wrong on the part of the defendant, for which this action can be maintained. *Defendant defaulted.*

Judgment for damages in the sum of one dollar.

HATHAWAY and CUTTING, J. J., concurred.

RICE, J., concurred in the result.

MAY, J., did not sit.

THOMAS C. SMITH *versus* PAUL LADD.

In two deeds made at different periods to one grantee, the following reservations were included, viz.: — In the first deed, "I do reserve a driftway from the county road, on to the east end of said lot, &c., and another driftway on to the west end of said lot, where it will best convene me;" and in the second deed, "I do reserve a county road across, &c., and a driftway from that county road to get on to the west end of said lot in the most convenient place to accommodate me," &c.

Held, that the reservation in each deed should be treated as an exception, and for the benefit of the portion of the lot remaining in the grantor, and as appurtenant to that portion.

The right of way thus reserved was not limited to foot passengers, but extended to passage for teams and all such uses as might be convenient in the occupation and improvement of the land.

A "driftway" is defined to be a "common way for driving cattle."

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

This was an action of TRESPASS *quare clausum* for breaking and entering the plaintiff's close situated in Fayette, and being the north part of lot No. 41, in said town. The defendant owned the south part of the same lot. Both claimed title from the same grantor, through sundry mesne conveyances. The defendant claimed a right of way over a portion of the plaintiff's premises by virtue of certain reservations in the deeds of their common grantor, and on this right rested his defence. The language of the reservations in the deeds, and other facts of the case, appear in the opinion of the Court.

It was agreed, that upon so much of the testimony as is legally admissible, the Court of law were to draw such inferences as a jury would be authorized to draw, and to enter a nonsuit or default as the law might require. If a default is entered, the Court is to appoint a referee to assess the damages, unless the parties agree upon the amount for which judgment is to be rendered. If the defendant is adjudged to have a right of way across plaintiff's land, plaintiff is to become nonsuit; otherwise, the defendant is to be defaulted.

E. Kempton, jr., for plaintiff, contended: —

1. The defendant has no right of way across the plaintiff's close by reservation and grant.

The reservation in the deed of October 8, 1812, of the 18 rod strip from Judkins to Jonathan Clough was merely a personal right, and not assignable. Also, the reservation in the deed of March 17, 1813, from Judkins to Stephen B. Clough, of the north part, was of the same character, and was not assignable. *Wadsworth* v. *Smith*, 11 Maine, 278; *Lord* v. *Lord*, 12 Maine, 88.

These rights of way, thus reserved, are so strictly and exclusively personal rights, and not appendant or annexed to the estate, that in the former case Judkins could not have taken another person in company with him, and, in the latter case, no one but Jonathan Clough. 3 Kent's Com., 419.

If these words were doubtful or inapt or capable of two constructions, the Court will adopt that construction which will operate most strongly against the grantor. *Adams* v. *Frothingham*, 3 Mass. 352; *Worthington* v. *Hylyer*, 4 Mass. 196.

Where the intention of the parties can be discovered by the deed, the Court will carry that intention into effect, if it can be done consistently with law. *Bridge* v. *Wellington*, 1 Mass. 219, 227.

In the construction of a deed, the Court will take into consideration the circumstances attending the transaction, and the particular situation of the parties, the state of the country, and of the thing granted or reserved at the time, in order to ascertain the intent of the parties. *Adams* v. *Frothingham*, above cited.

2. The defendant has acquired no right of way by prescription. Nothing can be claimed by prescription which owes its origin to matter of record. For the law allows prescription only in supply of the loss of a grant. Cruise on Real property, Title 31, c. 1, § § 8, 14.

It is apparent and certain that the claim of defendant of the right of way across plaintiff's land owes its origin to matter of record, to wit, the reservations by Judkins, and grants from him, through others to the defendant. If he has failed to show a good title by virtue of grant and by record evidence, he cannot now set up title by prescription, this being

inconsistent with the former. *Lang* v. *Lunt,* 37 Maine, 69; *Addington* v. *Clade,* 2 Black. 989.

In the case of *Addington* v. *Clade,* which was trespass *quare clausum,* the defendant justified under a prescriptive right to have and use the common of pasture.

The plaintiff traversed the right of common by prescription, and produced two ancient charters without date, containing a grant of common.

The Judge at *Nisi Prius,* being of opinion that the grants were inconsistent with the plea of prescription, a verdict was given for the plaintiff.

Upon motion for a new trial, it was urged for the defendant, that these grants might only be in confirmation of an antecedent prescriptive right, and these were not inconsistent with it.

The full Court was of opinion, that these grants might either be before the time of memory, or else they might have been only in confirmation of a prior right, in neither of which cases would they have been inconsistent with a plea of prescription.

No such argument can be urged for the defendant in this case. The grants are of recent date, showing that they are within the time of memory; and all the testimony proves, conclusively, that this grant was not in confirmation of a prior right. Every prescription must have a continued and peaceable usage and enjoyment. For, if repeated usage cannot be proved, the prescription fails. Cruise, Tit. 31, c. 1, § § 19, 26.

The use or possession on which such title is founded must be uninterrupted, and adverse or of a nature to indicate that it is claimed as a right, and not the effect of indulgence, or any compact short of a grant. *Gayetty* v. *Bethune,* 14 Mass. 49, 53; *Odiorne* v. *Wade,* 5 Pick. 421; *Sumner* v. *Tileston,* 7 Pick. 198.

3. The defendant has not this right of way by estoppel. Counsel on this point cited *Eastman* v. *Cooper,* 15 Pick. 276; *Adams* v. *Moore,* 7 Maine, 86.

S. Lancaster, for defendant.

The legal effect of these two deeds was to subject these

two strips to the servitude of this passage-way, and to annex it as an easement to the west end of the defendant's lot.

This the said Judkins had a perfect right to do, he then owning the whole of lot No. 41. It then became an easement appurtenant to the west end of the lot now owned by defendant, and still remains so, unless it has in some way been lost or extinguished. *White* v. *Crawford*, 10 Mass. 183.

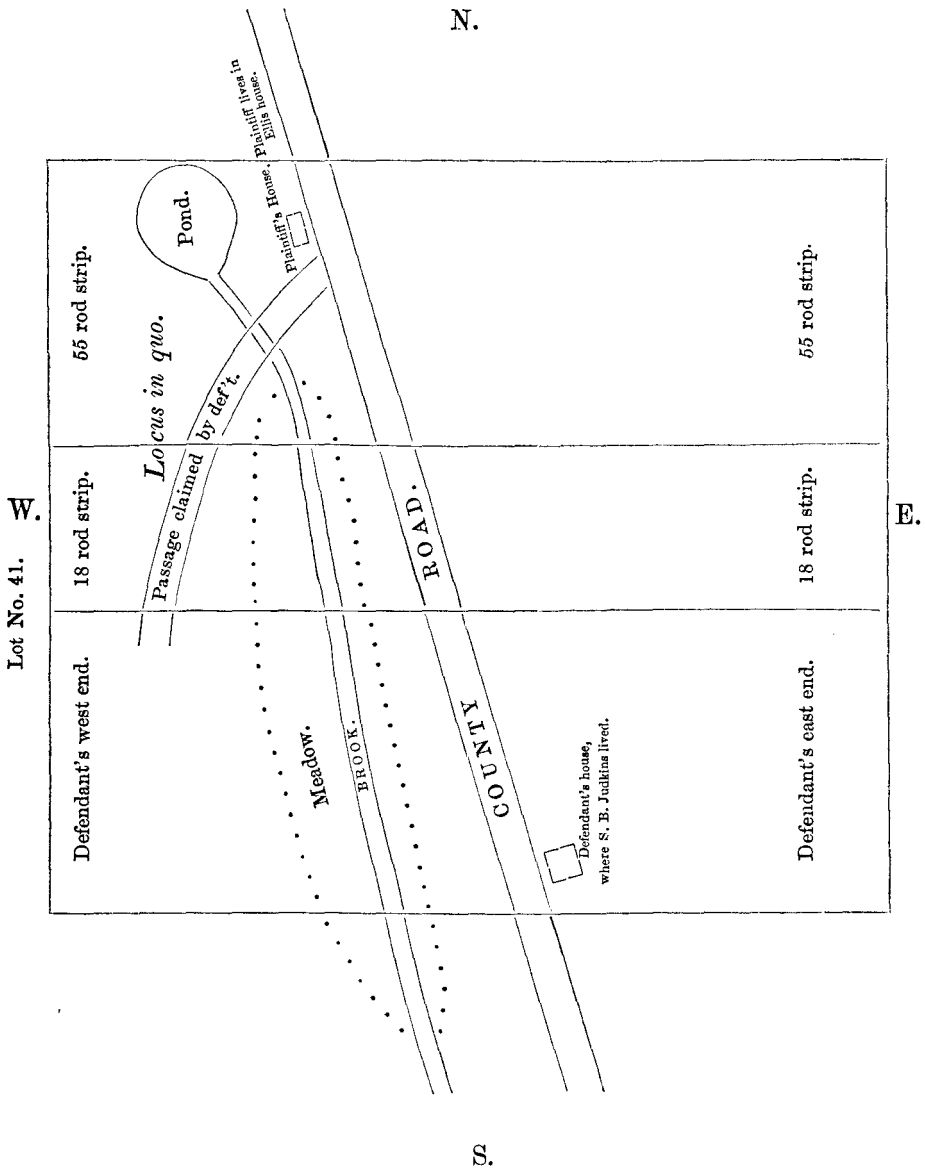
It has never been released or extinguished. On the contrary, it has always been used as belonging to the west end of defendant's lot from the time of its first creation in 1812 and 1813, to the present time.

The law contended for by defendant as governing this case is this, that this right of way was created for the benefit of what is now the defendant's west end, by the reservations in the deeds from Stephen B. Judkins to Jonathan Clough and Stephen B. Clough, respectively, of the 18 rod and 55 rod strips; the first of October 8, 1812, the second, March 17, 1813; and being so created and established, was conveyed to Samuel Wadleigh by Stephen B. Judkins by his deed of April 10, 1824, and would have been, even without an express grant; this doctrine is fully supported by the authority cited. *White* v. *Crawford*, 10 Mass. 183, and by *Bowen & al.* v. *Conner*, 6 Cush. 132.

And being so created and conveyed, it has come down to the defendant through the intermediate conveyances, and is now rightfully and legally in him, and would have been so without being specifically granted. *Mendell & al.* v. *Delano*, 7 Met. 178.

Again, the original deeds from Stephen B. Judkins of the 18 rod and the 55 rod strips, through which the plaintiff traces his title, having reservations in them of this passage-way, bind not only the original grantees but those claiming under them. *Mendell & al.* v. *Conner*, 6 Cush. 137.

The plaintiff then is estopped to claim this right of a passage-way just as much as the original grantees of Stephen B. Judkins would have been.


N.
W.
E.
S.
Lot No. 41.
Defendant's west end.
18 rod strip.
55 rod strip.
Locus in quo.
Passage claimed by def't.
Pond.
Plaintiff's House.
Plaintiff lives in Ellis house.
Meadow.
BROOK.
ROAD.
COUNTY
Defendant's house, where S. B. Judkins lived.
Defendant's east end.
18 rod strip.
55 rod strip.

TENNEY, C. J.—Stephen B. Judkins was formerly the owner of the whole lot No. 41, and under him both parties claim. On Oct. 8, 1812, he conveyed a strip through the centre of the lot from east to west eighteen rods in width, to Jonathan Clough, leaving a parcel of the same lot on each side; and on March 17, 1813, he conveyed to Stephen B. Clough, the whole of that part of lot No. 41, lying to the north of that previously conveyed. Through several mesne conveyances, the plaintiff derived title to these two strips of land conveyed by Stephen B. Judkins.

In the first of the deeds mentioned is a reservation or exception in these words,—"I do reserve a driftway from the county road, on to the east end of said lot, on to the south part, and across to the north part, in the most convenient place, and another driftway on to the west end of said lot, where it will best convene me. And I do reserve the county road, that is across said land, and you are to have the privilege to come on to my land to get on to the east end of yours, if it is needed or thought convenient;" and in the second of those deeds is the following, "I do reserve a county road across said land and a driftway from that county road to get on to the west end of said lot in the most convenient place to accommodate me and Jonathan Clough."

On April 10, 1824, Stephen B. Judkins conveyed the remainder of lot No. 41, being the southerly portion thereof, to Samuel Wadley, who on August 23, 1834, conveyed the same to James L. Williams. On April 18, 1835, James L. Williams conveyed the same to John B. Williams, from whom it passed to the defendant by deed, dated Oct. 3, 1835.

The intention of the parties to the deeds containing the reservations mentioned is too manifest to be misunderstood. They do not purport to be of the right of way *in gross* to the grantor, and to him only. The county road is mentioned as reserved, and the driftway is to allow of general access on to the two ends of lot No. 41, from that road. The convenience and necessity of this way was as great to subsequent owners of the part remaining as to the original proprietor.

As Jonathan Clough was the owner of the strip, 18 rods in width, at the time the north strip was conveyed to Stephen B. Clough, it was certainly proper that the right of way across the latter to the road should be secured to the proprietor of the former, especially as such right was granted partially at least in the conveyance originally made to Jonathan Clough.

The right of passage in one deed was where it would best convene the grantor, and in the other, in the most convenient place to accommodate the grantor and Jonathan Clough. This language cannot with propriety be limited in its construction, so as to confine the right of the driftway to the grantor and Jonathan Clough, but obviously has reference to the place of passage.

We cannot doubt that the reservation in each deed should be treated as an exception, and for the benefit of the portion of the lot which remained in the grantor, and they were appurtenant to that portion. Being so, they were appendages thereto, and passed with the land itself when it was conveyed, according to the principles which are treated as well settled in the case of *Winthrop* v. *Fairbanks*, (*ante page* 307.)

It is contended that if the right of way reserved was appurtenant to the land, the title of which remained in the grantor, that this right could not extend further than to entitle the owners to the privilege of passing on foot. The language used must have a reasonable construction given to it, under all the facts and circumstances of the case. Nothing appears, by which we can infer that the right was designed to be thus restricted. A passage for teams at that time would be as necessary and as convenient in making the land profitable as for foot passengers. Indeed, the word itself in the deeds used to define the right has a more extended signification. "Driftway" is defined by lexicographers to be a "common way for driving cattle." The parties evidently intended the privilege to extend to all such uses as might be convenient in the occupation and improvement of the land to be benefited. *Plaintiff nonsuit.*

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

TICONIC BANK *versus* JAMES STACKPOLE.

The certificate of protest, by a notary public, of a dishonored note, contained these words, — "I duly notified James Stackpole, indorser of said note, of said non-payment," — *Held*, that there being no qualification of the word "notified," as to the mode of notice, it must be regarded as having been verbal.

Verbal notice to an indorser, residing in the town where the note is payable, is sufficient.

If, from the whole protest, it appear, that in fact, notice was legally given, the insertion of the word "duly," cannot impair its effect.

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

ASSUMPSIT against the defendant as indorser of a note, of which the following is a copy: —

"$1000. "Waterville, March 2, 1855.

"Three months from date, for value received, we promise to pay James Stackpole, or order, at Ticonic Bank, one thousand dollars.

(Signed) "F. B. Blanchard,
"D. L. Stilson."

(Indorsed) "James Stackpole."

The plea was the general issue; the specification of defence was denial of notice of non-payment.

The plaintiff read the note, and also the copy of the record of protest of said note, by the notary public, under his hand and official seal.

Whereupon the case was withdrawn from the jury, and submitted to the full Court by the agreement of parties, upon the evidence introduced, subject to all legal objections, save any objection to the want of a seal upon the copy of protest, and the Court is to enter such judgment as the law and evidence require, with power to draw the same inferences as a jury might from the evidence.

J. H. Drummond, for plaintiffs.

The only question presented by the specifications is, denial of notice of non-payment.

The plaintiffs introduced the copy of the notary's record under his hand and official seal.

By R. S., c. 44, § 6, notaries are required to record all acts, protests, &c., "and all copies or certificates by him granted shall be under his hand and notarial seal, and shall be received as evidence of such transaction."

Also, "the protest of any foreign or inland bill of exchange or promissory note or order duly certified by any notary public under his hand and official seal, shall be legal evidence of the facts stated in said protest as to the notice given to drawer or indorser in any court of law." R. S., c. 44, § 12; *Fales* v. *Wardsworth*, 23 Maine, 553.

The certificate of the notary in this case states, that he presented the note at the place where it was payable, payment was refused, and that he duly notified the defendant the same day of the non-payment.

By the agreement the defendant should be defaulted for the amount of the note and the notary's fees. R. S., c. 44, § 14.

S. Heath and *Stackpole*, for defendant.

The only evidence introduced to charge the defendant is the copy of the notarial protest, which was objected to.

It is attempted to hold the respondent upon these words of the notary: — "And on the same day I duly notified James Stackpole, Esq., indorser of said note, of said non-payment."

The certified copy of a notarial protest is made legal evidence of the facts therein stated, R. S., c. 44, § 12; but this is defective in not stating the facts regarding any notice given to defendant. The notary should state what he has done, and the manner in which it has been done. The mode of giving notice should be stated clearly. Without it, his copy can be no evidence of notice. *Bradley* v. *Davis*, 26 Maine, 45.

All the notary has stated is his opinion. He might consider it very proper, in a case like this, to put a notice into the post-office, or send it by some third person, which might never reach the defendant, and call these, or any other modes he might adopt, due notice. The law does not allow him to be the arbiter of what is "due notice." That solely belongs to the Court and jury.

APPLETON, J. — By R. S., c. 44, § 12, it is enacted that "the protest of any foreign or inland bill of exchange or promissory note or order, duly certified by any notary public under his hand and official seal, shall be legal evidence of the facts stated in such protest, and also as to the notice given to the drawer or indorser in any Court of law."

From the protest of the notary public, which by agreement is made part of the case, it appears, that on the last day of grace, having the note in suit, he went to the Ticonic Bank where the same was payable, and presenting the same to the cashier, demanded payment thereof which was refused, the cashier saying there were no funds there to meet it; and that on the *same day* he *duly* notified James Stackpole, Esq., (the defendant,) indorser of said note, of *said* non-payment. The notice to the indorser, so far as regards time, was *duly* made, for it was made on the same day the note was protested.

The indorser was notified of "*said non-payment*," that is of the non-payment of the note in suit, after presentation at the bank where the note was payable. "A waiver of notice," remarks JOHNSON, J., in *Youngs* v. *Lee*, 2 Kerwan, 554, "was held in *Caddington* v. *Davis*, (1 Coms. 186,) to include demand and all other acts in law necessary to charge an indorser. Upon the same principle, the statement in this notice, dated on the day when the note was payable, must be intended to mean that it had been demanded and payment refused upon the day when it became due." In the present case, the indorser was seasonably notified of all the facts necessary to be communicated to fix his liability.

The protest, which is the language of the notary, is, "I duly notified James Stackpole, indorser of *said* note, of *said* non-payment." It is objected, that it does not appear in what mode the notice was given, as whether it was verbal or written, and reliance is placed by the learned counsel for the defence upon the case of *Bradley* v. *Davis*, 26 Maine, 45, in which WHITMAN, C. J., intimates, if the certificate of the notary were to be taken as conclusive, that it should appear in the protest whether the notice was verbal or in writing,

and, if in writing, how the same was transmitted or where it was left.

In this case there is no qualification of the word "notified," as to the mode of notice. It is the act of the notary, and the notification is to the indorser. In the absence of any qualification, it must be regarded as verbal, and that, as the defendant is a resident of the town where the note was payable, is sufficient.

The exception to the notice arises from the use of the word "duly" as qualifying the word "notified." Had that word been omitted, it is not insisted that the protest would have been defective. But if, from the whole protest, it appear that in fact notice was legally given, the insertion of "duly" cannot affect or impair the legal notice which otherwise the protest fully shows.

The notice was of all the facts required to charge the indorser. It was in due season, and the right of the plaintiffs to recover must be regarded as having been established.

Defendant defaulted.

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

HARVEY P. TOOTHAKER *versus* A. J. ALLEN *& al.*, AND E. J. ALLEN, *Trustee.*

The general denial of liability by a trustee, is in the nature of a plea, and subject to a full subsequent investigation by question and answer.

A trustee must, by his disclosure, distinctly and unequivocally negative the idea that he had funds of the principal defendant in his possession, or he will be charged.

If the trustee, in his disclosure of facts, is vague and unsatisfactory; or if, keeping accounts with the principal defendant, he fails to state them; or if, doing business with the principal defendant, and not keeping such accounts, he fails to assign a sufficient reason for the neglect; he must be charged.

EXCEPTIONS on trustee's disclosure. From *Nisi Prius*, RICE, J., presiding.

The trustee in this case, having made a disclosure, was discharged, to which the plaintiff excepted.

The case was submitted to the full Court without argument.

Larrabee, for trustee.

CUTTING, J.—The trustee, in his introductory and general answer, denies, in the language of the statute, all liability as the trustee of the principal defendants, at the time of the service of the process upon him. But such a denial must be considered in the nature of a plea, which is to be sustained by answers to interrogatories propounded by the plaintiff, if he seeks an investigation and gives the trustee a full opportunity to disclose the true business relations subsisting between himself and the defendants; otherwise the trustee would be constituted the judge of the law as well as of matters of fact, with the exclusive privilege of drawing inferences and conclusions, which more properly belong to the Court. The trustee has had such an opportunity, and his disclosure of facts is vague and unsatisfactory, tending to show either that he covers the defendants' property, or that he may be indebted to them. If he keeps accounts, he should have stated them, or have given some sufficient reason for his neglect. *Sebor* v. *Armstrong & Trustee*, 4 Mass. 206; *Shaw* v. *Bunker*, 2 Met. 376. He may have been indebted to his brothers to the amount of hundreds of dollars, from any thing which appears to the contrary in his disclosure, and still have eluded the charge of perjury. On *scire facias*, perhaps, he may have another opportunity of disclosing a more definite state of facts. *Exceptions sustained and Trustee charged.*

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

THOMAS F. DAY *versus* EBENEZER FRYE.

Under the Revised Statutes, brief statements of matters of defence, aside from such as would come under the general issue, must be certain to a common intent, as much as if stated in a special plea.

A notice of special matter to be given in evidence in defence under the general issue, must contain as distinct an allegation of the grounds of defence as would be required in a special plea, though not set forth with the same technicality.

But rules of special pleading can rarely be applied to brief statements and counter brief statements. The object of allowing these was to obviate that exactness of allegation and denial, by which parties were sometimes so entangled as to prevent a trial upon the merits.

It has been a favorite object of modern legislation to divest legal proceedings of abstruse technicalities. *Hence* the abolition of special pleading.

Another object has been to facilitate the administration of justice and to reduce the expenses incident thereto. *Hence*, actions are required to be entered on the first day of the term, and not later, except by special leave; and writs to be filed as early as the second day. *Hence* also, within a reasonable time, specifications of the nature and grounds of defence are required to be filed, and all allegations of the writ and declaration, not denied, are to be regarded as admitted at the trial.

The rule of Court, requiring that specifications of the nature and grounds of defence shall be filed in all actions, in accordance with the statute of March 16th, 1855, c. 174, § 4; that the defence shall in all cases be confined to the grounds therein set forth; and that all allegations in the writ and declaration, not therein specifically denied, shall be regarded as admitted for the purposes of the trial, is not repugnant to the provision of R. S., c. 115, § 18, abolishing special pleading, but is in strict harmony therewith and adapted to give it force and effect.

FACTS AGREED. Before MAY, J., presiding.

ASSUMPSIT upon an order of which the following is a copy:

"$100. E. Frye:—Pay T. F. Day one hundred dollars on my account. Vassalboro', 7th Mo. 3, '54. F. D. Dunham."

Indorsed,—"Rec'd twenty dollars. 7th Mo. 8th, 1854. $20,00."

The plea was the general issue.

The specifications of defence were,—"Action on order.—Defence, no funds in hands of drawee."

The declaration in the writ was upon the order accepted by the defendant.

The plaintiff read the order and there rested his case.

Whereupon the case was withdrawn from the jury and submitted, by the agreement of parties, to the full Court, who are to enter up judgment as the law and evidence require.

The defendant objected to the reading of the indorsement without proof of the handwriting.

Drummond, for plaintiff.

The case was tried at March term, Kennebec, 1856.

The declaration shows a good cause of action.

The specifications do not deny any of the allegations in the declaration. By the 9th rule, then, of this Court, all the allegations in the declaration are to be regarded as admitted for the purposes of the trial.

As the defendant introduced no proof, the plaintiff, had the case gone to the jury, would have been entitled to a verdict, for the amount due on the order declared on.

He is now entitled to judgment for that amount.

Vose, for defendant.

By c. 115, § 18, R. S., special pleading is abolished, and the defendant may in all cases plead the general issue.

The law of 1855 does not repeal, nor in any way conflict with c. 115, § 18, of the Revised Statutes. The sole object of the statute of 1855 was, to inform the Court what actions were intended for trial, and the adverse party of the general nature of the defence. It was not the intention of that Act, to limit the party to the defence specified. Hence the language of the statute, "he shall file a specification *in brief*."

Rule 9th of the Court, it is contended, is in direct conflict with the Act abolishing special pleading. R. S., c. 115, § 18. It is an attempt on the part of the Court, *by legislation*, to require parties to plead specially, and to limit them to their special plea, when the law had abolished special pleading.

The law of 1855, under which the rule was made, it is to be observed, has been repealed by the Act of 1856, April 9th, in relation to the Supreme Judicial Court.

The plaintiff having stopped in his testimony, without having made out a *prima facie* case, should become nonsuit.

Drummond, in reply.

It would seem, that a rule adopted after due deliberation by the whole Court, would have the binding effect of a decision.

But the rule is not invalid.

I. It is merely declaratory of the statute of 1855, and if the rule had not been adopted, the practice must have been the same under the statute, as is required under the rule. By the statute itself, the defendant could set up no defence, other than that stated in his specifications.

II. The rule simply obliges defendants to assert their rights seasonably; it deprives them of no rights. It is precisely similar to the rule requiring pleas in abatement to be filed within the first two days of the term.

The rule comes within the spirit of the decisions in *McDonald* v. *Bailey*, 14 Maine, 101; *Willis* v. *Cresey*, 17 Maine, 9; *Sellars* v. *Carpenter*, 27 Maine, 497; *Libbey* v. *Cowan*, 36 Maine, 264. In these cases, two rules of the Court are sustained, and vindicated against this same objection.

III. The rule does not conflict with the statute abolishing special pleading, any further than the statute, under which it was made, conflicts with it.

But, in truth, the rule in question concerns only the time of filing statements or pleadings. It has nothing to do with their forms.

The repeal of the law of 1855, since the case was made up, cannot in any way affect it.

RICE, J.—By § 4, c. 174, laws of 1855, it was provided that, in "all civil cases hereafter entered in said (Supreme) Court, when the defendant appears and desires a trial, he shall, at least fourteen days before the commencement of the term next after the entry of the action, or service on him, file with the clerk of the Court a specification in brief of the nature and grounds of his defence, with a declaration signed by himself or his attorney that the declarant believes that there is a good defence to all or a part of the plaintiff's claim, and that he intends, in good faith, to make such defence. And no action

shall be placed upon the trial docket unless such specification and declaration has been filed as aforesaid."

"The Court shall, from time to time, establish and record all such rules and regulations as may be necessary, respecting the modes of trial and the conduct of business, not being repugnant to law, whether in relation to suits at law or in equity." R. S., c. 96, § 9.

In July, 1855, the full Court, among other rules and regulations, established the following with regard to *specifications of defence.*

"Parties filing specifications of the nature and grounds of defence, with the clerk, under the Act of March 16, 1855, (c. 174, § 4,) shall in all cases be confined, on the trial of the action, to the grounds of defence therein set forth; and all matters set forth in the writ and declaration, which are not specifically denied, shall be regarded as admitted for the purposes of the trial."

It is now contended that this rule is inoperative and void, because repugnant to the provisions of c. 115, § 18, of R. S., by which special pleading is abolished. Is this so?

Section 18, c. 115, provides that the defendant may, in all cases, plead the general issue, which shall be joined by the plaintiff, and he may give in evidence any special matter in defence, when the issue is to be joined to the country; *provided he shall, at the same time, file in the cause a brief statement of such special matter.*

The statute providing that brief statements may be filed with the general issue, must be regarded as requiring a specification of matters relied upon in defence, aside from such as would come under the general issue, to be certain to a common intent, as much so as if insisted on in a special plea; and no proof is admissible, except in support thereof, or of the defence under the general issue. *Washburn* v. *Mosely*, 22 Maine, 160.

A notice of special matter to be given in evidence under the general issue, must contain as distinct an allegation of the grounds of the defence as would be stated in a special plea,

although it need not have the technicality of a special plea. *Brickett* v. *Davis*, 21 Pick. 404.

The rules applicable to special pleading can rarely be applied to brief statements and counter brief statements. One of the important purposes designed to be accomplished by allowing them to be used instead of pleas and replications, was to relieve the parties from that exactness of allegation and denial, by which parties were sometimes so entangled as to prevent a trial upon the merits. *Trask* v. *Patterson*, 29 Maine, 499.

To divest legal proceedings of all abstruse technicalities has been a favorite object of modern legislation. Hence the abolition of special pleading and the substitution of the proceeding by brief statement. It was to render simple, plain and certain, that which before, to the common mind, at least, was dark, complicated and uncertain.

Another object of modern legislation has been to facilitate the administration of justice, and to reduce as much as practicable the expense incident thereto.

Section 1, of c. 115, provides that no action shall be entered in the Supreme Judicial Court after the first day of the session thereof, without the special permission of the Court. The object in view, in requiring the action to be entered on the first day of the term, was to enable the defendant to file any motion or plea which he might desire for the abatement of the action, before large costs had accrued, and to this end such pleas and motions are required to be filed as early as the second day of the term. Then again, to the end that defendants may have an opportunity to be fully informed of the character of the proceedings which may be instituted against them, and know how to file their specifications or other grounds of defence, a rule of Court provides, that "writs are to be filed before entry of the action, and are to remain on file."

The plaintiff thus having, by statute provision, and a rule of Court designed to make that provision effective, entered his action and placed his writ containing his claim and the

grounds on which it rests, within reach of the defendant, the Legislature again interpose and say to the defendant, that after a reasonable time he shall disclose to the plaintiff the grounds of his defence, or in the language of the statute, he shall "file with the clerk of the Court a specification, in brief, of the nature and grounds of his defence." The objects of these provisions are most manifest; they are simply, that each party may be fully apprised, at an early day, of the claims and answers of the other, and of what is really in controversy between them. These claims and answers are required to be set out substantially; in brief, simple, but distinct language, without technical formality.

Then comes in view another object of the Legislature; the prevention of unnecessary cost to the parties. Hence, the provision of the rule, "and all matters set forth in the writ and declaration, which are not specifically denied shall be regarded as admitted for the purposes of the trial." And why should they not be? The rule does not deprive the defendant of the right to call upon the plaintiff to prove every allegation in his writ and declaration. It only requires the defendant to notify his opponent of the points in his claims which he intends to controvert, to the end that he may be prepared with testimony on the contested matters, and that he may not bring in witnesses and thereby increase costs to establish propositions which are not contested. In my judgment the rule is not only not repugnant to the statute provision but in strict harmony with it, and well adapted to give it force and effect.

Nor is the provision novel in principle. Motions and pleas in abatement, must be made in one of the first two days of the term to which the writ was returnable, or the defects to which they might have been interposed, are deemed to be waived. So, too, notice must be given of the denial of signatures, or their genuineness are deemed to be admitted. And, in this very statute, provision is made that no action shall be placed on the trial docket, unless such specification and declaration has been filed, as aforesaid. But it shall be the

duty of the Court, at an early and convenient time, to dispose of the actions not placed upon the trial docket, by nonsuit, default, or otherwise, according to the rights of the parties, and as the proper and prompt administration of justice may require; they deeming the whole cause of action to be admitted. That it was the design of the provision of the statute to which we have alluded to diminish the "law's delay," we have no doubt, and such, we think, was its tendency. The object of the rule alluded to was to protect the rights of parties, under the operation of the provisions of the statute, and to give effect to the statute itself. The statute has been repealed, whether wisely or unwisely, we express no opinion. But its repeal cannot affect this case, not having occurred until after this action was tried. *Defendant defaulted.*

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

JOHN N. DENNISON *& als. versus* WASHINGTON BENNER.

The recital in the caption of a deposition, that the deponent "being first duly sworn, gave his aforesaid deposition," imports that he was sworn according to law, before giving it.

The acts or declarations of a vendor, made *after* other persons have acquired separate rights in the same subject matter, cannot be received to disparage their title.

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

This was an action of the case under the statute, charging that the defendant took a conveyance of a quantity of goods from John Benner, on the 14th of April, 1848, of the value of $1000, for the purpose of defrauding the plaintiffs, who were the creditors of the said John.

The general issue was pleaded and joined.

There was evidence tending to show that the defendant purchased the goods of the said John at the time alleged, fairly and *bona fide,* and with no intention to defraud, and paid a full price therefor.

To sustain the issue on his part, the plaintiff offered the deposition of Wm. R. Keith, which was objected to by the defendant, on the ground that it did not appear from the caption, that the deponent had been sworn to testify relative to the cause or matter for which the deposition was taken, and that it did not appear that he had been sworn according to the requirements of law; but the Judge overruled the objection and admitted the deposition, and it was read to the jury.

The plaintiff also introduced Moses Sidelinger, who testified that he had a conversation with said John Benner in his store, in the fall of 1848, after the purchase of the goods by the defendant in the spring of that year; that said John had a book account against him, and after some searching, he found his books up stairs, concealed between the plastering and the chamber floor, in the store where they settled. He told him he wanted to settle up and get a note, so that the Boston chaps could not get the books, for if they did, they would trouble him, (the witness,) by suing him. This was the reason he gave for having his books where they were.

They settled, and the witness gave his note for about $50, to said John, after they had found the books. No other persons were present with the said John and the witness during this conversation. This testimony was objected to, but the Judge overruled the objection and admitted the testimony.

The jury rendered a verdict for the plaintiffs.

To the foregoing rulings the defendant excepted.

Bronson and *Paine,* for plaintiff.

The testimony of Sidelinger was properly admitted.

Plaintiff was required to establish two propositions: —

1st. That John Benner, by the transfer, intended to defraud his creditors.

2d. That the defendant knew of this intention and took the transfer to effect it.

To establish the first proposition, it was competent for

plaintiff to show the conduct of John subsequent to the transfer. *Richmond* v. *Vassalboro'*, 5 Maine, 396.

When one is doing an act, his declarations of his motives are admissible. *Wayne* v. *Greene*, 21 Maine, 357.

The declarations were explanatory of the act, and so connected with it as to fall within the principle of *res gestæ*. 1 Starkie, 47.

As the instructions are not complained of, it may be presumed they were correct.

Bradbury & Morrill, for defendant.

1. The caption to Keith's deposition is defective, and the deposition was not admissible.

It does not show by express terms, nor by necessary implication, that the deponent was sworn according to the requirements of the statute. *Brighton* v. *Walker*, 35 Maine, 132.

2. The declarations of John Benner were improperly admitted.

He was a competent witness, and they were hearsay. They were made too, a long time after the sale of the goods to the defendant, and the vendor could not impair the title to property he had already sold.

But they were no part of the *res gestæ*. They accompanied no act relating to the question at issue. The fact that John Benner concealed his books, or expressed a wish to settle them up and get a note so that "the Boston chaps could not get them," long after the sale, had nothing to do with the issue whether the defendant fraudulently purchased a lot of goods.

Yet these declarations were calculated to create great prejudice, and on them the plaintiff obtained his verdict, or they contributed to it.

May, J. — The first ground of exception relates to the admission of the deposition of one Wm. R. Keith. It is contended that the caption is defective, and does not show that the deponent was sworn according to the requirements

of the statute. The caption recites that the deponent "being first duly sworn, gave his aforesaid deposition;" and this language we think fairly imports that he was sworn according to law *before* giving it. This case is unlike that of *Brighton* v. *Walker*, 35 Maine, 132, cited in the argument, where the language of the caption was, that the deponent "was first sworn according to law to the deposition by him subscribed," which clearly indicates that the deposition was written and subscribed by the deponent *before* the oath was administered. In this case the language used cannot be misunderstood, and its plain meaning is, that the proper oath was administered before the giving of the deposition, and therefore it was legally admissible.

The other exception taken at the trial, and which is now insisted upon, is one of more doubt. This is an action under the statute against the defendant for taking a conveyance of a quantity of goods from one John Benner, on the 14th of April, 1848, for the purpose of defrauding the plaintiffs, who were then the creditors of said Benner, and the exception relates to the testimony of one Moses Sidelinger, who testified that in the fall after the purchase of the goods by the defendant, "he had a conversation with said John Benner at his store; that said Benner had a book account against him, and that he, after some searching, found his books up stairs, concealed between the plastering and the chamber floor, in the store where they settled; and that said Benner told him he wanted to settle and get a note, so that the Boston chaps could not get the books, for if they did, they would trouble him (the witness,) by suing him. This was the reason he gave for having the books where they were, and they settled, and he gave his note for fifty dollars." This testimony was objected to, and the question now before us is, whether it was properly admitted. It relates to both the acts and declarations of the vendor, which were done and made by him some months *after* the sale of the goods to the defendant. To maintain his action, it was necessary for the plaintiff to show that the sale of the goods to the defendant was fraudu-

lent, and as a part of the evidence to establish this fact, he must necessarily show that John Benner had a fraudulent intention in making the sale. But this must be established by competent testimony. Is it then competent for a vendor of goods by his *subsequent* conduct or declarations, to invalidate the title of his vendee, and is evidence of such conduct or declarations admissible for that purpose?

That mere naked declarations of the vendor *subsequently* made are inadmissible for such purpose, seems to be well established, while it is equally clear that both his conduct and declarations made before and about the time of the alleged fraudulent sale are admissible. All the authorities concur in this. As directly in point, we cite *Green* v. *Harriman*, 14 Maine, 32, and *Fisher* v. *True*, 38 Maine, 534. And the reason is, because in cases of alleged fraudulent conveyances or sales, what the vendor did or said respecting them, or respecting other similar transactions to which he was a party about the same time, may tend to throw light upon the question of his intention in making the sale in controversy. His conduct and declarations so made, are regarded as in the nature of accompanying admissions from which his intention in that particular transaction may be inferred. "But admissions made *after* other persons have acquired separate rights in the same subject matter, cannot be received to disparage their title, however it may affect that of the declarant himself." 1 Greenl. Ev. § 180. And SHEPLEY, C. J., in the case of *Fisher* v. *True*, before cited, remarks, that the vendor's declarations made subsequent to the sale, and having a tendency to impeach it, must be excluded.

If then an alleged fraudulent vendor of goods cannot *after the sale* be permitted, when not under oath, to speak through his lips so as to affect the title of his vendee, it is difficult to perceive why he should be permitted to speak through his subsequent acts; and that he cannot do so, after the sale and after he has parted with his possession of the property, seems to be well established by the authorities. In the case of *Bridge* v. *Eggleston*, 14 Mass. 245, the Court say, that "the

declarations, conversations *or even the actions* of a grantor ought not to be received in evidence in prejudice of the title he has created, because he is interested to have such title defeated by his creditors and because the other party has a right to examine him on oath, provided he is a competent witness." This Court have decided in a case similar to this, that the vendor's interest is balanced, and that therefore he is a competent witness. *Ward* v. *Chase*, 35 Maine, 515. But the Court, in the case of *Bridge* v. *Eggleston*, further say, that "the conduct and declarations of the grantor respecting the estate conveyed and tending to prove a fraudulent intention on his part *before the conveyance*, are proper evidence for the jury upon an inquiry into the validity of such conveyance by a creditor or subsequent purchaser, who alleges it to be fraudulent;" and MELLEN, C. J., in the case of *Flagg* v. *Wellington*, 6 Greenl. 386, cites this last quotation from the case of *Bridge* v. *Eggleston*, with approbation, and then remarks, "we know of no case which has extended the principle further than this decision;" and no case has been cited, and it is believed that none can be found, where the principle has been extended so as to admit in evidence the acts or declarations of the vendor made after the sale, and certainly not unless they were at or about the time of the sale. In the case of *Howe* v. *Reed*, 3 Fairf. 515, this Court held, that the plaintiff should be permitted to give in evidence a fraudulent sale of goods made by the same grantor about the same time, but before the conveyance in question. So also in the case of *Foster* v. *Hall*, 12 Pick. 89, the Court held, that cotemporaneous and antecedent acts and declarations of the grantor were admissible. The cases cited all treat the conduct and declarations of the grantor as standing upon the same ground.

It is true the cases cited are all in reference to conveyances of real estate; but no reason is perceived why the same rule should not be applied to sales of personal property; and the authorities show, that so far as declarations are concerned, the rule is the same in relation to both real and personal estate; and why should not the conduct or acts of a grantor

or vendor have the same effect in both cases? Is there any thing in the nature of the different estates, which requires a different rule to be applied in the one case from that which is applied in the other? Is there any thing in the nature of the evidence itself, tending to show that the subsequent acts of a vendor of goods ought to be received in evidence to impeach his vendee's title, any more than the subsequent conduct of a grantor of lands, to impeach the title of his grantee? We know of nothing either in the nature of the estates, or of the evidence itself, that requires a different rule. If, then, in the case of an alleged fraudulent conveyance of real estate, the subsequent conduct of the grantor should be excluded, as the cases cited seem to show, so should the same conduct or acts of the vendor in the case of a fraudulent sale. And no case has been cited where, in a question like this, the subsequent conduct of the supposed fraudulent vendor of personal property has ever been admitted. In the case of *Low* v. *Payson*, 32 Maine, 521, the marginal note by the reporter is, that "upon the question whether a sale was fraudulent, it is not allowed that the party claiming under the sale should prove that the grantor *after the sale* performed an honest act relative to the same subject matter;" but the case shows that the matter in controversy was the sale of personal property, and that the act offered in evidence was an offer to turn out the note taken for it to the plaintiff, after the suit was brought. If the honest acts of a vendor *after the sale* are excluded when offered in support of the vendee's title, it is not readily seen upon what principle his dishonest acts, subsequent to the sale, can be admitted.

The case of *Richmond* v. *Vassalborough*, 5 Maine, 396, cited by the counsel for the plaintiff, is not like this. That was a question of domicil upon a particular day by a pauper; and his subsequent conduct in remaining at or removing from the place where he was residing on that day, taken in connection with all the circumstances attending his going there, might well be received as tending to show with what intent he was there upon that particular day.

When the conduct or declarations of a vendor or grantor are admissible, it is upon the ground that they contain, either impliedly or expressly, an admission on his part as to the motive by which he was actuated in making the conveyance or sale; and, the rule of law being, as before stated, that "an admission made *after* other persons have acquired separate rights in the same subject matter, cannot be received to disparage their title; and this doctrine being, as is said by Mr. Greenleaf in his work before cited, vol. 1, § 180, "most just and equitable," and alike applicable "to vendor and vendee," "grantor and grantee," we have come to the conclusion that the testimony of Sidelinger, which was objected to, and admitted at the trial, was improperly admitted.

The acts testified to by this witness, were so long after the sale in question, that even if the rule that the acts of an alleged fraudulent vendor, occurring *at or about* the time of the sale, should be so extended as to embrace his acts immediately after it, they would not seem to fall within the rule. From aught that appears in the testimony, they might have been six or seven months after the sale in controversy, and they were separate and distinct transactions.

If the acts were not admissible, it is unnecessary to consider whether the declarations were a part of the *res gestæ*. They accompanied no act material to the question in issue and ought therefore to have been excluded. *Corinth* v. *Lincoln*, 34 Maine, 310. *Exceptions sustained, and*

New trial granted.

TENNEY, C. J., concurred that the testimony was improperly admitted. — RICE, and CUTTING, J. J., concurred in the result. — APPLETON, J., concurred.

COUNTY OF SOMERSET.

SAMUEL J. LOVETT *& al. versus* MOSES H. PIKE.
FRANCES HOWE *& al. versus* SAME.

A deputy sheriff having attached goods upon a writ, and sold them on the execution issued upon the judgment recovered in the suit, indorsing his doings thereon in his handwriting, but having deceased without affixing his signature thereto, *it would seem* that the sheriff might complete the return of his deputy, and that if so done, it would be valid.

Evidence may properly be received in such case in an action against a sheriff for not doing his duty in the premises, as to the disposition of the property attached, as well as in regard to the loss or injury suffered by any partial non-compliance with the law; and such evidence would not contradict the return, for no return was completed.

If a deputy sheriff purchase a portion of the goods attached by him, and sold at auction, the purchase is a conversion, for which an action of trover will lie; but the amount paid therefor, if allowed on the execution, may be shown in reduction of damages. If the sale was for a fair price, and the proceeds accounted for to the creditor, he has no just cause of complaint.

So, also, if the goods are sold by the deputy at private sale at a fair price; especially if the goods would otherwise have been lost by becoming valueless.

The officer must account for the value of goods sold by him not in accordance with law; and for those sold according to law, he is liable for the amount of the sales, with interest from the time of sale, deducting the expense of keeping and selling the same.

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

These were actions brought by attaching creditors against the sheriff of the county for his own default and that of his deputy, in not making a proper disposition of goods attached by the deputy.

The actions were defaulted and presented together for hearing in damages.

The attachment in the action *Howe & al.* v. *Foster*, was subject to that in *Lovett & al.* v. *same.*

The other facts will be found in the opinion of the Court.

Hutchinson, for defendant.

The execution was seasonably delivered to the deputy, who

advertised and sold the property attached at public sale, in all things conforming to law and his duty in advertising and making the sale, as appears by the evidence in the case and the return indorsed on the execution in the handwriting of the officer. The defendant should, therefore, be held liable only for the amount realized by him, deducting expenses, the balance being $433,48.

In the case of *Howe & al.*, the plaintiff is entitled to nothing, the amount received by the defendant having been absorbed in the first case, and the second attachment being subject to the first.

In this case, the Court should strike off the default, and the defendant should be allowed his costs.

J. S. Abbott, for plaintiff.

There was no valuation of the property attached, in the return on the writ; no schedule in any way alluded to; no indication that any schedule was ever annexed to the writ or accompanied it. The officer was ordered to attach to the amount of $650, in the action *Lovett & al.*, and judgment was recovered for $469,10.

The execution was never returned to the clerk's office.

The plaintiffs claim the amount of judgment recovered, with interest from the date of the sale.

The presumption is, that the officer did his duty, and attached to the amount he was ordered to attach. He is not at liberty to show, in this case, that the property attached was worthless, or of less value than the amount he was directed to attach. *Haynes* v. *Small*, 22 Maine, 14; *Childs* v. *Ham*, 23 Maine, 74.

At any rate, the plaintiff will be entitled to recover the amount of the judgment claimed, unless it clearly appear from legal evidence that the property attached was insufficient to pay the judgments.

The evidence regarding the alleged sales is legally inadmissible.

These sales, several of them, were made without authority. As to the rest, an attempt is made to substitute oral testi-

mony for the return of the officer. The plaintiffs are entitled to the official return. No satisfactory reason has been given why the executions, with proper and full returns, were not returned to the clerk's office as soon as August 7, 1849, as required by law. The deputy did not die till May, 1850.

But, if it had appeared that Hall died before the return day, and suddenly, oral proof of his doings would not be admissible. The plaintiff would still be entitled to an official return. *After the decease of the deputy, such return of his doings might be made by the sheriff. Ingersoll* v. *Sawyer*, 2 Pick. 276.

APPLETON, J. — The present plaintiff, on Nov. 27, 1848, sued out a writ of attachment against Leonard Foster, and placed the same in the hands of Andrew Hall, a deputy of the defendant, who on the same day returned, that he had attached "all the goods, wares and merchandize, owned by him, (Foster,) in the store now occupied by him in Brighton, also attached the shovel handle blocks stored under the above-said store together with those stored in said Taylor's barn." No schedule or appraisal of the goods then attached was made till a year afterwards. At the May term, 1849, of the District Court, the plaintiffs recovered judgment in their suit against Foster, and seasonably placed the execution issued thereon in the hands of said Hall, who advertised and sold the goods attached at public vendue, conforming to the law in advertising and making sale thereof, and indorsed his doings upon the back of the execution in his handwriting, but deceased without affixing his signature thereto.

The goods attached sold at less than their appraised value. The plaintiffs claim that the defendant should be held liable for their appraised value without any deduction.

It was held, in *Ingersoll* v. *Sawyer*, 2 Pick. 276, where a deputy sheriff had sold on execution an equity of redemption and given a deed to the purchaser and died before the return day, without having entered his doings thereon, that the sheriff might lawfully make a return of his deputy's doings,

and that the purchaser of the equity had a valid title, notwithstanding the return was made after the return day. It would seem, in accordance with the case to which reference has been had, that the defendant might have completed the return of his deputy, and that, if done, it would have been valid.

For some reason, the defendant declined acting in this matter, and the inquiry now arises, whether he may show by parol the proceeds and expenses of the sale made by his deceased deputy, and if shown, whether in case there was not want of good faith in his proceedings, the plaintiffs would not be limited by the amount thus proved.

The value, and proper disposition of the property attached, as well as the loss or injury suffered by any partial noncompliance with the law, are all matters in dispute, and as to which evidence may properly be received on either side. As the deputy failed to sign his return, the evidence cannot be regarded as contradicting it, for there was none completed.

It seems that the deputy purchased a portion of the goods sold at auction. Such a purchase is undoubtedly a conversion, for which trover will lie, though the amount paid therefor, if allowed on the execution, may be shown in reduction of damages. *Perkins* v. *Thompson*, 3 N. H. 144. But if the sale was for a fair price, and the proceeds are allowed the creditor, he has no just cause of complaint.

It appears that some articles were sold at private sale and before judgment was rendered. If this had not been done, they would have become valueless. For all such sales the defendant is ready to account. They were sold at fair prices, and no reason is perceived why the defendant should account for more than he has received. By making the sale, the plaintiffs receive the full value of what by lapse of time would otherwise have become a total loss; and instead of receiving an injury, have been benefited by the very sales of which they now complain.

From the whole evidence, it satisfactorily appears that the goods attached were mostly sold in accordance with the pro-

visions of law, and at a fair price, and for the benefit of all concerned. In those instances, when they were not so sold, the defendant is ready to account for their value.

The defendant should be held liable for the sales of the goods as proved to have been made. From this sum should be deducted the expenses of keeping and selling the same, and judgment should be rendered for this sum, and interest thereon from the date of the sale.

Defendant defaulted for $433,48, *and interest.*

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

APPLETON, J.—As the attachment in the action *Howe & al.* v. *Foster* was subject to that in *Lovett & al.* v. *Foster*, and as the goods attached did not sell for enough, after deducting the necessary expenses, to satisfy the first attachment, the plaintiff can only recover nominal damages.

As the defendant, at a preceding term, with a full knowledge of all the facts, voluntarily submitted to a default, no sufficient reason is perceived for disturbing the present posture of the case. *Default to stand.—*

Judgment for one cent damages.

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

STATE OF MAINE *versus* ITHAMER BOIES *& als.*

The repeal of the statute of 1855, c. 166, entitled "An Act for the suppression of drinking-houses and tippling-shops," by the statute of 1856, c. 255, takes from the courts all power to render judgment or to pass sentence against any one charged with an *offence* under the repealed Act.

But where a defendant had appealed from a decision rendered under the Act of 1855, and had entered into a recognizance in the usual form to prosecute his appeal, he is liable if the appeal is not entered; the forfeiture claimed under the recognizance being no part of the punishment for the offence.

The *right* to enforce a recognizance does not depend upon the guilt or innocence of the accused.

State *v.* Boies.

The *remedy* authorized by the statute of 1855, c. 166, § 24, for a breach of the condition of a recognizance, is only cumulative to the common law remedy.

Where the statute requires a defendant to enter into a recognizance to "*prosecute* his appeal," and the condition in the bond is "to *enter* his appeal," the latter term is included in the former.

On Demurrer.

This was an Action of Debt on a recognizance.

A general demurrer was pleaded to the writ.

The points put in issue in the case fully appear in the opinion of the Court.

Stewart & Hutchinson, for the State.

Webster, for defendant.

May, J. — This is an action of debt brought upon a recognizance entered into by the principal defendant with sureties before a justice of the peace, upon taking an appeal from a judgment rendered against him by said justice for an offence under the statute of 1855, c. 166, entitled "An Act for the suppression of drinking-houses and tippling-shops." The defendants put in a general demurrer to the writ, which is joined.

It is contended first, that the demurrer must be sustained, because the statute creating the offence, for which the principal defendant was tried, has been repealed by the statute of 1856, § 28, c. 255, without any saving clause as to prosecutions then pending. Such repeal has, it is true, taken from the Court all power to render judgment or pass sentence against said defendant for the offence with which he was charged, but the forfeiture claimed under the recognizance is no part of the punishment for said offence. This is a civil suit, and the recognizance upon which it rests is a proceeding authorized by law to secure the presence of the party accused in Court at the proper time and place when and where he was to be tried upon his appeal. Such proceeding has the twofold object of relieving the party from imprisonment until his trial, and to compel his attendance at it in order that the question of his guilt or innocence may be de-

termined according to law. It does not follow, therefore, that this action, founded as it is upon contract, should fail because said principal defendant must be acquitted or discharged upon the complaint against him. The right to enforce a recognizance, in no way depends upon the question of the guilt or innocence of the accused, and that question can only be determined by trial upon the complaint. Even if innocent, the defendant was bound to appear at the time and place of trial, and it would be unreasonable to permit him, after entering into the recognizance, to violate its condition, as it might subject the government, rightfully relying upon its performance, to great expense for the attendance of the witnesses and the preparation of the case. For the same reasons that the principal defendant cannot be permitted to show his innocence of the crime whereof he is accused in defence of this action, he cannot set up the repeal of the statute without any saving clause, which created the offence, especially, when the condition of the recognizance was broken, as in this case, before the repeal.

The second objection relied upon is, that the statute having provided in the 24th section *a specific* remedy for a breach of the condition of this recognizance, an action of debt will not lie therefor, and that such remedy alone can be pursued. The Court are of opinion, that the remedy authorized by the peculiar provisions of this statute, like that of *scire facias*, is only cumulative to that which the common law affords. *Commonwealth* v. *Greene*, 12 Mass. 1; *State* v. *Fulsom*, 26 Maine, 209. But it is said in argument, that if an action of debt can be maintained in this case, it must be brought within the time limited by the statute for the specific remedy in the 24th section. However this may be, it is not open to the defendants to set up this defence upon a demurrer. It can be taken advantage of only by a proper plea in bar. *Frohock* v. *Pattee*, 38 Maine, 103.

The third objection which is urged, is that the recognizance is void because the principal defendant is required in the condition "to enter his appeal," and it is said, that such

requirement is unauthorized by the statute. If this were so, the authorities show that this objection would be well taken; but we are not satisfied that the requirement in the condition is not fully authorized by the statute. We think it is included in that provision of the statute which required the principal defendant to enter into recognizance to prosecute his appeal.

One other objection was relied upon in defence, and that was, that the recital of the complaint and warrant, as set forth in the declaration, shows that they might and ought to have been quashed or abated for defects therein and irregularities of proceeding which appear upon their face. If this be so, enough appearing from the recital to show that the magistrate had jurisdiction in the case, as we think the declaration shows, they cannot be examined into in this suit. If he had appeared according to the condition of his recognizance, and such defects and irregularities had been found to be fatal, they would have availed him.

Upon the whole case, we are satisfied, that the demurrer must be overruled.

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

SAMUEL L. FOGG *versus* DARIUS BABCOCK.

Certain facts having been proved by the plaintiff, by competent evidence, a new trial will not be granted because the Court had improperly allowed a witness for the defence to testify to the same facts at an earlier stage of the trial.

A negotiable promissory note is to be regarded as none the less *assignable*, because its transfer by indorsement so vests the title to it in the assignee as to enable him to maintain an action upon it in his own name.

The assignor in such case, having been called and examined as a witness, by the plaintiff, the party "deriving title through and from the witness;" it is within the letter and spirit of the statute of 1855, c. 181, § 3, to admit the defendant, as "the adverse party," to testify "to the same matter, in his own behalf," which the assignor had covered by his testimony in the direct examination.

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

This was an action of ASSUMPSIT on a promissory note. The defence was payment to the payee of the note, prior to his transfer of it, over due, to the plaintiff.

Coburn & Wyman, for plaintiff.

Leavitt, for defendant.

APPLETON, J.—The note in suit was payable to Joshua Fogg, and after its maturity was by him transferred to the plaintiff by indorsement.

Benjamin Barker, a witness called by the defendant, testified that the defendant requested him to ask Joshua Fogg to show him the credits on his book in favor of the defendant, and that he communicated this request to Fogg, by whom the credits were shown him. He was then, notwithstanding the plaintiff's objections, permitted to state what those items of credit were. Joshua Fogg was then called on the part of the plaintiff, who produced his books, containing the account between him and the defendant, and to which the previous testimony of Barker referred.

A new trial is claimed because of the admission of the testimony of Barker. Were the testimony of Barker to be regarded as improperly received, it is difficult to perceive why, for that cause, a new trial should be granted. Certain facts having been proved by the plaintiff, by competent evidence, received at his own instance, no new trial should be granted because the same facts at an early stage of the proceedings may have been established by testimony justly liable to exception. The plaintiff cannot have been injured by the proof of facts which do not appear to have been disputed, and which his own witness has shown to be true, however objectionable may be the medium through which the proof was derived, when the same facts were proved on the part of the defendant.

A note of hand is a chose in action and assignable by indorsement. It is none the less to be regarded as assignable because it so vests in the assignee, that he may maintain an

action upon it in his own name. The assignor in the case at bar was called and examined as a witness by the plaintiff, a party "deriving title through and from him." The defendant, "the adverse party," was admitted under the statute of 1855, c. 181, § 3, to testify "to the same matter in his own behalf," about which the assignor, Joshua Fogg, in his direct examination, had previously testified; and his testimony was especially limited to that extent. The evidence, as thus presented, is equally within the letter and the spirit of the Act to which reference has been made. Any other or different construction would render it without meaning or effect.

Exceptions overruled.—Judgment on the verdict.

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

SAMUEL S. PARKER *versus* JOB N. TUTTLE.

The indorsement of a note by the payee, is presumed to have been made at the date of the note, in the absence of proof to the contrary.

But if it be proved that the indorsement was not then made, the indorsee in an action upon the note, in order to recover, must show that the indorsement is genuine, and that it was made prior to the commencement of his action.

A person who purchased intoxicating liquors, acting merely as the agent, cannot be deemed the seller of those liquors to his principal in violation of the statute of 1851, c. 211.

A note, taken by such agent from his principal, for money advanced by him in payment for liquors thus purchased, does not come within the prohibition of the statute of 1851, c. 211, § 16, and an action may be maintained upon it.

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

This action was upon a promissory note given to one Strickland, and by him indorsed.

There was evidence tending to show that Strickland was not present when the note was given, and tending to prove that plaintiff took the note in Smithfield, and that he said at the time, that he had seen the books of the said Strickland, and that the bill receipted was all right, and that the bills of items were not present at the time when the note and receipt were given. Instructions were given touching the actual

knowledge of plaintiff, and also touching the implied notice to plaintiff that the note was given in part for intoxicating liquors, to which no exceptions are taken.

The Court was requested to instruct the jury as follows:—

That to maintain this action, the plaintiff must prove that the note was indorsed and negotiated to plaintiff, before the commencement of this action; that the indorsement being without date, if it has been proved that it was not negotiated on that day, then the legal presumption that it was negotiated on that day is rebutted; and the plaintiff must prove that it was negotiated to him before the date of the writ; and if there is no such proof to satisfy them, the defendant is entitled to their verdict.

This requested instruction was not given. But the Judge instructed the jury, that if it was proved that the note was not negotiated on the day of its date, the presumption that it was indorsed and negotiated on that day, would be, of course, rebutted. And he also instructed the jury, that the note being indorsed now, in the absence of any proof to the contrary, the presumption is, that it was indorsed before the commencement of this action upon it.

The Court further instructed the jury, that if Strickland obtained the rum stated in one of the bills annexed to a deposition by one Crocker, in consequence of Tuttle's letter of instructions, and procured it for defendant, acting merely as his agent, then there was no violation of the statute by Strickland; and that it would be immaterial whether he obtained it of the city agency at Portland, or from Boston; and that the fact alone, that the rum was charged in the bill, instead of charging the money paid for it, would make no difference.

Verdict for plaintiff. To the foregoing refusal to instruct and to the instructions given, the defendant's counsel excepted.

John S. Abbott, for defendant.

Stackpole and *Webster,* for plaintiff.

TENNEY, C. J.—Evidence was introduced tending to show that the name of the payee was not indorsed by him on the

note on the day of its date. The jury were instructed, that, as the indorsement was thereon at the time of the trial, the presumption was, in the absence of proof to the contrary, it was made before the institution of the suit, if they were satisfied that it was not made on the day of its date.

A note purporting to have the indorsement of the name of the payee, with no indication of any time when it was made, independent of the date of the note, is presumed to have been indorsed on that day, because that date will apply to every thing written upon the same paper. If the indorsement is proved not to have been made so early as that day, the basis of this presumption is removed; and, in order to recover, the holder must show, not only that the indorsement is that of the payee, but that it was made before the suit upon the note was commenced. The case of *Hutchinson* v. *Moody*, 18 Maine, 393, sustains this principle.

The defendant's letter to Strickland is a request that he would purchase of the agent of the city of Portland a barrel of rum, and not that he should sell it himself. The rum was received by the defendant, and it was a question of fact under all the evidence upon that point, whether it was purchased by Strickland, or sold by him. If the purchase was made of the city agency of Portland, it was an exact compliance with the authority of the letter. If it was purchased by Strickland elsewhere for the defendant, in consequence of the request in the letter, and was so received, it might be treated as a ratification of the act of Strickland as the agent. The bill has a tendency to show that the purchase was made of Strickland, but it is not conclusive. The instructions were given as applicable to a state of facts, which the jury might find to be true, that the rum was purchased by Strickland as the agent of the defendant, and they are not regarded as erroneous.

Exceptions sustained.—Verdict set aside, and
New trial granted.

RICE, APPLETON, CUTTING and MAY, J. J., concurred.
GOODENOW, J., did not sit.

COUNTY OF SAGADAHOC.

THOMAS SPINNEY *& als. versus* JOHN MARR.

In a deed of warranty, the grantor conveyed certain interests, described in the following words: — "All the fishing rights, rights to the 'sand,' and to all useful things that may drift upon the beach." The deed also contained a description of the land that constituted the beach, and words of inheritance. — *Held*, that the word "sand" in the deed, was equivalent to "land," and that the grantor conveyed the fee.

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

This was an action of trespass. All the material facts in the case are stated in the opinion of the Court.

C. R. Porter, for plaintiffs, argued, —

1. In the construction of a grant, the Court will take into consideration the circumstances attending the transaction, the particular situation of the parties, and of the thing granted, in order to ascertain the intent of the parties. And when the intention is thus ascertained, the Court will carry it into effect, if the rules of law will permit it. *Adams* v. *Frothingham*, 3 Mass. 352; *Wallis* v. *Wallis*, 4 Mass. 135; *Marshall* v. *Fiske*, 6 Mass. 24; *Pray* v. *Pierce*, 7 Mass. 381; *Litchfield* v. *Cudworth*, 15 Pick. 23; *Frost* v. *Spaulding*, 19 Pick. 445.

2. Doubtful words and provisions in a deed poll, are to be taken most strongly against the grantor. *Adams* v. *Frothingham*, 3 Mass. 352; *Worthington* v. *Hylyer*, 4 Mass. 196.

3. If the word in the deed is "sand," instead of "land," this action can be maintained, because it conveys "rights" to the "sand," and the whole beach being sand during the ebbs of the tide, the whole was the property of the plaintiff and subject to his control.

The Court held, in *Howard* v. *Lincoln*, 1 Shepley, 122, that a reservation of all the trees standing and growing, reserved also the land, and that trespass *quare clausum* would lie. Cer-

tainly, here every thing being transferred but the water, the land passed under the term "sand."

Gilbert, for defendant.

TENNEY, C. J.—Ebenezer D. Chappel, the plaintiffs' grantor, derived title to a farm on Hunnewell's point, in the town of Phippsburg, including the beach, described in the writ, from Josiah H. Moore and others, by deed dated Oct. 30, 1838; and, on July 25, 1840, conveyed to Samuel W. Look that part of the land which was above high water mark, reserving therein certain privileges; and, on Sept. 9, 1854, he gave to the plaintiffs a deed, under which they claim title and the right to maintain the present action.

There is no controversy that the beach in question was not conveyed by Chappel's deed to Look, but remains in Chappel, if it did not pass to the plaintiffs, in his deed to them. The interest conveyed to them by the latter deed is in these words:—"All the fishing rights, rights to the sand, [or land,] and to all useful things that may drift upon the beach, derived to me within or upon the limits hereinafter stated, under the deed of Josiah H. Moore and others to me, dated Oct. 30, 1838." Then follows a description of the land, which composes the beach.

The Judge, who presided at the trial, read the word, which is matter of question between the parties, as being "sand," and ruled that, by the deed from Chappel to the plaintiffs, no fee in the land was conveyed, and that trespass for the breach of the close could not be maintained, and directed a nonsuit, to which ruling exceptions were taken.

The only question which is deemed important at this time is, whether the construction of the deed by the Judge was correct, upon the hypothesis that the disputed word was designed by the parties to be "sand" and not "land;" and we propose to examine this as a legal question on this assumption.

The beach or strand, described in the deed to the plaintiffs, is upon tide water, and is washed by the tides and the waves, and upon which, it was understood, drift-stuff would be thrown

by their action. It was also regarded as having value for a fishing ground. Upon the assumption that the word is "sand," and from the language used, this beach was wholly or partially composed of that material. And it does not appear that the ruling of the Judge was made on the ground that it was otherwise. None of the deeds introduced in evidence afford by their contents any grounds for supposing that this beach was an appendage of any importance to the farm, as yielding or capable of yielding any vegetable production, such as thatch, or any thing which is found sometimes growing between high and low water mark.

Whatever was intended to pass by the deed, to the plaintiffs, was conveyed to them, their heirs and assigns forever; and the right to dower therein was relinquished by the wife of the grantor.

The rights intended to be conveyed by the deed, are those derived by the grantor, by the deed of Josiah H. Moore and others to him of Oct. 30, 1838. And so far as the deed upon a proper construction covers any rights, those rights were conveyed to the exclusion of any remaining right in the grantor.

Was there, then, any thing, which the grantor could have enjoyed, after the delivery of his deed? He had no privilege of fishing upon the beach; none of taking any useful things that might drift thereupon; and none to the sand, of which the beach was in part at least composed; all these rights he had derived from the deed of Moore and others, and such he had conveyed to the plaintiffs without reservation.

When Chappel executed his deed to the plaintiffs, he resided in a distant State, and had before parted with the farm, bounded in part by this beach, and it does not appear that he was the owner of any other real estate in or near Phippsburg. Some of the privileges, which he had reserved in the deed of the farm, had expired by his removal; and if others remained, they could not have been regarded of much importance, while he was the owner of the beach, and after his deed conveying it, upon any construction, they could not have been regarded

as of any value. If there were rocks upon the beach, the case contains nothing which indicates that they were of greater value than those of the many leagues of rocks which compose much of the sea-shore of this State, and probably did not at all enter into the minds of the parties to the contract. It does not appear that the situation of the parties, the subject matter of the transaction, or the language of the deed, authorizes the conclusion that the grantor designed to retain any interest in land described in the deed, but that whatever right he acquired from Moore and others he intended to convey.

The beach was intended as a fishing privilege, and a spot which, from its peculiar location, received the drift of the ocean, of considerable value. It is not shown by the facts of the case to have possessed a value for other purposes. It was the basis of these privileges, and seems to have been described "the sand," as the ground on which the privileges could be enjoyed, instead of the word "land," for the reason, that it was so composed. *Exceptions sustained—*

Verdict set aside—and new trial granted.

RICE, CUTTING, and MAY, J. J., concurred.

APPLETON, J., non-concurred.

CHARLES CROOKER *& al. versus* RICHARD P. BUCK.

A common law submission of matter in controversy, in a suit pending in court, and a report of referees thereon, operate as a discontinuance of the suit.

A statute submission, in this State, is an independent proceeding, having no relation to the original action; it requires another entry, and is the subject matter of an independent judgment and execution.

No valid judgment can be rendered on the report of referees in a statute submission, except by consent, without allowing to the aggrieved party the time prescribed by statute, in which to present exceptions.

Such report must pass through all the ordeals of the law, before it can have full force, and until then the statute submission is not a *bar* to the pending suit.

Whether the statute submission operates as a *discontinuance* of the pending suit, either before or after judgment is entered on the report therein, *quære.*

Crooker *v.* Buck.

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

ASSUMPSIT for money had and received. After the plaintiffs' evidence was in, the defendant offered a statute submission of the matter in controversy, and an award thereon, made out of Court, after the action for the same cause was commenced, and contended that this proceeding operated as a discontinuance of the suit; and thereupon he moved that it be dismissed. The Court admitted the submission and award in defence, but overruled the motion.

The plaintiffs then offered to impeach the award before the jury, but the Court refused to allow it. The trial was then suspended to give plaintiffs' counsel an opportunity to present his objections to the submission and award, and the hearing was had. The plaintiffs' counsel contended that the question of fraud, corruption and partiality, on the part of the referees, he had the right to have passed upon by the jury; but the Court overruled the point, and all other objections. The award was accepted and an entry ordered to be made on the docket to that effect.

The Court then resumed the case on trial before the jury and ruled that the submission and award then constituted a perfect defence or bar to the action. The presiding Judge also ruled that he had no power to order a nonsuit, as there was evidence on both sides.

By consent of parties, the case was then taken from the jury, to be reported to the law Court, with the agreement that if any of the rulings were erroneous, or the award was improperly accepted, said acceptance of said award was to be set aside and a new trial was to be had. But if the rulings were all correct and the award was properly accepted, and plaintiffs had no right to submit the question of fraud in the referees to the jury at any stage of the proceedings, then such judgment is to be rendered, both in the action and as to the award, or such other disposition of the case and the award made, as the legal rights of the parties entitle them to.

A. Merrill, for plaintiffs, among other considerations, argued:—

1. That after the Court had decided that the reference "*unaccepted* was *not* a bar to the action, and did not operate as a discontinuance of it," the defendant had no right to go any further, for this was all that was set forth in his specification of defence.

2. The reference, under the circumstances of this case, was intended by the parties as a mode of settling the amount of damages for which judgment should be rendered in the action, and nothing more. As such it was equivalent to a reference entered into under a rule of Court. The Court may set it aside for the same reasons as one made under a rule of Court or under the statute, viz., for mistakes of law or of fact, or for excess of power, or for fraud, corruption and partiality in the referees. *North Yarmouth* v. *Cumberland,* 6 Greenl. 21; *Chapman* v. *Secomb,* 36 Maine, 102.

Bronson & Sewall, for defendant, contended that,—

1. The submission of the subject matter of the action operated as a bar, or rather discontinuance, of the action pending in Court. 5 Phillips' Ev., note 240, p. 149, and cases there cited; 15 Wend. 99; 12 Wend. 503; *Moores* v. *Allen,* 35 Maine, 276.

2. If it were not so, it would lead to the absurdity of having judgment in the action perhaps in favor of the claim, and against it in the reference.

3. The award of referees cannot be impeached collaterally, and hence the Judge properly ruled that it could not be impeached in the manner proposed by the plaintiff.

4. The award settled the matters in dispute, and could not be again examined by the jury in the manner proposed by plaintiffs. 5 Phillips' Ev., note 252.

CUTTING, J. — During the pendency of this suit in Court, the parties referred the same cause of action, by consent, before a justice of the peace, agreeably to R. S., c. 138.

At the trial, the defendant introduced the agreement and the report of the referees, as to the execution of which there was no controversy, and thereupon contended that they operated as a discontinuance of the suit.

That a submission at common law would have that effect, has been settled by a series of decisions in the State of New York. *Camp* v. *Root*, 18 Johns. 22; *Ex parte Wright*, 6 Cowen, 399; *The people* v. *Onandago C. P.*, 1 Wend. 314; *Larkin* v. *Robbins*, 2 Wend. 505; *Towns* v. *Wilcox*, 12 Wend. 503; *Wells* v. *Lain*, 15 Wend. 99; *West* v. *Stanley*, 1 Hill, 69. And recognized as law in this State, in the case of *Moores* v. *Allen*, 35 Maine, 276.

These decisions were based upon the consideration, that the parties had selected another tribunal to settle the controversy, and taken it from the jurisdiction of the Court where the cause, or the subject matter of it, was originally pending.

Does the submission under the statute vary the principle? All proceedings under the agreement are wholly disconnected from the original suit. Referees are substituted for the Court and jury, with full authority to decide the law and the facts, and if the Court have any supervisory power, it can be exercised only when the report shall have been returned to a term of the Court agreed upon in the submission, and after being entered upon the docket as an original entry. The record forms the basis of an independent judgment.

But the motion for a discontinuance was made by the defendant, and whether rightly overruled, or otherwise, the ruling being in favor of the plaintiff, who has no cause on this point to except, we place our decision on other grounds, which we will now proceed to consider.

It appears that after the motion was denied, the report was offered under one of the specifications, in bar of the suit; that after certain preliminary rulings, the cause, then on trial, was suspended, and the report was presented to the Judge for his acceptance, to which objections were filed, arguments heard, and the report finally accepted; that it was again offered in bar, and ruled to be effectual for that pur-

pose; to which ruling the plaintiff excepts, and the question by him presented is, was this ruling correct?

We have already seen that a submission under the statute is an independent proceeding, having no relation to, or connexion with the original action. It requires another entry, and is the subject matter of an independent judgment and execution. Although the report was accepted, it does not appear that judgment was rendered upon it, before it was offered in bar. No judgment could have been rendered, except by consent, without allowing to the aggrieved party the time prescribed by statute, in which to present his exceptions. R. S., c. 96, § 17. And exceptions are allowed in such cases. *Harris* v. *Seal*, 23 Maine, 435; *Lothrop* v. *Arnold*, 25 Maine, 136. Not until the report had passed through all the ordeals of the law, could it become an "absolute verity," and entitled to record, when it could not be impeached or avoided collaterally, but would remain in full force until reversed. *Bannister* v. *Higginson*, 15 Maine, 73; *Granger* v. *Clark*, 22 Maine, 128. The report, when offered in evidence, was not of such a character, and possessed not all the elements of maturity. The Judge erred therefore, in permitting it to go to the jury, and in his construction as to its force and effect. By the agreement of the parties, "if any of said rulings were erroneous, a new trial was to be had," it becomes unnecessary to examine the further rulings in the progress of the cause. If hereafter, on another trial, the report shall have matured into a judgment, and shall then be offered, it may be worthy of consideration by the plaintiff as to what may be its legal effect, even should the ruling as to a discontinuance be as favorable, as on the former trial.

Exceptions sustained.

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

WILLIAM V. MOSES *& al. versus* GEORGE ROSS.

At common law, one tenant in common, of a personal chattel, could not maintain an action against his co-tenant, who had received more than his share of the rents and profits.

But the tendency of decisions in this country has been to do away the technical difficulties which impeded the recovery by one co-tenant in a suit against another.

Assumpsit for money had and received may be maintained by one co-tenant against another for the proportion of money due the plaintiff, and in the hands of the defendant, on account of the sale or lease by him of the common property.

In a suit by one co-tenant against another, based on the statute of 1848, c. 61, it must be alleged and proved, that the joint estate has yielded "rents, profits or income," and that the defendant has taken the common property "without the consent of his co-tenant."

ON FACTS AGREED.

ASSUMPSIT, brought to recover of defendant the plaintiffs' share of the use or rent of a certain printing press owned in common.

The plaintiffs owned two-ninths of the said press, the defendant owned five-ninths of it and the remaining two-ninths were owned by persons not parties to the suit. The press had been used by defendant, as he had occasion to use it in his business, which was that of a printer, for the space of six years, one month and sixteen days. It was admitted that, at a reasonable time prior to the commencement of this suit, and after the use of the press by defendant as aforesaid, the plaintiffs had requested the defendant to pay them for said use. It was agreed that if, upon the above facts, the plaintiffs were entitled to recover the defendant should be defaulted, otherwise the plaintiffs become nonsuit.

Bronson & Sewall, for plaintiffs, contended that a remedy was provided for this and similar cases by the Act of Aug. 8, 1848.

It would be a reproach upon the law, if the defendant could not be compelled to pay what he admits to be justly due.

At common law, the defendant would be liable for the use

and income of the property received and enjoyed exclusively by him.

John S. Baker, for defendant.

Plaintiffs and defendant were tenants in common of said printing press. One tenant in common of a chattel cannot recover of his co-tenant for the use and occupation of the common property. *Sargent* v. *Parsons,* 12 Mass. 149; *Ballou & als.* v. *Wood & als.,* 8 Cush. 48; *Martyn* v. *Knowllys,* 8 T. R., 145; *McCrillis* v. *Banks,* 19 Ver., (4 Washb.,) 442.

There is nothing to show that defendant used said press more than his proportion of the time, or that he in any way interfered with the rights of the plaintiffs.

If there were no other defence this action cannot be sustained, because all the owners of said press are not made plaintiffs in the suit.

To maintain an action under the stat. of 1848, the plaintiff should allege and prove the receipt by the defendant of the whole, or more than his share, of the rents and profits or income, without the consent of the co-tenant. This he has not done.

APPLETON, J.—At common law this action could not be maintained. "If two be possessed of chattels personalls in common by divers titles, as of a horse, an oxe or cowe, &c., and if the one take the whole to himself, out of the possession of the other, the other hath no other remedie but to take this from him who hath done to him the wrong to occupie in common, &c., *when he can see his time* (*quant il poet voir son temps,*" *&c.*) Co. Lit. § 322. An action for money had and received will not lie by one tenant in common against his co-tenant, who has received more than his share of the profits. *Thomas* v. *Thomas,* 5 Wels. Hurts. & Gor., 29. The tendency of decisions in this country has been to do away with the technical difficulties, which impeded the recovery of one tenant against another. "In New York it has been frequently held," says NELSON, C. J., in *Cochran* v. *Canington,* 25 Wend. 410, "that on the sale of a chattel by a joint owner and

receipt of the money, the co-tenant may recover his moiety in the action for money had and received." The same principle applies when the common property has been leased and the rent has been paid. *Brigham* v. *Eveleth,* 9 Mass. 538. But to authorize a recovery, the funds must have been received and in the hands of the co-tenant against whom the suit is brought. In order to support such an action, it must appear, not merely that the defendant has received more than his share of the entire profits of the property or estate held in common, after deducting all reasonable charges; but that the balance is due to the plaintiff, and not to the other co-tenants. *Shepard* v. *Richards,* 2 Gray, 424.

The plaintiffs failing to make out a case which will authorize them to recover, according to the rules of the common law, claim that this action may be maintained under the Act, c. 61, approved Aug. 8, 1848, "giving further remedies to tenants in common." By § 1, it is provided, that one co-tenant may maintain an action of special assumpsit to recover his share, "whenever any joint tenant or tenant in common shall *take and receive the whole* of the *rents, profits* or income of the joint estate, or more than his share of the same, *without the consent of his co-tenant,*" *&c.* The declaration contains no allegation, that the defendant has taken the common property "*without the consent* of his co-tenant." Indeed, if such fact has been alleged, it is wholly unsustained by the facts as agreed upon by the parties. The case is equally destitute of any proof, that the joint estate has yielded any "rents, profits or income," without which there is nothing of which the plaintiff has been deprived, or in which he is entitled to share.

According to the agreement of the parties, a nonsuit must be entered. *Plaintiff nonsuit.*

Rice, Cutting, and May, J. J., concurred.

COUNTY OF LINCOLN.

WILLIAM MITCHELL *versus* CITY OF ROCKLAND.

Corporations, as a general rule, are not responsible for the unauthorized or unlawful acts of its officers.

Health officers are not authorized to take vessels, in quarantine, into their own possession and control, to the exclusion of the owner, or those whom he has put in charge.

And where such unauthorized and exclusive possession and control are taken by health officers or their servants, the town is not responsible for their acts.

The acts and declarations of an alderman, not representing the city government or the board of health, and not acting in behalf of either, are not legal evidence to affect the rights or liabilities of the corporation.

The original legal signification of *quarantine*, was the term of forty days, during which persons who came from foreign ports with the plague were not permitted to go on shore; but the signification of the term has been enlarged and modified by the statute, so as to represent the restriction against vessels having on board other contagious diseases than that of the plague.

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

This was an action of the case to recover for damage sustained by the plaintiff by the partial destruction of his vessel, the Caroline, and her cargo, by fire, occasioned by the act of the health officers of Rockland, while they were officially in charge of said vessel, there being a case of small pox on board. The verdict was for the plaintiff.

The defendants requested the Court to instruct the jury, that if the board of health of the city of Rockland, or any member thereof, or any other officer of the city, or employee of such officer, performed any acts in relation to the schooner Caroline and the case of small pox on board of her, not warranted by law, so that the acts of such officers, or officer, or employee, exceeded their or his legal authority, the city would not be liable in this action for such acts or doings, or the consequences thereof. Also, that if the health committee, or any person acting in behalf of such committee, pursued, in relation to said vessel, the authority conferred upon them by

statute touching vessels arriving in ports of this State with a malignant disease on board, and their action was in accordance with the duties conferred upon them and required of them by the statute, the city in its corporate capacity, would not be responsible in damages for any injury which the plaintiff may have suffered in consequence of the want of ordinary care upon the part of such committee, or any agent employed by them.

The Court declined to give these instructions, and instructed the jury, "that if the health officers of the defendant city, as such, took the possession and control of the plaintiff's vessel, and, having such possession, a fire, by which the plaintiff's vessel was injured, was occasioned by the want of ordinary and common care of such officers of the town, or their servants, the defendant town would be liable for losses thereby occasioned."

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

A. P. Gould and *J. O. Robinson*, for plaintiff.

1. The health officers of the defendant city had competent authority, by the nature of the duties and functions of their office, to act upon the general subject matter; and if they did not act *wilfully* or *maliciously*, and with a *design* to do the plaintiff a wrong, but did act with an honest view to obtain for the public some advantage or benefit, the city, in its corporate capacity, is liable to make good the damages sustained by the plaintiff, even though the health officers, to some extent, exceeded their legal authority. *Thayer* v. *City of Boston*, 19 Pick. 511; R. S., c. 21, § § 20, 26; 1 Salk., 289; 2 Salk., 441; 3 Camp. 403.

The acts done by the health officers were not wholly extra official, for they had a general authority over the vessel while she lay in the harbor, and if any portion of their acts were unauthorized, it was excess of authority merely.

It will not be denied, that all that was done, was done in good faith, and with the design of promoting the public benefit. The only complaint is, that through ignorance they erred,

and that they were careless and negligent in performing their duty. It is usual for the health officer to go on board, and direct what shall be done to the vessel before she shall be allowed to go up to the town; but not usual for him to do it himself. The most that can be said is, that the agents of the defendants performed their duty, in part, in an improper manner, by improper acts, not acts unsuitable to be done, but improper for them to do, without consulting the owner, and giving him an opportunity to employ some suitable person to see that it was done with safety to the vessel.

The authorities are abundant to sustain the doctrine of *Thayer* v. *Boston.*

The case of *Bush* v. *Steinman,* 1 Bos. & Pul. 404, was this:—The defendant contracted with a surveyor to put his house in repair for a stipulated sum; the surveyor contracted with a carpenter to do the whole business; the carpenter contracted with a bricklayer to do the brick work, whose servant left a quantity of casks of lime in the highway near the defendant's premises, having been employed to haul and leave them upon the premises. The plaintiff's carriage ran against the lime and was upset, and the defendant was held liable for the injury.

The case of *Littledale* v. *Lord Lansdale,* 2 H. Blackstone, 267, 299, is in point. The servants of Lansdale, who were employed generally in operating his coal mine, put a quantity of coals, without special instructions from Lansdale, upon Littledale's premises, and it was held, though an excess of authority, that Lord Lansdale was liable for the injury. See also *Horn* v. *Nichols,* 1 Salk. 289, and *Jones* v. *Hart,* 2 Salk. 441; 3 Campb. 403.

The distinction running through all the cases is this; that where the agent does an act wholly extra official, an act not within the general purview or scope of his authority, the principal is not holden. But if the agent has authority to act upon the general subject matter, his act, however indiscreet and negligent, is the act of the principal, and the principal is bound to repair all injuries to third persons, resulting from the negligence or misconduct of the agent.

If an agent, chosen for a special purpose, and invested with special and limited authority, exceeds that authority, the principal is not bound.

Health officers are invested with a general agency to act for the city, upon all matters relating to the public health. And with reference to vessels having contagious diseases on board, whatever acts they perform relating to such vessels, in good faith, and with the design of promoting the public health, are the acts of the city, whether they invade the rights of third persons or not.

The case of *Anthony* v. *Inhabitants of Adams*, 1 Met. 284, is not opposed to the doctrine of *Thayer* v. *Boston*. There the act done by the officer of the town from which the injury resulted, was altogether separate from, and independent of, the work which it was their duty to perform.

2. The city has *ratified* the acts of the health officers, by paying them and their servant for this *specific service*. Even if there was an excess of authority, the city has thus adopted their acts and made them their own.

3. The city is responsible for all damage, resulting to the plaintiff from the *negligence*, or want of ordinary care of their agents. 1 Metc. 284, 285.

4. But the verdict ought, in no event to be set aside; because the jury have found, that the loss was occasioned by the want of ordinary care in the officers of the city. Whether they had a right to take the exclusive control or not, they were bound to exercise *ordinary* care in all their acts; and this they have not done, even in performing those acts which are admitted to be within the scope of their legitimate authority; and "where the jury have found facts decisive of the case, in favor of the party prevailing, a new trial will not be granted, though erroneous instructions may have been given on a distinct point in the case." *Jewett* v. *Lincoln*, 14 Maine, 116; *Farrar* v. *Merrill*, 1 Greenl. 17; *French* v. *Stanley*, 21 Maine, 512; *Howard* v. *Minor*, 20 Maine, 325.

Thacher, for defendants.

1. The verdict and the special findings of the jury were

not authorized by the evidence. R. S., c. 21, § § 18, 19, 20, 21, 24, 26.

2. Under the finding of the jury the action cannot be maintained. The city cannot be bound by the acts of the health committee unauthorized by law. R. S., c. 21, § 18 *et seq. et ante;* Angell & Ames on Corp., p. 250, § 311, and cases cited in note to p. 330; *Thayer* v. *Boston*, 19 Pick. 513, and cases there cited by defendant's counsel; *Mayor of Albany* v. *Canliff*, 2 Comstock, 105.

3. Here was no precedent authority and no subsequent ratification.

4. Even a ratification cannot make the corporation liable for an act of its agent, which the corporation had no power to authorize. *Boam* v. *City of Utica*, 2 Barb. (S. C. R.) 104; *Hodges* v. *City of Buffalo*, 2 Denio, 110.

5. The second desired instruction ought to have been given. The city is not legally responsible for the acts of the health committee done in obedience to the requirements of law, *bona fide*, though there was a lack of due care upon the part of the committee or their servants.

TENNEY, C. J. — It is not in controversy, that the Caroline, owned by the plaintiff, came into the port of Rockland at the time alleged in the writ, having on board a man sick with the small pox, a malignant disease, of which he died a few days afterwards; that subsequently to the death and the removal of the body from the vessel, the person, who had some agency on board, connected with the sickness of the person deceased, under the health officers of the city, kindled a fire in a kettle, which he placed on a flat stone, lying upon the cabin floor, and caused to be burned in the kettle, brimstone, pieces of leather and old rope, for the purpose of fumigating the vessel and preventing the spread of the disease; that very soon after the fire in the kettle was kindled, the vessel was found to be on fire, and material injury was done thereto. From what source the fire communicated with the vessel, was a question for the jury.

The jury were instructed, that if the health officers of the city of Rockland, as such, took possession and control of the vessel, and having such possession, a fire by which the vessel was injured, was occasioned by the want of ordinary care of such officers of the city or their servants, the city would be liable for losses thereby occasioned. And it was found by the jury, in addition to the general verdict for the plaintiff, that the officers of the city of Rockland did take the exclusive control and possession of the Caroline, and that the injury to the vessel was occasioned by the neglect of the officers of the city or their servants.

It does not appear that any evidence was introduced, tending to show that the city, as such, authorized the acts complained of by the plaintiff, or that they were done in pursuance of any general authority from the city to act therefor; or that the acts were expressly ratified by the corporation. But it is insisted in argument, that the allowance and payment of the bill of the person who kindled the fire in the kettle, and who had had the charge of the sick man on board the vessel, which was in testimony, was a subsequent ratification of the acts of the health officers.

But the statute is invoked as authority to the health officers, for their acts, which it is insisted by the plaintiff's counsel, renders the city responsible.

It is a general rule, that the corporation is not responsible for acts of its officers, which are unauthorized or unlawful. *Thayer* v. *Boston*, 19 Pick. 511.

The statute relied upon by the plaintiff provides, that whenever the selectmen of any seaport town within this State, shall be of the opinion that the safety of the inhabitants thereof requires that any vessel, which shall arrive there from any port or place, should perform quarantine, they may cause such vessel to do so, at such place, and under such regulations as they may judge expedient. And any owner, master, supercargo, officer, seaman, passenger, consignee, or other person, who shall neglect or refuse to obey the orders or regulations of the selectmen, respecting said

quarantine shall incur a penalty in money, or suffer imprisonment, or both. And a health committee, or a health officer, legally chosen, may perform all the duties, and exercise all the authority, which selectmen may perform or exercise, in requiring vessels to perform quarantine, under the provisions of the statute referred to. R. S., c. 21, § § 20, 21 and 22.

The general definition of the word *quarantine*, in law, is the term of forty days, during which persons coming from foreign ports, with the plague, are not permitted to land or come on shore. 5 Jac. Law Dict. 362. The word has been enlarged and modified in its signification by statutes. The restriction against the coming on shore of persons on board of vessels, arriving in port, is applied to vessels having on board other contagious sickness than that of the plague. But no authority has been found, which allows health officers, by virtue of their power, to cause quarantine to be performed, *ex vi termini*, to take the vessel in which such contagious disease is found, into their own possession and control, to the exclusion of the owner, or those whom he has put in charge.

The language of the statute requires, that the vessel shall perform quarantine, in the cases prescribed, and all having connection with the vessel, as owner, master, &c., are required to comply with the regulations of the selectmen or health officers. This clearly implies, at least, that the owner, and those having possession and control of a vessel under him, shall not be divested of this control and possession by those municipal officers. The statute relied upon by the plaintiff, having given no such authority to the health officers of the city of Rockland, (even if they had taken the steps required by the statute to cause the vessel to perform quarantine,) to take the exclusive control and possession of the Caroline, the city cannot by the statute alone be held responsible for their acts.

The testimony relied upon by the plaintiff, to prove a ratification by the city of the acts of the health officers, which were not authorized by the statute, does not appear from the case to have been passed upon by the jury. It was a ques-

tion for their exclusive determination. The right of the plaintiff to recover was made to depend, by the instructions to the jury, upon the facts, that the health officers of the city took possession and control of the plaintiff's vessel; and, while in such possession, a fire caused an injury thereto through the want of ordinary and common care of those officers, or their servants. These instructions, unqualified as they were, are regarded as erroneous.

The conversation between the witness Mansfield and Alderman Wiggin, while the vessel had on board the man sick with the small pox, being received against the objection of the defendants, we think was also erroneous. Wiggin was not one of the board of health of the city of Rockland. He was an alderman only. He did not represent the board of health or the city government, and the corporation could not be legally affected by his declarations or acts, when he was not acting in behalf of either. *Exceptions sustained—*

Verdict set aside, and New trial granted.

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

GEORGE PRATT, JR. *versus* DAVID SEAVEY.

An action commenced before the expiration of a *lien*, and brought to enforce it, may be prosecuted to judgment and execution against an administrator or executor, nothwithstanding the death and insolvency of the debtor.

So also, in case of a defendant under guardianship by reason of insanity, whose estate has been duly represented insolvent.

ON FACTS AGREED. From *Nisi Prius.*

The case is fully stated in the opinion of the Court.

A. P. Gould, for plaintiff.

Henry Ingalls, for defendant.

MAY, J.—This action is brought to secure the plaintiff's lien upon a shoe shop and the land on which the same stands. The amount of the claim sued for and the original existence of the lien are admitted. This action was commenced within

ninety days after the plaintiff had performed the labor upon the building, and the writ properly alleges that it is brought to secure said lien.

The case shows, that the defendant was placed under guardianship for the *cause of insanity* by the judge of probate for the county of Lincoln on the third day of January, 1853, and that the guardian duly returned an inventory of the defendant's estate, and represented the same as insufficient to pay his debts, whereupon commissioners of insolvency were duly appointed, who have not yet made their return. At the January term of this Court, 1854, the insanity and insolvency of the defendant were suggested by the guardian, who defends this suit, and now contends, that the action should be dismissed on account of said insolvency; while on the other hand, the plaintiff contends, that his lien is not dissolved by the proceedings in the probate court. It is agreed by the parties, that if the action upon the facts cannot be maintained, it shall be dismissed, and if it can be, the defendant is to be defaulted. The only question, therefore, which is presented to the Court, is whether under our statutes, the plaintiff is entitled to proceed to judgment and execution that he may enforce his lien, or whether such lien is dissolved.

By the R. S., c. 125, § 37, any person performing labor or furnishing materials for erecting, altering or repairing any house, or *other building*, by virtue of any contract with the owner thereof, has a lien to secure the payment of the same, upon such house or building, and the lot of land on which the same stands, and upon the right of redeeming the same when under mortgage; which is to continue in force for the space of ninety days from the time when the payment becomes due; and in § 38, it is provided, that "such person may secure the benefit of such lien by an attachment of such house or building, land, or right of redemption, within the said ninety days, and such attachment shall have precedence of all other attachments, not made under any such lien." Under the provisions of this statute, it seems to have been decided by this Court, in the case of *Severance* v. *Ham-*

matt, 28 Maine, 511, "that it was not the intention of the Legislature to have such a lien enforced against an insolvent estate." That was a case where the party for whom the work was done, died shortly after the performance, and the action was brought against his executor; and WELLS, J., in a dissenting opinion, regards the lien created by the statute as a vested right, and as surviving the death and insolvency of the debtor. In the subsequent case of *Bangor* v. *Goding & al.*, 35 Maine, 73, the Court decided, that such a lien created by statute, gives no vested interest in the property, and is but a part of the remedy afforded by law for the collection of the debt, and is, therefore, subject to the control of the Legislature.

By the statute of 1850, c. 159, the 37th section of the Revised Statutes, before cited, is amended in several particulars, and by the 1st section of this statute it is expressly provided, that "such lien shall continue in force for the space of ninety days from the time when such payment becomes due, notwithstanding the decease of any such debtor, and the representation of his estate as insolvent; and the administrator or executor of *any* insolvent estate shall, upon citation, be holden to answer to any action brought upon a claim secured by such lien." Although such lien may not be regarded as a vested right until it is perfected, and is dependent upon a compliance by the plaintiff with the provisions of the statutes necessary for its enforcement, still it is clear, that an action which was commenced before the expiration of the lien, and brought to enforce it, may, by virtue of the statute of 1850, be prosecuted to judgment and execution, against his administrator or executor, notwithstanding the death and insolvency of the debtor. Does not a defendant under guardianship, by reason of his insanity, and whose estate is duly represented as insolvent, stand in the same position?

By the statute of 1850, c. 177, § 1, it is enacted "that to every such case, so far as it relates to all debts and claims between the said ward and all other persons, the principles of

law applicable to the estates of deceased persons, represented insolvent, are hereby extended and applied."

By the 2d section of the same statute it is provided, that " as to all the rights, doings and duties of the guardian, of the commissioners of insolvency, of the court of probate, *and other tribunals*, and of all parties and persons in relation to the debts and claims above mentioned, the like proceedings, *mutatis mutandis*, shall be had, and with the same effect, as in relation to the estates of deceased persons, represented insolvent," excepting certain provisions which have no connection with the case before the Court. We are, therefore, of opinion that this action stands upon the same footing, as if it had been brought against a person subsequently deceased, and whose estate was duly represented insolvent. The result is, that the action is maintainable, and the defendant, according to the agreement of the parties, is to be defaulted for the amount claimed, with interest from the date of the writ; but the execution to be issued upon the judgment, cannot be lawfully levied except upon the property to which the creditor's lien originally attached, and which lien has been kept in force in conformity with the provisions of the statute.

Defendant to be defaulted.

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

RICE, J., did not sit.

THEODORE A. SIMMONS *& al. versus* CHARLES A. CURTIS *& al.*

One partner, after the dissolution of a co-partnership, has no power to make new contracts, or to create new liabilities to bind the firm, without some special authority to do so. Such authority may be inferred from all the circumstances of the case.

A *valid* assignment of all the partnership estate, for the benefit of creditors of the firm, would, *ipso facto*, be a dissolution.

But an assignment, void for illegality, does not work such dissolution.

An assignment for the benefit of creditors, wherein the substantial requirements of the statute are not complied with, is void.

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

ASSUMPSIT on a note payable to plaintiffs or order, on demand, with interest.

Samuel S. Curtis, Oscar H. Sampson and Joseph Curtis, doing business under the firm name of Curtis, Sampson & Co., were admitted, on petition as subsequent attaching creditors, to defend this suit.

After the evidence was in, the case was withdrawn from the jury, and referred to the full Court on report. The points in issue will fully appear in the opinion of the Court.

Converse & Hubbard, for plaintiffs.

The instrument, intended as an assignment, is utterly void. By the statute of 1844, c. 112, § 1, all the property of the assignor should be conveyed, except that exempt by law from attachment. The instrument in this case, covers only the goods, debts, &c., belonging to the firm of Curtis & Wright. They make oath that only such property is assigned.

If it be said, that by § 2 of the same chapter, all the property passed, we answer, that it was not so intended by the Legislature. That provision relates to property that may not be named or included in the schedule, usually annexed to the assignment. The assignor having assigned all his property not exempt by law from attachment, and made oath that he has done so, without which, the assignment is declared void, in that case all his property shall pass.

But in this assignment, the assignors do no such thing, and therefore, by the very same statute, it is declared void.

2. The case finds that no bond was filed by the assignee within 20 days, agreeably to the requirements of the statute of 1849, c. 112; and it is contended, that he could not enter upon the trust, and was not assignee in fact until he had so done.

As against the plaintiffs, as attaching creditors, the statute declares it void.

We do not question that a valid assignment would dissolve the co-partnership, but an intention to do an act that would dissolve an attachment, unless done, amounts to nothing.

The death of a partner operates a disssolution, but if both parties intend to commit suicide on a time fixed, and they jump into water too shoal to drown them, their intention would amount only to a ducking, and that would not dissolve their business relations.

Tallman & Paine, for defendants.

The note in suit was made by Wright, one of the defendants, and if prior to the 23d of February (the date of the note,) the defendant firm had been dissolved, Wright had no authority to subscribe the co-partnership name, and the note is void. *Graves* v. *Murray,* 6 Cowan, 701; *Sanford* v. *Michels,* 4 Johns. 224.

After dissolution, the member authorized to settle the business of the firm, cannot give a co-partnership note in payment of a co-partnership debt. *Perrin & al.* v. *Keen & al.,* 19 Maine, 355.

The partnership of defendants was dissolved on the 2d of February, 1855, by the assignment, and the execution and acceptance thereof by the assignee; or at all events, when notice was published.

By the law of 1844, c. 112, § 2, "No assignment shall be valid unless sworn to; nor unless the assignee shall give the notice required in this Act."

The certificate of the due administration of the oath is indorsed on the assignment. And according to the testimony of Call, the notice was published within fourteen days.

In the notice, the date of the assignment is misrecited; but the date was not required to be set out, and the date may be rejected as surplusage.

The omission to file a bond in the probate office, for twenty days, renders the assignment invalid only as to attaching creditors. Laws of 1844, c. 113, § 1,

It is still a valid assignment as against the assignee, whether sued by creditors for their dividend, or by the assignors for the surplus. The assignee could not plead his own neglect of duty.

By force of this assignment, all the property of the assign-

ors, whether specified or not, vested in the assignee. Laws of 1844, c. 112, § 2.

Therefore the partners were deprived by their own act of the means of promoting the joint enterprize.

And the assignment was *ipso facto* a dissolution.

Again. Whether the assignment was valid or invalid, the Court will infer a dissolution.

It is a question of intent. What did the partners mean? No form of words is necessary to effect a dissolution. No words are necessary.

Suppose the partners dispose of their stock of goods and migrate to other States, would not such circumstances abundantly prove a dissolution? And did not the partners in this case manifest their intention quite as clearly?

No notice of the dissolution to the plaintiffs under the circumstances was necessary, or if necessary, notice to their attorney, (Converse,) was notice to them. *Whitman* v. *Leonard*, 2 Pick. 177; *Kent* v. *Charleston* 2 Gray, 281.

The giving of a new note to Curtis, Sampson & Co., by Curtis, the defendant, did not revive the co-partnership. Nor was it a ratification of the act of Wright.

The giving of the note to the plaintiffs was a fraud, and the note therefore void. Exactly in point, is *Whitman* v. *Leonard*, 2 Pick. 177, as explained in *Arnold* v. *Brown*, 24 Pick. 89.

MAY, J.—Notwithstanding a co-partnership after its dissolution may be regarded as subsisting in a qualified sense, for the settlement of its affairs, still, it seems to be well settled, that one partner, after its dissolution, has no power to make new contracts or to create new liabilities to bind the firm, without some special authority so to do. Such authority may be inferred from all the circumstances in the case, but without it he cannot give a co-partnership note in payment of a co-partnership debt. *Milliken* v. *Loring*, 37 Maine, 408; *Sanford* v. *Michels*, 4 Johns. 224; *Perrin & al.* v. *Keen & al.* 19 Maine, 355.

The note in suit bears date Feb. 23, 1855, and purports to have been given by Curtis & Wright, a firm consisting of Charles A. Curtis and Henry Wright. They make no defence, but Samuel S. Curtis, Oscar H. Sampson and Joseph Curtis, a firm doing business under the name of Curtis, Sampson & Co., having been admitted on petition as subsequent attaching creditors to defend this suit, appear and contend that the defendants are not liable on the note, because it was given by Wright without any authority from his co-partner, *after* the firm of Curtis & Wright had been dissolved; and if such be the fact the position is well taken. The case shows that the note was given by Wright *in the name of the partnership* for a debt against the firm, and that Wright had no other authority to give it than what a co-partnership implies. It therefore becomes important to determine whether there had been a dissolution of such connection when the note was given. This is a question of fact to be determined from the evidence in the case. *Taft* v. *Buffum*, 14 Pick. 322.

It appears that the defendants, as co-partners, on the second day of Feb., 1855, made an assignment "of all their property, estate, rights and credits *belonging to said partnership*, of every description, consisting of goods in the store and shop, stock, notes, accounts," &c., to one Everett W. Stetson, for the benefit of their creditors. Said assignment was duly executed by said Curtis & Wright and said Stetson, and also by the firm of L. B. Usher & Co., as creditors. Said assignee on the day of the assignment took possession of the stock in trade and books of the defendants, but did not give any bond or file any copy of the assignment in the probate office as is required by the statute of 1849, c. 113, § § 1 & 4. It further appears from the certificate of the magistrate upon said assignment, that said assignors, on the day of its date, made affidavit that they had "placed and assigned all their property, rights, estate and credits *belonging* to the co-partnership of Curtis & Wright of every description" in the hands of said Stetson for the benefit of their creditors.

It is contended in defence, that these proceedings operated

a dissolution of the co-partnership of Curtis & Wright; and it cannot well be doubted that a valid assignment of all the partnership estate, real and personal, made for the benefit of creditors by a firm, would *ipso facto* be a dissolution. Such an assignment necessarily implies an entire suspension and winding up of all co-partnership affairs; and by it the members of the firm are at once deprived of all the means necessary for the transaction of the company concerns, and so must be presumed to have intended what their act clearly implies. But if such assignment be absolutely void and the attempt to assign wholly abortive, it is not perceived how such *an unexecuted intention to assign*, on the part of the members of the firm, can properly be regarded as a dissolution of the firm. By such an assignment the co-partnership is not divested of the ownership of its property and effects, and would still be entitled to be re-invested with the immediate possession of the same; and we think it may reasonably be presumed that no dissolution of the connection was intended or expected unless the assignment should take effect. Suppose a solvent co-partnership should make a sale of its entire property and thus divest itself of all means for carrying on its proper business, and immediately after the execution of the necessary papers, and the delivery of the property, should learn that the whole transaction on the part of the purchaser was a fraud, could not the *co-partnership, as such,* avail itself of the fraud to set aside the sale, and, upon a restoration of the property, would not the members of the firm be regarded still as co-partners in the same manner as if no such fraudulent sale had been made? In such a case, when the sale is not void but voidable, can it be that there would be a dissolution, so that the co-partnership, as such, could not avoid it, and, if avoided, would not the members of the firm *eo instante*, without any other act on their part, still retain all the powers incident to the co-partnership? Would it not be absurd to suppose that they intended a dissolution, if the sale should prove to be without effect? The act of rescission could not, with propriety, be regarded as the formation of a new partnership,

but only as evidence of the continuance of the old one. If then, in the case under consideration, it should turn out, that the act by which the defendants, as partners, undertook to divest themselves of the partnership property for the benefit of their creditors, was absolutely void, we have no doubt that the mere intention to dissolve their firm, which arises only by implication from such act, must be regarded as falling with the act itself.

It therefore becomes important to determine whether the assignment proved in this case, is valid or not. That it is void as against attaching creditors, is not denied. The neglect of the assignee to give the bond required by the statute, is decisive upon this point. Stat. 1849, c. 113, § 1. But our inquiry now is whether it is not absolutely void.

Prior to the statute of 1836, c. 240, voluntary assignments made *bona fide* by debtors directly to, or in trust for all or any of the creditors of the assignor, if accepted by them, were held valid; but that statute expressly provided that "no assignment hereafter made by any debtor in this State, for the benefit of his creditors, shall be valid, except the provisions of this Act be complied with;" and under this statute, this Court decided, that an assignment which provided only for such creditors as should consent to discharge the assignor from any balance which might not be received under the assignment, was void. *Pearson & al.* v. *Crosby & al.*, 25 Maine, 261. This statute was expressly repealed by the statute of 1844, § 5. By this last statute, which is still in force, it is provided in § 1, that "all assignments made by debtors in this State, for the benefit of their creditors, shall provide for an equal distribution of all their estate, real and personal, among such of their creditors, as, after notice as herein provided, become parties to said assignments, in proportion to the amount of their respective claims, excepting such property of said debtors as may by law be exempt from attachment;" and the same section further provides, that "in all such assignments, the assignor or assignors shall make affidavit to *the truth thereof*, a certificate of which affidavit shall be made upon said as-

signment by the magistrate before whom the same may be taken."

By a fair construction of these provisions of the statute, the defendants were bound to provide in their assignment for an equal distribution of all their estate, real and personal, not exempt from attachment, among such of their creditors as should become parties to it; and to make affidavit that said assignment embraced the whole of such estate. The design of these provisions undoubtedly is, to give assurance to the creditors, that they will receive their just proportion of the avails of the whole estate which is by law liable for the payment of their debts, if they shall become parties to the assignment. It is not sufficient for a co-partnership to assign only the co-partnership property. It must appear also that the private property of the individual partners, not exempt from attachment, which is liable for the partnership debts, is in some way embraced in the assignment; and the oath of the assignors must verify such fact. By the second section of the same statute, it is provided, that "no assignment shall be valid, unless sworn to, nor unless the assignee or assignees shall give the notice required in this Act." We think the assignment made by the defendants, being limited, as it is in its terms, *to the property, estate, rights and credits belonging to the co-partnership of Curtis & Wright, and the certificate thereon, showing only that they made oath or affidavit that they had placed and assigned all such property in the hands of the assignee,* is not a compliance with the foregoing requirements of the statute. The assignment should contain some language, to show that the private property of each of the partners, not exempt from attachment, was intended to be assigned; yet there is not one word in it from which such intention can be inferred; but on the contrary, the language used clearly excludes it, and implies the possession of such property. In the case of *Merrill* v. *Winslow*, 29 Maine, 58, the Court held that an assignment made by a general partner, in his own name, without reference to the co-partnership, which was special, and conducted in his name alone, did not embrace

the co-partnership property, and we cannot doubt that the assignment in the present case embraces only the partnership property.

But it is contended on the part of the defence, that the assignment in this case operates upon the whole property of the assignors, co-partnership and private, by virtue of the provisions of the statute of 1844, § 2, which are, that "all assignments made by any debtor or debtors, for the benefit of any one or more of his creditors, shall be construed to pass all the property, real and personal, of such debtor or debtors, not exempted by law from attachment, whether *specified* in such assignments or not." The object of this provision is to provide, that a general description of the property shall be sufficient; but we think there must be some language used, from which an intention to assign the property can be inferred. It would be unreasonable to hold, or suppose, that an assignment of a stock of goods in a certain store should pass ships and farms, or that an assignment of a horse for the benefit "of one or more creditors," should pass a stock of goods. If it be said, that the case does not show that the defendants had, at the time of the assignment, any separate property belonging to them or either of them, we think the want of such property is not to be assumed, when the oath of the parties making the assignment does not negative the fact. The assignment should purport to be of the whole property liable for the payment of debts, or at least it should use language broad enough to embrace it, if any exist. We think therefore, that as the assignment in this case is limited to the partnership property of the defendants, and as the affidavit upon it does not import that such property was the only property of the defendants liable for the payment of their debts, it is not such an assignment, and so sworn to, as to make it valid within the true intent and meaning of the statute. It is therefore void, and being ineffectual to pass the property of the co-partnership of Curtis & Wright to the assignee, it is not sufficient, in connection with the other evidence in the case, to authorize us or a jury to say that said

co-partnership was dissolved thereby; and the fact that both of the defendants, subsequent to the making of said assignment, gave notes to the creditors of the firm in the partnership name, in payment for debts not then due, is somewhat corroborative of this view of the case.

But it is further contended in defence, that the giving of the note in suit was a fraud upon the other creditors of the firm. It appears to have been given for a debt honestly due, and whether such debt was payable at the time does not distinctly appear. The right of a debtor to prefer one creditor to another, cannot be questioned; nor does the fact, that in the present case such preference was given to the plaintiffs by only one of the partnership defendants, change the rule. The defendants must be defaulted, and the plaintiffs have judgment for the amount of the note and interest.

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

GEORGE FORSYTH *versus* ADONIRAM J. DAY, *& al.*

A principal can authorize his agent to act for and bind him in one name as well as in another.

An agent authorized to sign the name of his principal, effectually binds him by simply affixing to the instrument the name of his principal as if it were his own name.

As matter of convenience in preserving testimony, it is well that the names of all parties, who are in any way connected with written instruments, should appear upon the instruments themselves; but whether the name of the agent, who writes that of his principal, appear or not, his *authority* must be established *aliunde*.

The rule, as broadly laid down in *Wood* v. *Goodrich*, 6 Cush. 117, that the agent must make the instrument expressly as agent, and that this fact must appear on the instrument itself, cannot be sustained either by authority or upon principle.

A person may be bound by the use of his name by another on an implied authority.

In order to hold a party on implied authority, it must be made to appear, that he had knowledge antecedent to, or concurrent with the inception of the

instrument, that the assumed agent was thus using his name; that he permitted such use of it; and further, that injury had been sustained by the moving party in consequence of such permission. But when the use of the name of the principal by the assumed agent has been frequent and notorious, slight evidence on the latter point will be sufficient.

It is fraud in a person to acquiesce in the use of his name by another without authority, to the injury of innocent parties, and in such case the law will not permit him to deny the authority of the assumed agent.

In an action upon a note, to which the defendant's name had been signed by a third person, other notes, to which the defendant's name had been forged by the same person, either dated subsequent to the inception of the one in suit, or the existence of them not known to the defendant until after that time, and which the defendant had paid or had promised to pay, are not admissible evidence to show original implied authority on the part of such third person to sign the note in suit.

Neither are they competent evidence to establish the ratification or adoption by the defendant of the act of such third person in signing his name to the note. Ratification is equivalent to original authority; to be binding it must be made with full knowledge of all the facts; from the ratification or adoption of one specific act, no implication can arise, that another distinct, independent act of the same party has been adopted or ratified; the payment by the defendant of forged notes, in no way connected with that in suit, could have no legal tendency to show that he had ratified or adopted the latter.

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

This was an action of ASSUMPSIT upon a promissory note, purporting to be signed by the defendants. *A. J. Day* was defaulted. Daniel Day pleaded the general issue, and made affidavit denying his signature to the note in suit.

The facts will be found fully stated in the opinion of the Court.

The counsel for the defendants requested the Court to instruct the jury:—

1. That the defendant is not liable on the note in suit, unless he either signed it or authorized some one else to sign it for him.

2. That there is no evidence in this case competent to authorize the jury to infer authority by Daniel to Adoniram to sign his name to the note in suit.

3. If the defendant did not sign this note, nor authorize any one else to sign his name, and if it was not executed to

be used in Daniel's business, and was not so used, and he had no benefit therefrom, Daniel is not liable upon it; even though the jury be satisfied, that he did not inform the plaintiff's attorney, that his signature was not genuine when the note was presented to him after the note became due; that such a concealment of the fact, that his name had been forged, under such circumstances, was not such a fraud upon the plaintiff as will render the defendant liable in this action.

4. That if Daniel Day derived no benefit from the notes which Adoniram issued and affixed his name to without his consent, Daniel would not render himself liable on them by not repudiating them when they came to his knowledge.

5. That payment by Daniel of other notes to which Adoniram had affixed his signature, is not sufficient evidence for the jury to find, that Daniel authorized Adoniram to affix his name to this note, in the absence of proof that this note was made for, or used for Daniel's benefit.

6. That the fact that Adoniram had affixed the signature of Daniel to a large number of notes, some of which Daniel had paid, is not sufficient to authorize the jury to infer authority by Daniel to Adoniram to use his name in this case, if the plaintiff has failed to prove to the satisfaction of the jury, that Adoniram signed Daniel's name to this, after such use by Adoniram of his name came to the knowledge of Daniel.

7. That the defendant's neglecting to disclose to the plaintiff, or his attorney, the fact that the name of Daniel Day was forged to the note in suit, such paper never having been appropriated to the benefit of the defendant, was not a fraud upon the plaintiff, and he would not thereby be charged in this suit.

8. That the payment of one or any number of notes by the defendant, to which Adoniram had forged his name, had no tendency to show, and is not competent to prove, authority by the defendant to Adoniram to sign defendant's name to this note.

9. That if the plaintiff or his attorney did present the note in suit to the defendant a short time before it was sued, as is testified to by Mr. Converse, the defendant did not, by neglecting to inform the plaintiff that his signature was not genuine, adopt the signature as his own, so as to render him liable in this action.

10. That if the payment of notes by Daniel, to which Adoniram had signed Daniel's name, is competent evidence from which the jury would be authorized to infer authority by Daniel to Adoniram to sign Daniel's name to this note; it is competent for the defendant to rebut such evidence by showing, that he paid such notes to save the character and prevent the imprisonment of his brother, and if the jury are satisfied that such were his motives, the inference is rebutted, and such payments would not be proof of authority.

1. The first requested instruction was given in the language of the request.

2. The second requested instruction was refused, and it was submitted to the jury to determine from all the evidence, whether Daniel had given Adoniram authority to sign his name to the note in suit.

3. The third requested instruction was refused, and the effect of the facts assumed to exist in the requested instruction was submitted to the jury.

4. The fourth requested instruction was given, with the further remark, that the conduct of Daniel, as proved, was evidence, the effect of which was for the jury.

5. The Court instructed the jury, that the fact of payment, as set forth in the requested instruction, was one for their consideration.

6. The sixth requested instruction was refused, and it was submitted to the jury for them to draw such inferences from the facts therein assumed, and the other facts in the case, as they should deem justly inferable therefrom.

7. The seventh requested instruction was not given, but the force and effect of the alleged fact, as evidence upon the question, was submitted to the jury.

8. The eighth requested instruction was refused.

9. The ninth requested instruction was given with the further remark, that the conduct of the defendant Daniel Day, was a matter proper for the consideration of the jury in connection with the other evidence in the case.

10. The tenth requested instruction was refused, and the effect of the facts therein assumed or alleged was submitted to the jury.

11. The counsel for defendant requested the Court to instruct the jury, "that there is no evidence in this case competent to authorize the jury to infer authority by Daniel to Adoniram to sign his name to the note in suit." The Judge refused to give the requested instruction, but submitted the question of authority to their determination.

The counsel for defendant requested the Court to submit the following questions to be answered by the jury:—

1. Did Daniel Day make payments on notes to which his name had been signed by Adoniram J. Day, because he had given Adoniram authority to sign his name to said notes, or because he wished to save Adoniram from exposure and imprisonment?

2. Did Daniel Day, when this note was presented to him, refrain from disclosing the fact that the signature was not his, because he had given Adoniram authority to sign his name, or because he wished to save Adoniram from exposure and punishment? But the requests were denied.

The Court instructed the jury, that Daniel Day would not be holden to pay the note in suit, unless he had signed the note, or had previously given authority to Adoniram to sign his name for him, or, knowing that he was in the habit of using his name as alleged, had sanctioned, approved and ratified his course, and had held him out to the public as thus authorized.

That in determining whether such authority had been given, it was proper for them to consider the length of time in which his name had been signed by his brother, the probability that Daniel would be likely to know such use of it, and

whether, with a knowledge of the acts of Adoniram, he had given them his sanction. That the various facts tending to prove, as well as to disprove, such knowledge and approval and sanction of the acts of Adoniram, were especially for their consideration; and that if they should find that Adoniram was acting under the authority of Daniel, or that Daniel, knowing that his brother had been in the habit of signing his name, had ratified and approved the same, and held him out to the world as thus authorized, they should find for the plaintiff.

If the verdict, which was for the plaintiff, was against the evidence in the case; if the rulings or instructions requested and refused, should have been given; or if the rulings and instructions given were erroneous, the verdict was to be set aside and a new trial granted; otherwise judgment was to be rendered on the verdict.

A. P. Gould and *H. Ingalls*, for defendant.

1. Evidence of the existence of notes *prior* to the date of the plaintiff's note was inadmissible. It was too remote and uncertain, and calculated to mislead the jury.

2. But if notes prior to plaintiff's were not admissible, those dated subsequently were clearly inadmissible.

3. The testimony as to payments of forged notes by Daniel, *after* the date of the plaintiff's note, should have been excluded.

To these points, the counsel cited Bayley on Bills, 320; *Hall* v. *Huse*, 10 Mass. 39; *Heam* v. *Rogers*, 9 B. & C., 386; *Cooper* v. *LeBlanc*, 2 Stra. 1051; Chitty on Bills, 39.

4. But if the notes and testimony introduced by plaintiff were admissible at all, they were so only for specific purposes, which should have been clearly defined and stated to the jury by the Court.

The counsel for defendant contended, that the instructions of the Court to the jury were in a variety of particulars erroneous. They further cited 1 Parsons on Con. 44; *Amory* v. *Hamilton*, 17 Mass. 103, 109; *Wyman* v. *Hallowell and Augusta Bank*, 14 Mass. 58; *Salem Bank* v. *Gloucester Bank*,

17 Mass. 33; *U. S. Bank* v. *Bank of Georgia*, 10 Wheat. 333; *Smith* v. *Mercer*, 6 Taunt. 312; *Hartford Bank* v. *Hart*, 3 Day, 491; *Brigham* v. *Peters*, 1 Gray, 139; *Constein* v. *Fonse*, 1 Camp. 43; *Fitzpatrick* v. *School Commissioners*, 7 Humph. 224, 228; *Young* v. *Adams*, 6 Mass. 182; *Hortons* v. *Townes*, 6 Leigh, (Va.) 47; *St. John* v. *Redman*, 9 Porter, (Ala.) 428; *Union Bank* v. *Berine*, 1 Grattan, (Va.) 226; *Hall* v. *Huse*, 10 Mass. 39; American Leading Cases, 572, ed. of 1852, note to *Calver* v. *Ashley; Willson* v. *Tamman*, 6 Manning & Gr. 236, 242; *Finney* v. *Fairhaven Ins. Co.* 5 Met. 192.

Hubbard, for plaintiff.

1. The testimony establishes the fact, that defendant knew his name was placed to the note in suit by his brother, at the time it was presented to him by the plaintiff's attorney. His not denying the genuineness, his conduct and declarations, amount to an adoption of the note as his own. *Salem Bank* v. *Gloucester Bank*, 17 Mass. 1; same v. same, ib. 33: *Barbour* v. *Gingell*, 3 Esp. 60; *Leach* v. *Burnham*, 10 Wheat. 343; *U. S. Bank* v. *Bank of Georgia*, 10 Wheat. 333, and cases cited; Bayley on Bills, 326; 3 Day, 495; 2 Greenl. Ev. p. 67; 1 Greenl. Ev. 196; Paley on Agency, 143, 144; 1 Stark. 234; 1 Gray, 193; Story's Agency, 55, 56.

2. The instructions given to the jury went beyond the particular requests. They were too favorable to the defendant.

3. The verdict was conformable to the evidence. *Dewey* v. *Field*, 4 Met. 382.

4. The conduct of defendant was a fraud upon the plaintiff.

5. The instructions of the Court were correct.

RICE, J.—Assumpsit on a promissory note dated Oct. 16, 1854, for $270. Adoniram J. Day has submitted to a default. Daniel contests, on the ground that the name upon said note, purporting to be his, is not his genuine signature. The plaintiff received the note of Adoniram, for property

sold and delivered to him. There is no direct evidence showing that Daniel signed the note, or authorized Adoniram to place his name upon it. But the plaintiff contends that Daniel either authorized Adoniram to affix his name to the note originally, or has since adopted or ratified the act.

To sustain this proposition, the plaintiff, among other testimony, introduced a number of notes given by Adoniram to different parties, and upon which he had placed the name of Daniel as his surety. These notes all appear to have been given by Adoniram, in the prosecution of his own business, in which Daniel was in no way interested. Some of the notes thus introduced in evidence, bear date earlier than the note in suit, and there was testimony tending to prove that Daniel had knowledge that Adoniram had placed his name upon them, or some of them, before the date of the note in suit, but others bear date at a subsequent time. It also appears that after Daniel had discovered that Adoniram had forged his name upon many pieces of paper, he did not disclose the fact, but paid, or promised to pay, several pieces of the forged paper. To the introduction of all the forged paper the defendant objected, and especially to all such as bore date subsequent to the note in suit, or as was not brought home to his knowledge before the note in suit was executed and delivered.

The plaintiff claimed to introduce the forged paper referred to above, to satisfy the jury either that Daniel had originally authorized Adoniram to use his name, or had subsequently adopted or ratified its use.

Were the forged notes, dated subsequently to the note in suit, or of the existence of which the defendant had no knowledge until after the note in suit was executed and delivered, competent evidence to establish either implied or original authority or subsequent adoption and ratification?

In *Wood* v. *Goodrich*, 6 Cush. 117, in commenting upon the proper mode of executing a deed, or note, by an agent, FLETCHER, J., remarks, "It should appear upon the face of the instruments, that they were executed by the attorney, and

in virtue of the authority delegated to him for that purpose. It is not enough that the attorney in fact has authority, but it must appear by the instruments themselves, which he executes, that he intends to execute this authority. The instruments should be made by the attorney expressly as such attorney; and the exercise of his delegated authority should be distinctly avowed upon the instruments themselves. The instruments must speak for themselves."

In *Wilks* v. *Back*, 2 East, 143, a question was raised on the execution of submission bonds. Wilks was fully empowered to sign, seal, &c., for his late partner, Browne, and executed the submission thus:—"*Mathias Wilks*, L. S.—*Mathias Wilks*, L. S. for *James Browne*."

It was objected, that this was not a good execution on the part of Browne. In giving his opinion in the case, LAWRENCE, J., remarked, "this is not like the case in Lord Raymond's Reports, where the attorney had devised to the defendant, in her own name, which she could not do; for no estate could pass from her, but only from her principal. But here the bond was executed by Wilks for and in the name of his principal; and this is distinctly shown by the manner of making the signature. Not that even that was necessary to be shown; for if Wilks had sealed and delivered it in the name of Browne that would have been enough, without stating, that he had done so. There is no particular form of words to be used, provided the act be done in the name of the principal." LEBLANC and GROVE, J. J., expressed substantially the same views.

SOUTHERLAND, J., in *Pents* v. *Stanton*, 10 Wend. 271, remarks, "there is no doubt that a person may draw, accept or indorse a bill by his agent or attorney, and that it will be as obligatory upon him as though it was done by his own hand. But the agent, in such case, must either sign the name of the principal to the bill, or it must appear on the face of the bill itself, in some way or another, that it was in fact drawn for him, or the principal will not be bound.

The particular form of the execution is not material, if it be substantially done in the name of the principal."

When a person has authority, as agent, to draw, accept, or indorse a bill for his principal, he should either write the name of the principal, or state in writing, that he draws, indorses or accepts as agent, or by *procuration* of A. B., &c. Chit. on Bills, 36.

The drawing, accepting or indorsing as agent for another person, may be effected by merely writing the name of the principal, as if he himself were actually the party signing; but the most explicit and regular course is to sign the name of the principal, and then immediately under it to add *per procuration*, A. B., &c. Chitty on Bills, 37.

No case, I apprehend, can be found in the books which will sustain the rule so broadly laid down by the learned Judge in the case of *Wood* v. *Goodrich*, cited above. Nor can the doctrine be sustained on principle. It is difficult to perceive any sound reason why, if one man may authorize another to act for him, and bind him, he may not authorize him thus to act for and bind him in one name as well as in another. As matter of convenience, in preserving testimony it may be well that the names of all parties, who are in any way connected with a written instrument, should appear upon the instruments themselves. But the fact that the name of the agent, by whom the signature of the principal is affixed to an instrument, appears upon the instrument itself, neither proves nor has any tendency to prove, the authority of such agent. *That* must be established *aliunde*, whether his name appears as agent, or whether he simply places the name of his principal to the instrument to be executed.

More even. The authorities clearly show that one man may be bound by the use of his name by another, simply from an *implied* authority. It becomes material in this case, to examine under what circumstances such implied authority will arise.

The case of *Neale* v. *Erving*, 1 Esp. 61, was assumpsit on a policy of insurance. To prove the subscribing of the de-

fendant's name to the policy, the broker who negotiated the policy was called. He proved that the defendant's name on the policy had been subscribed by one *Hutchings*. He said he did not know by what authority Hutchings had done it; but that Hutchings was in the constant habit of subscribing policies in the name of Erving, and had done several for him, and others to his knowledge. ERSKINE objected that Hutchings must have done it by power of attorney for the defendant, which should be produced. But Lord KENYON held that the acts of Hutchings held him out to the world as properly authorized; and his having subscribed several policies in the defendant's name was sufficient evidence of that authority, in order to charge the defendant.

Brackenbank v. *Sugrue*, 5 C. & P. 21, was on a policy of insurance in which an alteration to correspond to an alteration in the voyage, was made by one Stewart. To prove the authority of Stewart the agent of the company was called, who testified that "Mr. Stewart signed for the company; we did not send policies to Ireland to have such alterations as this made in them. I have known losses paid on policies having such alterations made by Mr. Stewart, without being sent to Ireland, and that such alterations were made very frequently." Lord TENDERDEN was of opinion, that these facts were sufficient to establish proof of agency, for the purpose of making the alterations.

Watkins v. *Vince*, 2 Stark. 362, was an action on a guaranty by the defendant, by which, as was alleged, he had guarantied to the plaintiff pay for 100,000 bricks. The guaranty was in the handwriting of James Vince, the son of the defendant, a minor of the age of 16. It was proved that he had signed for his father in three or four instances, and that he had accepted bills for him. It being objected that this did not afford sufficient evidence of authority on the part of the son, Lord ELLENBOROUGH held it was sufficient *prima facie* evidence, in the absence of any inducement on the part of the son to *commit a crime*.

In *Barber* v. *Gingell*, 3 Esp. 60, which was on a bill drawn

by Taylor, and accepted by the defendant. One ground of defence was, that the acceptance was a forgery, which was fully proved. The plaintiff then proved that the defendant had been connected with Taylor in business; that he had in fact paid several bills drawn as the present one was by Taylor, and to which Taylor, as it was supposed, had written the acceptance in the defendant's name.

These facts were held by Lord KENYON to be an answer to the forgery set up by the defendant.

In *Courteen* v. *Touse*, 1 Camp. 43, the policy of insurance, on which the action was brought, was signed by one Butler, for the defendant. A witness called, proved Butler's handwriting, and swore that he had often observed him sign policies for the defendant; but he had not seen any general power of attorney from the defendant to Butler; nor did he know that Butler authorized him to sign this specific policy; nor was he acquainted with any instance in which the defendant had paid a loss upon a policy so subscribed. Lord ELLENBOROUGH held that the proof of agency must be carried further to charge the defendant.

In *Weed* v. *Carpenter*, 4 Wend. 219, it was held that where a man repeatedly, for three or four years, permitted his friend to indorse his name on bills and notes with his knowledge and without objection, a jury would be authorized to find authority for such indorsements.

In *Long* v. *Colburn*, 11 Mass. 98, PARKER, Justice, says, "This authority, (to sign a note,) may be by parol, by letter, by verbal direction, or may even be implied from certain relations proved to exist between the actual maker of the note and him for whom he undertakes to act.

In *Rusby* v. *Scarlett*, 5 Esp. 76, Lord ELLENBOROUGH says, "the general rule to subject the principal to the act of the agent is this, the agency must be antecedently given, or subsequently adopted. There must be in the latter case some act of recognition."

In *Bridgham* v. *Peters*, 1 Gray, 139, it was held, DEWEY, J., giving the opinion of the Court, that if the note in controversy

was indorsed in the same handwriting that Lambert had adopted as his, in his usual business transactions, it was competent for the defendant to show this fact.

As agency may be presumed from repeated acts of the agent, adopted and confirmed by the principal previously to the contract in which the question is raised, so such agency may be confirmed and established by a subsequent ratification. 1 Parsons on Contracts, 44.

Chancellor KENT says, 2 Kent's Com. 478, that an acquiescence in the assumed agency of another, when the acts of the agent are brought to the knowledge of the principal, is equivalent to an express authority. By permitting another to hold himself out to the world as his agent, the principal adopts his acts and will be held bound to the person who gives credit thereafter to the other in the capacity of his agent.

The holder of a bill purporting to be, but not in fact, accepted by the person to whom it is addressed, cannot recover against the apparent acceptor by proving a fact *subsequently* discovered, that on a former occasion the defendant had given a general authority to the person who accepted in his name, to accept bills for him. To make such authority available for such a purpose, he must show either that the authority remains unreversed at the time of the acceptance, or that he took the bill on the faith of the authority. Chitty on Bills, 35, note.

When it is sought to bind the principal for acts performed by an agent acting without express authority, on the ground of previous recognition of similar acts, it is necessary to show that the instrument in question was taken on the faith of such previous recognition. *St. John* v. *Redmond*, 9 Porter, 428.

It is a fraud in a person silently to lie by and see his name used by others without authority, to the prejudice of innocent parties. Though the party who acts may not in fact be the agent of the person for whom he assumes to act, the law will not permit a principal who remains silent when his name is

being used to the prejudice of others, with his knowledge, afterwards to deny the authority of his assumed agent. The rule to be deduced from the authorities I think to be this: To hold a party responsible for drawing, accepting, or indorsing a bill or note by another in his name, on an implied original authority, it must be made to appear, that the party sought to be charged had knowledge, antecedent to, or concurrent with the inception of the instrument sought to be enforced, that his name was being thus used by such assumed agent, and that he permitted it to be done; and further, that injury had arisen in consequence of such permission to the moving party. But when the use of the name of the principal had been with his consent, frequent and notorious, slight evidence on the latter point would be sufficient.

From these considerations it results, that all the notes introduced in this case, dated subsequent to the note in suit, and all other notes introduced, the existence of which was not proved to have been known to Daniel at or before the inception of the note in suit, were not competent evidence from which a jury would be authorized to infer original authority from Daniel to Adoniram to place his name on the note in suit, and for that specific purpose should have been excluded.

Were these same notes competent evidence from which the jury could legitimately infer the adoption or ratification of the one in suit?

The ratification of an act is equivalent to the original grant of authority. *Corno* v. *Iron Co.*, 12 Barb. 27.

But to make an unauthorized act binding upon the principal it must be made with a full knowledge of all the material circumstances in the case. *Hardemon* v. *Ford*, 12 Geo. 205. The ratification by a principal of the unauthorized acts of his agent is not binding unless made with a full knowledge of all the facts. *Nixon* v. *Palmer*, 4 Selden, N. Y.

Ratification and adoption are restricted to their own terms. By adopting or ratifying one specific act, no implication can arise that a distinct and independent act of the same party will also be adopted or ratified.

There was no evidence of any business connection between Daniel and Adoniram Day out of which the notes now under consideration originated. They appear to have been given by Adoniram for his sole benefit. After maturity, Daniel seems to have paid or caused some of them to be paid, and perhaps to have promised to pay others. This may have been done to relieve or protect his brother, or from other considerations. Those acts, however, must be deemed individual acts, each depending upon its own peculiar circumstances. So far as the defendant may have said or done any thing with reference to the note in suit, tending to show that he has ratified or adopted it, these acts or declarations are admissible in testimony against him. But the fact, that he has paid other forged notes, not connected with the note in suit, has no legal tendency to show that he has adopted or ratified that note, and they were not competent evidence for such a purpose.

We think the instructions given were not such as the defendant was entitled to receive, in view of the facts in the case, and his requests for instructions. There must therefore be a new trial.

Much consideration was given at the argument to the cases found in the books, growing out of suits to recover back money which had been paid on forged bills and notes. As the facts in this case do not, in my judgment, involve the principles discussed in this class of cases, I have not deemed it advisable to review the cases cited on that point.

Exceptions sustained.—New trial granted.

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

APPLETON, J., was not satisfied that a new trial ought to be granted, but concurred generally in the opinion given.

ISAAC AMES *& al. versus* CHRISTOPHER DYER *& al.*

The plan of a house, the model of a ship, or the mould by which a ship's timbers are formed, do not enter into the structure, and cannot be regarded as within the statutes by which liens are given, in certain cases, to the material man and the laborer.

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

This was an action of ASSUMPSIT to recover the value of the plaintiffs' labor in making a set of moulds, by which to construct the ship on which the plaintiffs claim a lien, and for materials used in making such moulds. The plea was the general issue, and a brief statement alleging that the claim of the plaintiffs did not constitute a lien claim.

It was admitted that the plaintiffs furnished the lumber to make, and assisted in making, a set of moulds, which were used by the defendants while constructing the ship Oliver Jordan, and that the timber of said ship was shaped by said moulds, which were so used in the yard where the ship was constructed; but they did not enter into the structure of the ship. The defendants contended that the plaintiffs had no lien upon said ship for their demand against defendants. The Court ruled that the plaintiffs had a lien upon the ship for making the moulds, and the materials therefor, and ordered that defendants be defaulted.

If, in the opinion of the Court, the plaintiffs have a lien for their claim, the default is to stand. But if this Court are of opinion that they have no lien, the default is to be taken off, and the allegation of a lien claim is to be struck from the writ by amendment, and judgment rendered against the defendants personally only; or such other disposition of the case is to be made as the Court shall judge proper.

J. A. Meserve, for plaintiffs.

The plaintiffs claim a lien under the statute of 1842, c. 125, § 25, which provides a lien for labor performed or materials furnished "for or on account of any vessel building or standing on the stocks," &c.

The moulds were furnished "for and on account of" the vessel, and were indispensable to the building of it.

Judge WARE, Daveis' Reports, p. 207, says, "if *the excess* had been small, and had been furnished under a belief that the whole was wanted, and intended to be used in building the ship, I should think the lien *ought to extend to the whole.*"

The learned Judge would include an "*excess,*" that did not actually go *into the structure* of the vessel. If an excess of timber, not used at all in the ship, may be covered by the lien, how can *moulds,* actually used and furnished for the ship, be excluded?

A. P. Gould, for defendants.

The statute gives a lien to those "who shall perform labor or furnish materials for or on account of any ship." The plaintiffs' labor and materials were not "for or on account of the *ship,*" but were for the *moulds* by which the ship was fashioned.

It has been held in the Admiralty Courts, that under the lien statute there is no lien, except for materials which enter into the *structure* of the ship, or for labor in building the ship itself.

In the case of *Lambard* v. *Pike,* 33 Maine, 141, 144, SHEPLEY, C. J., says, "To create a lien, the materials must be used for erecting, altering or repairing the building. *They must be so applied as to constitute a part of the building.*"

Judge WARE, in the case of *The Hull of a New Ship,* Daveis, 199, on p. 208, says, "The statute privilege extends only to materials which are furnished for the vessel, *and actually used in building it.*"

It has also been held in admiralty, that the statute gives no lien for *tools* purchased to be used in constructing the ship.

For some discussion of lien, see *Swett & al.* v. *James,* 2 R. I., 270, 288, and *Phillips* v. *Wright,* 5 Sandf. 342, where it is held that plaintiff has no lien, unless he show the materials went into the structure.

APPLETON, J.—"A lien," says SHAW, C. J., in *Sumner* v. *Hamlet*, 12 Pick. 76, "is the right to the custody of the property of another, with a right to hold and retain the same against the general owner as indemnity or for security for some debt or obligation." By the civil law a lien, *jus retentionis*, is defined to be "a right to detain a thing until a demand is satisfied." Lindley's Thibaut, § 232. It may result from the rules of the common law; it may arise from the contract of parties; or it may be created by statute. But whatever its origin, it rests upon the idea that the party having it has the right to retain the thing itself, whatever it may be, as by keeping or carriage, till the services in relation thereto, by work and labor, or by materials furnished, shall have been paid and satisfied by the general owner of the property, upon which the lien exists.

By R. S., c. 125, § 35, it is enacted, 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 repair after having been launched, shall have a lien for his wages or materials," &c.

The plaintiffs claim to recover the value of their labor in making a set of moulds by which the ship Oliver Jordan, upon which the lien is claimed, was constructed, and for materials used in making the same. The question presented for determination is whether, by the statute, they have such lien.

The moulds for a vessel cannot be regarded as a part of the materials with which it is constructed. They are used in its building as patterns in a foundry, or the last for a shoe. They may be indispensable for the construction of a vessel, as are the tools of the carpenter or joiner, or the ground upon which the keel is laid, and the ship finished, but they do not enter into its structure. The materials of which the moulds are made do not belong to the vessel, nor does the title to them pass to its purchaser. They may be again used, if another vessel of the same tonnage and form is to be built;

or they may be modified for another of different size and dimensions. "The whole theory of a lien for labor and materials," says SANDFORD, J., in *Phillips* v. *Wright*, 5 Sand. 342, "rests upon the basis, that such labor and materials have entered into and contributed to the production or equipment of the thing upon which the lien is impressed." Subsequently he adds, "can it be said that materials are furnished for and towards building a ship, when no part of them enters into or becomes a part of the ship?"

In *Swett & al.* v. *James*, 2 R. I., 270, it was regarded as necessary to create a lien, that the materials furnished should be incorporated in and become a part of the building upon which it was claimed to exist.

The plan of a house, the model of a ship, the moulds by which its timbers are to be hewed, may be necessary and even indispensable, but they do not enter into any structure so as to be a part of its materials, and cannot be regarded as within the provision of the statute by which a lien is given in certain cases to the laborer and the material man.

The writ is to be amended by striking out the claim for a lien, and the defendant to be defaulted.

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

EBEN FARLEY, *in Equity, versus* NATH. BRYANT *& al.*

Leave is properly given, at *Nisi Prius*, to file items of cost after the expiration of a year from the rendition of judgment, it being shown by the party applying for such leave, that he has exercised due diligence.

The question whether such diligence is shown, is one of fact, to be decided by the Judge at *Nisi Prius*, and exceptions will not lie from his decision.

IN EQUITY.

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

The question in this case, was simply as to the time of filing in the clerk's office, the items of costs claimed to be

allowed. The circumstances under which application for leave to file the claim for costs, was made, sufficiently appear in the opinion of the Court.

H. C. Lowell, for defendant.

1. By the rules of the common law the Court was deemed so far to have retained its jurisdiction over the cause and parties, for a *year and a day*, as to have power to assess and certify costs to the party entitled thereto, and to compel payment of the same by execution against the goods, &c., of the party charged, or by process of contempt, but not afterwards. Co. Litt. 184, 259; Bac. Abr., Attorney, D; 2 Sell. Pr. 429; *Hardisty* v. *Booney*, 2 Salk. 598.

The same principle has been recognized in this State, and is indeed substantially incorporated into our statutes and rules of Court. R. S. c. 115, § § 5, 104, 105, 106; Rules of Court, 9 Maine, 304; Nos. 1, 2, 3, 4, Rules in Chancery, 6 Maine, 481; Rule in Chancery, 18 Maine, 444, No. 21. The application to the Judge came too late here.

2. Courts of general chancery powers have, irrespective of statutory provision, a right to award and assess costs in two instances only; first, as condition precedent on which amendments or relief are granted in the progress of the proceedings; and the other on the final rendition of the judgment or decree, where it has the power, as incident to the case itself, to award and apportion the costs, and to enforce, at any time within a year and a day; that is, a year including the day on which judgment was rendered, the payment of the same by process of contempt. The Court here had no right to assess and certify costs after the year.

3. If the Court had the power to assess and certify costs after a year, there is no sufficient cause assigned for doing so in this case. There should be some reasonable cause; here there is no legal cause shown. *Allen & al., pet'rs*, v. *Haskell*, 31 Maine, 589; *Farley* v. *Bryant & al.*, 32 Maine, 480.

Besides, great injustice would be done by allowing costs to be assessed and enforced now.

Ruggles, for plaintiff.

There is no time fixed by statute, practice or adjudication, within which taxation of costs must at all events be filed. The Court, in *Allen* v. *Haskell*, 31 Maine, 589, distinctly intimates, that the items may be filed after the year for good cause shown.

In this case, the direction of the Judge to the clerk was a matter of *discretion*, and is not examinable on exceptions. What is a cause of delay is not matter of statute or fixed rule. The Judge to whom application is made properly decides that question.

CUTTING, J. — It appears from the documents before us, and others to which reference is made, that the plaintiff duly filed his bill in equity against the defendants, praying this Court to reform a deed upon the allegation of certain mistakes therein. That at the April term, 1851, judgment was rendered that the plaintiff was entitled to a decree reforming the deed in one particular and not in another, and that he should "recover his costs, excluding from the taxation thereof, all testimony not connected with the correction of that mistake." [See *Farley* v. *Bryant & als.*, 32 Maine, 480.]

It further appears, that on Nov. 4, 1853, the plaintiff filed the items of costs claimed by him to be allowed, in the clerk's office; that the clerk refused to consider or tax the same, because they were "filed after the expiration of one year from the rendition of judgment," and referred the parties to the Judge at *Nisi Prius*, who "allows bill of costs to be taxed before clerk." To this ruling the defendants except, and contend that the items were filed too late.

By statute, c. 115, § 104, "No first execution shall be issued after the expiration of one year, from the time judgment was entered." Consequently, in no event can the present judgment for costs, when taxed, be enforced by execution. It is to be presumed that the clerk, in the regular discharge of his duties, had made up the record, so far as the same could be done, before the schedule of costs was presented, with per-

haps a blank space left for the insertion of costs, if subsequently legally ascertained, and which can now be inserted and the record enlarged and amended only according to the truth and for good cause shown.

In *Allen* v. *Haskell*, 31 Maine, 589, this Court have decided, "that the taxation ought to be made up within some fixed time. Applications for that purpose, made more than a year after judgment, are considered too late, except for causes not appearing in that case," and cite Rule 21 of chancery practice.

Cases may occur, where a party, in the exercise of due diligence, is delayed more than a year after the rendition of judgment, before his costs can be finally adjudicated, settled and allowed; and to determine that such a party is without remedy would be, as to him, a denial of justice. The case, then, under consideration, involves this question of fact, has the plaintiff used due diligence? The evidence upon that issue was addressed to the final judgment and discretion of the presiding Judge, and, as a question of fact, was for him alone to decide, and from his decision no exceptions will lie. [Stat. of 1852, c. 216, § 8; *Jackson* v *Jones*, 38 Maine, 185.]

Exceptions not sustained.

RICE, APPLETON, and MAY, J. J., concurred.

TENNEY, C. J., did not sit.

BENJAMIN F. MARR *versus* ALVIN L. BARRETT.

An action of trover will not lie against a depositary, who sells goods in his charge at a price less than the one fixed by the owner. In such case it is a breach of duty, rather than an unlawful conversion.

M. instructed B., his factor, to sell a quantity of hay in Wiscasset. But B. without authority, and having made no advances whereby he would have a lien thereon, sent it to Boston and sold it there. *Held*, that this was a tortious conversion and that trover would lie.

The law recognizes no distinction between an unlawful transportation and a tortious conversion.

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

This was an action of trover to recover the value of a quantity of hay, belonging to the plaintiff, which he had intrusted to the defendant, as his factor, to sell in Wiscasset at a specified price. The defendant, however, without instructions to that effect, sent it to Boston, and there sold it.

Henry Ingalls, for plaintiff.

Hubbard, for defendant, contended, — 1. For an agent to sell at an under price is no conversion, and trover does not lie. Stephen's N. P., vol. 3. pp. 2683–4; *Dufresne* v. *Hutchinson*, 3 Taunt. 117; *Sargent* v. *Blunt*, 16 Johns. 74; *Cairns* v. *Bleeker*, 12 Johns. 300.

2. A mere wrongful asportation of a chattel is not a conversion, &c. Stephens' N. P., p. 2684.

CUTTING, J. — The principal question presented is, was the defendant guilty of a wrongful conversion in shipping the hay under the circumstances disclosed by the testimony?

That the hay was originally deposited in the defendant's storehouse, on Brooks' wharf in Wiscasset, to be by him shipped to Boston, for sale, is a fact established by the evidence.

The defendant then became the plaintiff's factor and subject to the rules of law regulating such relations. The letter of the plaintiff, of June 17, 1854, countermanded the orders to ship, but authorized a sale at Wiscasset at a specified price.

The authorities cited by defendant's counsel clearly establish the doctrine, that the action of trover does not lie against the depositary, who sells the goods at a price less than the one fixed; that in such case, there has been no unlawful conversion, but rather a breach of duty. *Dufresne* v. *Hutchinson*, 3 Taunt. 117; *Cairns* v *Bleeker*, 12 Johns. 304; *Sargent* v. *Blunt*, 16 Johns. 73. So that a sale of the hay at Wiscasset, below the price named in the instructions, would not have authorized this suit.

The defendant did not so sell at Wiscasset, but, after the lapse of a few weeks, and without further advice, shipped the hay to Boston, and *there* sold it. This act constituted an

asportation, but was it wrongful? The evidence discloses no advancements made, or liabilities assumed by the defendant, at the time he received the hay, or before the sale, for which he could have had a lien, and, under certain circumstances, would have been authorized to sell for his own indemnity, as was decided in *Brown* v. *McGrann*, [14 Peters, 479,] and after notice and demand for reimbursement, as in *Parker* v. *Brancker*, 22 Pick. 40; *Masfield* v *Goodhue*, 3 Coms. 62; *Blot* v *Boiceau*, 3 Coms. 78.

Does the place of sale, or an asportation from one place to another, change the principle? In such case new liabilities are assumed, or should be, by a person of ordinary prudence, for the protection of his property, such as insurance against the perils of the sea, &c. The factor, when shipping against orders, has no authority to procure insurance at the charge of his principal, but must himself assume the risk, and that too for the reason, that he is for the time being, the owner, which he cannot be except by an unlawful conversion. We know of no distinction between an unlawful transportation and a tortious conversion. Consequently the defendant must be defaulted, according to the agreement of the parties, and damages assessed at the rate of $16 per ton, for six tons and 295lbs., with six per cent. additional per year, from the time of shipment to the rendition of judgment.

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

MARY SMITH *versus* MICHAEL GORMAN *& al.*

A wife cannot maintain an action against her husband.

If, in an action against him by the wife, he fails properly to plead the coverture in bar, and the case is determined in his favor, he is not entitled to recover costs.

Where the questions in issue in a suit have been referred, under rule of Court, no exception to the misjoinder of parties can be taken advantage of on the acceptance of the report, unless the objection is specially set forth and submitted to the Court.

Smith *v.* Gorman.

It is within the discretion of the presiding Judge to grant delay, on the acceptance of the report of referees.

Referees may receive or reject testimony, which at common law would be inadmissible. They are the exclusive judges of the force and effect of the testimony received, and of the legal rights of the parties resulting therefrom.

On Exceptions to the acceptance of a referee's report. From *Nisi Prius*, Appleton, J., presiding.

This was an action of trover to recover for certain personal property held by the plaintiff in her own right, and alleged to have been converted by the defendants to their own use, one of the defendants being, in fact, the husband of the plaintiff. By a rule of Court, the action was submitted to a referee, who made a report thereon against Gorman, but found the other defendant, (the husband of the plaintiff,) not guilty, and awarded him costs for travel and attendance, if in the opinion of the Court he was entitled thereto. The counsel for defendants objected in writing to the acceptance of the report, and moved for delay, for reasons indicated in the opinion, which the Court refused, and ordered the report to be accepted.

The Court also ruled, that John Smith, one of the defendants, who was found *not guilty*, was not entitled to his costs against the plaintiff, he being her husband.

To which decisions of the Court, the defendants excepted.

Carlton, for plaintiff.

An award of a referee is not examinable, except on the ground of corruption, gross partiality or evident excess of power, which must appear upon the report, or be proved. *North Yarmouth* v. *Cumberland*, 6 Maine, 21; *Dean* v. *Coffin*, 17 Maine, 52; *Patten* v. *Hunnewell*, 8 Maine, 19; *Boston Water Power Co.* v. *Gray*, 6 Metc. 131.

Where a party defendant has a good defence at law, and submits the action to referees in the usual form, he refers all questions of law and fact to their judgment; and it is no ground for rejecting the report that it is against law. *Walker* v. *Sanborn*, 8 Maine, 288; *Portland Manuf. Co.* v. *Fox*, 18 Maine, 117.

The refusal of the Judge to grant the delay asked for by defendants, to prove the misconduct of the referee, was purely a discretionary power, and not subject to exceptions.

Where objections are made to the award of a referee, on the ground of misconduct of the referee, the allegations should be proved; and exceptions taken to the order of the Judge accepting the report, without proof of such allegations, cannot be sustained. *Patten* v. *Hunnewell*, 8 Maine, 19.

All the objections of defendants as to the illegality of the process, if any existed, and also to the proceedings thereon, were covered and cured by the submission and the award of the referee, he having passed upon the legality or illegality.

The award might well hold Gorman guilty, and discharge Smith as not guilty, the action being for a tort; and it is no objection to the holding Gorman guilty, that Smith, the husband, was joined, for if he could not legally be made a party, then it is as though he was never joined, and the action in contemplation of law is against Gorman alone; and the allegation in the writ, that the property was converted by said defendants, applies to Gorman alone. R. S., c. 1, § 3.

Clay and *Danforth*, for defendant.

1. By c. 168, of the laws of 1845, exceptions will lie to the order of the Court, accepting or rejecting the report of a referee. The principles of the law on which a report will be rejected, are fully discussed in the case of *B. Water Power Co.* v. *Gray*, 6 Met. 131.

By this authority it seems, that a mistake in a matter of law inadvertently made, will be a cause for rejecting a report.

2. That the referee intended to decide the liability of the husband to answer in an action in favor of his wife, correctly, or rather leave it for the Court to decide that question, appears from the provision he made in regard to costs for defendant Smith. Although he has found defendant Smith, to be husband of the plaintiff, he has adjudicated with regard to him, the same as though he was not; indicating at least, that in making this decision, that question was overlooked, and an

inadvertent mistake made; for a wife cannot maintain an action against her husband.

3. The writ should have been abated. There being two defendants does not help the matter, for the writ is one, and is either good or bad.

4. Neither does it help the matter, that the action is in form *ex delicto*. For if the husband could not be guilty of a conversion so as to make him liable to the action, another person could not be guilty jointly with him. Neither could the other defendant be holden on the ground, that in actions of tort one may be discharged and another holden.

APPLETON, J.—The writ in this case discloses no relationship between the plaintiff and either of the defendants. So far as the proceedings upon their face afford any indications, the action was rightly commenced.

At the return term a plea in abatement, alleging the plaintiff to be the wife of the defendant Smith, was filed.

By the common law a wife can only enforce her rights in conjunction with her husband. By statute 1848, c. 73, the wife is authorized to bring an action in her own name in vindication of her rights. So far as the statute gives her authority, she may commence and prosecute suits and no further. By § 1, "she may commence, *prosecute* and *defend* any suit in law or equity to final judgment and execution in her own name, in the same manner as if she were unmarried, *or she may* prosecute or defend *such* suit *jointly* with her husband." The statute is in derogation of the common law, and is not to be construed as giving the wife a right of action against the husband, unless it results from the express terms of the statute, or from necessary implication. The alternative is given to the wife to sue in her own name or "jointly with her husband." The authority is in the alternative, and in either case is co-extensive. As the husband and wife cannot "jointly" maintain an action against the husband, so neither can the wife alone. So the right of prosecution and of defence is co-extensive. If the wife may sue the husband,

the husband may sue the wife. The statute gives no mutual right of action between each other, to the husband and wife, and none such exists by the common law.

The suit could not have been successfully maintained against the husband, if he had properly pleaded the facts upon which he relied. His plea, being found upon demurrer to be fatally defective, was overruled, and a *respondeas ouster* awarded.

The case then stood for trial. The writ and pleadings disclosed no facts duly pleaded, on account of which the suit should be abated.

At a subsequent term it was referred by rule of Court. The referee awarded damages in favor of the plaintiff against the defendant Gorman, and made a special report setting forth that the defendant Smith was the husband of the plaintiff, and submitted the question, whether or not he was entitled to costs, to the determination of the Court.

The counsel for the defendant filed objections to the acceptance of the report of the referee, which were all overruled by the presiding Judge.

In an action of trover against two or more defendants, the judgment may be against all or a portion of the defendants, as the facts may be established by the proof adduced. No exception to the misjoinder of parties can be taken advantage of on the acceptance of the report, unless they are specially set forth and submitted to the Court.

There was an allegation of misconduct on the part of the referee. The counsel for the defendant made an affidavit setting forth the facts he expected to prove, and the ground of such expectation, and requesting delay that he might furnish such proof. Whether he was entitled to delay was a matter of discretion. The Court may have regarded the facts proposed to be proved as immaterial; or, if material, that no sufficient reason was afforded for granting the requested delay. It is immaterial on which ground a postponement was denied. It was discretionary with the Judge in either case.

The referee was at liberty to receive testimony which by the rules of the common law would be inadmissible, or to re-

ject it. Of the force and effect of the evidence received, and of the legal rights of the parties resulting therefrom, he was the selected and exclusive judge.

The husband not being liable to the suit of the wife cannot recover costs against her. The right to issue execution against her alone is derivable only from the statutes relating to this subject. The executions which may be issued under § 2, of the statute of 1848, c. 73, are limited to "such suits" as she may commence and prosecute by virtue of § 1. But, as has been seen, § 1 does not authorize a suit by the wife against the husband. Neither does it allow an execution to issue in favor of the husband against the wife. So great a change of the common law should be established by the clear language of a statute, or by necessary implication. Nothing indicates such to have been the intention of the Legislature.

Exceptions overruled.

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

STEPHEN PARSONS *versus* SIMON M. HUFF.

A rule of law that requires a jury to infer from one willfully false assertion by a witness, that all statements uttered by him are false, is manifestly erroneous. The maxim, "*falsus in uno, falsus in omnibus,*" is qualified by circumstances.

The credit of a witness is a matter entirely for a jury, as to which no invariable rules of law can be given.

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

This was an action of trespass *quare clausum*. Plea, general issue, with a brief statement.

After the evidence was in, the Court instructed the jury that it was a rule or maxim of law, that if a witness was willfully and corruptly false in any one material statement, and they were fully satisfied of that fact, they might properly regard such a witness unworthy of belief, and no credit ought to be given to his testimony in any one particular or

respect, any further than his testimony was corroborated by other evidence in the case; and they would consider whether such rule or maxim did not commend itself to their common sense, and if it did they might properly act upon it.

They were further instructed, that they were the sole judges of the credit to be given to any and all the witnesses in the case. The plaintiff excepted to the instructions.

The verdict was for the defendant.

Thacher & Ingalls, for plaintiff, contended, — 1. There was error in the ruling of the Court touching the declarations made by plaintiff to Hutchins relating to depositions not offered in the case.

2. There was error in the direction of the Court to the jury, touching the supposed maxim of law, "*falsus in uno, falsus in omnibus.*"

A. P. Gould, for defendant, argued that the instructions to the jury were well warranted by the authorities. 1 Starkie's Ev. 523, part 3, § 87.

APPLETON, J. — The Court in this case instructed the jury, "that it was a *rule or maxim of law,* that if a witness was willfully or corruptly false in any one material statement, and they were fully satisfied of that fact, they might properly regard such a witness unworthy of belief and no credit ought to be given to his testimony in any one particular or respect any further than he was corroborated by other evidence in the case," &c.

The jury, it will be perceived, were peremptorily instructed, as matter of law, that in a certain contingency no credit should be given to a witness; that if they found one perjurious statement in his testimony, they should disregard as false the whole he might utter. In other words, it was asserted, as matter of law, that the deliberate utterance of one falsehood imposed upon the jury the obligation to disregard all the facts to which the witness uttering such falsehood might testify.

Is it true that the jury, finding a witness false in one essential statement, are bound to disregard the residue of his testi-

mony? The question under consideration is one not of power, but of duty. Is the utterance of one falsehood conclusive proof of falsehood as to all other facts uttered by the witness, imposing upon the jury the duty to disregard the rest of his testimony, or is it to be viewed as a fact discrediting the witness; a circumstance of grave import affording grounds of distrust or disbelief, leaving the question of belief or disbelief optional with the jury?

The importance of the question is apparent; for if disbelief be imperatively required by law, then a jury may be legally required to disregard as false what in truth they believe.

The truth or falsehood of testimony depends upon the motives, or the balance of motives, acting upon the witness at the time of its utterance. The motives which influence the human mind are as various as the feelings and desires of man. The same motives vary in intensity between man and man. They affect the same man differently at different times and under different circumstances. The prejudices, the passions, the hopes and fears, the loves and hates, by which humanity is affected, are not susceptible of the uniform and accurate admeasurement of the mechanical forces. There is no motive, the action of which upon testimony is uniform. The same motive may lead to truth or to falsehood. However sinister its direction, it may be controlled or overborne by others acting in a contrary direction.

The facts which a witness may utter may be many. In relation to each fact, its conformity or disconformity with truth will depend upon the clear amount of the aggregate force of interests acting upon the mind of the witness as to each separate fact. The witness may be exposed to the action of a different class of motives as to the several facts to which his testimony may relate. It is obvious, therefore, that of the testimony of the same witness part may be true and reliable and part false and mendacious. A rule of law, which requires a jury to infer from one false assertion, that all facts uttered by the witness are false statements, is manifestly erroneous.

The credit of the witness is a matter entirely for the jury; as to which no invariable and inflexible rules of law can be given in advance. The credit of witnesses vary. The same witness may be trustworthy at one time, untrustworthy at another; true as to one fact, false as to another. It is for the jury in each case to determine what degree of credit is to be given each and every witness and to the several statements of each witness. Any rule of law, which takes from the jury this power and limits its exercise, is a manifest interference with their functions. It is the determination of the trustworthiness or untrustworthiness of testimony in advance of its utterance, and in utter and hopeless ignorance of all the facts essential to a correct decision as to such trustworthiness or untrustworthiness.

It was held, in *State* v. *Williams*, 2 Jones, (N. C.,) 257, that the maxim *falsus in uno, falsus in omnibus*, is, in a common law trial, to be applied by the jury, according to their judgment, for the ascertainment of the truth, and is not a rule of law in virtue of which the Judge may withdraw the evidence from the consideration of the jury, or direct them to disregard it altogether. "It is," remarks PEARSON, J., in his elaborate opinion in this case, "the province of the jury to decide issues of fact and to pass upon the credit of witnesses; when the credit of a witness is to be passed upon, such jury is called on to say, whether they believe him or not; this belief is personal, individual, and depends upon an infinite variety of circumstances. Any attempt to regulate or control it by a fixed rule is impracticable and worse than useless; inconsistent and repugnant to the nature of a trial by jury, and calculated to take from it its chief excellence, on account of which it is preferred by the common law to any other mode of trial, and to adopt in its place the chief objection to a fixed tribunal."

In *Lewis* v. *Hodgdon*, 17 Maine, 267, referring to the alleged rule of *falsus in uno, falsus in omnibus*, SHEPLEY, C. J., says, "it is not of such binding effect as to authorize a court to instruct a jury that they cannot believe one part of his statement and disbelieve another. While this is the presumption

of the law, cases often occur in which jurors are constrained to yield entire credit to certain statements and to disbelieve others." *Exceptions sustained.—New trial granted.*

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

AMBROSE MERRILL *versus* INHABITANTS OF WHITEFIELD.

Willfully corrupt and false testimony on a material point, does not so absolutely discredit the witness as to any other fact to which he may testify, that, as matter of law, the jury are bound to disregard his testimony. [See *Parsons* v. *Huff, ante.*]

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

This was an action of the case for injury and damages sustained by plaintiff, occasioned by a defective road.

There was testimony introduced by defendants tending to contradict one of plaintiff's witnesses, and the Judge instructed the jury, that it was a rule or maxim of law, that if the jury should be satisfied, that the witness for plaintiff had willfully and corruptly testified falsely to any one material fact, and they were fully satisfied of that fact, they might properly regard such a witness unworthy of belief, and no credit ought to be given to his testimony in any one particular or respect, unless he was corroborated by other testimony in the case; and they would consider whether such rule or maxim did not commend itself to their common sense, and if it did, they might properly act upon it.

They were further instructed, that they were the sole judges of the credit to be given to any and all the witnesses in the case. To the foregoing instructions, as matter of law, the plaintiff excepted.

W. Hubbard, for plaintiff.

Carleton & Gould, for defendant.

APPLETON, J. — New trial granted.

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

DANIEL SIDELINGER *& al. versus* JOHN HAGAR *& al.*

In an action by A., owner of a saw-mill, to recover damages of B., alleged owner or occupant of another mill situated on the opposite side of the same river and supplied with water from the same source, for diverting water from the mill of A., the ownership or actual occupancy of B., must be *proved* by competent evidence in the case, or the suit cannot be maintained.

Such ownership is not established by a deed to the defendants from a party not shown by the evidence to have had the title in him, while it does appear from the evidence, that a third party has in himself an older and apparently perfect outstanding title; and the presumption in the absence of proof in such case, is, that the possession follows the superior title.

The Court cannot presume that he, who assumes to convey as owner, is such in fact, or undertake to supply a link in the chain of title, whose existence is rendered probable, but which is not in the case.

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

This was an action of the case, in which the plaintiffs, Daniel Sidelinger, William Mathews and Benjamin Mathews, as owners of a saw-mill on the south side of Medomac river, claimed to recover damages of the defendants, John Hagar, Andrew S. Sidelinger and Henry Law, alleged owners of a stave-mill on the north side of the same river, for the diversion of water from the plaintiffs' mill by the defendants, in the use of their mill.

The facts, contained chiefly in deeds produced by the one party and the other, sufficiently appear in the opinion of the Court.

J. Ruggles, for defendants.

J. Bulfinch, for plaintiffs.

RICE, J. — This case comes before us on a report. The plaintiffs claim to recover damages, as owners of a saw-mill situated on the south side of Medomac river, in the town of Union, for the diversion of water by the defendants, the alleged owners of a stave-mill, situated on the opposite side of the same river, and drawing water from the same dam.

The title, as appears, on both sides of the river, to the land occupied by both mills, was originally in Benjamin Bussey, who conveyed the same to John Bulfinch, by deeds dated

Feb. 14, 1820, and July 9, 1821. Bulfinch immediately afterwards, and while sole owner on both sides of the river, built the saw-mill, now claimed by the plaintiffs, on the south side. The plaintiffs claim title under Bulfinch. The following table will exhibit the title to the saw-mill and land connected therewith, as deduced from the deeds put into the case by the plaintiffs, at the time this action was commenced, and at the date of several deeds referred to.

Date of Deeds.	John Bulfinch.	Samuel Hagar.	Suel Hagar.	Samuel Hagar, jr.	Daniel Sidelinger.	John Hagar.	Benj. Mathews.	Elijah Sidelinger.	William Mathews.
August 23, 1823,	2/3	1/6	1/6						
February 24, 1830,	2/3	1/6		1/6					
February 20, 1833,	1/3	1/6		1/6	1/3				
January 19, 1837,	1/6	1/6		1/3	1/3				
June 27, 1842,	1/6			1/3	1/3	1/6			
November 7, 1849,	1/6			1/3	1/3		1/6		
April 8, 1850,	1/6			1/3	1/3		1/6	1/6	
April 13, 1850,	1/6			1/3	1/3		1/6		1/6
May 16, 1850,	1/6			1/3	1/3		1/3		1/6
July 13, 1850,	1/6			1/3	1/3		1/3		1/3

From this exhibit it is manifest that the true condition of the title does not appear. There is nothing in the evidence by which the defects in the title by deed can be explained.

In the deed of February 20, 1833, Samuel Davis, without any apparent title, joins with Bulfinch in conveying $\frac{1}{3}$ of the saw-mill to Daniel Sidelinger. And in like manner Davis joins with Bulfinch in deed of January 19, 1837, in conveyance of one-half of one-third of the saw-mill to Samuel Hagar, jr.

Nov. 7, 1849, Vinal Ware, without apparent title, joins with John Hagar in conveying one-sixth of the saw-mill to Benj. Mathews, and on the 8th of April, 1850, Vinal Ware and John Hagar, without any apparent title in either, convey one-sixth of the saw-mill to Elijah Sidelinger, and on the 13th of

the same April, Elijah Sidelinger conveys one-sixth of the saw-mill to William Mathews. It is at this point of time and in this way that the plaintiffs first appear as co-tenants.

On the 16th of May, 1850, Suel Hagar conveys one-sixth of the saw-mill to Benj. Mathews. Suel Hagar received a conveyance of one-sixth of the saw-mill from Bulfinch, August 23, 1823, and conveyed one-sixth to Samuel Hagar, jr., Feb. 24, 1830. The deeds in the case do not disclose from whence Suel Hagar obtained any interest in the mill, except by the deed from Bulfinch above referred to. July 13, 1850, Elijah Sidelinger and Thomas Hagar conveyed to William Mathews one-sixth of the saw-mill, neither of whom appears by the deeds in the case to have had any title at the time of that conveyance. Thus the deeds show title in Daniel Sidelinger to one-third of the saw-mill, derived from Bulfinch; and also of one-sixth, derived from the same source, in Benj. Mathews. The same papers show that the title to one-sixth of the mill is still in Bulfinch, and to one-third in Samuel Hagar, jr.

Bulfinch was also sole owner on the north side of the river. February 24, 1830, he conveyed an undivided half of a certain lot on that side of the stream to Samuel Hagar, jr. The lot thus conveyed includes the lot on which the stave-mill stands. Since that time there is no evidence in the case showing a conveyance of the stave-mill lot by either Bulfinch or Samuel Hagar, jr., but the title apparently remains in them.

There is a deed in the case from Samuel Davis to John Hagar, dated May 2, 1844, purporting to convey the stave-mill lot by metes and bounds. There are also two deeds from John Hagar, dated April 8, 1850, conveying one-third of his stave-mill lot to Henry Law and one-third to Andrew S. Sidelinger. But there is nothing in the case showing that Davis was in any way connected with title to this lot, which he conveys to Hagar as derived from Bulfinch or Bussey, or that he had any title whatever thereto.

The evidence shows that John Hagar, one of the defendants, and Elijah Sidelinger employed a mill-wright to work

upon the stave-mill, when it was erected in 1845. But there is no evidence tending to show actual occupation of the stave-mill by either of the defendants since the plaintiffs became co-tenants in the saw-mill. Nor can it be presumed, in the absence of all proof, that the defendants are in the occupation of the stave-mill under their title from Davis, when the plaintiffs show an elder, and apparently perfect outstanding title in Bulfinch and Samuel Hagar, jr. The presumption rather would be that the possession follows the superior title of Hagar, jr., and Bulfinch.

It is obvious that this case has not been well prepared, and if we were permitted to speculate, we might come to the conclusion, that important links in the chain of title have been omitted which might have been supplied. There is, however, no such discretion confided to us. We must decide the case on the evidence produced, not upon what we may suppose exists. Not finding any evidence that the defendants have in law or in fact encroached upon the rights of the plaintiffs, nonsuit must be entered according to the agreement of the parties, with costs for defendants.

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

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1856.

COUNTY OF PENOBSCOT.

CALEB THURSTON *versus* JOHN ADAMS.

A warrant against the *person*, issued by an inferior Court, affords no protection to the officer serving it, when the Court has no jurisdiction over the subject matter of the offence, or when it is apparent on the face of the process, that the Court has exceeded its authority.

A warrant, issued by a justice of the peace, which may be lawfully resisted, or one by virtue of which, the person arrested would be released from arrest on *habeas corpus*, is a warrant which the magistrate had no authority to issue.

Such a warrant an officer need not obey, and at common law he will not be protected by it.

When the warrant is imperfectly expressed, the officer may be bound to act, if the subject matter be within the jurisdiction of the magistrate.

When *no cause* for issuing the warrant is expressed therein, there is no question as to the want of jurisdiction.

When the process is *in rem*, the same general principles are applicable.

The rights of the officer are to be determined upon what is apparent on the face of the warrant. He is not required to look beyond his process, nor is he to be held responsible for antecedent defects or informalities.

The provision in § 16, of the Act of 1851, that no action of any kind shall be maintained in this State "for the recovery or possession of spirituous liquors or the value thereof," the same being kept for sale in violation of law, is constitutional.

On Facts Agreed. From *Nisi Prius*, Hathaway, J., presiding.

Trespass on the case for taking and carrying away certain spirituous liquors. Writ dated Nov. 24, 1852.

The defendant justified the taking as constable of Frankfort, which office, it is admitted, he held at the time. The original taking was under a warrant issued by A. Jones, Esq., one of the justices of the peace for the county of Waldo, under the provisions of the "Maine Law," so called. The defendant introduced in justification a complaint signed by three voters of the town of Frankfort, where the liquors were at the time deposited, dated Dec. 3, 1851. Also a warrant issued upon said complaint, dated Dec. 4, 1851. Also the record of judgment in the same case, rendered before said Jones, Dec. 9, 1851. Also warrant for the destruction of said liquors, dated Dec. 26th, 1851.

It was admitted at the trial, that the liquors sued for were a part of those described in said proceedings, which were not given up, but which were taken by the defendant as aforesaid. If a full defence is not made out by the foregoing, then defendant offers evidence to prove that said liquors sued for were kept and intended for purposes of illegal sale, contrary to the provisions of law.

If the proceedings afford a sufficient defence, then plaintiff is to become nonsuit.

If said proceedings do not make out such a defence, and such evidence as is offered as aforesaid is admissible, then the cause is to stand for trial.

Damages in case of a default to be assessed by a jury unless otherwise agreed by parties.

Rowe & Bartlett, for plaintiff.

1. If a magistrate issues precepts, or orders arrests for acts not known to the law as offences; if he imposes illegal punishments, or commands a plain and obvious violation of the law, he can, when thus transcending the bounds of his authority, afford no more protection to an officer, than could one not a magistrate. *Gurney* v. *Tufts*, 37 Maine, 130, 133.

2. The 11th § of the Act of 1851, for the suppression of drinking-houses and tippling-shops, relied on as creating the offence and authorizing the process and proceedings, is unconstitutional. *State* v. *McNally*, 34 Maine, 215, 216, 217; *Fisher* v. *McGirr*, 1 Gray, 1, and *Green* v. *Briggs*, 1 Curtis, C. C. R. 337.

3. If that section be constitutional, the facts alleged in the complaint do not charge an offence under it, and therefore could not give a magistrate jurisdiction.

4. The constitution, art. 1, § 5, forbids the issuing of a search warrant without probable cause. This shows on its face the want of probable cause.

5. It contains no averment, that the liquors were kept with intent to sell in the town of Frankfort. It is almost verbatim like the complaint in *State* v. *Robinson*, 33 Maine, 565, which was adjudged to be bad on that account.

6. The evidence which the defendant says he has in reserve is inadmissible. Intent to sell cannot be tried in this case. If the liquors were legally condemned, plaintiff cannot recover any damage for their destruction; if they were not legally condemned, they were property at the time of their destruction.

7. Plaintiff is entitled to pay for the casks, the officer having no authority to seize them.

A. W. Paine, for defendant, contended — 1. That the proceedings introduced, viz., the warrant for seizure and the warrant to destroy the liquors sued for, afford a full defence to the suit.

2. That the Act of 1851, under which the proceedings were had, is constitutional.

3. That even if the law be unconstitutional, the officer is not to be held responsible for his acts done in pursuance of it.

4. That if there was error in all the proceedings under which the liquors were seized and destroyed, still the plaintiff has no right to maintain his action, because the liquors were at the time of the seizure kept by him for the purposes of illegal sale.

APPLETON, J.—A warrant against the person, issued by an inferior court, affords no protection to the officer by whom it may have been executed, when the court issuing it had no jurisdiction over the subject matter of the offence, or over the person; or when, on issuing the same, it exceeded its authority and that fact is apparent on the face of the process. If the warrant issued by the justice of the peace, in the form in which it is given to the officer, is such that the party may lawfully resist it, or, if arrested, may be released upon *habeas corpus;* it is a warrant which the magistrate had no authority to issue, and which, therefore, the officer need not have obeyed, and which at common law will not protect him against the action of the party injured. When the warrant is imperfectly expressed, the officer may be bound to act, if the subject matter be within the jurisdiction of the magistrate, but when no cause for issuing the same is set forth, there is no question as to the want of jurisdiction. *Gurney* v. *Tufts,* 37 Maine, 130; *State* v. *Weed,* 1 Foster, 268; *Whipple* v. *Kent,* 2 Gray, 210; *Barnes* v. *Barber,* 1 Gilman, 410; *Green* v. *Elgin,* 5 Ad. & Ell., N. S., 100.

When the process is *in rem* the same general principles are equally applicable. The magistrate must have jurisdiction *in rem* over the thing upon which he adjudicates, and against which his process issues. If he has no jurisdiction, or, if having general jurisdiction, it appears by the warrant that there is an entire want of authority to issue it in the particular case, and that no cause of forfeiture is disclosed, the officer acting under such warrant cannot be protected.

The rights of the present defendant are determined by the warrant, and if that discloses sufficient ground for the judicial action of the magistrate, it affords a complete justification for the officer. The officer is not to look beyond his process, or to be held responsible for antecedent defects or informalities. His rights are to be determined upon what is apparent upon the face of the warrant, whenever the magistrate has jurisdiction, and if that discloses sufficient authority, the officer will have established a complete defence, otherwise not.

In *Green* v. *Elgin*, 5 Ad. & Ell., N. S., 100, the warrant of commitment, issued by the Court of Review, was held bad, as not containing any proper adjudication of a contempt, nor showing how the party committed might clear himself. "In the present case," says DENMAN, C. J., "no offence whatever can be collected from the documents."

The distinction is fully recognized between a court of ultimate resort and inferior magistrates. "There is," says BIGELOW, J., in *Piper* v *Pearson*, 2 Gray, 122, "a marked distinction in this respect between courts of general jurisdiction and inferior tribunals having only a special or limited jurisdiction. In the former case the presumption of law is, that they had jurisdiction until the contrary is shown; but with regard to inferior courts and magistrates, it is for them, when claiming any right or exemption under their proceedings, to show affirmatively that they acted within the limits of their jurisdiction." It is material, therefore, to consider whether the warrant discloses any authority on the part of the magistrate to issue the process under which the defendant justifies.

It appears from the warrant, by the authority of which the liquors in dispute were destroyed, that the magistrate issuing the same, on the 3d of Dec., 1852, received a complaint under the Act of June 2, 1851, for the suppression of drinking-houses and tippling-shops, c. 211, § 11; that he thereupon issued process for the search of the premises described in the complaint; that the officer serving the same seized certain liquors, the owners of which he returned as unknown; that of this a portion was claimed and given up by the magistrate to the several claimants; that for the liquors not thus surrendered, there were no claimants; and that such remaining portion was declared forfeited on the 9th of the same December, and ordered to be destroyed.

Now, by § 12 it is provided, that "if the owner, keeper, or possessor of liquors under the provisions of this Act shall be unknown to the officer seizing the same, they *shall not be condemned and destroyed* until they shall have been advertized, &c., for *two weeks*, by posting up a written description of the same

in some public place," &c. As the complaint was made on the 3d of December, and the adjudication had on the 9th of the same month, it is apparent from the warrant that the notice, without which the liquors of owners unknown "shall not be condemned and destroyed," could never have been given. The liquors, therefore, were never before the magistrate so that he could legally condemn them and order their destruction; and this is apparent by inspection of the warrant. The owners are set forth as unknown and as not appearing. They were not bound to appear, except after the notice, which the statute directs to be given; and until that time had expired the magistrate had no right to act upon their forfeiture.

The Act in question no where prohibits the possession of liquors for mechanical or medical purposes, or for the use of the person thus possessing. Its prohibitions are against, and its penalties are for the keeping with intent to sell, and its forfeitures are when the liquors are so kept. If the liquors were not so kept, they are as much within the protection of the law as any other property. The warrant discloses no adjudication by the magistrate that they were so kept. If not so kept, if held for legitimate and lawful purposes, the law affords the owner the usual remedies for the vindication of his rights.

It is apparent, therefore, that no defence has been disclosed. The warrant under which the officer acted, negatives the fact of the magistrate's authority to issue the same; and such want of authority being apparent to the officer, he was under no obligation to obey or enforce its mandates.

The statute, § 16, provides that no action of any kind shall be maintained in this State "for the recovery or possession of spirituous liquors or the value thereof." This provision has been limited to liquors kept for sale in violation of the provisions of law. *Preston* v. *Drew*, 33 Maine, 558. The statute in this respect is clear and imperative. It violates no provision of the constitution. It says liquors shall be kept for sale only on certain conditions and for certain purposes. It defines the conditions and prescribes the purposes. If kept in

violation of its provisions, it refuses its aid and withholds its protection. If, therefore, on trial, it shall be made to appear that the liquors were intended for sale contrary to law, no action can be maintained for their value under the provisions of the statute. *McGilvery* v. *Black*, 38 Maine, 287.

The cause to stand for trial.

TENNEY, C. J., and HATHAWAY, MAY, and GOODENOW, J. J., concurred. RICE, J., did not sit.

JOHN B. FOSTER *versus* EPHRAIM PAULK.

Bank checks are, in form and effect, bills of exchange.

As between the holder and the drawer, on failure by the drawee to pay, a demand at any time before an action is commenced will be sufficient, unless it appear that the drawer has sustained an injury by delay.

The indorser of a check may be holden on proper notice, after the drawee upon legal demand has refused payment, or in any state of facts which amounts to a dishonor of the check.

A check drawn on a bank in which the drawer has no funds need not be presented at all, in order that an action may be maintained upon it.

The *holder* of a check is *prima facie* the rightful owner of it.

A check, payable to bearer, is transferable by delivery.

The holder of a check need not prove a consideration for it, unless he possesses it under suspicious circumstances.

An exchange of checks constitutes a good consideration in each case.

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

This was an action of ASSUMPSIT on a check, payable to J. B. F., or bearer.

At the trial, the plaintiff read the check declared upon, and proved that, at the maturity of the check, Paulk had no funds in the bank, and never had any there. The cashier testified, that no demand or presentation had ever been made of the check, except that it was, before its maturity, left by plaintiff in the bank, and was in the bank at the time of its maturity.

Defendant then offered another check made by plaintiff to defendant at the same time, which was given in exchange for

the one in suit, and proved that, about two months after its maturity, it was presented for payment by S. A. Gilman, the cashier of City Bank, Bangor, and payment refused, and that at that time Foster had no funds in the bank on which the check was drawn. The cashier further testified that, at the maturity of the check, Foster had more than $20,000, to his credit in the bank, all which had been drawn out by him before the check was presented.

On the day of the trial, prior to the trial, and also at the trial, the defendant tendered the check to plaintiff, and offered to surrender it up to him.

The counsel for defendant requested the Judge to instruct the jury that, upon the evidence, the plaintiff had no right to recover, which he declined to; but instructed them that the evidence introduced by the defendant constituted no defence. The jury returned a verdict for plaintiff.

Exceptions were taken to the above instructions, and the refusal to instruct.

Rowe & Bartlett, for plaintiff.

1. Exchange of securities is sufficient consideration. *Rolfe* v. *Caslan*, 2 H. Black. 570; *Buckler* v. *Buttment & al.*, 3 East, 72; 1 Camp. 179, note.

The case shows that plaintiff gave to defendant his check for same amount payable at same time; that, at its maturity, funds were in the bank to meet it; that defendant had transferred and indorsed it, and was discharged from his liability as indorser by the *laches* of the holder; and that plaintiff is still liable on it as drawer.

2. The leaving defendant's check in the bank by plaintiff, before and at maturity, is sufficient presentment.

3. Demand and notice were not necessary. Defendant never had any funds in the bank, and suffered nothing by plaintiff's neglect. *True* v. *Thomas*, 16 Maine, 36; Story's Prom. Notes, § § 492–7–8, and cases in notes; *Little* v. *Phœnix Bank*, 2 Hill, 425; *Kemble* v. *Mills*, 1 Manning & Granger, 757.

A. W. Paine, for defendant, contended, — 1. The check in suit has no value or consideration, expressed or acknowledged, directly or indirectly.

2. It is denied that an action can be maintained, upon the check payable to "J. B. F.," in the plaintiff's name. Chitty on Con. 648 to 655.

3. But admitting that the check be payable to the plaintiff, it does not follow, that the defendant is liable to pay the plaintiff in case of its non-payment. 5 Phil. on Ev., (Hill's ed.,) 121; 2 Parsons on Con. 135; *Cromwell* v. *Levett,* 1 Hall, 56; 6 Wend. 369; *Patee* v. *Ash,* 7 S. & R., 116; Chit. on Con., 6th Am. Ed. 749, 750.

4. The check of the plaintiff being the *sole* consideration taken by the defendant for his check, there was no legal consideration.

"The holder is not bound by receiving a check, but he may treat it as a nullity if he derives no benefit from it, provided he has been guilty of no negligence which has caused an injury to the drawer." 2 Parsons on Con. 135.

Here the drawer has himself abstracted the funds after the check was drawn, and has, of course, received no injury. His own fault has caused the protest or dishonor. *Taylor* v. *Wilson,* 11 Met. 53. *Aldrich* v. *Fox,* 1 Greenl. 316, is much stronger to the point contended for than the case at bar. *Cromwell* v. *Levett,* 1 Hall, 56. — The check is not presumed to be received as payment, though the drawer has funds, but "as the means whereby the holder may procure the money."

Lord KENYON said, in *Bolton* v. *Richard,* 6 T. R., 139, "if defendant gave the check on an insolvent person, it would be too much to say, that it would cancel the plaintiff's debt." How much more so if the drawer abstracted the funds himself, as he did here. Also *Tapley* v. *Martes,* 8 T. R. 451.

5. The case is more impressive as one of a failure of consideration.

TENNEY, C. J. — The check, the cause of action in the present suit, is dated Oct. 16, 1854, and payable to J. B. F.,

or bearer, at the Exchange Bank, on Oct. 23, 1854, and signed by the defendant, as drawer.

Several objections are made by the defendant to the plaintiff's right to maintain the action.

Bank checks are, in form and effect, bills of exchange. They are not direct promises by the drawers to pay, but they are undertakings, on their part, that the drawees shall accept and pay, and the drawers are answerable only in the event of the failure of the drawees to pay. As between the holder and the drawer, a demand at any time before suit brought will be sufficient, unless it appear that the drawee has failed, or the drawer has in some other manner sustained an injury by the delay. *Cruger* v. *Armstrong*, 3 Johns. Cases, 5; *Conray* v. *Warren*, 3 Johns. 259. The indorser of a check may be holden on proper notice, after payment has been refused by the drawee, upon a legal demand, or any state of facts which amounts to a dishonor of the same. *Heylyn* v. *Adams*, 2 Burr. 669; *Rushton* v. *Aspinwall*, Doug. 679. And a check, drawn on a bank in which the drawer has no funds, need not be presented at all, in order to sustain an action upon it. *Franklin* v. *Vanderpool*, 1 Hall, 78.

The holder of a check must *prima facie* be deemed the rightful owner thereof. *Cruger* v. *Armstrong*, and *Conray* v. *Warren*, before cited.

A check on a bank, being payable to bearer, is transferable by delivery, and an action may be maintained in the name of the holder, if he is otherwise entitled to recover. *Grant* v. *Vaughan*, 3 Burr. 1526.

In this case, the plaintiff, being the holder of the check, could maintain an action thereon, in his own name, even if the initials of his name had not been inserted. And the check, having those initials, is an equally good cause of action. The initials can in no degree prejudice those rights.

The law is now understood to be, that the bearer of a bill of exchange, or a promissory note, payable to bearer, need not prove a consideration, unless he possesses it under suspicious circumstances; and that such paper stands on the same

footing with specialties, and *prima facie* imports a consideration; and the rule is equally applicable to checks. *Conray* v. *Warren*, 3 Johns. Cases, 259.

The consideration of the check declared upon in this action is shown to have been the check of the defendant to the plaintiff, of the same date and amount; payable at the same time and place. The principles in relation to consideration, applicable to bills of exchange and promissory notes, from their analogy to those relating to banker's checks, will equally apply to them. And the plaintiff's check in favor of the defendant, was a good consideration for that in suit. *Dockray* v. *Dunn*, 37 Maine, 442.

Has the consideration of the check in suit failed? This case is distinguished from those cited for the defendant, where the check was taken on account of a prëexisting indebtedness of the drawer to the person to whom it was given. In this case no such relation is shown between the parties. Each had the other's check, and no other consideration moved from one to the other.

The check of the defendant was in the bank on which it was drawn, at its maturity. No funds of the defendant were there at that, or any other time, to meet it. This fact, unattended by others suited to discharge or qualify his liability, would enable the plaintiff to recover in a suit thereon.

Did the withdrawal, by the plaintiff, of his funds in the Exchange Bank, after his check had matured, and the consequent failure of payment thereof two weeks after, when presented by the holders, take away the consideration of the check in suit, so that the action cannot be maintained? The check of the plaintiff was indorsed by the defendant without date, and in blank, and was presented by the cashier of the City Bank, Bangor, and must be treated as negotiated to the bank on the day of its date. Funds sufficient to meet it, belonging to the plaintiff, having been in the Exchange Bank at its maturity and withdrawn so long afterwards, the defendant, who was indorser, was exonerated from liability, even if he had had notice of the non-payment, immediately after the present-

ment of the check. But it does not appear that he had any notice. As between the City Bank, the holder of the check, and the plaintiff, the drawer, the latter will be holden, after a demand made, at any time, as we have seen; and, at the time of the commencement of this action, his liability had not ceased. And that of the defendant must continue.

It does not appear that the plaintiff's check to the defendant was filed in set-off, and the offer to surrender it at the trial was no defence to this suit. *Exceptions overruled.— Judgment on the verdict.*

HATHAWAY, APPLETON, and MAY, J. J., concurred.

GOODENOW, J., did not sit.

WM. H. VINTON *versus* PHILIP WEAVER AND JOHN W. VEAZIE.

A magistrate's warrant of commitment must show his authority for issuing it; and, if it show the want of such authority, it will afford no protection to an officer who makes an arrest by virtue of it.

Where a principal officer is liable, his aids, acting by his order, are also liable.

All men are bound to know the law.

If the arrest be unlawful, resistance is lawful.

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

TRESPASS. Plea, general issue and justification under a mittimus.

At the trial, it was proved that the defendant Weaver was constable and marshal of Bangor, and was well known as such; that he arrested plaintiff on a mittimus, and caused him to be carried to jail; that the defendant Veazie aided and assisted him in so doing, by Weaver's request; and that both defendants, Weaver and Veazie, seized plaintiff by the collar, threw him on the floor, and held him there, till the arrival of the police officers, for whom Weaver had sent.

Evidence was introduced in the case, touching the question whether or not, in the service of the mittimus, the defendants used unnecessary and unreasonable violence to the person of

the plaintiff, and tending to prove that they did use such force and violence, and the jury were requested to find specially upon that question.

The presiding Judge instructed the jury that the mittimus, under which defendants attempted to justify, was a void precept, and furnished them no justification, and that, if Weaver was guilty of a trespass in making the arrest and the commitment of the plaintiff, and if defendant Veazie aided and assisted Weaver in so doing, the fact that Veazie acted by request of Weaver would not relieve him, (Veazie,) from his liability to the plaintiff; and that defendants would be equally liable to him.

To these instructions defendants excepted.

A general verdict was returned for plaintiff; and the jury also, under instructions from the Court upon the subject, found specially that, in the execution of the mittimus under which defendants attempted to justify, they used such unnecessary and unreasonable force and violence upon the person of the plaintiff as amounted to an abuse of legal process.

Ingersoll & Wakefield, for defendants.

Waterhouse & W. C. Crosby, for plaintiff.

APPLETON, J.—It was held in *Gurney* v. *Tufts,* 37 Maine, 130, that a magistrate's warrant of commitment must show his authority for issuing it, and that, if it show the want of such authority, it affords no protection to an officer by whom an arrest may have been made. The warrant in that case was similar to the one under which the defendant Weaver has attempted to justify.

It is insisted that a distinction exists between the aids and servants of the officer, and the officer himself, and that, while it is conceded that the latter may be liable, the former should be exempted from liability. But such seems not to be regarded as the law. They must both stand or fall together. "Whenever," remarks SAVAGE, C. J., in *Elder* v. *Morrison,* 10 Wend. 138, "a sheriff or constable has power to execute process in a particular manner, his authority is a justifica-

tion to himself and all who come to his aid; but if his authority is not sufficient to justify him, neither can it justify those who aid him. He has no power to command others to do an unlawful act; they are not bound to obey, neither by the common law nor the statute, and if they do obey, it is at their peril. They are bound to obey when his commands are lawful, otherwise not. The only hardship in the case is that they are bound to know the law. But that obligation is universal; ignorance is no excuse for any one. The counsel for the plaintiff in error insists that there is a difference between aiding in the original taking and in overcoming resistance. It seems there is no such distinction. If the taking was lawful, the resistance was unlawful; but if the taking was unlawful, the resistance was lawful. If the resistance was lawful, neither the officer, nor those he commands to assist him, can lawfully overcome that resistance."

Exceptions overruled.

TENNEY, C. J., and HATHAWAY and GOODENOW, J. J., concurred. RICE, J., did not sit.

HARRIET WHEELER *versus* BUCHAN HASKINS.

An agent of another to sell real estate must account to the administratrix of his principal on demand, for the proceeds of the sale; if he does not so account, he is liable in damages.

The *measure* of damages is the amount for which the property was sold, and interest from the time when demand was made to account.

An agent's power of attorney ceases at the death of his principal.

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

This was an action of ASSUMPSIT to recover three hundred dollars, alleged to have been received by the defendant for the sale of a certain lot of land in Bangor, as agent of the plaintiff's intestate.

After the evidence was out, the case was taken from the jury, and it was agreed that, if the Court thereupon, or upon that part of it which was legally admissible, or not objected

to, find that the plaintiff can recover, judgment may be rendered in her favor; the Court to assess damages as a jury might, otherwise the plaintiff to become nonsuit.

The facts in the case are stated in the opinion of the Court.

Hilliard & Flagg, for defendant.

1. The agency is admitted. The defendant had authority to act in the premises, not simply in selling and transferring the title, but in the mode of payment.

2. In this case no money ever came into defendant's hands. He acted with due caution in taking the obligation of Benjamin Wheeler.

3. The remedy is against Benjamin Wheeler.

A. H. Briggs, for plaintiff.

1. If the defendant, under his power of attorney, sold in good faith and according to his best skill and judgment, intending to act for the interest of his principal, then it was his duty to account to the administratrix in a reasonable time; and if he refused he would be liable for the value of the property sold. *Clark* v. *Moody & al.*, 17 Mass. 145.

2. If defendant did not sell in good faith, with prudence and skill, and with an honest intention, he would be liable.

3. If defendant sold in good faith and intended to account, it was inconsistent with his duty to sell as he did, and hence he is liable for the value of the property sold.

HATHAWAY, J.—Benjamin and Philander Wheeler were brothers, living in New Orleans. Philander owned a lot of land in Bangor, and, by his power of attorney of Sept. 13, 1839, the defendant was authorized to sell it, by virtue of which power, he sold and conveyed it to Benjamin Wheeler Aug. 14, 1844, (Benjamin being then in Bangor,) for three hundred dollars, as appears by the deed, and for which, the defendant states, that he received Benjamin's obligation of the same date, by which, after reciting that whereas he had bought the land for three hundred dollars, payable on demand, to Philander Wheeler, in New Orleans, he bound himself to

defendant, "to so satisfy the said Philander Wheeler, or if demanded by said Haskins, to deed back the said lot of land for the same sum," as appears by the obligation, which was introduced by the defendant in the case.

Before Benjamin left Bangor to return to New Orleans, Philander died, and his decease was known at Bangor, and, from the evidence, it can hardly be doubted that his death was known to both Benjamin and the defendant, before Benjamin left Bangor to return home. The plaintiff's counsel argues "that Philander was dead, and the defendant knew it, when he deeded to Benjamin."

If such were the fact, this action could not be maintained, for the defendant's power of attorney would have died with his principal, and the deed to Benjamin would have been void. The plaintiff, however, in her writ, alleged that the defendant was bailiff of Philander, and living, from September 14, 1839, to August 14, 1844, (the date of the deed to Benjamin,) and, if it were competent for the plaintiff to disprove the allegations in her writ, the case furnishes no evidence that he was not then living, nor how long he survived after that time, except that the news of his death arrived at Bangor while Benjamin was there, that season, and before he left there for New Orleans. And the *defendant* makes no question but that Philander was living when the deed to Benjamin was executed.

From the facts presented in the case, the Court must presume that Philander was living when that deed was executed by the defendant as his attorney.

The plaintiff was duly appointed administratrix, and, by Curtis, her attorney, made demand upon the defendant, to account for the purchase money of the land, which he refused to do, and, so far as the case discloses, has persevered in his refusal.

The plaintiff was the legal, personal representative of Philander Wheeler. The defendant had received the pay, or the evidence of indebtedness of Benjamin Wheeler for the land. Neither of them had accounted to Philander, in his life time, and it was the defendant's plain duty to account to the plain-

tiff for the money or security in his hands, which he had received for the land, and which belonged to her, as the legal representative of Philander Wheeler. *Wilkins* v. *Wilkins*, 1 Salk. 9; *Clark* v. *Moody & al.*, 17 Maine, 145; *Hemenway* v. *Hemenway*, 5 Pick. 389.

It was more than four years after he sold the land, before he was called upon to account, and he then absolutely refused and persisted in his refusal. His statements, when called upon by Curtis, the plaintiff's agent, appear to have been disingenuous and evasive. The obligation, which he says he received for the land, is somewhat peculiar, when looked upon in the light of his subsequent conduct, and the circumstances of the sale.

The case is not destitute of evidence indicating that the conveyance was made in anticipation of the expected decease of Philander in a short time, and that the defendant's conduct, as Philander's agent in the matter, was not characterized by that perfect good faith to his principal, which the law requires.

Upon the whole evidence presented, the conclusion is inevitable, that the defendant's neglect and refusal to account were unreasonable and unjust, if not fraudulent, and that the plaintiff is entitled to recover.

It does not appear in the case, when the plaintiff was appointed administratrix, nor that the defendant knew she had been appointed, until the demand was made upon him; *hence*, he will be liable to pay interest *only* from the time when the demand was made, which Curtis testifies was a short time before the date of the writ. A "*short time*" is very indefinite.

The plaintiff is entitled to judgment for three hundred dollars and interest thereon from the date of the writ; and accordingly— *A default must be entered.*

TENNEY, C. J., and MAY, and GOODENOW, J. J., concurred.

APPLETON, J., did not sit.

HENRY E. PRENTISS *& al. versus* JOHN H. KELLEY *& al.*

A. and B., as counselors at law, commenced, at the request of D., and prosecuted to judgment, an action in which C. and D., alleged co-partners, were plaintiffs. They afterwards sued the latter for their fees. D. was defaulted, and C. denied that he was ever the partner of D., or authorized or was interested in the original suit. The Court *held*, that the acts and doings of the plaintiffs in Court, without other proof of notice to defendant C. than arose merely from the long continuance of the suit in Court in the name of C. and D., were not sufficient evidence of partnership, or of promise on the part of C. to entitle the plaintiffs to recover against him.

Attorneys are placed upon no better footing than other men, for the recovery of their fees.

It is a general rule that special authority to bring a suit must be shown by the attorney.

Where the plaintiff's appearance is seasonably called for, the attorney's employment must be shown; but if not called for at the first term, it will be presumed.

Whether an attorney could legally prove his retainer and the services performed, by his suppletory oath, (*Codman & al.* v. *Caldwell*, 31 Maine, 560,) *dubitatur*.

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

This action was ASSUMPSIT by the plaintiffs, counselors at law, for professional services in the suit of these defendants against J. R. Mayo.

The general issue was pleaded and joined.

The defendant Perkins was defaulted.

Plaintiffs offered in evidence, a contract in their possession, purporting to be signed by J. R. Mayo and John Perkins & Co., but it was objected to for want of proof of execution and evidence that it was given them by Kelley.

Plaintiffs then put into the case, without objection, the original writ of the defendants against J. R. Mayo, dated Dec. 7th, 1846, in which these defendants were alleged to be partners, under the firm of John Perkins & Co.; and defendants admitted that this writ was made by plaintiffs, and was upon the above contract. The Court then admitted the contract. Plaintiffs then introduced the dockets of the District and S. J. Courts of the county of Penobscot several terms, during the years 1847 and 1848, from which it appeared that the

action, *John H. Kelley & al.* v. *J. R. Mayo*, was regularly entered, prosecuted by the plaintiffs and finally entered "neither party;" and also the testimony of J. E. Godfrey, the counsel of Mayo, that plaintiffs had appeared and acted for the plaintiffs in the action against Mayo.

The defendant Kelley then called his brother, Jones S. Kelley, who testified as follows:—"I was in Prentiss & Rawson's office in Bangor. Prentiss asked me if I was acquainted with Mr. Perkins, as Perkins lived in my neighborhood. He asked if he was good. I told him he was good, if he had any thing to do with. He told me that he had a note against him for fees, concerning Perkins and my brother. I do not recollect that he said it was on the Mayo matter."

Defendant offered to prove by John Perkins, one of the defendants, after he was defaulted, that he was the only man who ought to pay the plaintiffs' demand, that the suit for services, in which the plaintiffs sue, was by and for him alone, that the defendant Kelley was improperly joined, and that Kelley was not then his partner and never was.

The Court is authorized to draw any inference, from these facts, that a jury might properly do, and to treat the evidence as a jury might, and to render judgment by default, for the sum of $46,00, with interest from the date of the writ, if, in the opinion of the Court, Kelley is liable; and if said Kelley is not liable, in the opinion of the Court, the plaintiffs will discontinue against him, he being allowed his costs, and amending their writ, and taking judgment against said Perkins on his default. But, if the testimony of Perkins be admissible, the action is to stand for trial.

Prentiss, for plaintiffs.

A. H. Briggs, for Kelley.

MAY, J. — This action is brought by the plaintiffs, who are counselors at law, to recover compensation for professional services alleged to have been rendered by them for the defendants, as co-partners. Perkins, one of the defendants, is defaulted. Kelley, the other defendant, denies that he was

ever a partner of Perkins; that he ever in any way employed the plaintiffs to render the services in question; or that he had any knowledge of their performance. There is no proof in the case tending to charge him, or to show that he was a member of the firm of John Perkins & Co., except what arises from the fact that the plaintiffs, in the year 1846, brought a suit in the name of these defendants, alleging them to be partners of a firm under that name, against one Mayo, upon a contract, which, being in the possession of the plaintiffs, was offered in evidence by them, and which purported to have been signed by said Mayo and John Perkins & Co. It appears from the dockets that said suit was regularly entered in Court, and prosecuted by the plaintiffs for several terms, during the years 1847 and 1848, and was finally entered "neither party." There was other proof that the present plaintiffs were the acting counsel for the plaintiffs in that suit, which stood upon the docket as an action "*John H. Kelley & al.* v. *J. R. Mayo.*" The execution of the contract declared on in that suit was denied; and also that it was given to the plaintiffs by said Kelley; but it was admitted that the suit was brought by the now plaintiffs upon said contract. The first question is, whether upon these facts there is sufficient legal evidence, to authorize the Court to infer that the defendant Kelley, either as a partner with said Perkins or otherwise, became liable to the plaintiffs, so as to entitle them to recover against him jointly with said Perkins in this suit. The defendant Kelley certainly cannot be charged by the acts of Perkins, done without his knowledge or consent, unless there be proof of some then existing relation between them to authorize such acts, or some subsequent ratification; nor can he be bound by the mere acts of the plaintiffs, unless they were so performed that he must have known, or be presumed to have had knowledge of them, and thus to have assented to their performance.

The facts before stated disclose no acts on the part of Perkins, such as will render Kelley liable; certainly, if not his partner, of which there is no evidence, unless the bringing

of the suit by the plaintiffs against Mayo upon the contract aforesaid, and the proceedings in Court in said action are such evidence; and the plaintiffs do not contend that Kelley is liable upon any other ground, than that he must be presumed to have known of the bringing of that suit, from the fact that it was entered and stood so long upon the dockets in a public court, and so he must have authorized it. No authority is cited which establishes such a position.

That the records of courts of justice, and recitals in writs and judgments are sometimes and for some purposes admissible in actions where the parties are not the same, is not to be denied. Thus, where two had been sued as partners and had suffered judgment by default, the record was held competent evidence, as tending to show that the defendants had held themselves out as partners to the world, in a subsequent action brought by a third person against them as such. *Craigin & al.* v. *Carlton & al.* 21 Maine, 492; *Ellis* v. *Jameson*, 17 Maine, 235.

So when the defendant in an action has made declarations or averments, in his writ in a former suit, against other parties, the record may be legally introduced for the purpose of showing his admissions. *Parsons* v. *Copeland*, 33 Maine, 370. In these cases, however, it will be perceived that the parties to the record, against whom it was offered, may properly be presumed to have had actual notice of the suits; they either brought the actions, or legal process must have been served upon them, and having notice, they must be regarded as having assented to or asserted the truth of the record. The mere fact, that the record and proceedings were in a court of justice, has never, to our knowledge, been held sufficient evidence of notice. All our statutes, requiring service of judicial process, are based upon the insufficiency of such notice. It is said by Greenleaf, in his work on Evidence, vol. 2, § 139, that, "when a suit is by an attorney for fees, he must prove his retainer and the fees and services charged," and he mentions various modes in which such proof may be made, but among them is no such mode as that

contended for in the present case. We do not doubt but that such record with notice, either actual, or properly presumed, in the absence of all proof of any dissent, would be sufficient to authorize the inference that the attorneys who brought the suit were employed by the parties of record in whose behalf they were acting; but we think, without such notice, such a rule would not only be dangerous, but sometimes oppressive. If it be said that such is the relation of an attorney to his client and the Court, that an employment ought to be presumed, it is sufficient to reply, that no case can be found where attornies at law are placed upon any better footing for the recovery of their fees than other men. It is laid down as a general rule, that a special authority must be shown to institute a suit. Greenl. Ev., vol. 2, § 139, before cited. Hence, when a plaintiff's appearance is seasonably called for, proof of employment is always required, although, before the hearing upon that question, several terms of the Court may have intervened; but if not called for at the first term after the defendant has notice of the suit, then, for the purpose of facilitating proceedings in Court, it is to be presumed; but the rule in such cases can properly have no effect upon the question of employment as between the attorney and his client. In the case of *Codman & al.* v. *Caldwell*, 31 Maine, 560, it was held, that an attorney at law might prove his retainer and the services performed, by his book and suppletory oath, and it is difficult to perceive upon what ground such evidence *would be* admissible, if the same facts might be established by disinterested proof arising from the record and the proceedings of the attorney in Court, for such evidence is only allowed from the necessity of the case.

In the case of *Foster* v. *Dow*, 29 Maine, 442, it is said by Justice WELLS, in the opinion of the Court, that "the acts and doings of the attorney, who had the care of the suit, Farris against the plaintiff, in suing Farris for his services and obtaining judgment by default, and execution against him, could have no effect upon the rights of the plaintiff. They were *res inter alios. If Farris had notice of the suit they*

might affect him by way of admission;" and in this case, we are of opinion, that the acts and doings of the plaintiffs in Court, without other proof of notice to the defendant Kelley, than what arises from the mere long continuance of the suit in Court, in the name of the defendants against Mayo, is not sufficient evidence of any partnership or promise, to entitle the plaintiffs to prevail against him. The plaintiffs failing in their proof, it becomes unnecessary to determine whether the defendant Perkins was admissible as a witness in defence or not.

According to the agreement of the parties, the plaintiffs are to discontinue against Kelley, he taking costs, but are to have judgment against the defendant Perkins.

TENNEY, C. J., and HATHAWAY, APPLETON, and GOODENOW, J. J., concurred.

JAMES B. FISKE *& al. versus* SAMUEL L. HOLMES *& al.* AND D. R. STOCKWELL, *Trustee.*

The absence of previous or contemporaneous assent to a transaction, renders its ultimate validity contingent, it being doubtful whether the necessary ratification will ever be given.

It follows that a subsequent assent does not relate back so as to prejudice a party, whose conduct has been guided by the transaction as it actually occurred.

Still less will a party be injuriously affected by a subsequent assent to, or affirmation of an act, if the party assenting or affirming had, when the act was first communicated, disaffirmed and repudiated it.

Whether the payment of a debt, after it has been put in suit, must be specially pleaded in bar to the further maintenance of the action, *quære.*

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

ASSUMPSIT on an account annexed to the writ, which bears date April 12th, 1854.

To prove their account the plaintiffs produce their book accounts supported by the suppletory oath of Fiske. The amount charged against the defendants, and all the plaintiffs claimed of them, was $19,65, and this was posted upon the plaintiffs'

leger into a private account which plaintiffs had against one of the defendants, George M. Estabrooks, by mistake of the clerk of plaintiffs. There was about $70, in all, charged against said Estabrooks, of which this $19,65 formed the last two items, dated in Aug. 1853, to wit,—

1853, Aug. 16, To 99½ lbs. spun-yarn, 14½, $14,43
" " 24, To 36 lbs. " 14½, $5,22 — $19,65.

There was a credit on said leger, dated March 31st, 1855, of $37,10, to said Estabrooks in his private account.

The defendants claimed that this $37,10, which plaintiffs received, was company funds, and should be applied to pay the company debt of $19,65, and not the private debt of George M. Estabrooks; and that, if it were so applied, the plaintiffs' demand in suit was more than paid, and the verdict should be for the defendants.

The plaintiffs admitted that the amount of said credit was received from one Davis R. Stockwell, the trustee, who, being introduced by the defendants, testified that he had dealings with the defendants as partners, to the amount of about $600, and that, on closing up their business, there was due the defendants $37,10, which he paid to the plaintiffs by their request, and with the understanding that it was to be re-paid to him by the plaintiffs if he should be obliged to pay it over to Holmes and Estabrooks; that he had a conversation with Estabrooks after he had paid the $37,10 to plaintiffs. In that conversation, witness told Estabrooks that he had paid said sum to plaintiffs, and Estabrooks replied, that it belonged to him, and he wanted to use his money to suit himself. Neither of the defendants had called upon him for the money since that time. He was soon afterwards summoned as trustee of said Holmes and Estabrooks in the suit of one Charles Fiske against them, and, on a full disclosure of all the facts, he was discharged by the Court; and a short time after he was again summoned as trustee of said Holmes and Estabrooks in this suit.

On the trial of this case, defendants expressly assented to the payment of said $37,10, as made by Stockwell to plain-

tiffs, and made said payment their sole ground of defence to the plaintiffs' suit, and claimed that they had always acquiesced in said payment since the conversation testified to.

The Court instructed the jury to find whether, from the facts in the case, there was any assent to said payment made by the defendants before the commencement of this suit, and that any assent or acquiescence made by defendants after the action was brought could not avail them as a defence.

The defendants further claimed, that if the plaintiffs had actually received the amount of their bill against the defendants, from any source whatever, though subject to a condition, they could not maintain their action; that their debt was paid. On this point, the Judge instructed the jury, that the payment must come from the defendants, or have been made by their direction or subsequent assent, previous to the date of this writ; that it was a rule of law, that one man could not voluntarily pay another's debt, and thereby discharge himself from his legal obligation to his creditor, without such creditor's consent, or subsequent ratification.

Verdict for plaintiffs.

To the above instructions the defendants excepted, and the exceptions were allowed.

W. C. Crosby, for plaintiffs.

E. C. Brett, for defendants.

APPLETON, J.—It seems that Davis R. Stockwell, having funds of these defendants in his hands, without their knowledge, at the instance of the plaintiffs, paid the same to them, with the understanding that they were to repay the same to him in the event of his being called on by the defendants therefor. The plaintiffs passed the amount received to the credit of Estabrooks, one of the defendants, against whom they had a bill individually. When the fact of the payment was communicated to Estabrooks, he expressed dissatisfaction with what had been done, and claimed the money paid as belonging to him.

As Stockwell made this payment to the plaintiffs in his own

wrong, he still remained liable to the defendants for the amount of their funds in his hands. To constitute this a valid payment by him, his acts must have been previously authorized or subsequently approved. The payment, too, was conditional and Stockwell retained the right of reclamation.

The defendants might at any time recall these funds from the hands of Stockwell. If this were done, the plaintiffs, by the very terms on which they received them, would be liable over to Stockwell. The payment having been upon condition, and made by one unauthorized, and not having been sanctioned or approved before the date of the plaintiffs' writ, this action must be regarded as having been rightly commenced.

Upon the trial of the action, the defendants expressly assented to the payment by Stockwell and relied upon the same as their only defence.

It is now claimed that this affirmance shall act retrospectively, and not merely defeat an action rightly commenced, but deprive the plaintiffs of their costs and impose upon them those of the defendants.

But such is not the law. No maxim is better settled than the maxim *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*. But as the absence of previous or contemporaneous assent renders the ultimate validity of a transaction contingent, it being doubtful whether the necessary ratification will ever be given or not; it necessarily follows that the subsequent assent does not relate back so as to prejudice a party whose conduct has been guided by the transaction as it actually occurred. Still less shall a party be injuriously affected by a subsequent assent to, or affirmation of, an act, if the party assenting or affirming had, when the act, which is in dispute, was first communicated, disaffirmed and repudiated the same.

If the defendants assent to the payment as one made in their behalf, it cannot operate retroactively and thus defeat the present action. As other rights have intervened, it cannot be regarded as effective, to the injury of the plaintiffs, be-

fore it was given. The defendants might have affirmed the payment at any moment had they so chosen, and, not so doing, they are equitably liable to the costs which have arisen.

If the payment is to be regarded as made when the act of Stockwell was affirmed, it would be a payment after the commencement of the suit, and, according to many authorities entitled to the highest consideration, could not be given in evidence under the general issue, but must be pleaded in bar of the further maintenance of the suit. "It would be unjust," says RICHARDSON, C. J., in *Bank* v. *Brackett*, 4 N. H. 557, "that a plaintiff, who had rightfully commenced a suit for a just cause, be barred by matter arising after the commencement of the action, and subjected to pay all the costs from the beginning. To prevent this injustice, the law compels a defendant to plead matter arising after the commencement of the action in a particular manner, that the Court may be enabled to settle the question of costs on just principles." In *Corbett* v. *Swinbourn*, 8 Add. & Ell. 673, it was held that payment after the commencement of the suit, and acceptance thereof by the plaintiff, is to be pleaded in bar of its further maintenance.

But we do not intend to decide whether a payment thus made should be specially pleaded or not, as it is not necessary for the determination of this cause.

The defendants claimed that the payment made by Stockwell, if subsequently assented to, was a bar to this suit. The presiding Judge instructed the jury otherwise, and correctly. The effect of a payment after the commencement of a suit was not presented to the Court for their consideration.

The instructions requested were rightfully withheld, and those given were in accordance with the legal rights of the parties. *Exceptions overruled;—Judgment on the verdict.*

TENNEY, C. J., and HATHAWAY, MAY, and GOODENOW, J. J., concurred.

RICE, J., did not sit.

WILLIAM L. HOWE *versus* JOHN K. RUSSELL.

Assumpsit for use and occupation of land will not lie, unless upon some contract between the parties, express or implied.

ON MOTION FOR NEW TRIAL, from *Nisi Prius*, CUTTING, J., presiding.

The facts in this case are fully stated in the opinion of the Court.

Wm. Fessenden, for plaintiff.

John S. Abbott, for defendant.

HATHAWAY, J. — On the third day of September, 1838, Joseph Russell conveyed his farm in Skowhegan to Osgood Sawyer, which farm, on the 4th of September, 1845, Sawyer conveyed to the defendant, who occupied it after that time, claiming title under his deed. On the 19th of May, 1847, an execution in favor of Francis B. Blanchard against Joseph Russell, was levied on the farm as Joseph Russell's property, and seizin and possession thereof delivered to the plaintiff, who claimed to be the owner of the execution, and, on the 25th of May, 1847, Blanchard conveyed the farm to the plaintiff, who filed and entered his bill in equity against the defendant and Joseph Russell, on the 13th of September, 1848, in which bill he averred that the defendant held said farm in trust for Joseph Russell, in fraud of the plaintiff, and prayed that said Joseph and John K. Russell might be required to convey the farm to the plaintiff, "and come to a full and fair account of the rents, income and profits thereof, and for all strip and waste by them done and committed on the premises."

In due course of proceedings in chancery upon this bill, on the ninth of May, 1854, the Court decreed that the conveyance of the farm by Joseph Russell to Osgood Sawyer was a mortgage, and that it had been fully paid and discharged, and that Joseph and John K. Russell should release and convey said farm to the plaintiff, &c. In obedience to

which decree, the defendant and Joseph Russell did convey the farm to the plaintiff, by deed dated the 15th, and acknowledged the 18th of September, 1854; and this action of *assumpsit* was brought to recover pay for the use and occupation of the farm from May 15th, 1847, to the date of the plaintiff's writ, September 15th, 1854.

The verdict was for the defendant, and the case is presented on a motion for a new trial, because, as the plaintiff alleges, the verdict was against the evidence.

The defendant's counsel contends that, as there was a prayer in the plaintiff's bill for an account of the rents and profits, the whole matter embraced in this suit having been also embraced in the bill in equity, must be considered as having been finally adjudicated upon, in that process. This may present a question worthy of the plaintiff's consideration, but the Court have no occasion to decide or consider it, for the defendant also contends, in support of the verdict, that an action of *assumpsit* for use and occupation, cannot be maintained by the evidence reported. And such is the opinion of the Court.

Assumpsit for use and occupation of land will not lie, unless upon some contract between the plaintiff and defendant, express or implied.

Here was no express contract, and no evidence is perceived from which a contract can be implied.

The defendant had the legal record title to the land, and occupied it, claiming it as his farm. The Court decreed that the plaintiff was, in equity, entitled to it.

The defendant was a disseizor, and the plaintiff *treated him as such.* There was no relation of landlord and tenant existing between them.

The defendant resisted the plaintiff's claim of title, to the extent of his power, and yielded only to the mandate of the Court.

The evidence does not sustain *this* action, and the verdict was right. *Wyman* v. *Hook*, 2 Greenl. 337; *Porter* v. *Hooper*, 2 Fairf. 170; *Bancroft & ux.* v. *Wardwell*, 13 Johns. 489;

Notes by Rand & al. in *Cummings & ux.* v. *Noyes*, 10 Mass. 433, edition of 1851; *Larrabee* v. *Lumbert*, 34 Maine, 79.

Motion overruled. —

Judgment on the verdict.

TENNEY, C. J., and APPLETON, MAY, and GOODENOW, J. J., concurred.

WILLIAM LEWIS *versus* WARREN BROWN.

In general, the *opinion* of a witness is not evidence. He must speak of facts. The opinion may be arrived at by some unwarrantable deduction of the witness, or from premises not well established.

Of the force of a discharge in bankruptcy.

On REPORT from *Nisi Prius*, CUTTING, J., presiding.

This was ASSUMPSIT for money had and received and money paid, &c., and was brought to recover the sum of $210, and interest, paid by plaintiff as surety for defendant on a bond given to one E. G. Vaughan, conditioned to save him harmless from certain debts assumed by defendant.

General issue pleaded, and also bankruptcy of defendant.

Plaintiff introduced the bond made by defendant to said Vaughan, which is dated Nov. 23, 1835, and is signed by plaintiff as the surety of defendant. Also, assignment of said bond, May 4th, 1852, by said Vaughan to Wm. T. Hillard, and receipt of said Hillard to said Lewis for $210, indorsed thereon.

Defendant introduced two agreements or papers, dated Aug. 6, 1852, signed by Hillard, one being to the plaintiff, and the other to the defendant.

Defendant also introduced his petition in bankruptcy, dated Feb. 7th, 1842, and discharge, dated Aug. 3d, 1842.

Whereupon the cause was withdrawn from the jury by consent of parties, and referred to the whole Court, who are authorized to draw such inferences as a jury would be authorized to draw, and to direct a nonsuit or default for such sum as may be conformable to law.

Simpson and *A. W. Paine*, for plaintiff, contended, —

1. That the defence had produced no sufficient proof, that there was a legal and binding agreement between the parties that the sum paid by the plaintiff for the defendant was to be a gratuity. The proof consists of the verbal testimony of Mr. Hillard.

2. That, as matter of law, the defence set up cannot avail, even though the facts be as alleged by the defendant. The case comes directly within the principle of *Brooks* v. *White*, 2 Met. 283; *White* v. *Jordan*, 27 Maine, 370.

The reasoning of the Court in *Smith* v. *Bartholomew*, 1 Met. 276, embraces this case and is conclusive of its merits. *Parker* v. *Baylies*, 2 Bos. & Pul. 73.

The laying out of money for one's own benefit, though at the request of another, will not support a promise on the part of the latter to pay therefor.

In *Andrews* v. *Andrews*, 33 Maine, 178, the promise in substance was like that here, and it was declared invalid for want of consideration. See also *Tobey* v. *Wareham Bank*, 13 Met. 440, 449. *Bean* v. *Jones*, 8 N. H. 149, is also in point.

3. The question of bankruptcy, as affecting the right of plaintiff to recover here, is conclusively settled in favor of plaintiff by repeated decisions. *Dole* v. *Warren*, 32 Maine, 94; *Woodward* v. *Herbert*, 24 Maine, 358; *Ellis* v. *Ham*, 28 Maine, 385; *Reed* v. *Pierce*, 36 Maine, 455.

Hillard & Flagg, for defendant, argued, —

1. That the defendant relied upon the evidence of the assignee of the bond, and the two receipts or agreements signed by the assignee.

2. The evidence shows that the defendant distinctly understood and had reason to understand, that he was fully discharged from any further claims by virtue of the bond.

3. The evidence also shows, not simply a compromise between the assignee of the plaintiff and the defendant, but between the plaintiff and the defendant.

GOODENOW, J. — This is an action to recover the amount of money paid by the plaintiff as surety for the defendant, on a bond dated November 23, 1835. It is not denied, but admitted that the plaintiff did in fact pay or secure to be paid to the assignee of the obligee, the sum of $210, August 6, 1852, and that he was surety for the defendant on said bond.

But the defendant contends that, on that day, he made a compromise with the assignee of the bond, by which he was to be discharged from all further liability, upon paying $279,04, in ninety days, which sum he subsequently paid accordingly; and that the plaintiff was a party to that compromise, and bound by it. William T. Hillard, Esq., introduced as a witness by the defendant, testified, subject to objection, that he saw the parties before any thing was done on this bond, and after a good deal of conversation, the "defendant agreed to pay a certain proportion, and the plaintiff the balance of the sum to be paid, at which time he gave the discharges already introduced;" that he would not say that he ever saw the plaintiff and defendant together, or that the plaintiff ever agreed that he would discharge the defendant from responsibility to pay back; that he, the witness, agreed with the defendant that he should be discharged from the bond, and told the defendant that he should not be called on to pay any more, but the plaintiff was not present. It was distinctly *understood* between the witness and the defendant that he should not be called upon to pay any more; otherwise he would not have obligated himself to pay what he did; that he gave the defendant assurance from what conversations he had had with the plaintiff, but he could not recollect any of the language he made use of to the plaintiff; that he acted as the agent of Mr. Vaughan in making the settlement; that the plaintiff was as anxious as the defendant that the matter should be compromised for as small a sum as possible, and that the defendant should pay all the witness could get out of

him, and that he *understood from the plaintiff that the defendant was to pay the amount named in his discharge, and should not be called upon for any thing more, but that he could not give his language.*

In general, the opinion of a witness is not evidence; he must speak of facts. It may have been derived from some unwarrantable deduction of the mind, from premises not well established. Mr. Hillard does not state any *facts*, from which we can understand that the plaintiff agreed to discharge the defendant from all liability over to him as his surety. The written discharges referred to by Mr. Hillard, only engage to discharge the bond when the notes given by the parties should be paid. They have no relation to the rights and obligations of the plaintiff and defendant between themselves.

The defendant has not indemnified the plaintiff as his surety, according to the undertaking which the law implies. He did no more, but less than he was bound to do, when he paid a part of the damages claimed by virtue of his bond.

Mr. Hillard was not the plaintiff's agent. We do not find that he had any authority to surrender the plaintiff's claim upon the defendant for indemnity, if in fact he undertook to do so. It is a meritorious claim, and should not be extinguished without unequivocal evidence that the plaintiff has, for a valuable consideration, agreed to its extinguishment.

The discharge of the defendant in bankruptcy cannot avail him in this case. *Dole* v. *Warren*, 32 Maine, 94.

A default should be entered.

Damages $210, *and interest from August* 6, 1852.

TENNEY, C. J., and MAY, and HATHAWAY, J. J., concurred. APPLETON, J., dissented.

ALBERT SMITH, *in Equity, versus* ANDERSON PARKER *& als.*

A conveyance in trust, either secret or expressed, of real estate, made or procured to be made by one largely indebted and insolvent, for the purpose of defrauding creditors, is void both as to existing and subsequent creditors.

A. mortgages his real estate to the assignor of B., and allows the mortgage to be foreclosed by B., with the understanding that he shall be allowed to redeem notwithstanding the foreclosure. A. then, with the design of defrauding his creditors, procures B. to convey to C., in trust for A's wife and children, and, in certain contingencies, for his own benefit; — *Held*, that the transaction was void as to creditors.

The amount of the mortgage, or other sum, having been paid by A., (grantor and debtor,) to B., for the conveyance as aforesaid, the title to the premises will, "in equity," for the purpose of protecting the rights of the creditor whom there was an attempt to defraud, be held to be in A. and not where the form of the conveyance would seem to place it.

BILL IN EQUITY. The facts are fully stated in the opinion of the Court. The case was heard upon demurrer, pleaded by the trustee and *cestui que trust;* the remaining party having put in his answer.

Hillard & Flagg, for defendants.

1. If the plaintiff is not entitled, on his own showing, to relief, he is not entitled to a discovery. *Coombs* v. *Warren*, 17 Maine, 337.

2. If, for any reason founded on the substance of the case, as stated in the bill, the plaintiff is not entitled to the relief he prays for, he may demur. Story's Eq. Pl. c. 10, § 526.

3. The case does not show any indebtedness of Thomas, between the time of giving the mortgage and its foreclosure.

4. The original trustee is not charged in the bill as connusant of the alleged fraud of Frederic Thomas, nor can it be believed that his successor, who knew nothing about the original transaction, could be a party to such fraud. Nor does the bill, except by implication, connect the wife with the alleged fraudulent attempt of the husband. Fraud cannot be imputed where no design to deceive is manifest. *Denny* v. *Gilman*, 26 Maine, 149.

5. It is not fraud upon the attaching creditor, if the assignee of the debtor make an agreement with the mortgagee, that

the latter shall hold the mortgage until the time for redemption has expired, and then convey the land to the assignee on being paid by him the amount secured by the mortgage. *Danforth* v. *Roberts & als.*, 20 Maine, 307.

6. The remedy at law is adequate and ample. Defendants rely upon the deed of trust. If impeached as fraudulent, a jury at common law should try the question.

Rowe & Bartlett, for plaintiff.

The bill sets out a case of post-nuptial settlement, and alleges, in substance, that it was voluntary and made with fraudulent intent, the husband being insolvent at the time. Plaintiff is a subsequent creditor.

Whether such a settlement is to be impeached by a subsequent creditor, on the ground of its being voluntary alone, has been a good deal mooted in England and in this country, but no doubt has ever been raised as to its being void, where it was also fraudulent. *Sexton* v. *Wheaton*, 8 Wheat. 229; 5 Cur. 396.

"To avoid a post-nuptial settlement, insolvency need not be proved."

"A merchant largely indebted, and whose means of payment were subject to many contingencies, was not in a condition to make such a settlement of a large landed estate, and it is voidable by his creditors." *Parish & al.* v. *Murphree & al.* 13 How. 92; 19 Cur. 407.

"If the facts show clearly a fraudulent intent, the conveyance is void against all creditors, past or future." 13 How. 99; 19 Cur. 409.

"All transfers of property, made with an intention to defraud creditors, are void, as it respects creditors, whether then existing or becoming such subsequently." *Pullen* v. *Hutchinson*, 25 Maine, 249 to 254; *Clark* v. *French*, 23 Maine, 221.

MAY, J. — This case now comes before us upon demurrer to the bill by two of the defendants, the other defendant having put in an answer; and it is conceded by the counsel for the plaintiff, that the bill can be maintained only on the

ground of fraud on the part of Frederic J. Thomas, the husband of Mary Thomas, in the conveyance which was made by John Bradbury to Nathaniel J. Thomas, on the fourth day of August, 1846, in trust for the sole use and benefit of said Mary during her life; and then to be conveyed, and the proceeds thereof, in such manner and to such persons as the said Mary, in her last will and testament, should order and appoint; and in want of such disposition by said Mary in her life time, then to be held in trust for her child or children, and the lineal descendants of any such child, living at the time of her decease; and in case of failure of any such child or lineal descendants, *then to the use of said Frederic J. Thomas, if living, and if he shall not survive the said Mary, then to his heirs at law.* The said Frederic, on the fourth of Nov., 1841, mortgaged the same premises to Seth W. Merrill, to secure the payment of three notes amounting to $900, the last of which fell due Sept. 2, 1843, and the said Merrill, on Nov. 2, 1842, duly assigned said mortgage to the said Bradbury, in whose hands it became legally foreclosed sometime in March, 1846. The said Nathaniel J. Thomas having deceased, Anderson Parker, one of the defendants, was duly appointed trustee under said deed, and accepted the trust.

The bill charges, in substance, that said Frederic J. Thomas, at the time of said conveyance from said Bradbury to Nathaniel J. Thomas, *was largely indebted and insolvent,* and that he, *with the fraudulent intent and design to defraud and injure his creditors,* suffered the said mortgage to be foreclosed, *with the understanding and agreement between him and the said Bradbury,* that he should be allowed to redeem said lands notwithstanding such foreclosure; and that afterwards, on or before August 4, 1846, he paid the amount due upon said mortgage to said Bradbury and redeemed the same, and procured the conveyance thereof to be made to said Nathaniel J. Thomas, in trust as aforesaid; and if this is not so, that the said Frederic, after the right of redemption had been suffered to expire as aforesaid, and, on or before the said fourth day of August, 1846, purchased the said lands of said Bradbury,

paying him out of his funds about $900 therefor; and, *with the fraudulent intent and design aforesaid*, procured the same to be conveyed in manner and in trust for the purposes aforesaid. And the plaintiff further complains, that the said Frederic, being indebted to him, he obtained judgment and execution against him, the said Frederic, in Dec. 1849, for the sum of $293,29 and $33,69 costs of suit, which execution he caused to be duly levied upon a part of the premises so conveyed in trust as aforesaid; and further, that the said premises are still, as they have been from before the conveyance from said Bradbury to Nathaniel J. Thomas, *the home and residence of said Frederic, his wife and family;* and that he ought to be put into the possession and enjoyment of so much of said premises as has been set off to him; and further, that he has been manifestly wronged and injured by the aforesaid proceedings, wherefore he prays for such discovery and relief as his case may properly require.

The question presented is, whether the foregoing facts alleged in the bill, and admitted by the demurrers, show such a case of fraud in the said conveyance from Bradbury to Nathaniel J. Thomas, as to render it void as against the plaintiff, who claims only as a subsequent creditor.

It was held in the case of *Reade* v. *Livingston*, 3 Johns. Ch. 481, that voluntary settlements after marriage, upon the wife or children, and without any valid agreement previous to the marriage to support them, were void as against creditors existing when the settlement was made. But if the person be not indebted at the time, then it is settled that the post-nuptial voluntary settlement upon the wife or children, *if made without any fraudulent intent*, is valid as against subsequent creditors. "This doctrine," says Chancellor Kent, in his Comm. vol. 2, p. 173, "was not only deduced from the English authorities, but it has since received the sanction of the Supreme Court of the United States, in the case of *Sexton* v. *Wheaton*, 8 Wheat. 229." The same is held in *Picquet* v. *Swan*, 4 Mason, 443. If, however, such voluntary settlement or conveyance be made *with a fraudulent intent and design as*

to creditors, it cannot be upheld even as against such as are subsequent. If such conveyance "is intentionally made to defraud creditors, it seems perfectly reasonable, that it should be held void as to all subsequent, as well as to all prior creditors." 1 Story's Eq. 352. It is true, the trust in the present case, is not a secret trust, but is apparent upon the face of the deed, and in certain contingencies, is for the benefit of Frederic J. Thomas, the husband of the *cestui que trust*, he having advanced the whole purchase money which was paid for the conveyance, and having occupied the premises with his wife and family, since it was made as well as before.

Had this deed been made without any trust expressed upon its face, still there would have been a resulting trust in favor of Frederic J. Thomas, which, if made to defraud creditors, it cannot be doubted, would be void as to subsequent creditors as well as to those existing at the time. No sufficient reason is perceived why the expression of a trust upon the face of a voluntary conveyance should change the rule.

By the 5th c. of the statute of Eliz. "every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, or any of them," by writing or otherwise, "that had been or afterwards should be" had or made to or for any intent or purpose, "to delay, hinder or defraud creditors, or *others*, of their just and lawful actions, suits, debts, accounts," &c., is declared to be "clearly and utterly void, frustrate and of no effect; any pretence, color, feigned consideration, *expressing of use*, or any other matter or thing to the contrary notwithstanding." Under this statute, voluntary conveyances, made without consideration by persons who are insolvent, may on that very account be deemed fraudulent, even as against subsequent creditors, and when made, by persons whether insolvent or not, for the purpose of defrauding such creditors, are to be declared void as against them. *Howe* v. *Ward*, 4 Maine, 195.

In Newland on Contracts, 389, it is said "the deeds which are avoided by the statute of the 13th of Elizabeth are void as well against those creditors whose debts were contracted

subsequently to such deeds as against those whose debts were in existence at the execution of the deeds." And in a note in Story's Eq. 353, he says "where a settlement is set aside, as an intentional fraud upon creditors, there is strong reason for holding it so as to subsequent creditors." The same doctrine is held in *Taylor* v. *Jones*, 2 Atk. 600. So also this Court, in an elaborate opinion drawn by WHITMAN, C. J., in view of said authorities and others, came to the same conclusion. *Clark* v. *French*, 23 Maine, 221. Whether this rule has been changed in this State, by the statute of 1847, c. 27, § § 1 and 2, it is unnecessary now to inquire, because the conveyance in question was made prior to the passage of that Act. The bill directly alleging fraud in the procurement of the conveyance from Bradbury to said Nathaniel J. Thomas, and such fraudulent intent as to creditors being admitted by the demurrers, we are brought to the conclusion that said conveyance must be regarded void as against the present plaintiff.

The case shows that Frederic J. Thomas, *with the fraudulent design aforesaid*, long after the condition in the mortgage, then held by Bradbury, had been broken, and after the right of redemption had become foreclosed in conformity with the forms of law, either paid off said mortgage and redeemed said premises, with the consent and agreement of said Bradbury, so that he became entitled thereby to a release from said Bradbury of the legal estate which remained in him, after receiving such payment; or having no right of redemption in the premises, *he purchased them and paid for them out of his own funds, and with the view and purpose of defrauding his creditors*, procured the said conveyance thereof to be made from said Bradbury to said Nathaniel J. Thomas. In either case, after the payment of said mortgage, or the purchase money, the said premises became equitably the property of said Frederic J. Thomas; and such transaction, we apprehend, notwithstanding the conveyance in trust as aforesaid, "will, for the purpose of protecting the creditor who was attempted to be defrauded, place the title" in equity, where, according to the

real intention of the parties, it was to be beneficially fixed, and not where the mere forms "and *apparent* trust, adopted for so iniquitous a purpose, would seem to place it;" and this, notwithstanding there may have been no intentional fraud in the trustee or *cestui que trust*, named in the deed, who took, at best, from an insolvent person, through a mere voluntary conveyance, made without consideration. In support of these views, we refer to the reasoning of the Court in *Goodwin* v. *Hubbard & al.* 15 Mass. 210.

On the whole, we think that, under such circumstances, rights could only be acquired subject to be defeated by the creditors of Frederic J. Thomas, by reason of the fraud on his part, whether such creditors were existing at the time or subsequently; and that the plaintiff, upon the facts stated in his bill, is entitled to a release of the land set off on his execution, and the demurrers filed by the defendants must be overruled.

TENNEY, C. J., and HATHAWAY, and GOODENOW, J. J., concurred. APPLETON, J., did not sit.

EMMA L. LEAVITT, (*by her next friend,*) *versus* CITY OF BANGOR.

A *prochein ami* is not necessarily one of kin, but may be "any one who will undertake the infant's cause," and is, according to the theory of the law, appointed by the Court.

A *prochein ami* is not, under our statutes, a party to the suit in such a sense as to make him responsible for costs.

Neither is he so a party to the suit as to have rendered either himself or his wife incompetent witnesses, prior to the passage of the statute of 1856, c. 266.

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

This was an action under the statute for damages sustained by the plaintiff, from a defect in a highway.

The plaintiff offered as witness the wife of the *prochein ami*, who was objected to, and excluded by the presiding Judge.

Exceptions were taken to this and other rulings of the Court, but as this point alone was relied on at the argument, and considered in the opinion in the case, the others are omitted.

J. A. Peters, for plaintiff, contended that the witness was improperly excluded. The reason of the exclusion was, that the Court considered her as the wife of a party to the suit. A "next friend" is not a *party*, but merely the *attorney* of a party. The infant is the party.

An infant can neither prosecute nor defend by himself, but must in each case act by attorney. Nor can he select his own attorney. The "next friend" who prosecutes, and the guardian *ad litem* who defends, are both appointed by the Court. And their relation to the infant is precisely the same as a general attorney to a client. The mode of selection is the only difference. In the one case a client selects, in the other the Court selects for the infant client, who is not supposed capable of selecting for himself. A "next friend" usually commences an action by his own mere motion, but it is by an implied permission of Court; and the Court can depose him at any time during the different stages of litigation and appoint another. For the nature of this relation I refer the Court to a learned opinion in the case of *Guild* v. *Cranston*, 8 Cush. 506. The same Court has decided, that the costs of a suit run against the infant, and not against the *prochein ami*. *Crandall* v. *Slaid*, 11 Met. 288.

Waterhouse, for defendant.

May, J. — One question presented in this case is, whether the wife of the *prochein ami*, she being the mother of the plaintiff, who is an infant, was a competent witness when offered for the plaintiff in this suit; and this question is to be determined by the law as it stood at the time of the trial, which was before the passage of the statute of 1856, c. 266, making parties competent witnesses in civil suits. By the common law, a party, as a general rule, is excluded from

testifying in his own cause, and the wife of such party is alike inadmissible.

A *prochein ami*, or next friend, is not necessarily one of kin, but may be "any person who will undertake the infant's cause;" and according to the theory of the law he is appointed by the Court. Such power of appointment is recognized as existing in any court of common law by our statute. R. S., c. 110, § 33. It has been decided in Massachusetts that such courts may not only appoint, but they have authority to revoke any appointment, even during the progress of a suit. Such authority, both for appointment and revocation, seems to be necessary for the protection of the infant, as he will be bound by the judgment which may be rendered. *Guild* v. *Cranston*, 8 Cush. 506.

The relation of a *prochein ami* to the infant, is similar to that of a guardian *ad litem* to his ward; and no reason is perceived why the recital of the name of the former in the writ, as the next friend of the infant plaintiff, should make him any more a party to the suit, than that the recital of the name of the latter, as guardian *ad litem* for minor defendants, in the pleadings, or its entry upon the docket, should make him a party to such suit. Both are mere agents, appointed either theoretically or in fact by the court, to conduct the business of the suit for the real parties whom they represent. In all such cases, the infant is the real party whose rights are bound by the judgment; and whatever may have been or now is the English law or practice respecting an infant's liability to costs, it is provided by our statutes, (R. S., c. 115, § 56,) that "in all actions the party prevailing shall recover his costs;" and there can be no doubt that such costs are to be recovered of the other party in the suit.

In Massachusetts, it has been held that an infant plaintiff, suing by *prochein ami*, is alone liable as party for the costs. *Smith* v. *Floyd*, 1 Pick. 275. In this case, the court say that, after judgment against the infant plaintiff, the defendant can proceed against the *prochein ami* for the costs; but this ap-

pears to have been upon the ground of his being the indorser upon the writ, and not because he was the actual party. At the time of this decision, the statutes of that State required all writs to be indorsed; and it had been held in the case of *Crossen* v. *Dryer*, 17 Mass. 222, that a *prochein ami* was a plaintiff within the meaning of the statute of 1784, c. 28, § 11, which required the plaintiff or his agent or attorney, to indorse or cause to be indorsed an original writ, which indorsement created a liability for costs. Subsequently, after the passage of the R. S., c. 90, § 10, which required no plaintiff, who was an inhabitant of that State, to indorse his writ or procure an indorser, except by special order of court, the same Court held that a *prochein ami*, as such, was not a party so as to be liable to costs. *Crandall* v. *Slaid & ux.*, 11 Met. 288.

It is said, in the opinion of the Court in the case last cited, that the *dictum* in *Blood* v. *Harrington*, 8 Pick. 552, "that a *prochein ami* is answerable for costs," "is inconsistent with the decision in *Smith* v. *Floyd*," before cited, "and is not supported by any statute on the subject of costs." The statutes of this State in relation to costs, will be found upon examination to be substantially like those of Massachusetts. We think, therefore, that the witness offered ought not to have been excluded on the ground of any interest in her husband, and that he was not a party of record in any such sense as to render him incompetent to testify in the suit. We do not mean to say that a *prochein ami* may not be regarded as a party for certain purposes, such as receiving notices to take depositions and the like, but only that he is not a party in such a sense, as under our statutes, at the time of the trial, would make him responsible for costs.

The exceptions, so far as they relate to the exclusion of the witness, are sustained, the verdict is set aside, and a new trial granted.

TENNEY, C. J., and HATHAWAY, APPLETON, and GOODENOW, J. J., concurred.

INHABITANTS OF EDDINGTON *versus* INHABITANTS OF BREWER.

A married woman follows and has the settlement of her husband, if he has any in the State.

If he has none, her settlement is not lost or suspended by the marriage. A., before her marriage, had a settlement in the *westerly* part of a town. Immediately after her marriage, (which was with an unnaturalized foreigner, having no settlement in this State,) they removed to, and resided in the *easterly* part of the town; while residing there, that portion of the town was incorporated into a new town; — *held*, that her settlement was in the new town.

ON FACTS AGREED. From *Nisi Prius*.

ASSUMPSIT to recover for supplies furnished to Mrs. Sarah Ann Kavenagh and children, paupers, being the wife and children of Andrew Kavenagh. The only question was as to the settlement.

Mrs. Kavenagh was born and had her settlement in the town of Brewer, by derivation from her father, who had his settlement there on March 16, 1851. She, being then more than 21 years of age, married her present husband, he being an unnaturalized foreigner, having no settlement in this State.

Immediately after their marriage they removed into that part of Brewer now Holden, where they continued to reside until the spring of the year 1855. In the mean time the two children, for whose support this action was also brought, were born. In the spring of 1855, Kavenagh left his family, and they thereupon fell into want, and were supported for a while by the town of Holden.

On April 13, 1852, the town of Brewer was divided, and the easterly part incorporated as the town of Holden.

On March 16, 1855, a portion of the town of Brewer was annexed to Eddington, which portion embraced the farm and home of Mrs. Kavenagh's father, where she was born and had her home until her marriage. Mr. and Mrs. Kavenagh were then living in Holden, having their home there.

The paupers having called upon Holden for support, the overseers of the poor notified the overseers of Eddington, who, supposing the paupers were legally chargeable to that

town, caused them to be removed to Eddington. After their removal to Eddington, that town continued to furnish them with a support, for which this action is brought. If the legal settlement of said paupers is in Brewer, the defendants to be defaulted, otherwise a nonsuit to be entered.

J. A. Peters, for defendant.

Mrs. Kavenagh and children are paupers belonging to Holden. The case finds that, in 1852, Brewer was divided and the easterly portion of it incorporated into a town by the name of Holden. At the date of this incorporation the paupers lived and had their home in Holden, not as paupers, but supporting themselves. The Act of incorporation does not disturb the principles applied to such Acts of division in the general law, as a reference thereto will show. *Holden* v. *Brewer,* 38 Maine, 472; *Mount Desert* v. *Seaville,* 20 Maine, 341.

In the case at bar, the paupers were self supporting *bona fide* residents of Holden, having their home there voluntarily at the time of the division. The case of *Mount Desert* v. *Seaville,* 20 Maine, 341, has never been questioned or denied, to the extent of the principle involved, as far as the case now under consideration is concerned, and never can be. We come literally under the mode named in the latter clause of article 4, § 1, c. 32, R. S., which is the same as mode 6, named in the above case.

In 1852, when Holden became a town, the persons who afterwards became paupers actually "dwelt and had their homes in said new town." But even if the paupers do not belong to Holden, they do to Eddington and not to Brewer.

On March 16, 1855, a portion of Brewer was annexed to Eddington. That portion was the former home of Mrs. Kavenagh, where she had derived her settlement. On said March 16th, she and children had not become paupers.

Now, upon these facts, it is clear that if the paupers have not acquired a settlement in Holden, they must belong to Eddington, because they come within the literal language of article 4, pauper Act, and its only sensible construction.

The language is this, "upon the division of any town, every person having a legal settlement therein, but being absent at the time of such division, and not having gained a legal settlement elsewhere, shall have his legal settlement in that town wherein his last dwelling place shall happen to fall upon such division."

Here was a division of a town, because an annexation of territory to another town is the same thing, as far as the settlement is concerned, as a division. 1 Maine, 130; 16 Maine, 69; 13 Maine, 299.

Then there was, in the sense of the statute, "a division," and the persons had a settlement in the town divided, and were absent at the time of division or annexation, because they were then in Holden, and they had not gained a settlement elsewhere, unless it was in Holden; and, if so, Brewer cannot be made answerable, and their last dwelling place and home in said Brewer was in that part of it which became Eddington. *Smithfield* v. *Dearborn*, 19 Maine, 386; *St. George* v. *Deer Isle*, 3 Maine, 390.

A. W. Paine, for plaintiffs.

1. Have the paupers gained any new settlement either in Holden or Eddington; for, if not, her old settlement in Brewer still remains.

Her marriage to an alien having no settlement in this State did not affect her settlement before existing. R. S., c. 32, § 1. But *alienage* would not prevent her husband from acquiring a settlement in any of the modes provided by statute, in the same manner as a *citizen*. *Knox* v. *Waldoboro'*, 3 Greenl. 455.

After marriage the wife can gain no settlement separate or different from that of her husband, nor one independent of her husband; but while the marital relation exists her settlement is wholly dependent upon his, so far as any change of settlement or any new settlement is in question. *Hallowell* v. *Gardiner*, 1 Greenl. 33; *Jefferson* v. *Litchfield*, 1 Greenl. 196; *Augusta* v. *Kingfield*, 36 Maine, 235.

The case, then, is one of "a new town composed of a part of one * * * old incorporated town."

The provision of the statute applicable to that case is, that "*every person legally settled in any town* of which such new town is composed, shall have the same rights in such new town in relation to settlement, whether incipient or absolute, as he would otherwise have had in the old town where he dwelt."

The husband was then living in Holden, but he had no legal settlement there. He had an incipient settlement in Brewer, gained by his residence there one year. This incipient settlement followed him into Holden, and if he had remained there four years longer, his settlement would have become absolute. The pauper's settlement in Brewer, then, was not affected by the division, and the incorporation of Holden.

2. After the incorporation of Holden, and while Kavenagh and family were living in that town, a portion of Brewer was annexed to Eddington, including Kenney's farm. This annexation was in effect like the incorporation of a new town. *Smithfield* v. *Belgrade,* 19 Maine, 387, and cases *passim.*

In order to give a settlement in such new town, or town to which such annexation is made, it is necessary that the person should actually dwell and have his home upon the territory annexed, at the time of annexation, and also have his settlement in the former town. *Hallowell* v. *Bowdoinham,* 1 Greenl. 129; *New Portland* v. *Rumford,* 13 Maine, 299; *New Portland* v. *New Vineyard,* 16 Maine, 69.

Here the Kavenagh family were not at the time living on the territory annexed; and the husband had no settlement in Brewer, from which territory the annexed town was taken. For this two-fold reason, then, the paupers did not by the annexation gain a settlement in Eddington.

If it be contended that the annexation of the territory on which the pauper wife had had her settlement carried her settlement with it, I reply, —

1st. That such a result would be in direct violation of the statute provision, that "her settlement at the time of marriage

shall not be lost by the marriage." Her settlement at the time of marriage was in Brewer, and, if "not lost," it remains there still. If it be now in Eddington, then her settlement in Brewer is "lost."

2d. If it should have the effect to carry her settlement, it most certainly could not carry his there, inasmuch as he never had any settlement in Brewer at all, and never lived at the time of annexation, or at any other time, on the annexed tertory. The result would, in that case, be to separate the husband and wife, by giving them different settlements, and also to make her settlement to change from one town to another without any change in his. In both respects the result would be in contravention of the well settled principle of law, as stated in *Augusta* v. *Kingfield*, 36 Maine, 235.

3d. The question of settlement, under the clause of the statute under examination, does not in any respect depend upon the question of territory.

GOODENOW, J.—The case finds that Mrs. Kavenagh had her settlement in the town of Brewer, by derivation from her father. On the 16th of March, 1851, she being then more than 21 years of age, married her present husband, Andrew Kavenagh, he being an unnaturalized foreigner, having no settlement in this State.

Immediately after their intermarriage they removed into that part of Brewer, now Holden, where they continued to reside until the spring of the year 1855, and until after the incorporation of Holden, on the 13th of April, 1852, which was composed of the easterly part of the town of Brewer.

A married woman shall always follow and have the settlement of her husband, if he have any within this State; otherwise, her own at the time of marriage, if she then had any, shall not be lost or suspended by the marriage.

Mrs. Kavenagh was residing in that part of Brewer which was incorporated as the town of Holden, and had a settlement there at the time of the incorporation. By operation of law her settlement was transferred from Brewer to Hol-

den; and her two children follow and have her settlement, their father having none within the State.

According to the agreement of the parties—

A nonsuit must be entered.—Costs for defendants.

TENNEY, C. J., and HATHAWAY, APPLETON, and MAY, J. J., concurred.

ABRAHAM SANBORN *versus* NATHAN L. MERRILL.

The *prochein ami*, as such, is not liable for costs which may be recovered against the plaintiff, in case the suit is unsuccessful.

The promise to answer for the debt or default of another must be in writing, to be valid.

But when a person *originally* undertakes to pay for services performed for, or goods furnished to another, he is liable therefor, and the promise need not be in writing.

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

This was an action of ASSUMPSIT. The writ contained two counts, one on the express promise of the defendant, &c., the other on an account annexed, brought by the plaintiff, an attorney and counselor, to recover costs of Court and fees in the following described case.—The action was originally commenced in District Court, May term, 1851, Martha J. Merrill, by her next friend, *N. L. Merrill* v. *Matthew Ritchie*, January term, 1852. There was a trial and a verdict for defendant. An appeal was entered to Supreme Judicial Court, Oct. term, 1852. In the mean time Martha J. Merrill married James W. Leveston, and he came into Court and prosecuted the action with his wife, the name of N. L. Merrill being left off. The plaintiff, in that case, leaving the State, an indorser was called for, and the plaintiff in this case put his name on the writ. The action finally resulted in a verdict for defendant.

A. L. Simpson, called by the plaintiff, testified, that he was "counsel for defendant, Matthew Ritchie, in the original case. Mr. Sanborn argued the case for the plaintiff, and managed it

throughout. After the trial in S. J. Court, where the action was brought by appeal from District Court, the defendant Merrill, was in my office and complained somewhat of the course which was taken in defence in the case. We had offered to prove on the last trial, that Mr. Sanborn took the case to carry on, on shares, which testimony was ruled out. Merrill complained because we offered to prove that; he said there was no such thing in fact; that he employed Mr. Sanborn in the first instance to carry on the suit, and agreed to pay him, and he should pay him. The husband of the minor being out of the State, I moved for an indorser, and Mr. Sanborn indorsed the writ, after consulting with Mr. Merrill."

It was submitted to the Court to decide whether this action can be maintained. If so, the defendant is to be defaulted for such sum as any member of the Court may adjudge to be due; otherwise plaintiff is to become nonsuit.

A. Sanborn, for plaintiff.

Hillard & Flagg, for defendant.

APPLETON, J. — The *prochein ami*, as such, is not liable for the costs which may be recovered against the plaintiff, in case the suit should be unsuccessful. *Crandall* v. *Slaid*, 11 Met. 288. The infant plaintiff is liable for costs. *Smith* v. *Floyd*, 1 Pick. 275.

The promise to answer for the debt or default of another must be in writing, to bind the person thus promising. But an individual may originally undertake to pay for services which are to be rendered, or for goods which are to be delivered another. The question in such cases is, on whose credit the services are rendered or the goods delivered. Nothing is clearer, than that a person may contract for the performance of services in which he is in no way personally interested. It is of no importance to the individual performing them, who is to be thereby benefited. It is sufficient for him, that he performed them at the instance and on the credit of his employer. In such case, the promise need not be in writing.

The defendant has admitted that he employed the plaintiff

to perform the specific service rendered. He never discharged him from his retainer. His liability must be regarded as justly continuing till the termination of the particular service, upon which he was retained to enter.

Defendant defaulted.

TENNEY, C. J., and HATHAWAY, MAY, and GOODENOW, J. J., concurred.

JOHN MCPHETERS *versus* WILLIAM L. LUMBERT *& al.*

By the statute of 1855, c. 144, owners of logs, attached under the *lien* law, "may come into Court and defend" the suit. But it is not competent for the owners to try the question of *lien* in such suit. The statute does not provide for the trying of any matter, except what may be regarded as a defence to the action.

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

This was an action of ASSUMPSIT for labor in driving logs, the plaintiff claiming a lien under the statute provision giving to laborers a lien on lumber. Upon notice to the owners of the logs, they appeared, and having pleaded the general issue for Lumbert *& al.*, put in the following plea: —

"And now the owners of the logs, described in said writ and declaration, come and defend against the alleged lien in said writ, when and where, &c., and for plea say, that the plaintiff has no lien on said logs in manner and form as he has alleged, and of this put themselves on the country;" with a brief statement, under this last plea, "that said owners say, that if any such lien ever did attach under the laws of this State, the same has been discharged." The issue tendered in both these pleas was joined by plaintiff. It was agreed, that the attachment was made in season to preserve the lien, if not otherwise discharged. It was also agreed, that the plaintiff had assigned his interest in the subject matter to one Ephraim B. Pierce, for whose benefit this suit was prosecuted.

Rowe & Bartlett, for plaintiff.

The claim, in this case, is not simply a claim against the contractors, but, like the claim of a material-man under the maritime law for repairs on a ship in a foreign port, is a claim both *in personam* and *in rem*. The labor was done on the credit of the logs, as well as on the credit of the contractors. The logs are as much holden for the services, in the first instance, as are the contractors. The statute provides a way, by which the remedy against the contractors and against the logs may be enforced at the same time and by the same process.

The claim against both is an entirety. An assignment of it, therefore, gives rights against both, unless one had been previously discharged.

The case is none the less clear, if we regard the claim as existing only against the contractors, and the lien upon the logs as security merely.

The debt is the principal, the security is the accessory. The accessory follows the principal, usually by implication of law, always by the express action of the parties, as in the familiar cases of mortgages and pledges.

An analogous case is familiar to all. A creditor sues and attaches the property of his debtor. That attachment effects what this statute does. It designates and sets apart certain property which shall be holden as security for the claim in suit. The creditor may assign his claim before entry, while the suit is pending, or after judgment; and the assignee will be substituted in all his rights, and may obtain satisfaction of the debt from the property attached, in the name of the assignor.

Ingersoll, for the log-owners.

The first question that arises is, can the owners of the logs defend in this suit against the claim of laborer's lien?

The defendants contend that they have the right. By the Act of 1855, c. 144, it was enacted that, "in all suits brought to enforce the lien given by the Act to which this is addi-

tional, such notice shall be given to the owner of the lumber as the Court shall order, and the owner may come into Court and defend such suit."

By virtue of this Act, the log-owners have appeared and filed two pleas; a plea of the general issue for the defendants Lumbert & al., and also a plea for themselves, denying that any lien existed when the action was brought, and that if any ever existed, it has been discharged. To allow this defence to the owners of logs will save time and expense in settling their rights under the Acts giving a lien on lumber for services.

The log-owners in this case contend, under this issue, which they trust the Court will decide they may make of right, in order that other cases may be disposed of in this way, that their logs are discharged from the lien claimed in the writ. The case finds that, before action brought, the plaintiff had assigned all his right, title and interest, in and under his claim for labor, to Ephraim B. Pierce, for a valuable consideration. And there does not appear to be any authority given the assignee to enforce the lien given by statute on the logs; without such authority there can be no right in Pierce to hold the logs.

The assignment of McPheters transferred only his claim for services against Lumbert & Cowan. His lien on the logs could be only for *his* benefit. It was a mere personal privilege, which he could enforce, and he only; for it could not be transferred to Pierce. *Holley* v. *Huggeford*, 8 Pick. 73.

MAY, J. — This action is brought to recover compensation for the personal services of the plaintiff in driving logs, and to enforce his lien under the provisions of the statutes "giving to laborers on lumber a lien thereon." Stat. of 1848, c. 72, as amended by stat. of 1851, c. 216, § 1.

The defendants of record make no defence; but the owners of the logs on which the lien is alleged to exist, upon notice given to them, under the statute of 1855, c. 144, come into Court, and, taking upon them the defence of said action, claim the right to try the existence and validity of such lien.

It is admitted that the plaintiff is entitled to recover in this suit a certain amount; but the right to enforce the collection of the judgment by reason of any lien upon the logs driven by the plaintiff, and not belonging to the defendants, is denied.

The first question presented in this case is whether it is competent for the owners of the logs to try the question of lien in the suit. By the stat. of 1855, before cited, it is provided that the owner of the lumber "may come into Court and defend such suit." If the action can be defeated, the lien falls to the ground. The statute does not provide for the trying of any matter except what may be regarded as a defence to the suit; and all other modes of trying the question of lien, which the law provides, are left open to the parties interested therein. We cannot doubt that if it had been the intention of the Legislature to permit the trial of any side issue, having reference only to the manner in which the judgment to be recovered might be enforced, they would have used some appropriate language to express such intention. The argument of counsel, that to allow the owners of the lumber to try the question of lien in some manner, not a defence to the suit, would be a saving of time and expense in settling the rights of the parties, if valid, cannot authorize the Court to legislate upon the subject. We can only administer the law as we find it. The language of the statute is too plain to admit of the construction contended for. The plaintiff is entitled to judgment for the amount admitted to be due, which is $47,54, with interest from the date of the writ.

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

APPLETON, J. — The only defence relied upon, is an assignment by the plaintiff of his lien claim to one Pierce. This neither releases nor discharges the lien. It in no way prejudices the log-owners nor injuriously affects their rights. The cause may still be prosecuted to final judgment in the name

of the assignor. The assignment of the plaintiff constitutes no defence.

When and to what extent the log-owners may intervene for the defence of their rights against the lien claimant, it is not now necessary to determine.

THOMAS DOLAN *versus* JOHN BUZZELL.

In an action of trespass, the question of damages is for the jury to determine.

A mere *intent* to sell property in violation of law, which may be lawfully used, does not, at common law, subject the property to forfeiture, nor deprive the owner of his proper remedy against persons illegally interfering with it.

By statute of 1851, c. 211, § 16, the maintenance of an action for the recovery or possession of intoxicating or spirituous liquors is forbidden only when they are so held as to be liable to seizure or forfeiture, or are intended for sale in violation of law. Whether so held is for the jury to determine upon the evidence.

The provision of the statute of 1851, c. 211, § 16, so far as it applied to actions for the recovery of liquors, or the value of liquors, not liable to seizure or forfeiture, or not intended for sale in violation of law, was unconstitutional.

THIS was an action of TRESPASS for taking liquors, the property of the plaintiff. Plea, the general issue, with brief statement of justification as an officer, and taking under warrant.

The Court ruled, that the evidence under the plea of justification was insufficient, but instructed the jury, that if they were satisfied the property was in plaintiff, and that defendant took the same without legal authority, the question of damages was for them to determine from the evidence; and if the jury believed that the liquors were intended for sale in violation of law, the plaintiff could not maintain his action.

The verdict was for defendant.

To these rulings and instructions the plaintiff excepted.

A. Waterhouse, for plaintiff.

John E. Godfrey, for defendant.

MAY, J.—The instructions in this case contain three legal propositions. The first, relating to the evidence under the plea of justification, was wholly in favor of the plaintiff; the second regarded the rule of damages and was strictly correct; and the third, and last proposition, was, that "if the jury believed," (by which we understand a conviction forced upon them by the evidence,) "that the liquors were intended for sale in violation of law, the plaintiff could not maintain his action."

At common law, a mere intent to sell property, in violation of law, which may be used for lawful purposes, does not subject it to forfeiture, and will not deprive the owner of his proper remedy against persons illegally interfering with it; but by the statute of 1851, c. 211, § 16, it is expressly provided, that "no action of any kind shall be maintained in any court in this State, either in whole or in part, for intoxicating or spirituous liquors sold in any other State or country whatever, nor shall any action of any kind be had or maintained in any court in this State for the recovery or possession of intoxicating or spirituous liquors, or the value thereof." This statute was in force at the time of the acts of trespass complained of, as well as at the time of the trial, but has since been repealed. It has, however, been so restricted by construction in this Court, that its general language is limited so as to forbid only the maintenance of any action for the recovery or possession of such liquors, when so held as to be liable to seizure, or forfeiture, or intended for sale in violation of the provisions of that Act. *Preston & al.* v. *Drew*, 33 Maine, 558.

It is not now contended that such a limitation might not properly be introduced by judicial construction, or that said Act, so far as it applies to this suit, was unconstitutional. The exceptions, therefore, are overruled and judgment is to be rendered on the verdict, there being no motion to set it aside as against the evidence. *Judgment on the verdict.*

HATHAWAY, APPLETON, and GOODENOW, J. J., concurred.

JOHN D. LUMBERT, *in Equity, versus* THOMAS A. HILL *& als.*

The extent of an execution on lands, accepted by the creditor, is a statute purchase of the debtor's estate; and the return of the officer is the *only* evidence of title by the levy.

A statute title by levy must always be perfect — that is, every thing made necessary by the statute to pass the property must appear by the return of the officer and by the record thereof, to have been done.

When an execution and levy thereof have been returned and recorded, there can be no other notice of the previous proceedings, by which subsequent attaching creditors or purchasers can be affected.

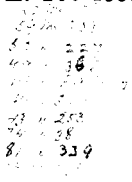
To *reform* a levy so recorded, and deeds consequent on the levy, thereby changing existing legal titles, would render the registry of deeds of little value, as furnishing any certain evidence of title to real estate, and it cannot be done.

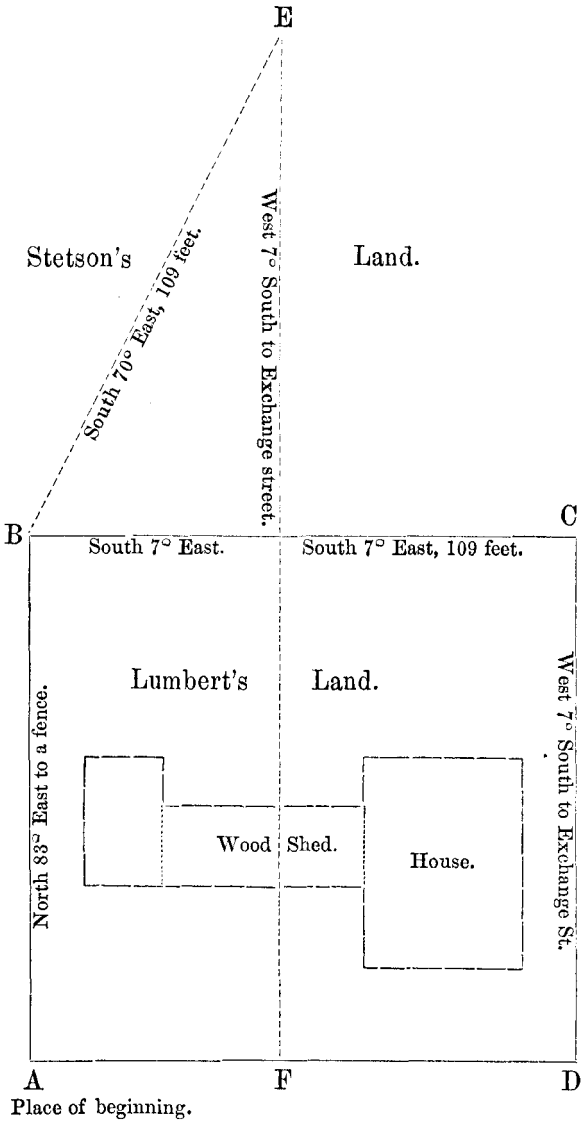
In cases of relief, by correcting mistakes in the execution of instruments, the party asking relief must stand upon some equity superior to that of the other party. If the equities are equal, a court of equity is silent and passive.

BILL IN EQUITY.

The cause was heard upon BILL, ANSWERS and PROOF.

The facts of the case are sufficiently stated in the opinion of the Court. The following diagram will serve to illustrate the mistake in the description of the levy, against which relief was sought by the bill. A. B. C. D. indicate the premises intended to be levied on, and which were actually run out and appraised. But the description in the return of the officer is A. B. E. F. The mistake was made by stating the second course from B. as S. 70° E. 109 feet, instead of S. 7° E. 109 feet.





Exchange Street, Bangor.

Rowe & Bartlett, for plaintiff, contended, that in a case of this nature, where the description of the land levied on was erroneous, the mistake may be proved by parol evidence, and relief granted by a court of equity; and cited the following authorities in support of the position: *Peterson* v. *Grover*, 20 Maine, 363; *Farley* v. *Bryant*, 32 Maine, 474; *Grosvenor* v. *Titus*, 6 Paige, 347; *Gillespie* v. *Moore*, 2 Johns. Ch. 595, 600; *DeReimer* v. *DeCantillon*, 4 Johns. Ch. 85; 1 Story's Eq., § § 155–7, 161, 166, and notes; 3 Greenl. Ev. pp. 366–7–8 and notes.

A. W. Paine and *T. A. Hill*, for defendant.

The following points were maintained, and authorities cited.

The prayer of the bill is two-fold, viz.: — 1st. To enjoin the defendants against claiming or exercising acts of ownership over certain land, alleged to be plaintiff's, by virtue of a levy.

2d. For the Court so to reform the levy under which plaintiff claims, and intermediate deeds, as to cover and include the defendants' lot, which is not now included.

I. Our first proposition is, that the levy is a statute conveyance, and the Court will never reform a deed or levy of real estate, for mistake, so as to *enlarge* the premises conveyed, unless there is some evidence in *writing* showing the error and the true intention of the party executing it.

This point has been directly adjudicated by this Court in the case of *Elder* v. *Elder*, 1 Fairf. 80. The cases, *Peterson* v. *Grover*, 20 Maine, 363; *Farley* v. *Bryant*, 32 Maine, 474, are not in conflict with it.

The principle established in *Elder* v. *Elder*, was, after several previous partial applications, fully established in England in the leading case of *Woollam* v. *Hearne*, 7 Ves. 211.

This whole subject and course of authorities are collated with much care and fullness in 2 White & Tuder's Leading Cases in Equity, part 1, p. 540, (355,) under the leading case of *Woollam* v. *Hearne*.

II. The statute prescribes, that the appraisers shall describe the premises set off by them in their certificate by metes and bounds, or so that the same may be distinctly

known and identified. In the case at bar, this has been done to the letter. This is a provision of statute binding upon all Courts of the State. Equity has no power to set it aside. To alter the return so as to make it include another lot of land, or to enlarge the premises already described, would be to set the statute at naught. *Freeman* v. *Paul*, 3 Greenl. 260; *Means* v. *Osgood*, 7 Greenl. 147; *Bannister* v. *Higginson*, 15 Maine, 73; *Fairfield* v. *Paine*, 23 Maine, 498; *Berry* v. *Spear*, 13 Maine, 187; *Pierce* v. *Strickland*, 26 Maine, 277; *Thatcher* v. *Miller*, 13 Mass. 271; 10 N. H. 291; *Hovey* v. *Waite*, 17 Pick. 196; *Emerson* v. *Upton*, 9 Pick. 167; 1 White & Tuder's Leading Cases in Eq., 191, 192.

III. Whatever rights the plaintiff might have had if the defendants here were the original debtors, yet, as against these defendants, who had no notice of mistake, if any, he has no right to the reform or amendment prayed for. *Fairfield* v. *Paine*, 23 Maine, 498; *Haven* v. *Snow*, 14 Pick. 28; *Chamberlain* v. *Thompson*, 10 Conn. 254; *Stanley* v. *Perley*, 5 Greenl. 369; *Emerson* v. *Littlefield*, 3 Fairf. 148; *Coffin* v. *Ray*, 1 Met. 212; *Sumner* v. *Rhoads*, 14 Conn. 135; *Oud* v. *Brown*, 14 Ohio, 285; *Stevens* v. *Batchelder*, 28 Maine, 218.

IV. A levy is a statute title. The whole proceeding to perfect it is prescribed by statute. In order to make such a title valid, the provisions of the statute must be strictly pursued. In default of this there is no remedy. *Williams* v. *Brackett*, 8 Mass. 240; *Piscataqua Bridge Company* v. *N. H. Bridge Company*, 7 N. H. 72; *Main* v. *Kip*, 6 Paige, 90; *Metcalf* v. *Gillett*, 5 Conn. 400; *Hobart* v. *Fisher*, 5 Conn. 592; *Grover* v. *Howard*, 31 Maine, 550.

V. For the defective execution of a power created by *contract or devise*, the Court of Equity may relieve, but the case is different with the execution of a power created by *statute*. That must be strictly pursued, and for any omission or variance there is no remedial power in the Court to correct the error. Thus in *Bright* v. *Boyd*, 1 Story, 487; 1 Story's Eq. Jur. § § 96, 177; *Earl of Darlington* v. *Pulteney*, Cowp. 267.

VI. There are still other equities in this case, which offer an insuperable obstacle to the plaintiff's recovery.

This is a contest between creditors, and the Court will not discriminate between them. The only law which governs such contest, is that of "*vigilantibus et non dormientibus succurrent leges.*" The law disregards the equity, if the one is as great as that of the other, and if in the race the one out-runs the other, to the victor belong the spoils.

The Court will not interfere to give one a precedence over the other. *Hunt* v. *Rousmanier, Ad'x,* 1 Pet. 1, 17; *Fitzsimmons* v. *Ogden,* 7 Cranch, 2.

Rowe, in reply.

The weight of authority in this country is in favor of reforming, on parol evidence, in cases within the statute of frauds. *Peterson* v. *Grover,* settled the question in this State. The distinction between cases within and without the statute is fanciful; written evidence, when it exists, is as requisite to prove a contract without, as to prove one within; it is as grave a matter to reform on such evidence in one case as in the other; correcting a mistake in the one is no more violating the statute, than in the other; it is violating the rule of common law, which calls for written evidence.

The objection is purely technical, and as such does not apply here, for the statute provides only for contracts, and this is not a case of contract.

But we contend there is evidence of the mistake in the return itself, as stated in the opening.

This is not a case of defective execution of a statute power, (though Story intimates, in notes to the section cited by defendants' counsel, that in case of mistake, &c., relief may be given,) but a case of a defective return of a perfect execution of a power. If appraisers be not sworn, that is a defect in a levy; if sworn, but that fact is not properly stated in the return, that is not a defect in the levy, but in the return merely.

The officer seized the land we claim, caused it to be appraised, set off by metes and bounds, and delivered possession to the creditor. Here was complete execution of a power; a

return is not "doings," but evidence of "doings;" title and possession pass to the creditor before the return. The mistake in the return is the officer's; it is his duty to make the description; it is his in whatever part of the return found. Appraisers merely certify the appraisal of land shown.

In reforming a deed, it is a question of intention; for a deed should express the intention of parties. But in amending a return, it is a question of fact, what was actually done. For a return should be a true statement of the officer's doings.

Permission to officers to amend is common practice, always granted where truth requires it, and no wrong will be done.

The objection to altering after record is no stronger in case of a return than in case of a deed.

Jos. R. Lumbert is the party legally interested in this case, for an amendment revives a debt against him; he consents.

Hill will suffer no wrong; he will only be deprived of an undue advantage, which he acquired by the mistake; he will stand as well then as if there had been no error.

Hill had notice. Of the fact no one can have a doubt. The only question is, is it *legally* proved? Coombs' testimony balances the answer; circumstances turn the scale.

He made a thorough examination of Lumbert's title on record.

The description in our return, when applied to the land, shows, not only that there was a mistake, but suggests its nature so far as to put any one on inquiry. A document which showed more would not need amending.

The contest is not between two creditors. The plaintiff is a purchaser, innocent, and for a valuable consideration, whose improvements now constitute more than half the value of the premises.

HATHAWAY, J.—The defendant, Joseph R. Lumbert, owned a lot of land in Bangor, on Exchange street; he was indebted to the Merchants' Bank, in Boston, and also to the defendant, Thomas A. Hill.

In June, 1840, the bank recovered judgment against Lum-

bert for their debt, and caused their execution thereon to be levied on land as his property, and the levy was duly returned and recorded. Subsequently, April 17, 1843, Hill commenced an action against Lumbert, to recover the debt due him, and attached Lumbert's real estate, and in due process of law, recovered judgment, upon which execution was duly issued and levied upon land as Lumbert's property, which levy was also duly returned and recorded. The land described in the levy of the bank, includes the northerly half of Lumbert's lot on Exchange street, and Hill's levy covers the southerly half of the same lot.

The plaintiff has title through sundry mesne conveyances from the Merchants' Bank, and, in his bill, alleges that the levy of the bank, in fact, covered the whole lot, including the part subsequently levied upon by Hill, and that in the appraisers' certificate, and the officer's return of his doings on the execution, there was an error in describing the easterly boundary line, as running south, *seventy* degrees east, instead of south, *seven* degrees east, by reason of which mistake, as he alleges, the levy as returned and recorded, does not describe the land upon which the execution was actually extended, but omits that part of the lot upon which Hill's execution was subsequently levied, and includes another piece of land, to which Lumbert had no title. And the plaintiff prays that the error may be corrected, and that the levy and the deeds following it, through which he derives title, may be reformed, &c.

The extent of an execution on lands, accepted by the creditor, is a statute purchase of the debtor's estate.

By R. S., c. 94, § 19, it is made the officer's duty to return the execution with a certificate of his doings thereon, into the clerk's office to which it is returnable, and within three months after the completion of the levy, to cause the execution and the return thereon to be recorded in the registry of deeds, and by § 20, if the execution and levy are not recorded, as provided in § 19, it shall be void against subsequent attaching creditors without notice; "but if the levy is recorded, though after the expiration of three months, it shall be valid

and effectual against any conveyance, attachment, or levy made after such recording." The return of the officer is the *only* evidence of title by the levy.

A statute title must always be perfect; that is, every thing made necessary by the statute, to pass the property, must appear by the return of the officer; and, when recorded, it must, of course appear by the record, to have been done. 14 Mass, 20, and Rand's notes. And when the execution and levy thereof have been returned and recorded, as was done in this case, there can be no other notice of the previous proceedings than the record, by which subsequent attaching creditors or purchasers can be affected.

"To reform an instrument in equity, is to make a decree, that a deed or other agreement shall be made or construed, as it was originally *intended* by the *parties*, when an error, as to a fact, has been committed." Bouvier, L. D. Tit. Reform. The levy of an execution on land conveys title by operation of law, not in pursuance of any agreement by which the intention of the parties was manifested, or can be ascertained. The question, however, of reforming a levy, after the execution and the officer's doings thereon, have been duly returned and recorded, and where the rights of third parties would not be affected thereby, need not be considered in this case; for if the judgment creditor, by mistake, do not make his title to the land seized on the execution, perfect by his levy, surely there can be no reason why a *subsequent* attaching creditor or purchaser should be prejudiced by such mistake, for the record is the statute evidence of what was done in extending his execution. Every person has a right to rely upon the record as the evidence of title, unless he have legal notice of a subsequent conveyance.

The plaintiff cannot have the relief which he seeks, unless the officer can have leave to amend his return on the execution. To reform the levy and deeds as prayed for, and thereby change the existing legal titles of the parties, if it could be done, would render the registry of deeds of little value, as furnishing any certain evidence of title to real estate.

It is familiar law, that the Court will not allow an amendment of an officer's return, after a long time has elapsed, unless from some minutes made at the time, and also, that an officer will not be permitted to amend a defective return of an extent, if a third person have subsequently acquired title to the land.

But if the Court could grant the relief sought, in all cases of relief, by correcting mistakes in the execution of instruments, the party asking relief must stand upon some equity superior to that of the party against whom he asks it. If the equities are equal, a court of equity is silent and passive. 1 Story's Eq., c. 5, § 176, and notes.

In this case, neither party appears to have any equity superior to the other. The plaintiff has the title of the Merchants' Bank, and nothing more. The bank and Hill were both creditors of Joseph R. Lumbert, and, of course, they both desired to collect their debts, and they had equal rights to do so. The bank levied their execution, and left a part of Lumbert's land open to attachment by his creditors, as appeared by the record. If Hill had not attached the land, Lumbert might have conveyed it, or any other of his creditors might have attached it. Hill ascertained to his satisfaction, that the levy of the bank did not include it, and he was neither legally or morally guilty of wrong in attaching it to secure his debt. There was no contract or privity between him and the bank. He was not the guardian of their interests, and if the bank neglected to take and perfect their title to the land, which they might have taken on their execution, it was not his fault, and he had a perfect legal right to attach what the bank left of Lumbert's land, and seize it on execution, in payment of his debt. It would have been requiring too much, to have asked him to be quiescent, and lose his debt, rather than disturb the plaintiff in the temporary enjoyment of property, to which he had no legal title, and which might, at any time, have been conveyed by Hill's debtor, Joseph R. Lumbert, or attached or seized on execution by any of his creditors.

The result is, that if the levy of the bank, as recorded, includes the land upon which Hill subsequently extended his execution, then the plaintiff holds it by legal title; but if that levy does not include it, a court of equity can grant him no relief.

The bill is dismissed with costs for the defendants.

TENNEY, C. J., and APPLETON, GOODENOW, and MAY, J. J., concurred.

CITY OF BANGOR *versus* THE INHABITANTS OF HAMPDEN.

A., and his wife and children, while residing in Bangor, were furnished with supplies as paupers; the husband having no settlement in the State, and the wife and children having their settlement in the town of Hampden. *Held*, that the latter town was liable for such part of the supplies as were used by the wife and children, but not for such as were used by the husband.

In order for one town to recover in an action against another town for supplies to paupers, the jury must be satisfied that the alleged paupers had fallen into distress, and needed immediate relief, and that the supplies furnished were necessary.

What may have been the cause of their distress and want in such case, is immaterial.

MOTION FOR NEW TRIAL. From *Nisi Prius*, CUTTING, J., presiding.

This was an action of ASSUMPSIT for supplies furnished Charles Robinson, Anna Robinson, his wife, Jane M., Enoch L., Richard J., and Charles H. Robinson, minor children of Charles and Anna.

It was admitted that Charles Robinson had no settlement in this State; that his wife and the four children had their settlement in Hampden; and that the supplies were furnished to the family.

Doct. G. B. Morrison, called by plaintiffs, testified that he had known the Robinson family since February, 1849; knew them first in Hampden; had been called frequently to attend the family, and had attended them as city physician of Ban-

gor. The family were always poor. He was never there when he did not think they needed some assistance.

Joseph N. Downe, called by plaintiffs, testified to the sickness of Mrs. Robinson.

Charles Hayward, overseer of the poor of Bangor, testified that he had officially notified the overseers of Hampden to take the family away.

Mrs. Anna Robinson, one of the alleged paupers, called by the defendant town, testified that her husband was very sick; had been sick eight years; had done no labor during that time of any amount, and had earned nothing. She and her children had supported the family, except what assistance had been rendered by the plaintiffs. She also testified that the supplies were necessary, and that they lived as prudently as they could.

The presiding Judge instructed the jury that they must be satisfied that the persons alleged to be paupers had fallen into distress and stood in need of immediate relief, and that the supplies furnished were necessary for their maintenance and support; that if they were in such a situation, it was immaterial for what cause, whether through their own fault or the misconduct of the husband and father; and that the defendants in such case would be liable for such part of the supplies as was used by the wife and children, but not for what was consumed by the husband.

The verdict was for defendants. Whereupon the plaintiffs moved for a new trial.

A. Waterhouse, for plaintiffs.

J. A. Peters, for defendants.

APPLETON, J. — The rulings of the presiding Judge were correct. No exceptions are taken thereto. The verdict was in plain and palpable disregard of the whole evidence, and is utterly unsupported by proof. *New trial granted.*

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

RICE, J., did not sit.

THOMAS J. STEWART *& als. versus* A. P. WALDRON *& al.*

Certain matters in issue between the parties having been submitted to referees, objection was taken to their award, on the ground that the submission was, in fact, to the committee of the Board of Trade of Portland and that their action should have been governed by the constitution and by-laws of that board; which it was not. In the submission, they were named as individuals; but in their report they styled themselves "The Committee of Arbitration of the Board of Trade of the City of Portland." — *Held*, that the submission was to the persons named therein in their individual, and not in their official character, and that no objection having been taken to their mode of proceeding, in giving notice and admitting evidence, their decision is final and conclusive.

On REPORT from *Nisi Prius*, CUTTING, J., presiding.

This was an action of DEBT on a charter party. The question submitted to the full Court is stated in the opinion.

Rowe & Bartlett, for plaintiffs.

Kent, for defendants.

GOODENOW, J. — This is an action of debt. The writ is dated March 16, 1855, and contains three counts; the first, upon a charter party, claiming the actual damages alleged to have been sustained by the plaintiffs; the second, upon the award of arbitrators in favor of the plaintiffs, for the penal sum named in the charter party, $500, and costs of arbitration, $35; and third, upon an account annexed.

If, upon the facts admitted and the whole evidence, the Court shall be of opinion that the plaintiffs are entitled to recover on the *second* count, a default is to be entered, and judgment made up under that count, otherwise the case is to stand for trial.

On the 21st of October, 1854, the parties agreed to refer the matter in dispute between them, by an obligation, as follows: —

"We, the undersigned, parties in a case now pending between us, and which we have mutually agreed to refer to Messrs. N. F. Deering, C. S. Carter, C. M. Davis and A. L. Hobson, to arbitrate and decide, and do further agree to

abide by the decision of said referees, and do hereby each to the other bind ourselves in the penal sum of $500, to abide by such decision." Both parties were heard before said referees, who, on the 25th of October, 1854, made their award in writing in favor of the plaintiffs, for the penal sum named in the charter party and costs of arbitration; of which the defendants had due notice.

The defendants object to the validity of this award because, they allege, that the submission was in fact a submission to a committee of the Board of Trade of Portland, and should be subject to the constitution and by-laws of said Board of Trade; and that the proceedings of the arbitrators were not in accordance with the same; and that for this reason their award is not binding upon the parties.

It is true that the arbitrators, in their report, style themselves as "the Committee of Arbitration of the Board of Trade of the city of Portland;" and that notice was given and the parties were heard, as they usually are before said committee; and that the four gentlemen who are named above as referees, were at the time they heard the case, members of said committee. But these facts do not change the character of the submission. That refers the case to the gentlemen named, in their individual, and not in their official character. No exception appears to have been taken by either party to the mode of proceeding, in giving notice, or admitting and hearing evidence. The case seems to have been carefully considered; and we see no good reason to dissent from the conclusion to which the arbitrators arrived, if the question were open for our consideration. But it is not. In our opinion the decision of the arbitrators is final and conclusive between the parties; and, according to the agreement of the parties, a default must be entered, and judgment made up for the plaintiff, upon the second count in the writ, according to the terms of said award.

TENNEY, C. J., and HATHAWAY, APPLETON, and MAY, J. J., concurred.

NATHANIEL HAYNES *versus* JOHN T. HAYWARD *& al.*

An agreement of parties that a deposition may be used by either side in the trial of a cause, and not in terms limited to the trial at a particular term of the Court, will not be construed by the Court to be so limited.

The deposition in such case is properly admissible at a subsequent trial; especially when it does not appear that the party objecting is taken by surprise, or that he asks for a continuance, in consequence of the ruling of the presiding Judge to admit it.

A. contracted with B. to sell him all the logs cut and hauled during a lumbering season into a certain stream by A's agents, at a stipulated price for the different kinds of lumber, per thousand, based upon the woods' scale of G., whose certificate of quantity was to be conclusive between the parties; with a further provision in the same contract, that B. was to pay A. fifty cents a thousand for driving the same logs to a point named; — *Held*, that A. sold the logs where they were landed, and that they then became the property of B.; that the agreement to drive was an independent branch of the contract, and that A. could not recover for the driving without proof of the driving; but that he could recover for the value of the logs if not driven to the point named. — *Held* also, that the scale bill of G., annexed to his deposition and verified by his oath, was admissible evidence to show the quantity of lumber.

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

This was an action of ASSUMPSIT on the following contracts:

"Bangor, March 26, 1853.

"Memorandum of agreement between Nathaniel Haynes and Hayward & Co., of Bangor: —

"Said Haynes agrees to sell, and does hereby sell to said Hayward & Co., all the logs cut and hauled into the "Joe Merry" waters the present lumbering season by J. & F. H. Cowan, and marked NHx.

"Said Haynes further agrees to drive said logs to the North Twin Dam on the west branch of the Penobscot river, for fifty cents per thousand feet.

"Said Hayward & Co. on their part agree to purchase said logs and to pay for the same at prices as follows: —

"For all White pine and for thirty thousand feet of Norway pine eight five-eighths dollars per thousand; for all Norway pine over thirty thousand feet, seven five-eighths dollars per M. feet; for spruce $4,50, per M.; and in addition thereto they are to pay said Haynes fifty cents per M. for driving

the said logs to said North Twin Dam so soon as they shall be there delivered.

"The foregoing sale and prices are based upon the woods' scale of John K. Gilmore, whose certificate of quantity shall be conclusive between the parties.

"The foregoing sale of logs shall be considered equal to cash when the logs get into the Penobscot boom, and shall be settled for as follows: —

"Said Hayward & Co., agree to negotiate the note of said Haynes on three or four months, for one thousand dollars, to furnish funds to pay his men when they leave the woods.

"They also agree to provide said Haynes with means, either in cash or short paper, to take up the aforesaid note of one thousand dollars, and also another note of said Haynes for the sum of eleven hundred dollars on four months from the first day of March, current, to the order of Ricker, Jewett & Co., at the time said notes mature, and the balance shall be paid one-half in three and one-half in four months from the first day of August next.

"It is further agreed with regard to said Gilmore's scale, that if on examination, it shall not be satisfactory to either said Haynes or Hayward & Co., then they shall agree upon some other scaler, whose certificate of quantity shall be conclusive between the parties, in which case the cost of re-scaling shall be paid by Hayward & Co."

Signed { "Nathl. Haynes,
"Hayward & Co."

"Bangor, April 9, 1853.

"Have agreed with Mr. N. Haynes to discount from the prices before named 12½ cents per thousand, and the scale of Mr. Gilmore is to be taken in settlement."

Signed { "Nathl. Haynes,
"Hayward & Co."

The writ was dated Sept. 22, 1854. Plea, the general issue. The plaintiff offered the deposition of one Gilmore, which was objected to as having been taken in another action.

Plaintiff's attorney then testified, that said deposition was

taken to be used in an action between the parties, returnable at the October term, 1854, which action was not entered. Another writ for the same cause was sued out, returnable to the January term, 1855. Subsequent to said October term, and before said January term, one of the defendants came to said attorney and said he had agreed with the plaintiff, that Gilmore's deposition might be used by either party, as had been before agreed between them in reference to said Oct. term; that he, defendant, considered said deposition favorable to him, and wished to have an agreement in writing; such an agreement was written, he thought defendant took it, it was not in witness' possession, nor had he seen it since it was written. It was signed by witness, as attorney for plaintiff, and by one of the defendants for them. Defendants denied, that there was any other scale bill than that in the deposition.

This action was tried at January term, 1856, and the deposition was then offered and objected to. But defendants afterwards waived their objections, and the deposition was used at that trial.

Annexed to said deposition was a paper, which plaintiff contended was the scale bill of said Gilmore. Defendants objected to the admission of the scale bill, that it was not the original, and offered to show by one Ruer, clerk of defendants, that the original scale bill was in defendants' hands on the same sheet with a letter to plaintiff from Gilmore, and making 5½ per cent. discount in the price, which original was passed back to plaintiff. But the Judge admitted the scale bill.

Plaintiff introduced testimony tending to show, that he was engaged by his agents, in the winter of 1852–3, in lumbering on letter A., belonging to him, and in getting the logs into the "Joe Merry" waters, which logs were marked NHx. and that Gilmore was there scaling; also that the logs were well marked.

There was no positive evidence, that the logs were driven

to the "North Twin Dam," or nearer than within about seven miles of it.

The Judge ruled—on motion by defendants for nonsuit, on the ground that plaintiff had not sufficiently proved the driving to "North Twin Dam"—that plaintiff sold the logs by the contract where they were landed; that the logs then became the property of defendants; that the agreement to drive to "North Twin Dam," was an independent branch of the contract; that plaintiff could not recover for driving, but could recover the value of the logs if not driven to "North Twin Dam," or to the main Penobscot river.

The defendants offered to prove fraud or mistake in the scale, by evidence tending to show that there was a clean drive of logs to the boom, and that there was no loss of logs by freshets or their going to sea; that there were rafted at the boom, in 1853, 74,320 M., in 1854, 258,930 M., and in 1855, 152,366 M. at boom scale, which is about 20 per cent. larger than woods' scale; that great pains had been taken at all the booms and mills, and places where logs were secured below the main boom, in the river, in all the years 1853, 4, and 5, to secure all that escaped of this mark, without being rafted, and that 63,015 M. only had been recovered in the three years. Other testimony of like kind was also offered. They also offered to prove that fraud was practiced by the Messrs. Cowan, and their men by their orders, in the scale; that logs were so sawed and laid as to conceal the rots and other imperfections; that the logs were not all actually scaled, but a few only at a time, and estimates made of the others by comparison.

The Judge excluded the testimony so offered by defendants.

In case the rulings were sustained, a default was to be entered, and the presiding Judge was to assess damages; otherwise a new trial was to be had.

A. Sanborn and *Haynes*, for plaintiff.

1. The deposition of Gilmore was properly admitted, on the agreement of Hayward, one of the defendants.

2. The scale bill was properly admitted as a part of the

deposition. Gilmore deposed that it was his scale bill. We refer to the language of the contract, "Gilmore's certificate of quantity," &c.

3. The testimony of the plaintiff's witness proves that the logs were duly marked with the contract mark.

4. The rulings of the Court, "that plaintiff sold the logs where they were landed; that the logs then became the property of defendants; that the agreement to drive to "North Twin Dam" was an independent branch of the contract; that plaintiffs could not recover for driving without proof of driving, but could recover the value of the logs, though not driven to North Twin Dam," were correct.

By the express terms and stipulations of the contract, it is evident that the plaintiff sold the logs to defendants, at the landing, and that they were thereafter at defendants' risk. The price of the logs at the landing, was agreed upon in one part of the contract, and in an independent part of it was the agreed price for driving them.

5. The testimony to prove fraud or mistake in the scale, was incompetent, because the parties had agreed that the scale of Gilmore should be conclusive; and this, as it appears, after they knew what that scale was.

There was a consideration, too, for that agreement, viz.; a deduction of 12½ per cent. on a thousand.

Besides, if there was such fraud or mistake, it is not pretended that the plaintiff had any knowledge of it.

The only effect of such fraudulent conduct on the part of the Cowans or their men, was to produce mistake or error by Gilmore in his estimate or scale of the logs, and this contradicts his scale.

The same remark is to be made with regard to the testimony going to show that there was a clear run of logs to the boom, none lost, &c.

6. The other testimony offered by defendants is open to the objection first made, and much of it is entirely immaterial. Some of it is subject to other, and obvious objections.

Blake, for defendants.

1. The deposition of Gilmore should have been excluded. It was not taken in this action, but before the date of the writ in this action. It was offered at a former trial, and ruled out; but the defendants at length waived their objection for that term, and let it in. The plaintiff should have taken it again in vacation; he had notice it would be objected to.

2. The paper purporting to be Gilmore's scale should not have been admitted, without proof of loss of the original, or that this was a transcript from his scale book.

The report states carelessly, that the Judge admitted it as a part of the deposition. If inadmissible of itself, it could not be correctly introduced by annexing it to the deposition.

It is to be assumed that there was an original scale bill, and that this differs from that 5½ per cent., and that the original is in the hands of plaintiff; for the defendants offered so to prove.

3. The contract to *sell* logs and to *drive* them was *one* contract, separately stated merely to fix the price when delivered at the boom. If so, a nonsuit should have been ordered, as requested.

4. The object of the proof offered by defendants, was to show that the logs, though Gilmore may have intended to scale them honestly, were not marked, (which would be the fault of the plaintiff who contracted to sell them so marked,) or that, if so marked, there was fraud practiced by the Cowans, the plaintiff's agents, upon the scaler, so that there was an over-scale.

5. In regard to *marking;* the plaintiff contracted to sell logs marked NHx, and if the scale included logs not marked, so many as were not marked, though included in the scale, defendants ought not to pay for. The duty of plaintiff was to have all the logs marked. The testimony offered and excluded, tended to show that a large number of the logs scaled, were not marked.

6. We offered to show fraud in the Cowans, plaintiff's agents, or of their men by their order, on the scaler. This

testimony should have been admitted, whether the plaintiff was connusant of the fraud, or not. He ought to suffer, and not the defendants, by the wrongful conduct of his agents.

7. Suppose Gilmore made an important mistake in his scale; suppose he made a mistake in adding up his figures; cannot that be shown? And must the defendants suffer by this means, and have no remedy?

GOODENOW, J.—This action was tried at the January term, 1856, and the deposition of John K. Gilmore was then offered by the plaintiff, and objected to by the defendants. The defendants afterwards waived their objections, and the deposition was used at the trial. At this term, April, 1856, the plaintiff offered the same deposition, which was again objected to by the defendants, as having been taken to be used in another action. The plaintiff's attorney, H. P. Haynes, Esq., then testified that said deposition was taken to be used in an action between these parties returnable at the October term of the S. J. Court, 1854, which action was not entered. Another action, for the same cause, was commenced for January term, 1855. Subsequently to said October term, and before said January term, said Hayward came to him, and said he had agreed with the plaintiff Haynes, that Gilmore's deposition might be used by either party, as had been before agreed between them in reference to said October term; that he considered the deposition favorable to him and wished to have the agreement in writing. Such an agreement was written. He thought Hayward took it; it was not in the witness' possession; that he had not seen it since it was written. It was signed by witness as attorney for plaintiff, and by Hayward for defendants.

As it appears from the report of the case, the defendants did not limit the waiver of their objections to the deposition, to the trial at the January term; we are of opinion that the deposition was properly admitted at the trial at the April term, 1856. It does not appear that the defendants were surprised by its admission, or that they moved for a continuance

in consequence of it. The scale bill annexed, verified by the oath of the defendant, taken in connection with the written contract between the parties, was also properly admitted.

We are of opinion that the Judge committed no error in refusing to order a nonsuit; or in rejecting the testimony of the defendants as to the facts, which the report states they offered to prove in defence.

The rulings of the presiding Judge are sustained. A default is to be entered and judgment for such damages as he shall award.

TENNEY, C. J., and HATHAWAY, APPLETON, and MAY, J. J., concurred.

JACKSON H. SHAW *& al. versus* MILES HUSSEY.

The primary controling rule, in the exposition of wills, is that the intention of the testator as expressed in his will shall prevail, provided it be consistent with the rules of law.

The intention of the testator is to be collected from the whole will taken together, every word receiving its natural and common meaning.

A devise of land to another generally or indefinitely, with a power of disposing of it, amounts to a devise in fee.

Such a devise, without words of inheritance, is treated as equivalent to a devise with words of inheritance.

But when a testator gives to the first taker an estate for life *only*, by certain and express words, and annexes to it a power of disposal, the fee does not vest in the legatee.

A testator in the first item of his will, "gave and bequeathed to his wife all his estate, real and personal, during her natural life," &c. In the sixth item, he says: — "I will that at the decease of my wife, all my real estate, that may remain unexpended by her, be divided in equal shares between," &c. — *Held*, that this being in express terms, a devise for life only, the wife did not take an estate in fee; but the power of disposal being given her by implication in the words "that may remain unexpended by her," she could sell the lands at her discretion.

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

This was a writ of ENTRY. Plea, the general issue, with a claim for betterments.

The demandants claimed title under the will of Ezekiel Hayes, deceased.

The tenant claimed under a deed from Polly Hayes, (widow of said Ezekiel,) to him dated June 12, 1850, acknowledged June 27, 1850, and recorded February 6, 1851. Also deed from said Polly Hayes to said Miles Hussey, dated May 3, 1849.

The testimony was submitted to the full Court, or so much thereof as the Court might deem legally admissible, with authority to enter judgment conformable to law.

A. Sanborn and *Haynes*, for demandants, cited the following authorites in their argument:—*Varney* v. *Stevens*, 15 Maine, 331; *Jackson* v. *Robbins*, 16 Johns. 537; *Ide* v. *Ide & al.* 5 Mass. 500; Cruise's Digest, title 38; *McLellan* v. *Turner*, 15 Maine, 436.

Peters and *Barker*, for tenant, cited 22 Maine, 257; *Smith* v. *Bell*, 6 Peters, 68; 12 Wend. 602; *Parsons* v. *Winslow*, 6 Mass. 169.

TENNEY, C. J.—The real estate in controversy was the property of Ezekiel Hayes at the time of his decease. He died testate, and in his will are the following provisions, with others not deemed material to the question at issue. "2d, I give and bequeath to my beloved wife Polly Hayes all my estate, real and personal, during her natural life, subject to the payment by her, as hereinafter described, of the following legacies and entailments after her decease." "6th, I will, that at the decease of my wife, all my real estate, that may remain unexpended by her, be divided in equal shares between Ansel Shaw, and his son Jackson Hayes Shaw." "7th, I will that all my personal property be at the disposal of my said wife, to give and bequeath and bestow on whom she may choose." In the 8th item the testator appointed his wife, and his brother-in-law, Ansel Shaw, the executors of his will.

After the death of the testator, his will was proved, approved and allowed in the probate court, and execution there-

of was committed to the persons named therein as executors, who gave bonds, and proceeded in the administration of the estate.

After the sale of certain real estate belonging to the testator at the time of his death, by the executors of the will, under a license from the Court of Probate, to pay the charges of administration, and the debts of the testator, which amounted, at the time of his decease, to the sum of one thousand dollars, Polly Hayes, by two deeds, executed and delivered at different times to the tenant, conveyed to him the lands described in the demandants' writ; the form of the deeds being appropriate to convey a fee.

The demandants in this action are Jackson Hayes Shaw, named in the sixth item in the will, and Aaron S. Hill, who acquired the right of Ansel Shaw, derived under the same item of the will, if any he had.

Upon a proper construction of the will, did the wife thereunder acquire in the lands of which the testator died seized, any interest beyond that of a life estate; and had she a power of disposal of the whole or a part thereof; and did she effectually convey the lands described in her two deeds to the tenant?

The first and great rule, in the exposition of wills, to which all other rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. Doug. 322; 1 Bl. Rep. 672. It was said, in the case of *Thelluson* v. *Woodford*, 4 Ves. 329, by Sir RICHARD PEPPER ARDEN, Master of the Rolls, "I know only one general rule of construction, equally for courts of equity and courts of law, applicable to all wills, which the courts are bound to apply, however they may condemn the object; the intention is to be collected from the whole will taken together. Every word is to have its effect. Every word is to be taken according to the natural and common import; and if words of art are used, they are to be construed according to the technical sense, unless upon the whole will it is plain, the testator did not so intend. The Court are

bound to carry the will into effect, provided it is consistent with the rules of law." 5 Ves. 248.

It is very manifest, upon the application of the rules of construction referred to, that the plain import of the second item in the will was intended by the testator to be essentially modified, by the seventh item, touching the personal property. Our inquiry is, whether the second item was essentially qualified by the sixth, in reference to the real estate.

If a man devises land to another to give and to sell, this amounts to a devise in fee; for in a will, the word heirs is not necessary to create an estate of inheritance. Co. Lit. 9, b. And it is laid down as an incontrovertible rule, that when an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee. *Jackson* v. *Robins*, 16 Johns. 588. And in *Ramsdell* v. *Ramsdell*, 21 Maine, 288, it is said by SHEPLEY, C. J., in delivering the opinion of the Court, "It has become a settled rule of law, that if the devisee or legatee have the absolute right to dispose of the property at pleasure, the devise over is inoperative," "and it cannot reasonably be supposed, nor do the decided cases admit, that it could be the intention of the testator to give only an estate for life, unless there be words clearly declaring such intention, when he gave the unqualified and absolute right to dispose of the entire property at pleasure."

A devise to one, without words of inheritance, but containing the power to dispose of the property without qualification, is treated as equivalent to a devise with words of inheritance. And the law is well settled, that in a devise to a person, and his heirs and assigns, forever, with a subsequent clause, that if the devisee should die without issue, the property of which he should die possessed, of that first devised, should go to another, the limitation over is void. *Ide* v. *Ide* 5 Mass. 500; *Jackson* v. *Bull*, 10 Johns. 19. If, however, the devisee in fee should die before the testator, the ulterior bequest will be let in. *Burbank* v. *Whitney*, 24 Pick. 156.

It was insisted by counsel in the case of *Jackson* v. *Robins*, that the Court fell into an error in *Jackson* v. *Bull*, in

applying to a devise of real estate the doctrine, that (where property is devised) to one, his heirs and assigns, with a limitation over, on a certain event, *the latter was void.* The distinction contended for, was not admitted, and it has been treated by the most eminent Courts as having no foundation in law. *Jackson* v. *Robins,* before cited, and cases there cited.

To the rule, which is treated in the cases referred to, and others cited therein in its support, an exception has been recognized as well established, having for its object, to effectuate the intention of a testator, and as not being repugnant to the rule itself, in cases proper for its application. The exception is, when a testator gives to the first taker an estate for life *only,* by certain and express words, and annexes to it a power of disposal. And authorities, which have been cited in support of the rule, establish the exception. And this Court in the case of *McLellan* v. *Turner,* 15 Maine, 436, say, "if it were admitted, that a power of disposal existed, she would not take a fee, there being an express devise to her for life."

If we apply the principles, which have been adverted to, in the case before us, it would seem, that the result to the parties must be the same, whether it falls within the rule or the exception. If, as is contended by the tenant, the devise was of an estate in fee to Polly Hayes, the limitation over was void. But if it was a devise of an estate for the life of the devisee, with the power of disposal, it would fall within the exception, and the tenant is in *by the will.* 6 Cruise's Dig. Tit. 38, c. 13, § 6. But if the devisee was to have an estate for life only, without the power of disposal, her deeds to the tenant could be no defence after the death of his grantor.

Had the devisee, Polly Hayes, the power of disposing of the lands at pleasure, to have effect after her death? No such power is given in express terms. The devise over is, however, "all my real estate, that may remain unexpended by her." If the testator intended that she should take only during her natural life with no power of disposal, the words

"that may remain unexpended by her" are utterly destitute of meaning; and if they are disregarded in the construction, it is in violation of the rule, "every word is to have its effect," unless by giving it effect, a principle of law is disregarded.

These words import clearly, that a portion at least of his real estate might be expended by his widow; and if a portion might be so expended, there is nothing which restricts her in the disposition of the whole. In the language used by SHAW, C. J., in giving the opinion of the Court in *Harris* v. *Knapp*, 21 Pick. 412, "in this last case, the words 'whatever shall remain,' necessarily mean, that portion of the property bequeathed, which shall be undisposed of at her decease; but there is no allusion in the will to any mode, by which the sum thus given, is to be diminished, excepting the disposition thereof, to be made by Mrs. Harris, and therefore the implication is inevitable. This is inconsistent with the supposition that the whole was to remain undiminished."

By giving the legitimate import to the words "that may remain unexpended by her," in the construction of the will, no rule of law can be in the least violated, inasmuch as it would be no more than a devise, in which the testator gives to the first taker an estate for life *only*, by certain and express words, and annexes to it a power of disposal, — the very devise which the authorities that have been cited, treat as one to be made effectual in every particular.

It is suggested by the demandant's counsel that the personal property having been entirely bequeathed to the wife, and the debts of the testator at his death being the sum of $1000, in the settlement of the estate, large portions of the lands would be required to be sold, to raise the means of discharging these debts and the expenses of administration, and hence sales for such purposes were those which the testator supposed would be made. The language of the will is not fairly susceptible of this construction. The devise over was not of all the real estate that might remain unexpended by the executors of the will, or in defraying the charges of administration, and in the payment of his debts;

but of what might remain unexpended by his wife, who is referred to in the same item by that name, and nothing to indicate that he had in his mind any diminution of the real estate by her as one of the executors in the administration; indeed, the appointment of her to that trust was in a subsequent part of the will, so that the reference could not have been to *her* as administratrix, for the *antecedent*. Two executors are named in the will, and the part which he supposed might be conveyed, in settling the estate, would be alienated under authority of law and an order of probate, and, as he would anticipate, by the two agents of his appointment as executors, and not by one only. The term of time, too, in which the real estate might have been expended by her, was limited only by her decease; whereas the sale for administration purposes might reasonably be expected to take place in a short time after the testator's death. On the other hand, if the design of the testator was that his wife should dispose of the real estate as her wants might require, or as she might deem expedient, the language was entirely appropriate, he not having given to her the power in express terms, which he left to implication.

The will imposed no restraint upon the wife, touching the objects for which sale of the real estate might be made, but the whole was left to her discretion. It is obvious, that the testator believed that some of his real estate might remain undisposed of at his wife's decease. Whether such would or would not be the case, might be expected to depend much upon the portion required to raise means to pay the debts due from the estate, and charges of administration; and also upon the time which should elapse from his own to her death, her individual necessities, and the propriety in her judgment of converting the real estate into money. If she should survive him but a short time, the real estate which might be left after the payment of the charges upon the whole, would probably remain unexpended by her. But if she should live to extreme old age, her wants would probably require for

their proper supply a sum equal to the value of the whole residue.

The case finds that at the time of the death of the testator, his wife was an invalid; by the will, the payments required for settling the estate and for the payment of debts, must all be from the avails of the sales of the lands, so far as sales were required for such purpose. Portions of the personal property, bequeathed to the wife, might not be so valuable to her as the price put thereon in the inventory, and but a part of it was of such a character as would yield an income till sold.

It would appear from the will that the testator had no descendants, none being named as such. The only relatives mentioned therein, besides his wife, are two brothers-in-law, and a nephew and a niece. From certain articles of furniture, and other things appraised as parts of the testator's estate, it is manifest that the family had lived in comfort and in a respectable manner, though not in affluence. It is due to him, to suppose that he would wish to leave to his wife the means, so far as he had them, sufficient to enable her to live in the same comfort and respectability, so long as she should survive him. No others are shown to have held such relations to him, or to have been in the low condition of life, that would awaken his sympathies for them, so far as to induce him to make a diversion of his property from his wife to others, and thereby expose her to want. But he had a choice, when he determined who of his relatives should be the objects of his bounty, if his wife should not for any reason dispose of all his real estate.

If his design in the devise and bequest to his wife was, that she might subsist in comfort after his death, beyond all contingency against which he could provide, and he conferred the power of disposal of real estate, to promote such an object, he left her to be the judge of the time, the mode and extent of doing it. And if she did from the avails of the sales of real estate obtain more, than she expended before her de-

cease, this fact cannot defeat the conveyances. Even if the will had provided, that the conveyances of real estate should be only for the removal of her wants, and if no other was appointed to be the arbiter touching those wants, the power to decide this question would be with her, and her decision, shown by her deed would be conclusive and would protect her grantee. *Spofford* v. *Hobbs*, 29 Maine, 148. But the power of alienation is not limited to any condition, and if it exists at all, was to be exercised entirely in the discretion of the wife of the testator.

The conclusion to which we come, is, that the testator having devised to his wife his real estate, during her natural life *only*, terms which are express, and which cannot be disregarded, she did not take an estate in fee. But the wife having, by clear implication, the right of disposal of the real estate she was brought within the exception to the general rule referred to. The disposal having been made under a power in the will, it was carrying out one of the provisions of the same, and the tenant holds under it.

In this result the manifest intention of the testator is made to prevail; every word touching the devise of the real estate has given to it, its natural and common meaning, and no principle of law has been violated in any degree.

Demandants nonsuit.

Judgment for the tenant.

HATHAWAY, APPLETON, GOODENOW, and MAY, J. J., concurred.

NATHAN C. TRIM *versus* INHABITANTS OF CHARLESTON.

A town is not legally responsible for improper proceedings, willful or otherwise, by the majority of a school district.

Assessors are responsible only for their personal fidelity and integrity in the assessment of such taxes as they are by law required to assess.

The provisions of R. S., c. 14, § 88, are not applicable to school districts.

ON REPORT. From *Nisi Prius.*

This was an action of the case to recover back the amount of a tax, alleged by the plaintiff to have been illegal, and which was paid by him under duress.

A. Sanborn, for plaintiff.

J. A. Peters, for defendant.

GOODENOW, J. — This is an action of the case, founded on the R. S., c. 14, § 88, which provides that, "if any sum of money shall be assessed, which was not granted and voted for a legal object, with other moneys legally granted and voted to be raised, the assessment shall not thereby be rendered void," &c.

It is brought to recover of the defendants the amount of a certain tax, which the plaintiff alleges was illegally raised, by a supposed school district, No. 5, in Charleston, for the alleged illegal object of removing a school-house and repairing the same; which tax was assessed by the assessors of said Charleston, and by their warrant ordered to be collected; and which was paid to their collector by the plaintiff, while in jail on said warrant; and also twenty-five per cent. interest thereon, and for other damages.

The statute seems to relate to State, county, town and plantation taxes, and the assessment and collection thereof.

Chapter 17, from § § 28 to 36, inclusive, relates to the raising, assessing and collecting taxes in school districts.

If it had been the intention of the Legislature to make the provisions in c. 14, § 88, applicable to school districts, we are of opinion, that such object would have been distinctly stated; especially after the decision of this Court in the case

of *Trafton* v. *Inhabitants of Alfred*, 15 Maine, 258, that "no action can be maintained against a town for the assessment and collection of an illegal school district tax."

It is not alleged or proved, or even asserted that this sum of money, which the plaintiff has been compelled to pay for an "illegal object," was assessed "with other moneys legally granted and voted to be raised." This would seem to be necessary in order to bring the case within the statute. It is not alleged that there was any error, mistake or omission by the assessors, collector or treasurer of the town. The substance of the averment is, "that the tax was not *raised* for a legal object."

The allegation of a mistake in the assessors, is only an allegation, that they mistook the law. They are not responsible, excepting for their own personal faithfulness and integrity, for the assessment of any tax, *which they are by law required to assess.* They are by law required to assess, "all moneys voted to be raised by the inhabitants of such district for the purposes aforesaid," and only such.

We may reiterate the language of the late Chief Justice MELLEN, in the case of *School District in Green* v. *Bailey*, 3 Fairf. 259. "It could never have been intended that a town should be held answerable for any improper proceedings, willful or otherwise, on the part of a majority of a school district." *Plaintiff nonsuit. — Costs for defendants.*

TENNEY, C. J., and HATHAWAY, APPLETON, and MAY, J. J., concurred.

LUMBERMAN'S BANK *versus* SAMUEL R. BEARCE.

Under R. S., c. 69, banking corporations are liable to the same penalties as individuals for taking usurious interest.

In a suit upon a note where more than legal interest has been reserved or taken, the damages must be reduced by the oath of the defendant by reason of such usurious interest, in order that the party so taking or reserving it shall recover no costs, but shall pay costs to the defendant.

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

This action was ASSUMPSIT upon a note dated July 10, 1854, for one thousand dollars, payable to one Boody, or his order, signed by Paulk & Co., and indorsed by said Boody and the defendant.

The defendant pleaded the general issue, and filed a brief statement, alleging that usurious interest was reserved by plaintiffs in the note.

To support the action against defendant as indorser of the note, plaintiff introduced the deposition of E. B. Pierce, who testified that, at the time of the discounting of said note, and ever since he was the cashier of said bank, he took said note of Boody by order of the president and directors of said bank, at their bank, and deducted from the money loaned thereon one per cent. per month, as interest or discount; that on the 22d day of April, 1856, by order of said president and directors, he indorsed on said note the sum of $20,50, being the amount of excess of legal interest taken by said bank for discounting said note.

The defendant, to establish the fact of usury on said note, introduced the deposition of Boody, the payee thereof, who swore that he called on the president of said bank, before defendant indorsed said note, and made an arrangement with him to discount the same at one per cent. per month, by procuring the name of defendant; that defendant afterwards indorsed said note, and thereupon it was discounted at one per cent. per month discount.

The defendant requested the Court to charge the jury that, if plaintiff took more than legal interest on the discount of said note, this action could not be maintained. The Court refused, and instructed the jury, that the same penalties attached to banking corporations as to individuals on taking greater interest than allowed by law, and that defendant might avail himself of proof of the fact of usury by the bank to avoid the excess of interest taken over six per cent.; but such proof would not otherwise affect the validity of the note.

The jury found for plaintiff.

To the above instructions of the Court, and refusal to instruct, the defendant excepted.

J. H. Hillard, for plaintiffs, contended: —

1. The instructions were correct. Banks and other corporations come within the provisions of c. 69 of the Revised Statutes, relating to usury. Such corporations are "persons" within the meaning and language of the law. R. S., c. 1, § 3, rule 13.

2. The plaintiff is entitled to costs. The damages were not reduced by proof, but by voluntary indorsement by plaintiffs on the note; and whether made before or after the action was commenced, is immaterial. *Cummings* v. *Blake,* 29 Maine, 105; *Hankerson* v. *Emery,* 37 Maine, 16.

Sewall, for defendant.

GOODENOW, J. — There is no foundation for exceptions to the instructions of the presiding Judge to the jury.

The damages in this case were not reduced by the oath of the *defendant.* The plaintiffs are entitled to judgment on the verdict, and their costs.

The defendant is not entitled to costs.

Exceptions overruled.

TENNEY, C. J., and HATHAWAY, APPLETON, and MAY, J. J., concurred.

WILLIAM E. SMALL *versus* JOHN TRICKEY.

When an arbitrator examines witnesses behind the back of one of the parties, such party is justified in at once abandoning the reference.

But if, after the fact comes to his knowledge, he continues to attend the subsequent proceedings, this will be a waiver, and the irregularity cannot afterwards be set up to avoid the award.

But the examination of a book of accounts by one referee in company with the party who obtained the award, after a full hearing of the evidence of the parties and the arguments of counsel, in order to test the accuracy of an account transcribed by a witness, cannot be regarded as in any sense an *ex parte* hearing; and, in the absence of all proof of misconduct, partiality or fraud, cannot affect the award.

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

DEBT ON AWARD.

The plea was the general issue, and a brief statement, alleging a want of publication and demand, and that the award was made *ex parte*.

The only question presented and relied on in this case was, whether certain *ex parte* proceedings by the referees vacated their award.

One Cushing was a witness before the referees, and swore to an account of lumber taken from his books, which were not produced at the trial. After the evidence was out, and the case had been argued by the parties, the referees adjourned, but to no specified time or place. Subsequently, one of the referees, accompanied by the plaintiff, went to Cushing's, and there examined Cushing's books for the purpose of ascertaining whether the account rendered corresponded with the books. No notice was given the defendant of this examination. The account was found to agree with the books in every respect, so that the examination of the books did not affect in any manner the result to which the referees finally came. There was also some evidence that the plaintiff was present with the referees, the defendant being absent and having no notice, at the time the award was made up. It appeared, however, that the principles upon which it was made up had been before agreed upon.

It was also testified by one of the referees that the plaintiff "had nothing to do with making up the award." Another of the referees testified that he did not know of plaintiff's writing or figuring, at the time the award was made up, but that "he had more or less to say."

The defendant left the State soon after the hearing, and did not return before the case was wholly closed.

Upon this testimony the defendant was defaulted, with the agreement that it should be taken off and the action stand for trial, if in the opinion of the whole Court, upon so much of the evidence as was legally admissible, the action was not sustained.

Sanborn and *Rawson*, for defendant.

We concede that notice to defendant, of the award and a demand on him to perform it prior to the commencement of the action, were not necessary. By the old authorities they were requisite, but recent decisions have established the contrary doctrine; and though we think it wrong in principle, yet it is too late to contest it.

But we contend that the award was made *ex parte*, and is therefore void. It was made in the presence of Small, who accompanied Parsons, one of the referees, to Frankfort, and assisted him in the examination of Cushing's books, Trickey being all the while absent, and having had no notice of the hearing and examination, that he might be present if he saw cause.

Hallowell and Veazie, referees, testified that the examination of Cushing's books by Small, the plaintiff, and Parsons, confirmed the testimony of Cushing before the referees, and the award was exactly what they had agreed upon before the examination was made; so that it did not change the result.

But who can say that Small did not so conduct that examination as to make the books confirm Cushing's testimony? Who can say, that if Trickey had been present, it might not have been different? The referees had postponed the final consummation of their award for the purpose of procuring this examination; they had not made their award; they would not make it until that examination could be had. Why? Because they were not satisfied with the testimony before them. They appealed to the books. It was important, therefore, that they should be examined. In conducting or making this examination, if one party was admitted among or before them to aid or assist, most certainly it was due to the other party that he should be permitted to take part in it also; that he should be notified, at least, so as to have the opportunity to do so if he pleased. And no man can safely say that their award is the same which it would have been if Mr. Trickey had been present with Mr. Small and Mr. Parsons at that examination. It is impossible to demonstrate that it is the

same; and, no matter, therefore, what Hallowell and Veazie may think or believe, it cannot change the grossly *ex parte* character of their official acts.

J. A. Peters, for plaintiff.

Was the hearing *ex parte?* There is no sort of evidence of it. The parties were fully heard; they then agreed upon the result; that result was favorable to plaintiff. All that was afterwards done was to examine and test certain things for their own satisfaction, lest there may have been an error; and it was all for the benefit of the defendant. Mr. Cushing had produced papers; had sworn to them; parties had argued upon them. To make assurance doubly sure, and for the benefit of defendant, before making the award, Mr. Parsons, who was more particularly Mr. Trickey's friend, was sent to Frankfort to see further if Cushing was correct, and he, said Parsons, requested Small, the plaintiff, to go with him.

Certain things are deducible from these facts.

Every thing was regular, and the basis of an award was unanimously agreed upon. The final award was precisely the same as that basis, and nothing intervening caused any alteration in it. Whatever was done in the meantime was for defendant's benefit and security, and it was so regarded at the time. It neither benefited or injured any body.

There is no evidence of fraud, partiality or prejudice in the case.

The presence of the plaintiff, waiting for his award, of which he was notified, was no injury to any body. The cases are numerous which decide that it is not improper for an attorney of the party recovering to draft the award for the referees.

The Court will notice the conclusion of the report in this case; that default comes off, if plaintiff cannot sustain an action on this evidence. We need only a *prima facie* case.

Appleton, J. — After the parties had introduced such proof as they severally relied upon, and had each presented their views as to the effect of the same, the referees adjourned for

a final decision. Before the award was made, it was deemed desirable by the referees to verify an account, which had been sworn by a witness to be correct, by comparing the same with the original books of account from which it had been copied. A comparison was made, and the copy was found correct. The party in whose favor the award was made accompanied one of the referees, who made this examination, and aided in making the comparison. This was done for the purpose of preventing any possible mistake. It is not alleged that the comparison was fraudulently or erroneously made. This cannot be regarded in any meaning of the phrase, as an *ex parte* hearing. No misconduct, partiality or fraud on the part of the referees is shown to exist.

It was held in the House of Lords, in *Drew* v. *Drew*, 33 Eng. Law & Eq. 9, that where an arbitrator examines witnesses behind the back of one of the parties, such party is justified in at once abandoning the reference and applying to a Judge to rescind the submission; but if he continue, after the fact come to his knowledge, to attend the subsequent proceedings, this will be a waiver of the irregularity, and he cannot afterwards set aside the award on that ground. But in the present case no witnesses were examined, and no evidence was heard. The comparison instituted was a measure of extraordinary precaution on the part of the referees, and for the benefit of the losing party. No error having been discovered, the award was based upon the evidence introduced at the trial, and was entirely unaffected by the subsequent proceeding, to which the defendant objects.

No reason is perceived for taking off the default which has been entered. *Default to stand.*

TENNEY, C. J., and HATHAWAY, MAY and GOODENOW, J. J., concurred.

PENOBSCOT RAILROAD COMPANY *versus* DANIEL WHITE.

When the charter of a corporation requires notice of the time and place for opening books of subscription to the capital stock to be given under the direction of the persons named in the first section of the Act, a majority of the persons thus named, and less than the whole, may lawfully give such notice.

When the corporation has been regularly organized and the proceedings entered of record, the shares subscribed for are recognized as shares of its stock and the subscribers therefor as corporators.

The records of the corporation are then competent and sufficient evidence of who are the corporators, and of the number of shares held by each, unless proof be introduced to destroy their effect.

In an action by a railroad corporation to recover assessments, made for the general and legitimate purposes of the corporation, it is not necessary for the plaintiffs to show a compliance with the provision of its charter requiring that the company shall not engage in, nor commence the construction of any section or sections of the road until seventy-five per cent. of the estimated cost thereof shall have been subscribed for by responsible persons.

The right to make such assessments cannot be made to depend upon any actual indebtedness existing at the time, nor can it be defeated by any apparent indebtedness incurred under an invalid contract.

Prior to the organization of the corporation, the defendant by his subscription agreed to become the holder of twenty-five shares in the capital stock, upon the condition that not less than the least sum required by the charter should be subscribed. — *Held*, that it was not competent for a subscriber to show, that the shares subscribed for and recorded in the books of the corporation were subscribed for by persons of no actual pecuniary responsibility, and reputed not to be responsible for the amount subscribed for by them, with the qualification, however, that the defendant might introduce *any* testimony tending to show that the subscriptions were not made in good faith.

From the nature of the contract of subscription it must have been contemplated that the shareholders or corporators should determine who were apparently responsible as subscribers, and when they did so in good faith, the subscribers to the stock must be regarded as bound by such decision.

The declarations of a subscriber, made long after the organization, in relation to his subscription, are not admissible to show that the corporators did not act in good faith in receiving such subscription.

If there is not evidence in a case sufficient to authorize a jury to find the fact upon which a request for instruction is based, the Judge presiding is not bound to give the instruction requested, whether in itself correct or not.

It is immaterial with what motives and under what circumstances the defendant acted in signing a paper calling and in attending a meeting of the directors at which certain assessments were made; and evidence offered upon these points was therefore properly excluded.

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

ASSUMPSIT for fifteen assessments of five dollars each, on twenty-five shares in the capital stock of the Penobscot Railroad Company.

An original subscription book, containing the printed terms of subscription, was introduced. That portion of it important to the understanding of this case, is as follows:—"4th. The corporation may be organized when one thousand shares shall have been subscribed, but 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 charter is found among the special Acts of 1847, approved August 2, and the additional Act, referred to in the opinion of the Court, was approved August 21, 1850.

The other facts of the case appear in the opinion of the Court.

Kent, for defendant.

1. The notice that books of subscription would be opened, was subscribed by twelve only of the sixteen persons named in the charter. Where a statute requires an act to be done by certain individuals, not a board, it must be done by all, and not a majority merely.

2. The proof of actual subscriptions to the amount required, rests upon the recorded vote of the corporators. Is this sufficient? It is but the declaration, by parties themselves, that a condition precedent has been performed by them. Especially, (whatever other effect such a record may have,) can such an *ex parte* declaration be proof for plaintiffs in an action to recover an assessment? Can a bank so prove its capital stock paid in?

In *Dummer's case*, 40 Maine, 172, the Court considered the objections there made to certain subscriptions were not sustained. The point now made was not decided in that case. What was said about the records was uncalled for.

3. The recital in the notice calling a meeting for organization, signed by defendant, that 1210 shares had been subscribed, was an official act, and does not bind him as an individual. *Walker's case*, 10 Mass. 390; *Middlesex Turnpike Co.* v. *Swan*, 10 Mass. 384; *same* v. *Locke*, 8 Mass. 268.

4. But the Judge not only gave this effect to the records, but he refused to admit evidence, that the subscribers for 500 shares, were neither by repute nor actually responsible for the amount subscribed. The charter intends to require that responsible subscribers shall not be called upon until the one thousand shares are filled by responsible men. Otherwise the requirement is of no value. *Salem Mill Dam Co.* v. *Ropes*, 6 Pick. 23; *same case*, 9 Pick. 187.

5. As to the testimony in regard to the circumstances under which the defendant attended the meeting at which assessments were laid, the facts put in by plaintiffs derive their whole force from certain acts of defendant. The extent and force of those acts depend upon the circumstances under which they were done. If the act was merely a formal one, or defendant was misled, he ought to be permitted to show it. Greenl. Ev., § § 52, 53.

6. One of the most important questions arising in the case, is that touching the construction of the third section of the additional Act of Aug. 20, 1850.

The presiding Judge ruled, that considering the proof sufficient to establish that 1210 shares had been subscribed, the right to make assessments to the full amount of $100, on each share, was perfect and complete.

It is contended, that the object of the provision in question, was to prevent the collection of assessments until the seventy-five per cent. is obtained. It is a restriction upon the grant of power to the company, and not an enlargement. It is in the additional act, which increases the possible number of shares to 6000, but does not increase the *minimum* number, 1000. Instead of changing that number, this guard of the 3d section was introduced.

This company have violated this section in every particular.

The basis of the right to assess, is clearly the right to expend in the construction of the road. The illegal contract is no basis. Can the directors, admitting that no money can be expended upon the construction, go on and assess for the general purposes of the company, in anticipation that possibly, at some future day, the subscription may be filled up? *The directors have no right to assess for general purposes, unless they have a right to use the money.*

Wilson and *Rowe & Bartlett*, for plaintiffs.

1. It is admitted that the requisite number of shares were subscribed; but it is said they are, some of them, shown not to be *responsible.*

Does the charter require a guaranty, that every subscriber should be, beyond doubt, at all times able to pay assessments?

There is nothing in the charter making such a requisition.

There is no analogy between this case and the cases in 6 Pick. 23, and 10 Pick. 142.

2. If duly organized, the company could lawfully assess; if they could lawfully assess, they could lawfully collect.

3. But defendant relies upon § 3d of the additional Act of 1850.

Suppose, for the sake of the argument, the company could not commence construction until seventy-five per cent. was subscribed by responsible persons, might not the company have occasion to assess for other purposes besides construction? There is the survey and location, and other preparatory steps. How can the "estimated cost of said section or sections" be made?

Plaintiff may be enjoined not to do a certain act; but it does not follow, that his dereliction in matters *subsequent* is to operate a failure of *conditions precedent.* The directors may, in such case, be liable, but defendant still is liable to the company.

If the subscription can be invalidated by conditions subsequent, the company might make the assessment, collect the money, and spend it, and then what would be the subscribers'

remedy? 7 Met. 276; *Day* v. *Stetson*, 8 Maine, 371; *C. Ass.* v. *Baldwin*, 1 Met. 359, at 364; *Meadow Dam* v. *Gray*, 30 Maine, 551; 2 J. J. Marshall, 264; *Brigham* v. *Shattuck*, 10 Pick. 306, at 309.

The attention of the Court is called to all the terms of the subscription. The 1st, 2d, 3d and 5th provisions are all conditions precedent, as much as the 4th, but the duties and rights are subsequent in all, and of necessity must be so.

In other words, most of the terms are inserted in the subscription; but no defence on this ground was ever made.

Parol testimony as to conditions and matters of record, is inadmissible. 34 Maine, 369; Ib., 360, 366.

The offers of defendant to show fraud were a mere pretence. The Court allowed the fullest latitude to defendant, in this respect.

If there was fraud, the defendant was himself *particeps criminis.*

This whole question was argued last year and settled in the case *Oldtown & Lincoln R. R.* v. *Veazie;* and more especially in the case of *these plaintiffs* v. *Dummer*, 40 Maine, 172. The attention of the Court is especially called to the language of the Court in the last named case.

MAY, J.—The first objection urged in defence of this action is, that the notice, that books of subscription to the capital stock would be opened at different places, was signed by only twelve persons, being not all, but a majority of the persons named in the first section of the plaintiffs' charter. The third section of the charter provides that such books shall be opened under *the direction* of the persons named in section 1, and that public notice shall be given, thereof, in some newspaper printed in Bangor and Boston. It is not denied that the proper notice was given if the signatures thereto were sufficient. There is nothing in the charter requiring such notice to be signed by all the persons named therein. The fact that the corporators acted upon it, and the defendant among them, so as to organize the corporation, sufficiently shows that it was

given under their direction. The provision in the charter, section 3, that if the subscription "shall exceed four thousand shares, the same shall be distributed among all the subscribers according to such regulations, *as the persons having charge of the opening of the subscription books* shall prescribe before the opening of said books," would seem to indicate that the corporators had authority in this matter of subscription, to act through committees to whom their power might properly be delegated. The doings of the corporators, therefore, in fixing the time and the terms of the subscription, and the notice of the appointment of a committee for that purpose, of whom the defendant was an acting member, are without legal objection.

2. It is next objected that the one thousand shares, required to be subscribed for by the third section of the charter, as amended by the Act of 1850, § 1, before any organization could take place, were not legally proved to have been so subscribed for, and that, for that reason, the organization relied upon by the plaintiffs, and the subsequent assessments upon the shares, were unauthorized and void.

It appears from the records of the corporation, that at a meeting of the subscribers to the stock, held May 3, 1851, for the purpose of organizing said company, a committee was chosen to ascertain and report whether a sufficient number of shares had been subscribed, to authorize an organization, which committee reported that 1210 shares had been subscribed in said capital stock, being more than 1000 shares, the number required by the charter; and at the same time said committee also reported a list of the subscribers, their several places of residence, and the number of shares subscribed by each; which report was duly accepted, and the corporation was, thereupon, organized; a code of By-laws was adopted, and a board of directors chosen, of whom the defendant was one; in which office he acted, having been subsequently appointed upon a committee of the directors to negotiate a contract for the construction of the road.

In the case of these plaintiffs v. *Dummer*, 40 Maine, 172,

the Court say "that when the corporation was organized, the shares subscribed for were recognized as shares of its stock, and the subscribers thereof as corporators. This was sufficient to complete the contract." The contract in that case was that of subscription, and precisely like that of the defendant in this case. In the present case the presiding Judge at the trial, ruled that the fact that 1000 shares had been subscribed as required by the charter and the terms of subscription, was sufficiently established by the evidence. In the case of these plaintiffs v. *Dummer*, just cited, the Court further say, that "when a corporation has proceeded regularly to ascertain its corporators, and the owners of shares in its capital stock, 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." It is not denied, but that it appears from the records of the corporation in this case, that all this had been done, and as no contrary proof at this stage of the case had been offered, the ruling of the Judge upon this point is found to be correct.

3. It is next urged that this action cannot be maintained for the assessments, unless the plaintiffs first show a compliance with the terms of the third section of the Act of August 20, 1850, and that seventy-five per cent. of the estimated cost had been subscribed for by responsible persons, as therein specified. By this section, it is provided that the company shall not engage in, nor commence the construction of any section or sections of the railway, until that amount of the estimated cost of such section or sections is so subscribed. A like provision is somewhat considered in *Boston & Providence R. R. Co.* v. *Midland R. R. Co. & al.* 1 Gray, 368. This provision does not seem to have any connection with the organization of the company; nor to take from them the power of making assessments, as conferred by their charter, when deemed necessary, however much it ought to influence them, in deciding upon the question of the expediency of making such assessments. It is undoubtedly true, as is

contended by the able counsel in defence, that the right to assess money upon corporators depends upon the right to use it when assessed and paid; but the right to use it may, without doubt, exist, notwithstanding there is no actual indebtedness on the part of the corporation existing at the time when the assessment is made. It may be, and often is expedient to make assessments, in view of anticipated liabilities, to be subsequently incurred in the prosecution of the general purposes for which the corporation was created; but it may be questioned, whether it would not generally be much wiser, and would not better promote the pecuniary interests of such corporations, to postpone the making of their contracts until a solvent treasury should insure the prompt performance of them on their part. Contractors, then, would have no occasion to exact exorbitant prices, because of the uncertainty of their being promptly paid, if paid at all. But whether expedient or not to assess moneys, in anticipation of liabilities to be subsequently created, there can, in our judgment, be no doubt of the existence of the power in the plaintiff corporation to make such assessments, and if rightfully made, we know of no authority, and none has been cited, tending to show that such assessments, even though the money should be subsequently misappropriated by the corporation or its agents, would be void; nor can we perceive any reason why such assessments, if made to raise money for the general but legitimate purposes of the corporation, when the corporation, through its directors, had made contracts for the execution of those purposes, should be void, even though it might subsequently turn out that such contracts were invalid, for want of authority in the directors to make them. In such a case the enterprise itself is lawful, being the very one for which the corporation was created; but the mode adopted for its completion is unlawful, being unauthorized by the charter. The moneys are assessed for the legitimate objects of the charter, but the contracts to secure the accomplishment of those objects are invalid. Such contracts may be avoided, and the moneys raised, may, notwithstanding, be appropriated

in conformity with the charter for the very purposes for which the corporation was created. It is, therefore, apparent that the right to make assessments cannot be made to depend upon any actual indebtedness existing at the time, nor defeated by any apparent indebtedness incurred under a contract which was void. It ought, perhaps, rather to be presumed that the corporation will effect the purposes of its charter in some legal way, and that the moneys assessed will be invested for that purpose. The corporation therefore are not bound to show a compliance with § 3, of the statute of 1850, before this suit for the recovery of assessments can be maintained.

It is said by the counsel for the defendant, that this section imposing a limitation upon the powers of the corporation, was inserted in the Act of 1850, for the purpose of protecting the subscribers to the stock from unwise appropriations of their money. It may be so, but if so, the subscribers, when they find the corporation of which they are members, or its agents, misappropriating their money, must find a remedy in some other mode than that which is sought and relied upon in this case. No error is found in the ruling upon this point.

4. The defendant, assuming the burden of proof, next offered to prove that the requirements of said section 3, in the Act of 1850, had not been complied with, which testimony was excluded. The fact, for the reasons before stated, being immaterial, such evidence was rightly rejected.

5. Proof was next offered by the defendant, that of the 1210 shares subscribed for, and recorded in the books of the corporation as before stated, at least 500 shares were subscribed for by persons not actually pecuniarily responsible therefor, and who were not reputed to be responsible for the amount for which they subscribed. Testimony for this purpose was excluded, subject, however, to the qualification, that the defendant might offer *any* evidence tending to show, that these subscriptions were not made in good faith, and upon this point the defendant put in such testimony as he chose. Prior to the organization of the corporation, the defendant,

by his subscription, agreed to become the holder of twenty-five shares in the capital stock, upon the condition that not less than the least sum required by the charter should be subscribed; and it cannot be doubted that before he can be held to such subscription, it must appear that such condition has been performed. It is said, however, by the Court in the case of these plaintiffs v. *Dummer*, before cited, that "if the company obtain 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." The charter must receive a reasonable construction, if its language will allow it, and there can be no doubt that it requires good faith of the corporation in the exercise of its rights and the performance of its duties.

If the corporation should, for the purpose of making up the amount of stock required before an organization, accept a list of subscribers as share holders, which was composed in part of idiots and town paupers, as suggested by the counsel in defence, such a subscription would not be a compliance with the provisions of the charter; but if, on the other hand, the list *appeared* to the company to consist of names which might be relied on for the fulfillment of the subscription, they would be justified in proceeding to organize, and their proceedings would be valid, even though it might subsequently be made to appear that some of the subscribers at the time were not of sufficient pecuniary responsibility to pay for their stock, and were not reputed to be so, provided the corporation acted in good faith on their part in the acceptance of such list. From the very nature of the contract of subscription, it must have been within the contemplation of the parties, that the share holders, or corporators, should determine who were apparently responsible as subscribers, and when they had done so in good faith, the subscribers to the stock must be regarded as bound by such decision. The reputation or fact of pecuniary inability, could at most only be evidence upon the

question of good faith, and for that purpose the defendant was permitted to prove them if he desired.

6. It is insisted, that the evidence offered upon the question of good faith, was sufficient to authorize the jury to find that the subscription of Gideon Mayo was colorable and fraudulent, and that the plaintiffs did not act in good faith in accepting it. The case shows that the testimony upon this point consists in the declarations of said Mayo, in relation to his subscription, made at a meeting of the stockholders long after the corporation had been organized. Such declarations were not legally admissible upon the question whether the corporation acted in good faith at the time of its organization. The defendant himself testifies, that he thinks these declarations were made at some meeting after the assessments had been made. The Judge was requested to instruct the jury that, if Mayo's subscription was not *bona fide*, but colorable, and made in fraud or evasion of the charter, it could not be regarded as a compliance with that provision of the charter, which required that at least 1000 shares should be subscribed for before any organization could take place. Whereupon, the Judge stated, that he should instruct the jury that if they believed the evidence, the subscription made by Mayo was binding upon him, and the plaintiffs' evidence, if believed, was sufficient to entitle them to recover. Both these propositions, in the judgment of the Court, are correct. No opinion was expressed by the Judge in regard to the requested instruction, probably because he regarded the evidence in the case, as insufficient to authorize the jury to find the fact on which the request was based; nor does this Court perceive any sufficient evidence to justify the jury in finding such fact. If the counsel for the defendant thought otherwise, he had the right to have insisted upon the requested instruction, and if given, to have submitted the evidence upon that question to the jury. He did not choose to do so, and may, therefore, properly be regarded as acquiescing in the opinion of the Judge, as to the effect and weight of the evidence. As no ruling was given in pursuance of said request, there being no

evidence to require it, we are not called upon to determine whether the proposition contained in the request, is in conformity to the law in such a case, or not.

7. The questions proposed to the defendant by his counsel, with a view to ascertain the circumstances under which he acted in attending the meeting of the directors, held Nov. 26, 1852, when certain assessments were made, and in signing a paper calling that meeting, and which were not admitted by the Judge at the trial, may be regarded as rightly excluded, because it was immaterial with what motives or under what circumstances he acted, in those particulars. Nothing which was done at that meeting, had any tendency to throw light upon the question of the legality of the organization, or the right of the plaintiffs to make assessments upon the stock. These had been perfected long before, and the assessments might have been lawfully made, for aught that appears, without his presence.

In view of all the evidence in the case, we perceive nothing erroneous in the orders, rulings and opinions of the Judge who presided at the trial, and concur with him that if the whole evidence in the case is believed, this action is maintained. The default, therefore, in accordance with the agreement of the parties, must stand.

TENNEY, C. J., and HATHAWAY, J., concurred in the result. APPLETON and GOODENOW, J. J., concurred.

RUTH GOOCH *versus* CHARLES HOLMES.

The Act of 1855, establishing the municipal court of Bangor, and the Act of 1856, by which that court was abolished, made provision for cases pending on exceptions from that to the Supreme Judicial Court.

The giving of an order on a third party, by plaintiff to defendant, for certain bank bills, which order was neither presented by the defendant nor the bills received upon it, is not a sale and delivery of said bills to defendant.

A. agreed with B. to pay him a given sum for a quantity of bank bills, which were in the hands of C., subject to the order of D. — B. procured and delivered to A. the order of D. on C. for the bills, and A. received the order, but never

presented it, nor received the bills. — *Held*, that the transaction did not constitute a sale and delivery, but only a contract for sale, and not having been in writing, was void by the statute of frauds.

On Exceptions from the municipal court of Bangor, Lyon, J., presiding.

Assumpsit.

The writ originally contained two counts; one for balance of account, being "for order on E. L. Lovejoy, for forty dollars in bills of Ship Builders' Bank, of Rockland, delivered you by S. Shepherd;" the other, on a promise by the defendant to pay the plaintiff forty dollars, in consideration of the delivery of an order for certain bank bills, drawn by Hodgman & Carr, express-men, on Lovejoy, their agent. The judge of the municipal court, after issue joined, and while the defendant's counsel was arguing the cause to the jury, allowed an amendment adding a new count, for the same bank bills sold and delivered.

The case was tried at the Dec. term, 1855. It appeared in proof, that the plaintiff, owning a lot of bank bills on a bank in Rockland, had placed them in the hands of Hodgman & Carr of Bangor, express-men, for presentment and collection. Hodgman & Carr gave the plaintiff their receipt for the bills, and sent them to their agent at Rockland for collection. The plaintiff meeting the defendant at Bangor, agreed with him, verbally, to sell him the bills, and the defendant agreed to buy them for forty dollars current money. Thereupon the plaintiff surrendering her receipt procured the order of the express-men on their agent in Rockland for the bills, and delivered it to the defendant, who received it, but who never presented it, nor received the bills or any part of them. The contents of the order did not appear.

The defendant requested the Court to instruct the jury, that if the defendant offered to give forty dollars for said bills, but never actually received the bills, or presented the order to obtain them, and made no payment, and gave no memorandum in writing, and gave nothing as earnest money to bind the bargain, that the mere fact of receiving said order

would not be a delivery to him of the bills; and that the defendant would not be holden, because the contract was within the statute of frauds.

But the Court ruled otherwise, and stated to the jury, that the giving to the defendant the order, was delivering all the possession plaintiff could give, and was a sufficient constructive delivery of possession, to take the case out of the operation of the statute of frauds.

The defendant further asked the Court to instruct the jury, that the damages to be recovered would be the difference between the value of Ship Builders' Bank bills at the time of contract and forty dollars in current money. The Court, however, instructed the jury, that the damages would be the forty dollars agreed to be paid, and interest from date of writ.

J. A. Peters, for defendant.

1. Exceptions will lie to the allowing of amendments, where it is done, as in this case, as matter of law and not of mere discretion. *Rowell* v. *Small,* 30 Maine, 30.

2. The action was for bills sold, when it should have been for non-fulfillment of an agreement to buy. It was not a sale, but a contract for sale. As the writ stood, the evidence did not support the counts in the writ. The amendment was for a new cause of action, or the writ cannot stand; if not for a new cause of action, it should not have been allowed without terms. *Atkinson* v. *Bell,* 8 B. & C., 277; *Ayres* v. *Sleeper,* 7 Met. 45.

3. This cause was tried before a jury in the Bangor municipal court, Dec. term, 1855. That court was established in 1855, and abolished in 1856. By the Act abolishing the court, the business of said court was divided, the Supreme Judicial Court had jurisdiction of certain portions of it, and the police Court of certain other portions. It is contended, that this case falls between the two, and that no provision is made for it. At the time the Act of 1856, passed, the action was not pending in said court, nor returnable thereto. If anywhere, the case must go back to the police court. But the police court has no jurisdiction over twenty dollars. The

attention of the Court is called to the Acts of 1855 and 1856.

4. The contract is within the statute of frauds. "A contract for the sale of promissory notes is within the statute of frauds." *Baldwin* v. *Williams*, 3 Met. 365. The price was upwards of thirty dollars; the purchaser did not accept any part of the goods; he gave nothing in earnest to bind the bargain; nor did he give any note or memorandum. The order was not given by the defendant but by the plaintiff. There was no real or constructive delivery of the bills, certainly no *real* delivery, and, under the statute of frauds, a constructive delivery will not answer. R. S., c. 136, § 4.

The giving of the order could be no delivery. The agent might refuse to deliver the bills on the order.

5. The case finds, that the money was to be paid for the bills, and not for the order.

6. If the order had been given by the plaintiff herself, it could have been but her agreement to deliver; but there must be an agreement on the part of the defendant, (in writing,) to receive.

7. The measure of damages was wrong; we have never had the bills; they have not been tendered us. So, the plaintiff still having them, can recover of us only the difference between the sum agreed to be paid, and the value of the bills.

W. C. Crosby, for plaintiff.

1. The amendment was rightly allowed. The witness testified differently from what was expected; his testimony proved the promise to be to pay for the bills, and not the order for them. We were taken by surprise. It is immaterial, at what stage in the trial the amendment was allowed, providing the rights of the defendant were not injuriously affected. It is frequently done after verdict. *Cram* v. *Sherburne*, 14 Maine, 48.

2. The instructions were correct. The bills were not in the actual possession of the plaintiff. She held a receipt for them. Relying on the promise of defendant, she surrender-

ed this and obtained an order from Carr & Hodgman on their agent for the delivery of the bills to defendant. Nothing but the payment of the price remained to be done. The delivery was complete on the part of the plaintiff, for she was divested of all claim to or control over the bills by the surrender of the receipt and delivery of the order. Defendant received the order, and could have had the bills if he had called for them. This order was like that on the warehouse keeper in *Greaves* v. *Kepke*, 2 B. & A., 131; *Zwinger* v. *Samuda*, 7 T. R. 67; 2 Kent's Com. 500; *Searle* v. *Reeves*, Roberts on Frauds, 176.

3. The instructions asked for on the question of damages were rightfully refused. The request was based upon a supposed executory contract for the sale of the bills, as if they were still in the possession of plaintiff. The proof is, she has completed the delivery, all the delivery it was in her power to make. She has no possession or control of them.

HATHAWAY, J.—The defendant contends that the abolishment of the municipal court of Bangor, by statute of February 28, 1856, by which the police court was established, left the case at bar unprovided for, as a case not pending in Court. It appears by section 14 of the statute establishing the police court, and sections 12 and 13 of the statute of 1855, by which the municipal court had been established, that the case was provided for, and that the plaintiff is rightly in court.

The plaintiff by her writ, as amended, claims to recover forty dollars for certain bank bills of the Ship Builders' Bank, as *sold and delivered* to the defendant; and it was proved that she had forty dollars in bills of that bank, which had been deposited with Hodgman, Carr & Co., to be presented for payment, and for which they had given their receipt, and had sent the bills to Lovejoy, their agent, at Rockland. Subsequently, the defendant being at Bangor, told Shepherd, the plaintiff's agent, that he would give forty dollars, in current money, for the bills. Whereupon "Shepherd got Hodgman, Carr & Co.'s order on Lovejoy and gave up their receipt, and

handed this order to the defendant." The order was not presented, and the defendant never received the bills.

The question is, whether or not this transaction was a sale and delivery of the bills to the defendant; if it was, they became his property, immediately on the receipt of the order, and were at his risk. The order cannot be presumed to have been any thing more than an authority from Hodgman, Carr & Co. to Lovejoy to deliver the bills, upon its presentment, and according to the directions therein contained. The defendant was entitled to receive the bills from Lovejoy only by virtue of the order, concerning the contents of which, the case gives us no information.

According to the facts presented, the whole matter remained in contract. It was something *to be* done; nothing was completed; the bills might have been taken on execution as the plaintiff's property. R. S., c. 117, § 3. They might have been presented to the bank and redeemed; they might have been stolen, or lost, or destroyed, before the defendant could have presented the order, or before he received it.

The evidence in the case, entirely fails to prove a sale and delivery, by which the bills would pass to the defendant, and become his property. *Moody* v. *Brown*, 34 Maine, 107.

If the plaintiff claims to recover for breach of contract, on the part of the defendant, to buy the bills for forty dollars, in that view of the case, the instructions were erroneous concerning the measure of damages; and besides, such contract, according to the evidence, was void by the statute of frauds, for the proof was "that the defendant agreed to give the forty dollars, current money, for the forty dollars, Ship Builder's bank bills." This promise was verbal, and he did not receive the bills, nor any part of them.

Exceptions sustained and new trial granted.

TENNEY, C. J., and APPLETON, GOODENOW, and MAY, J. J., concurred.

MARY PURRINGTON *versus* EPHRAIM B. PIERCE.

The demandant in an action of dower, having recovered judgment for her dower, and in the same suit her damages for detention thereof, cannot maintain a separate action against the tenant for the use of the premises from the date of the verdict in her favor, to the time of the actual assignment of dower.

ON FACTS AGREED.

This was an action of the case to recover rent for the use of certain premises assigned to the demandant in an action of dower.

The time between the verdict and the assignment was about two years.

The facts appear in the opinion of the Court. Demand for the intermediate rents was made.

Ingersoll, for plaintiff.

The remedies provided for recovery of damages for detention of dower, by the 144th chapter of the R. S., § 5, are similar to those provided for a demandant in a writ of entry c. 145, the different sections of which have been adjudicated upon, in an action for mesne profits, in the case of *Larrabee* v. *Lumbert*, 36 Maine, 440.

The same reasoning and the same construction applied to the chapter giving remedies to a demandant in dower, will sustain the plaintiff's claim in the action at bar for *mesne profits*, after her verdict in dower, and before the assignment of the same, a space of nearly two years.

The judgment in the first action was for dower and damages for detention. The verdict was responsive to the declaration, and was for the detention up to the time of the verdict.

The general rule of the common law remains to give the plaintiff compensation for the detention of the premises by the defendant for one year and ten months, while her action of dower was under advisement before the Court.

This same question arose in *Larrabee* v. *Lumbert*, before cited. The writ of dower is as much a writ of possession, on proof of title, as a writ of entry.

The refusal of the Chief Justice, to whom the question was referred, to allow any thing more than the verdict and interest, was right. The plaintiff now having exhausted her remedy under the statute, claims for the indemnity under the rules of the common law.

J. H. Hillard, for defendant.

In *Perry* v. *Goodwin*, 6 Mass. 498, the damages for detention of dower were assessed from the time of demand to the time of the verdict, precisely as in the case between these parties, and there seems to be no provision for any other mode of assessment.

Can the action be maintained for rents and profits for the time between the verdict and assignment of dower?

1. Assumpsit will not lie in this case, for there was no express or implied promise. *Wyman* v. *Hook*, 2 Greenl. 337.

2. Plaintiff had no right to occupy *till dower was assigned.* All the interest she had prior to assignment was a mere chose in action. *Bolster* v. *Cushman*, 34 Maine, 428; *Johnson* v. *Shields*, 32 Maine, 424, 427.

To maintain trespass for mesne profits, there must be a right of entry, if not an actual entry. 9 Mass. 556; *Emerson* v. *Thompson*, 2 Pick. 473.

3. All the damages plaintiff is entitled to recover is provided for by R. S., c. 144, § 7. That statute does not apply to a case of this kind. The plaintiff has exhausted her remedy. If the law now furnishes her no remedy, the Legislature must provide one. The Court cannot do it.

HATHAWAY, J. — In an action between these parties, the plaintiff recovered a verdict, January 7th, 1853, for her dower, and damages for its detention. Upon a question of law reserved by the plaintiff, that action was continued in Court until the October term, 1854, when judgment was rendered on the verdict, for her dower and damages, — *Purrington* v. *Pierce*, 38 Maine, 447, — and her dower was duly assigned to her, before the commencement of this suit. The plaintiff seeks, in this action, to recover the rents and profits, which

she claims to be due for the use of the premises assigned to her as dower, during the time intervening between the finding of the verdict and the final judgment thereon, and for detention of the same after a demand for the rent, made November 20, 1854.

The mode of proceeding, in an action at law, to recover dower, and damages for its detention, is prescribed by statute. R. S., c. 144. The whole subject was revised by the Legislature, and the statute remedy must be pursued. By that statute, § 5, it is provided that, "if the demandant recovers judgment for her dower, she *shall*, also, in the same action, recover damages for the detention thereof." The statute is imperative that she shall recover her damages in the same action in which she recovers her dower. The action must be brought against the person who is tenant of the freehold when the suit is commenced, although the demand had been made of a prior tenant; and from the fact that the Legislature deemed it necessary, specially, to give an action against such prior tenant, by the statute, § 7, to recover the rents and profits while he occupied, after demand, it may reasonably be inferred that they did not intend that the plaintiff in dower should have a second action, for damages for detention, against the same tenant of whom she had previously recovered judgment, both for her dower and such damages. If the Legislature had so intended, they would, doubtless, have made provision to that effect by the statute, as they did in the case provided for by § 7.

The plaintiff's counsel argues that the remedy, in this case, is similar to that prescribed for a demandant in a writ of entry, to recover, in the same action, damages for the rents and profits, from the time when his title accrued, as is provided by R. S., c. 145, § § 14 and 15; and he contends that the same reasoning which induced the Court, in *Larrabee* v. *Lumbert*, 36 Maine, 440, to sustain an action for rents and profits which accrued after the date of the writ of entry, by which the plaintiff had recovered his land, will authorize the maintenance of this suit.

This view of the case entirely overlooks the difference between the legal rights of the demandants, in writs of entry and of dower, and also the difference in the statutes, by which their respective remedies are provided.

The demandant, who prevails in a writ of entry, must have had *title*, and a right of entry, when he commenced his action, and if entitled, in the same action, to recover rents and profits, the liability of the tenant therefor is defined and measured by the statute, § 15, both as to the amount and *time*, and limited to the clear annual net value of the premises, for the time, during which he *was* in possession thereof. The statute gave the demandant, in a writ of entry, no new rights; it only changed the remedy by which he should recover the rents and profits, which had accrued before the date of his writ, and enabled him to accomplish, in *one* suit, that for which *two* actions had been previously necessary.

But the demandant in dower has neither title nor right of entry; for, although she have a right of dower, she cannot lawfully enter until dower be assigned to her, or recovered by process of law. The widow has no estate in the lands of her husband till assignment; her right of dower is merely a personal right. It cannot be taken in execution for her debt. It cannot be the subject of a lease. Inst. 34 and 37, B; *Bolster* v. *Cushman*, 34 Maine, 428; 1 Greenl. Cruise, tit. 6, c. 3, § 1, and notes; *Croade* v. *Ingraham & al.*, 13 Pick. 33; *Sellars* v. *Carpenter*, 27 Maine, 497.

By the stat. c. 144, concerning the action of dower, no measure of damages is prescribed. It simply and imperatively provides, that the demandant shall, in the same action, recover her damages for the detention thereof; it leaves the whole question of damages open to the jury, to be determined by them, upon the evidence, under proper instructions from the Court.

This action cannot be legally maintained, and a nonsuit must be entered.

TENNEY, C. J., APPLETON, MAY, and GOODENOW, J. J., concurred.

STATE *versus* CITY OF BANGOR.

Under Revised Statutes of 1840, c. 25, § 89, subjecting the party obliged to repair certain ways, &c., to fine for injuries resulting from defects therein, the amount of forfeiture, within the limits of the statute, may be fixed by the Court in the exercise of its discretion.

The Judge at *Nisi Prius* having imposed such forfeiture, his decision is final.

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

This was an indictment under the Revised Statutes of 1840, c. 25, § 89, for a defective bridge, whereby one Earnest Klatz was drowned. The plea was not guilty.

The jury returned a verdict of guilty. Whereupon the Judge presiding assessed the damages in the sum of one thousand dollars.

To this the defendant city excepted, because the Judge did not allow the jury to assess the damages and fix the penalty, but reserved it to himself; and because the penalty fixed by the Judge was excessive.

A. Sanborn, for State.

Waterhouse, for defendants.

TENNEY, C. J. — By the statute of Massachusetts, entitled "An Act making provision for the repair and amendment of highways," passed March 5, 1787, § 7, if the life of any person shall be lost through the deficiency of the way, &c., the county, town or persons, who are by law obliged to repair and amend the same, were to be amerced in the sum of one hundred pounds, to be paid to the executor or administrator of the deceased, for the use of the heirs, upon conviction, on a presentment or indictment of the grand jury. The statute of 1821, of this State, subjects the party, obliged to repair and amend the way, &c., to the liability to be amerced in the sum of three hundred dollars, in such case, to be recovered on a presentment or indictment of the grand jury. c. 118, § 17.

The statute now in force, R. S., c. 25, § 89, is substantially the same as the two former, excepting, that instead of the penalty, fixed at a given sum, it is provided that it shall not exceed the sum of one thousand dollars.

It is insisted by the counsel for the defendant, that inasmuch as the power is manifestly intended to be given, to reduce the forfeiture below the sum of one thousand dollars, this power is conferred upon the jury; and that in this case they should have been allowed by the Court to have assessed the damages, as the forfeiture.

The language of the existing statute does not differ from other statutes for the punishment of crimes by a pecuniary forfeiture, which is not made absolutely certain in amount, in reference to the question which we are now considering. In such cases, the jury have always been called upon to declare in an oral verdict, whether the accused was guilty or not guilty of the offence charged; and the amount of forfeiture has been fixed by the Court, in the exercise of its discretion. The appropriation of the penalty, by the statute, has never been regarded in practice as a ground for the transfer of the power to determine the same, from the Court to the jury.

In the statutes of 1787, and of 1821, the forfeiture being fixed by law, the Court were called upon only to render the judgment accordingly; and the jury were never expected to connect with their verdict of guilty, the declaration of the forfeiture incurred. And, as the present statute is a substantial revision of the former, if the Legislature intended to impose upon the jury the duty of determining the sum which should be forfeited, it would have been so declared.

If, however, there be any doubt upon this question, it does not arise in this case, inasmuch as it has been agreed between the county attorney and the defendants' solicitor, that the forfeiture shall be adjudged by the Court; and exceptions do not lie to the exercise of a power thus conferred.

As in all criminal cases, in which the Court is to judge of the degree of punishment, within the limits of the statute, to be inflicted, the penalty was imposed in this instance by the Court, in its discretion, and is final.

Exceptions dismissed.

HATHAWAY, APPLETON, GOODENOW and MAY, J. J., concurred.

STATE *versus* SAMUEL B. BROWN.

Scire facias can issue from no Court but the one having possession of the record upon which it is issued.

It may properly be made returnable to a term of the Court holden for the transaction of criminal business.

A *recognizance* should recite the cause of caption.

A writ of *scire facias* on a recognizance, referring to no charge against the defendant, and containing no reference to any charge against him in any complaint or indictment, is bad, and insufficient to authorize proceeding to trial.

A recognizance, conditioned that the defendant should appear in Court from *day to day during the term*, does not furnish a foundation for a writ of *scire facias*.

A party cannot be required to come into Court actually in session, to answer "such matters and things as shall be objected against him," without any specific charge being alleged or set forth.

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

This was *Scire Facias* on a recognizance.

The defendant moved to quash the writ, on the grounds stated in the opinion of the Court. The motion was overruled, reserving the legal rights of the defendant. Thereupon a demurrer was filed, and a joinder on demurrer. If the motion and demurrer be overruled, the cause is to stand for trial.

John Burnham, for the State.

Blake and *Waterhouse*, for defendant, contended:—

1. The R. S., c. 171, § 30, provides that processes of this kind shall not abate, if among other things, it appear "that from the description of the offence charged, the magistrate was authorized to require and take the recognizance;" in effect requiring the offence charged to be described. Here there is no such description of the offence; hence the recognizance, and proceedings based upon it, are of no effect. *State* v. *Hartwell*, 35 Maine, 129; *Libby* v. *Main & al.*, 2 Fairf. 344. *State* v. *Smith*, 2 Greenl. 62, is an authority to the same point.

2. The writ should have been returnable at the civil term

of the Court. Chapter 246, § 16, of Acts of 1852, confers upon the Court at which this is returnable, only jurisdiction over "all the *criminal* business thereof;" i. e., of Penobscot county.

TENNEY, C. J.—This is a writ of *scire facias*, brought before a term of the Court held for the transaction of criminal business, setting out that the defendant appeared before the Justices of our Supreme Judicial Court, holden at Bangor, in and for the said county of Penobscot, on the first Tuesday of June, A. D. 1854, and acknowledged himself to be indebted to the State in the sum of two hundred dollars, to be levied on his goods and chattels, lands or tenements, and in want thereof, upon his body, to the use of the State, if the defendant did not personally appear before said Court from day to day, during said term, to answer to all such matters and things, as should be objected against him, on behalf of said State; and the writ then alleges a default of the defendant upon his not answering upon a solemn call to come into Court at said term, as appears by the record.

The defendant filed a general demurrer, which was joined on the part of the State. Two grounds are relied upon in support of the demurrer. First, that the action of *scire facias* should have been made returnable to a term of the Court holden for the trial of civil business. Second, that the declaration presents no legal cause for taking the recognizance.

1. It is well settled that *scire facias* can issue from no Court, but one in possession of the record upon which it issues. *Commonwealth* v. *Dawney*, 9 Mass. 520. It was proper that the writ should be returnable to a term of the Court holden for the transaction of criminal business.

2. It is a general principle that a recognizance should recite the cause of the caption. 9 Mass., before cited; *Harrington* v. *Brown*, 7 Pick. 232; *Wingate, in error*, v. *Commonwealth*, 5 Cush. 446; *State* v. *Smith*, 2 Greenl. 62; *Libbey* v. *Main & al.*, 2 Fairf. 344. The writ refers to no

charge against the defendant whatever, and contains no reference to any charge in any complaint or indictment. This defect in the writ must be regarded as fatal and is insufficient to authorize the proceeding to trial. It is not perceived that the recognizance described in the writ, being that the defendant should appear in Court *from day to day during the term,* is a foundation for a legal distinction. A party cannot be required to come into Court, actually in session, to answer to such matters and things as shall be objected against him, without any other charge being mentioned, more than to come into Court at a future term. *Declaration adjudged bad.*

APPLETON, J., concurred.—RICE, J., concurred in the result.

COUNTY OF WALDO.

INHABITANTS OF FRANKFORT *versus* GEORGE WHITE *& al.*

The form of the warrant to be given by the selectmen or assessors to the collector of taxes is prescribed "in substance" by R. S., c. 14, § § 57, 58, and a warrant which in terms gives no authority to distrain or commit is defective.

A collector cannot be regarded as in fault for not collecting taxes committed to him for collection by such a warrant, and no recovery can be had upon his bond for failure to do so.

A clause in such defective warrant, purporting to extend to it the powers granted in a previous one to the same person in due form, would give no greater authority than would a similar reference to the section of the statute from which all power in the premises is derived. It would still be defective.

ON FACTS AGREED.

This was an action of covenant on the bond of a collector of taxes. The facts in the case appear in the opinion of the Court.

C. H. Pierce, for plaintiff.

N. H. Hubbard, for defendants.

APPLETON, J. — When a collector of taxes becomes incapacitated to perform the duties of his office, the assessors, in pursuance of the power conferred on them by R. S., c. 14, § 99, "may appoint some suitable person a collector to perfect such collection and grant *him a warrant for that purpose.*"

It seems that Amos Weston, who had been chosen collector for the town of Frankfort, for the years 1847 and 1848, had failed to collect the taxes committed to him for collection. The assessors, under the provisions of § 99, proceeded to appoint the defendant White to perfect the collection of so much of the taxes as remained uncollected. The bond required by statute for the faithful performance of his duty as collector was given by him and is in suit in this action.

The form of the warrant to be issued by the selectmen or assessors for the collection of taxes, is prescribed "in substance" by the R. S., c. 14, § § 57 and 58. The warrant, dated July 17, 1849, which was for the collection of the taxes which Weston had neglected to collect, fails to comply in form or substance with the requisitions of these sections. It gives in terms no authority to distrain or to commit.

It is in proof that the defendant White was chosen collector for 1849, and that, on June 23 of that year, the assessors gave him a warrant in due form of law to collect the taxes of that year.

The warrant of July 17, 1849, contains this clause, "and the powers in our previous warrant, bearing date June 23, 1849, are extended to the foregoing list." It is insisted that these words gave the collector all the authority necessary to enable him to enforce the collection of the taxes which had previously been committed to Weston for that purpose.

The collector, by § 99, is appointed to perfect the collection of the taxes remaining uncollected, and the warrant is to be granted "for that purpose." The warrant of July 17 does not, directly nor by implication, appear to have been given "for that purpose." It is not, "in substance," according to the form prescribed in § 57. The authority contained in the warrant of June 23 is limited to the lists therewith commit

ted. A reference thereto could give no greater authority than would a similar reference to the section of the statute from which all power in the premises is derived. The warrant of June 17 must be regarded as defective, as giving no authority to commit nor to distrain.

As the collector could not legally have enforced the collection of the taxes committed to him, he cannot be regarded as in fault for not collecting. *Plaintiffs nonsuit.*

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

BENJAMIN H. BACHELDER *versus* ROBERT THOMPSON *& al.*

When an execution is levied on the rents and profits of a life estate, under the provisions of R. S., c. 94, § 14, the debtor is entitled to a *specific statement* of what has been done, in order that he may see whether more of his property has been taken than an amount equal to the debt and costs.

The return should either state in dollars and cents the precise value of the rents and profits set off; or else there should be a reference to other papers that will make the amount certain.

If the amount exceeds by only a few cents the *exact sum* required, the levy will be void. It will be void also when the return is so indefinite that the precise amount cannot be computed, and the question, whether there be excess or not, cannot therefore be determined.

The mere statement in the return that the rents and profits set off for a certain time *will be sufficient*, in the estimation of the appraisers, to satisfy the execution and all fees, is not sufficiently definite to meet the requirements of the statute.

ON FACTS AGREED.

This was an action of trespass *quare clausum*, to recover for damages done by the defendants, in entering upon, and taking the income of certain real estate, the rents and profits of which had been set off to the plaintiff on execution. It will be seen, by the opinion of the Court, that the right of the plaintiff to recover turned upon the question of the validity of the levy.

White & Palmer, for defendant, contended that the levy was fatally defective.

The return does not show an actual appraisement of either land, or rent and profits. It simply asserts that it was estimated that the yearly rents and profits would be "sufficient" to pay the execution and all fees, but how much more it does not say. Nor does any part of the return say that the appraisers went upon, or proceeded with the officer, or examined the land, so as "to be able to ascertain its true value."

It is hardly sufficient in an appraisement, in a legal sense, to say that there is enough of a thing for a certain purpose. It should appear at what sum the yearly rents were fixed.

This is a statute proceeding, and all the requirements must appear by the return to have been complied with. *Litchfield* v. *Cudworth*, 15 Pick. 28; *Monroe* v. *Redding*, 15 Maine, 153.

Knowlton, for plaintiff.

As to the legality of the levy, all the provisions of R. S., c. 94, § 14, were strictly followed. The value of the whole life estate of Robert Thompson was more than the amount of the execution. Hence it was necessary to levy on the "rents and profits."

In such a case, the language of the statute is, "the appraisers shall estimate the rents and profits for such length of time as shall be sufficient to satisfy the execution." This was done by the appraisers, and their "length of time" was one year. What more, what less, what else, could, or should, or ought to have been done by them? The statute does not call for an "appraisement." An "estimation of the length of time" is all that is required.

Defendants' counsel further says it does not appear that said appraisers viewed the land, or went on to it with the officer. Their certificate states, "we have this day viewed a tract of land," &c. They also say they have set it out by metes and bounds. *Sturdivant* v. *Frothingham*, 1 Fairf. 100.

If the appraisers proceeded under the direction of the officer, this is sufficient. *Roop* v. *Johnson*, 23 Maine, 335.

The last objection to the validity of the levy is that no sum was fixed as the yearly value. Sec. 14, c. 94, does not

require it. The length of time to satisfy the execution was estimated, and this is enough to meet the requirements of law.

MAY, J.—The right of the plaintiff to recover depends upon the validity and effect of the levy, made upon his execution against Robert Thompson, June 10, 1853. That levy was upon the rents and profits of the premises described in the plaintiff's writ, and it is alleged that the said Thompson had a life estate therein.

It appears, from the return of the appraisers, that they estimated that the rents and profits of said land, exclusive of the buildings thereon standing, for one year, would be sufficient to satisfy said execution; and that they set out said tract of land for that time to satisfy said execution and all fees. The return of the officer is very similar in its language, except that it states the amount of the fees. No mention is made, in the return of either, of the amount then due upon the execution, nor does it appear whether interest was computed on the sum due on the execution or not. If interest was included in the computation, there is nothing to show the time when the rents and profits were regarded as falling due, and to which the interest should have been computed.

The R. S., c. 94, § 14, in express terms, provides that, when an execution is levied on the rents and profits of a life estate, "the appraisers shall estimate" them "for such length of time as shall be sufficient to satisfy the execution; and for such term of time the premises shall be set off to the creditor, if the life estate shall so long continue; computing interest on the sum due on the execution, and deducting the rents and profits, as so much paid from time to time, when the rents and profits fall due." This provision is imperative in its requirements. Do the proceedings upon the plaintiff's execution show a compliance therewith? We think not.

The debtor is entitled under the statute to a specific statement of what has been done. Public policy requires such statement, that he may see whether more or less of his property has been taken, than the amount of the debt and costs

which he owes. The return should state, in dollars and cents, the precise estimation of the rents and profits which have been set off, or at least there should be some reference to other papers by which the amount can be made certain. *Rawson & als.* v. *Clark,* 38 Maine, 223. If the amount exceeds, even by a few cents by way of interest, or otherwise, the exact sum required to satisfy the debt and costs, the levy will be void. *Glidden* v. *Chase,* 35 Maine, 90; *Brown* v. *Lunt,* 37 Maine, 423; or, if the language of the return be so uncertain that it cannot be told whether there be any excess or not included in the levy, then it cannot be regarded as sufficient to pass the estate.

A mere statement in the return that the rents and profits for a certain time, in the estimation of the appraisers, *will be sufficient* to satisfy the execution and all fees, would be true even if they exceeded double that amount. A precise actual value should be put upon them. The return in this case, failing to conform to the principles before stated, is clearly too loose to be upheld. It, therefore, becomes unnecessary to consider the other questions which the counsel have discussed. The plaintiff must be nonsuit.

TENNEY, C. J., and HATHAWAY, GOODENOW, and APPLETON, J. J., concurred.

EPHRAIM BOWLEY *versus* WILLIAM BOWLEY.

Subsequent to the statute of 1824, c. 272, and prior to April 1st, 1841, when the Revised Statutes took effect and became in force, the maker of a promissory note, not discounted at any bank or left for collection therein, was not entitled to grace, and an action was maintainable upon such a note immediately after the expiration of the day of payment.

A. attached "all the right, title and interest" which B. had "to any and all real estate in said county," &c. Afterwards, B. petitioned for and obtained his discharge in bankruptcy, under the Act of Congress of August 19th, 1841. A. duly filed in Court, against said bankrupt, one of the notes upon which his suit was brought, and to secure payment of which said attachment was made; — *Held,* that this should be regarded as an abandonment or waiver of the attachment.

Bowley *v.* Bowley.

The right of a plaintiff arising from an attachment is not an absolute right.

A discharge in bankruptcy, under the Act of Congress of August 19th, 1841, may, *it seems*, be pleaded by the bankrupt in bar to any suit upon a debt or claim provable against him, under said Act.

When thus pleaded, in a suit commenced prior to the proceedings in bankruptcy, it operates to dissolve any attachment that may have been made in the suit.

In such case, the defendant must be regarded as the prevailing party, and he is entitled to his costs from the time he pleaded and produced in Court his certificate of discharge in bankruptcy.

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

This was an action of ASSUMPSIT. The writ was dated August 26, 1839, and contained one count on a note alleged to have been given to the plaintiff by defendant, at Hope, on the 5th day of March, 1838, and payable to him, or order, for twenty-three dollars and twenty-five cents, in sixty days, and interest. But this note was not produced or offered in evidence at the trial, and it appeared that it had been filed in Court, by the plaintiff, as a claim against the defendant in bankruptcy. The writ also contained counts on two promissory notes alleged to have been made by defendant on August 23, 1838, for $175, each, and payable to plaintiff, or order, in one year from date, and interest.

The pleadings were the general issue, and a brief statement, setting out defendant's petition, the regular proceedings, and his certificate of discharge in bankruptcy, under the Act of Congress, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," passed August 19, 1841.

Some evidence was introduced, subject to objection, and the cause was then withdrawn from the jury and referred to the full Court, to render such judgment as the law of the case should require.

H. C. Lowell, for defendant.

1. The action was prematurely brought; the writ is dated on the last day of grace of the notes upon which the suit is founded.

2. The discharge in bankruptcy was properly pleaded and is a perfect bar to the action.

N. Abbott, for plaintiff.

By virtue of the attachment of the real estate of defendant in this suit, the plaintiff had secured a lien upon the property and was entitled to a judgment to enforce that lien.

GOODENOW, J. — This is an action of assumpsit. The writ is dated August 26, 1839. Two of the notes declared on are dated Aug. 23, 1838, payable to the plaintiff, or order, in one year from the date, with interest. The defendant contends that the action was prematurely commenced, it being on the last day of grace. It does not appear that these notes, or either of them, had been discounted at any bank, or left therein for collection; or that the maker was entitled to grace under the statute of 1824, c. 272.

But a more serious, and in our opinion, an insurmountable objection to the recovery of the plaintiff, arises from the proceedings of the defendant in bankruptcy, which appear to have been duly pleaded at the January term, 1855. The defendant filed his petition in the United States District Court, October 25, 1842; was decreed a bankrupt, Dec. 13, 1842; filed his petition for a full discharge, October 23, 1844, and was duly discharged, Jan. 5, 1853.

The plaintiff contends that, notwithstanding these proceedings, he had secured a lien on the defendant's property, by a previous attachment on the writ, and is entitled to a judgment to enforce the same. The officer's return states that he has attached "all the right, title and interest which the within named William Bowley has to any and all real estate in said county of Waldo." It describes no real estate. It does not even name the town in which it is situate. We are left in doubt whether, or not, the defendant had, at the time of the service of the writ in this case, any real estate, or any right or interest in real estate, in the county of Waldo, which was liable to an attachment. We think this fact should appear

affirmatively. It is not unusual for officers to make a return similar to the return in this case, without having or pretending to have any knowledge of the defendant's right or title, or possession, or claim to any real estate. If the return described specifically the real estate attached, it might authorize us to come to a different conclusion. In an attachment of personal estate, the sheriff, upon the service of the writ, takes possession of the goods, and acquires thereby a special property in them, for the purpose of enforcing the attachment, and the rights of all concerned in the attachment and in the goods. It has been held that an attachment similar to this is valid, and holds all the real estate of a debtor subject to it; but it does not establish the fact that he had any real estate. 23 Maine, 165, 170. If the plaintiff claims to have a judgment *in rem*, he should establish conclusively the existence of the *rem*.

It appears by the case that the plaintiff included in his writ a note, alleged to have been made by the defendant at Hope on the 5th of March, 1838, payable to the plaintiff, or order, for twenty-three dollars and twenty-five cents, in sixty days, and interest, which was not produced or offered in evidence at the trial; but the same was filed in the bankrupt's court, January 21, 1845, in proof of the plaintiff's debt against the defendant.

If there was in fact any real estate of the defendant in the county of Waldo subject to attachment, it is reasonable to presume the plaintiff received a share of the proceeds of it, as far as it would go, in payment of this last mentioned note. This, in our opinion, should be regarded as a waiver or an abandonment of his attachment. The argument from inconvenience is forcible in law, and it would be inconvenient, if not impracticable, to ascertain the extent of the plaintiff's lien under these circumstances. Shall he be permitted to prove a part of his claim, and thus diminish the general fund, and still hold on to his attachment? We are of opinion that he should not.

The right of a plaintiff arising from an attachment on mesne process is not an absolute right. All attachments of proper-

ty, in this State, whether by trustee process, or otherwise, are dissolved by the death of the debtor, and the issuing of a commission of insolvency upon his estate. 1 Maine, 333; 2 Maine, 8.

The submission of an action, and all demands between the parties, to referees, dissolves an attachment of property, made in that action, whether other demands are in fact exhibited to the referees or not. *Mooney* v. *Kavanagh*, 4 Maine, 277. The mere act of entering into such a reference dissolves an attachment. The lien, created by the attachment of goods on mesne process, is dissolved if the goods be not seized on execution within thirty days after the rendition of judgment.

In the case of *Peck & al.* v. *Jenness & al.*, 7 Howard, 612, it is decided that the proviso of the second section of the bankrupt Act, passed on the 19th of August, 1841, preserves all liens which may be valid by the laws of the States respectively; and that, where an attachment was issued and the defendants afterwards applied for the benefit of the bankrupt Act, a plea of bankruptcy was not sufficient to prevent a judgment from being rendered condemning the property under attachment. It was admitted, in that case, that property real and personal *existed*, and was actually attached, and that the sheriff took certain goods and chattels into his custody and possession, as security for such judgment as the plaintiffs in their said suit might obtain, *and that he then retained the custody thereof.* It was admitted by the Court, in that case, that the fourth section of the statute, which declares that "the certificate or discharge, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this Act, and shall and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever," if it stood alone, would make a plea of bankruptcy a good plea in bar in discharge of all debts. And the learned Judge who wrote the opinion proceeds to remark that "it is among the elementary princi-

ples with regard to the construction of statutes, that every section, provision and clause shall be expounded by a reference to every other; and, if possible, every clause and provision shall avail, and have the effect contemplated by the Legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another." The proviso to the second section of this Act declares "that nothing in this Act contained shall be construed to annul, destroy or impair any lawful rights of married women, or any liens, mortgages or other securities on property, real or personal, which may be valid by the laws of the States respectively," &c. The Legislature might intend that the lien created by an attachment should continue unimpaired, nothwithstanding the debtor should have been decreed a bankrupt, until he should obtain a final discharge; and that the certificate of discharge should be necessary as evidence that he had not conducted fraudulently. If he failed to obtain his certificate, the attaching creditor would not lose the advantage which his vigilance had secured to him. Such a construction would give significance to both of the above cited provisions, without annulling or destroying either.

It seems to have been conceded, that it would not have been an infringement of vested rights if the lien created by an attachment had been dissolved by the bankrupt Act. In *Atlas Bank* v. *Nahant Bank*, 23 Pick. 488, the Court say, when speaking of attachments, "but in equity, all these priorities give way to a general proceeding which has for its object to distribute all the effects of a debtor, by paying the whole, if there be assets, and then proceeding for a ratable distribution. If the property turn out to be sufficient to pay the whole, any priority by attachment would be useless, if not, it would be unjust." In *Ex parte*, John S. Foster, 2 Story, 157, STORY, J., says, "it is conceded, on all sides, that unless the attaching creditor obtains a judgment in his favor in the suit his attachment is gone. It is plain, therefore, that it gives no absolute right of any sort. It merely puts the remedy in progress. It is to my mind as perfectly clear and incontrovertible that, if the bankrupt, before any

trial or judgment in that suit, obtains a discharge, that discharge is, by the express terms of the bankrupt Act, (§ 4,) a full and complete discharge from all debts provable under the bankruptcy, of which the debt sued for must be one; and, of course, that it is pleadable as a bar to that very suit of the attaching creditor, in the nature of a plea *puis darrien continuance.*"

"The Act, therefore, manifestly contemplates that, as to all property and rights of property of the bankrupt, and as to all suits in law or equity pending, in which the bankrupt is a party, the bankrupt is to be treated as if he were *civiliter mortuus*, and all his property and rights of property were vested in the assignee, as his executor or administrator." Again he says, "I agree, that the Court ought not to dissolve the attachment, or to take away the inchoate rights of the creditor to the security thereof, until it is ascertained by a decree whether the party is a bankrupt, and whether he is entitled to a discharge from his debts. The Court may, and, indeed, ought to allow the proceedings to be entered in the proper Court, and to be continued, if the creditor elects to do so, until the discharge is obtained; but not to proceed in the mean time to trial or judgment; for, if the petitioner should never be declared a bankrupt, or should not obtain any discharge, it may be that there may be a judgment against him *in personam*, even supposing, (which I do not decide,) that, in such an event, the attachment would be gone by the operation of the bankrupt Act of 1841. But if a discharge should be obtained, I can entertain no doubt that no judgment whatsoever could be had in the suit against the bankrupt, and that he and the assignee might each plead the discharge in bar of further proceedings."

We must regard the defendant as the prevailing party in this case, and entitled to costs from the time he pleaded, and produced in Court, his certificate of discharge in bankruptcy. Statute of 1848, c. 60.

Plaintiff nonsuit.— Costs for defendant.

TENNEY, C. J., concurred in the result.

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

COUNTY OF PISCATAQUIS.

INHABITANTS OF MILO *versus* INHABITANTS OF GARDINER.

A child, under age, follows the settlement of his father, which is continued until a new one is acquired.

When the acts of assessors are material, they may be established by the evidence of their books of assessment.

The temporary absence of a juror from the jury rooms, without permission of the Court, affords no ground for disturbing the verdict, when there is no proof of misconduct on his part with reference to the cause on trial.

When such absence may be regarded as a contempt of the Court, it may become its duty to punish the offender.

A mere difference of opinion between the Court and jury, in the deductions from the proof, or inferences to be drawn from the testimony, will not, where there is evidence on both sides, authorize the disturbance of a verdict.

ON EXCEPTIONS and MOTION FOR NEW TRIAL. From *Nisi Prius*, APPLETON, J., presiding.

This was an action of the case against the defendant town, to recover supplies furnished one Barzilla Dorr, a pauper, whose settlement was alleged to be in Gardiner.

The plaintiffs introduced the deposition of the pauper referred to.

The defendants introduced evidence tending to show that the father and mother of the pauper moved into Milo, January 16, 1833, from Gardiner, where they had a settlement, and continued to live in Milo more than five years, and acquired a new settlement there; that Barzilla went to Milo a few days before they did, and resided with them in that place as his home, until into the summer of 1833, when he went away to work; that he became of age May 12, 1833; that he drifted about from place to place until he married, in November or December, 1836, and went to Bangor, continuing there awhile, and then living at various other places until he became again a resident of Milo.

Upon these facts, the defendants requested the Court to instruct the jury, if a settlement under his father and mother commenced in Milo, as stated, that, at the end of five years, when the parents acquired a new settlement in Milo, the son's settlement would then be also in Milo, which instruction the Judge refused to give.

The plaintiffs put in the book of assessment of taxes of Milo, for years intervening between 1833 and 1838, to which the defendants objected, but the Court admitted it.

Exceptions were taken by the defendant town, and allowed.

The verdict was for the plaintiffs; whereupon the defendants moved for a new trial, on the ground that the verdict was against law and evidence, &c., and also for the reason that one of the jurors left the jury room temporarily, while the jurors were deliberating on the verdict.

C. A. Everett, for plaintiffs.

Blake and *Danforth*, for defendants.

1. Legitimate children shall follow and have the settlement of their father "until they gain a settlement of their own." R. S., c. 32, § § 1, 2; Act of 1821, c. 122, § 2.

The pauper's settlement was in Milo, between January 16, 1838, and May 12, 1838, by virtue of his *following* and having the settlement of his father, and he never acquired one *out of Milo*, afterwards, himself. So the law of this case is clearly with Gardiner, and the instruction, refused by the Judge, should have been given as requested. *Parsonsfield* v. *Kennebunk*, 4 Greenl. 47; *Plymouth* v. *Freetown*, 1 Pick. 197.

2. The books of assessments should have been excluded. They were well calculated to have a great effect upon the jury; and yet the omission to tax him may have arisen from his being poor, and sick, and miserably broken down all the while, as he really was; or it may have been done purposely, in order to be afterwards used as evidence.

Upon the motion for new trial:—

1. The absence of the juryman without cause, without permission of Court, leaving at his own motion and staying away during his pleasure, constitutes good cause for a new

trial. There may have been misconduct on his part. If present his suggestions might have brought the others to a different result and himself too.

2. The verdict was clearly and palpably against evidence.

APPLETON, J. — While a child is under age his settlement accompanies and follows that of his father. This is expressly declared in the second mode of gaining a settlement in the statutes of 1821, c. 122, § 2, which provides, that "legitimate children shall follow and have the settlement of their father, if he have any within this State, *until they gain a settlement of their own.*" *Hampden* v. *Brewer*, 24 Maine, 281.

When the child arrives at full age, the settlement derived from his father remains fixed until a new one is acquired in some of the modes specified by the Act, to which reference has been made.

If the acts of the assessors become material, their books of assessment are the evidence by which they may be established.

That a juryman was temporarily absent from the jury room, without the consent of the Court, affords no ground for disturbing the verdict, when there is no proof of any misconduct on his part in reference to the cause on trial. If the juryman has been guilty of an act which may be regarded as a contempt of Court, it may become their duty to punish the offender. No reason is perceived why the party, in whose favor a verdict has been rendered, should be punished for what he was in no way responsible, by setting aside a verdict which he has fairly obtained.

There are probably few verdicts rendered, where, in the first instance, there is entire unanimity on the part of the jury. In case of a motion for a new trial, the inquiry is not whether the verdict is such as the Court would on the same evidence have rendered, nor whether it is conformable to the conclusions to which the presiding Judge might or would have arrived. The law imposes on the jury the duty of ascertaining the facts. It is for them to determine the meaning of the

words used, and from the appearance and manner of the witnesses, to mete to each the degree of evidence to which they may be severally entitled. Their verdict is the result of their aggregate opinions. It is not to be disturbed, unless for manifest error or misconduct. A mere difference between the Court and jury in the deductions from the proof, or the inferences to be drawn from the testimony, will not, when there is evidence on both sides, justify the disturbance of a verdict. It is not for the Court to assume the functions of a jury, nor to touch upon their appropriate and peculiar sphere of duty. *Exceptions and motion overruled.*

TENNEY, C. J., and HATHAWAY, MAY, and GOODENOW, J. J., concurred.

JOSHUA JORDAN *versus* JOHN G. MAYO *& al.*

When hydraulic works are erected on both banks of a private stream, if there is not sufficient water to afford a full supply for all, each riparian proprietor is entitled to an undivided half, or other proportion, of the whole bulk of the stream.

The owner of the entire water power on the falls of a river not navigable, with the dam across the same, and the different erections dependent thereon, having conveyed certain portions of the premises, to wit, the carding and clothing building, and a tract of land upon which the same stood, "with the privilege of drawing water from the flume connected with said building, sufficient for all the purposes of clothing and carding, and when there shall not be sufficient water for all the mills erected or to be erected on said flume and privilege, the said clothing and carding privilege is in all cases to have the preference;" it was *held*, that neither the owner, nor any person claiming under him by subsequent grant, could, by virtue of ownership of the shore opposite the premises first granted, draw off the water so that there should not be sufficient to meet the purposes of the grant. — *Held*, also, that the words in the grant, "erected on said flume and privilege," did not restrain those of the preceding clause, so as to enable the grantor, or his assigns, to draw as much water for the mills on the other side of the stream, and not through the same flume, as they might choose.

The grant by the owner of the whole stream of water sufficient for a given purpose, precludes the grantor and his assigns from diminishing or defeating in any way what he has thus conveyed.

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

This was an action of the case for using the waters of the Piscataquis river to the prejudice of the plaintiff and for diverting the same.

The plaintiff and defendant claimed through mesne conveyances, under the same grantor, the plaintiff's deed being prior to that of the defendant's.

The plaintiff claimed the right to so much of the water of the river as was necessary to carry his machinery; and the question was, whether his deed was to be so construed as to give him such right.

The clauses of the plaintiff's deed, upon the construction of which the case turned, are given in the opinion of the Court.

The "flume," mentioned in the deed to the plaintiff, was upon the easterly side of the river, while the diversion complained of was upon the westerly side.

It was agreed, that if, upon the testimony legally admissible, the action was, in the opinion of the Court, maintainable, defendant was to be defaulted, and damages assessed by referees to be agreed upon by the parties or appointed by the Court; if not, the plaintiff was to become nonsuit. The Court was authorized to draw such inferences as a jury might.

A. Sanborn, for defendant, elaborately argued the following points: —

1. The language of the deed under which the plaintiff claims clearly limits the preference which was to be given for "clothing and carding," to the erections on the "privilege" made by the canal on the easterly side of the river.

2. If it is urged that the plaintiff had the right to draw water from the "flume," sufficient for the purpose of clothing and carding; I reply that this general grant is limited and restrained by the restrictive clause that follows, to wit: "and when there shall not be water sufficient for all the mills, &c., *on said flume or privilege*, the said clothing and carding mill is to have the preference."

It is thus limited and restrained to such use of the water on the east side, coming through the canal and flume as they then existed, with no right to interfere with the use of the water for the saw and grist-mill on the west side in quantity and manner as it was then drawn.

3. The consideration paid for the demandant's privilege was small and it cannot be supposed that it was the intention of the grantor, for a trivial sum, to give a preference to the carding and clothing mill over his own grist and saw-mill upon the other side of the river, of far greater value and income. He intended it to apply only to the privilege on the easterly side.

4. The defendant has not violated the rights of the plaintiff in the use of the water. The testimony shows that he has used only one-fifth of the proportion to which he is entitled.

5. Has he been guilty of diverting the water from the Piscataquis river, or rather from the millpond made by the dam across it, to the injury of the plaintiff? He now takes the water directly from the pond through a part of the main dam by means of a canal, which is no diversion. In order to divert the water, he must take it outside and beyond the dam and not return it again to the pond. He has done nothing at all like this. Ang. on Wat. Cour. 97 to 106; *Blanchard* v. *Baker*, 8 Greenl. 253; *Webb* v. *Portland Manf. Co.* 2 Sumner's C. C. R., 18, and cases there cited.

Robinson, for plaintiff, presented the following among the the points of his argument: —

1. The testimony shows that the defendant drew water from the common reservoir, when there was not sufficient for the operation of the mills of both parties to this suit.

2. Both parties claim under the same grantor, but plaintiff's deed is prior in point of time to defendant's.

The plaintiff insists that a fair construction of the language of the deed to him and to those under whom he claims, to wit, the words, "for the purpose of carding and clothing," gives to the plaintiff rights to the water power in controversy,

superior to any and all subsequent grantees of the common grantor.

3. Both by language employed in the plaintiff's deed and by contemporaneous facts, the water power in question was treated by the grantor and grantee as a *unit, an entirety*, so that when the plaintiff and his grantors had the right (prior to all others) to draw water from the flume for the purposes named in the deed, this right extended to the whole of the common fountain, the feeder of the flume, and was of necessity an indivisible right. *Blanchard* v. *Baker*, 8 Greenl. 253, 270.

4. The first clause in plaintiff's deed is general, unrestricted, and ample for all the purposes claimed by plaintiff. These general words are not to be restrained by restrictive words added, when such words do not clearly indicate the intention, and designate the grant. 21 Greenl. 69.

5. In construing deeds, the grant shall be taken most forcibly against the grantor. 21 Greenl. 69.

The words in the latter part of the clause in the deed, which are thought by the defendant to be restrictive, are rather to be considered words of enlargement.

6. The word "privilege," used in connection with flume in the clause under consideration, extended to the whole power of the stream. The word is defined in Webster as "a waterfall in streams sufficient to raise water for driving water wheels." If there was more than one flume, that word would be restrictive. Privilege means, however, the whole fall.

7. Bradbury, the common grantor, could not divert water from our flume to our prejudice, because that would be taking from us the means requisite to the enjoyment of his grant to us. The defendants are in his place. They cannot, by construction, nullify their own grant. *Hathorn* v. *Stinson*, 1 Fairf. 224; *Elliot* v. *Sheppard*, 25 Maine, 371; 35 Maine, 65; 17 Maine, 169, 281; 38 Maine, 90.

APPLETON, J.—On August 20, 1832, John Bradbury, having by various deeds acquired the title to so much of lot No. 11,

range 1st, as embraced both shores and the entire water power on the falls in Piscataquis river, in Foxcroft, and the dams across the river, and the different erections dependent thereupon, in consideration of one thousand dollars, paid by Stephen P. Brown, and an agreement on his part "to pay one-eighth part of all the expenses of supporting and maintaining the dam across the Piscataquis river, immediately above the bridge, and one-sixth part of the expense of supporting and maintaining the dam at the said mill, now owned by me, (said Bradbury,) immediately below," conveyed to him "the carding and clothing building, in the town of Foxcroft aforesaid," and a certain tract of land upon which the same stood, &c., &c., "with the privilege of drawing water from the flume now connected with said building *sufficient* for all the purposes of clothing and carding, and when there shall not be sufficient water for all the mills erected on said flume and privilege, the said clothing and carding privilege is in all cases to have the preference," &c.

This was the first conveyance made by Bradbury, after the title to the entire privilege and the land on both sides had become vested in him. The terms of this deed are first to be satisfied. The grantee therein is to be protected without limitation or restriction, in the rights acquired. What those rights may be, is to be ascertained from the language of the deed by which they are conferred. It is immaterial from what sources the title of Bradbury was acquired. Having acquired the whole, he might make such a disposition of the whole estate or any portion of the same, as he should deem advisable.

Neither is it material to examine the subsequent grants, by which Bradbury ultimately became entirely divested of his whole estate in lot No. 11. The remainder, after Brown's deed was fully satisfied, could only be conveyed. If the deeds purport to convey more, they would be ineffectual. The rights of Brown are neither increased nor diminished by the subsequent conveyances of Bradbury.

The plaintiff, by various mesne conveyances, has acquired

the title of Brown. The defendants may be regarded as representing the remaining interest of Bradbury. The rights of the parties to this controversy will be readily perceived, by regarding it as one between the original parties to the conveyance from Bradbury to Brown, and ascertaining what were their respective rights by virtue thereof.

In the construction of a deed, it is a general rule that its language should be taken most strongly against the grantor, and most beneficially to the grantee.

"When hydraulic works are erected on both banks of a private stream," says WALWORTH, Ch., in *Arthur* v. *Case*, 1 Paige's Ch. 447, "if there is not sufficient water to afford a full supply for all, the owner on each side is entitled to an equal share of the water." Each riparian owner is entitled not only to half or other proportion of the water, but to the whole bulk of the stream, undivided and indivisible, or *per my et per tout.* Ang. on Wat. Courses, § 100; *Vanderburg* v. *Vanbergen*, 13 Johns. 212. Such is the law when the opposite shores have different owners; but, in the case before us, at the date of the conveyance under consideration, they had both become vested in the same individual. No conflict of right between different shore owners can arise. The question is, what the owner of both shores and the entire water privilege, intended to convey by the words of his grant.

Brown, by his conveyance, acquired certain premises and the buildings thereon, "with the privilege of drawing water from the flume now connected with said building, *sufficient for all the purposes* of clothing and carding." These words are plain. The water is to be drawn from the flume. The grant is of water "*sufficient for all the purposes* of clothing and carding." It contains no limitations or restrictions. The grantor, by virtue of his ownership of the opposite shore, could not draw off the water so that there should not be a sufficiency of water to meet the purposes of the grant. If he could rightfully so do, he might defeat his grant. But that he cannot be permitted to do.

The next words in the deed from Bradbury are these,

"and when there shall not be sufficient water for all the mills and machinery erected, or to be erected on said flume and privilege, the said clothing and carding privilege *is in all cases* to have the preference." It is insisted that these restrain those of the preceding clause; that the precedence is limited to that over the machinery on the same flume, and that the grantee might draw as much water for the mills on the other side of the stream, as he might choose. The general grant is of a sufficiency for certain purposes. That sufficiency is in no way to be diminished or made an insufficiency. By the preceding clause, Brown was to have a sufficiency. By the one under consideration, his rights were made prior to all having machinery upon the same flume. These rights are not in conflict, nor are they to be impaired by the grantor.

"Suppose a man," remarks SHAW, C. J., in *Dryden* v. *Jepherson*, 18 Pick. 392, "owning land on both sides of a stream, (not navigable,) should grant to another the land on one side, bounded by the thread of the stream, and should, at the same time, grant a right for a mill on his own land, with a dam of sufficient height to raise the water to drive such mill. As such dam could not raise the water, without being extended across the river, and of course one half upon the grantor's land, such a grant would, by necessary implication, carry the right to build on the grantor's own land, and to occupy it as far as necessary to maintain the dam, so long as the dam should be kept up." So, in the present case, the grant of water "sufficient for all the purposes of clothing and carding" precludes the grantor from diminishing or defeating what he has conveyed.

The plaintiff is entitled, by his grant, to water "sufficient for all the purposes of clothing and carding." The defendant has diverted the water, and has thereby deprived the plaintiff of his legal right to a sufficiency of water.

Defendant defaulted.

TENNEY, C. J., and HATHAWAY, GOODENOW, and MAY, J. J., concurred.

ALEXANDER MAXWELL *& al. versus* NATHANIEL HAYNES *& al.*

A. sold to B. certain goods, for which the latter promised to pay a bill due from A. to C. Afterwards C. presented his bill to B., who said the bill was good, that he had agreed with A. to pay it, and that he would pay it soon. *Held*, that the promise of B. was based on a new and original consideration; that, therefore, it does not come within the statute of frauds, and that B. is liable.

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

The facts of the case appear in the opinion of the Court.

Everett, for plaintiff.

A. Sanborn, for defendants.

The evidence shows only a verbal promise of the defendants to pay the debt of another. It therefore comes within the statute of frauds, and the action cannot be maintained.

GOODENOW, J. — This is an action of assumpsit. The plaintiffs introduced witnesses to prove that Cowan & Knowles hauled logs in the winter of 1854 on the defendants' town for them by the thousand; that Cowan & Knowles made bills at different places during the winter, among the rest the plaintiffs' bill. In the spring of 1854, Cowan & Knowles sold out all their "fixings" in the woods to the defendants; and they promised Cowan & Knowles to pay said bills; that the plaintiffs called on the defendants, and the defendants said the bill was good, and they would pay it soon, that they had agreed with Cowan & Knowles to pay it. The defendants rely upon the statute of frauds.

It seems to us reasonable to infer, from the report of the case, that the promise of the defendants arose from a new and original consideration of benefit or harm, moving between the newly contracting parties; and it is not therefore within the statute of frauds. *Dearborn* v. *Parks*, 5 Maine, 81.

The defence fails. *Hilton* v. *Dinsmore*, 21 Maine, 410.

A default must be entered and judgment for $33,48, and interest from the date of the writ as damages.

TENNEY, C. J., and APPLETON, HATHAWAY, and MAY, J. J., concurred.

ROBERT CUTTS *versus* NATHANIEL HAYNES *& al.*

In an action of assumpsit against A. and B., as partners, the evidence having shown the promise to have been by A. alone, the plaintiff may, under the R. S., c. 115, § 11, amend his writ by discontinuing as to B., on paying him his costs, and have his judgment against A. alone.

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

ASSUMPSIT on account annexed, and for money had and received.

The evidence being out, the case by consent of parties was taken from the jury and agreed to be submitted to the Law Court, to enter such judgment and for such sum, if for plaintiff, as they shall deem to be agreeable to law, having authority to draw such conclusions as a jury would be authorized to draw.

Everett, for plaintiff.

A. Sanborn, for defendant.

The testimony shows the verbal promise of but one of the defendants to pay these plaintiffs their demand against Cowan & Knowles, and they must therefore be nonsuit. See Chitty's Pleadings.

GOODENOW, J. — We have not been furnished with a copy of the report in this case, but understand from the arguments that the facts are the same as those reported in the preceding case of *Maxwell* v. *Haynes & al.*, with the exception that, in this case, the testimony was that Haynes *alone* had bought out the "fixings" of Cowan & Knowles, and had agreed with them to pay the plaintiff's bill, and that he *alone* told Cutts that he would pay the bill. If such are the facts, the plaintiff may have leave to amend by striking out the name of Rice, the other defendant, upon paying him his costs up to this time; and have judgment against Haynes alone for the amount of his bill and interest from the time it was demanded and for his costs. R. S., c. 115, § 11.

TENNEY, C. J., and HATHAWAY, APPLETON and MAY, J. J., concurred.

JOHN F. SCAMMON *versus* EDMUND SCAMMON.

A statute title is not perfect, unless every thing has been done which the statute requires.

A title cannot be acquired by a location of a lot reserved for public uses, under the R. S., c. 122, § 4, unless the return of the committee, after having been accepted by the Court, is recorded in the Registry of Deeds within six months.

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

WRIT OF ENTRY.

The demandant claimed title to the premises, through mesne conveyances, from the Commonwealth of Massachusetts. The tenant claimed, through mesne conveyances, by virtue of the assignment and location of the premises, as a lot reserved for public uses.

The proceedings had in the assignment of the lot, upon the validity of which the case turned, appear in the opinion of the Court.

The parties agreed that the Court might draw such inferences and conclusions from the testimony, as a jury might; and if, in the opinion of the Court, the demandant could maintain his suit, the case was to stand for trial to adjust the respondent's claim for betterments; otherwise, the demandant to become nonsuit.

James Bell, for demandant.

1. The tenant's counsel insists, that he has shown a "judgment for location." There is no such "judgment," and if there was, it would be unauthorized, and of no validity.

2. It is said the demandant should have appeared, and objected to the acceptance of the report. We contend that the location is absolutely void, and not voidable merely.

The counsel argued against the validity of the location on the ground of want of certainty in the location on the face of the earth, &c., which is rendered unimportant by the decision of the Court upon the question of registry.

3. The title of the respondent under the location must fail for want of compliance with that provision of the statute,

requiring the recording of the location in the registry of deeds within six months. R. S., c. 122, § 4.

A. M. Robinson and *P. S. Merrill*, for respondent.

1. The committee having been duly appointed, have complied with the requirements of the R. S., on the subject of location of lots for public uses, in all material respects.

2. The records show a "judgment of location." This judgment, not having been reversed or annulled, presents an insurmountable barrier to the plaintiff's suit. *Bannister* v. *Higginson*, 15 Maine, 73; *Smith* v. *Keene*, 26 Maine, 411; *Pierce* v. *Strickland*, 26 Maine, 277; *Eldridge* v. *Preble*, 34 Maine, 148; *Plummer* v. *Waterville*, 32 Maine, 566; 5 Greenl. 459; 1 Greenl. 369; 37 Maine, 21.

3. The doings of the committee, accepted by the Court, have been duly recorded; and though not within six months, as the statute requires, yet before the conveyances to the plaintiff. The statute is directory, and it is enough that the record is before the conveyance set up against it. 15 Mass. 139; 17 Maine, 249; 22 Maine, 145.

HATHAWAY, J. — The demandant derives title to the premises, through mesne conveyances from the Commonwealth of Massachusetts, by grant of February 16, 1811, to the trustees of Saco Academy, which grant contained the common reservations of lands for public uses. The tenant, through mesne conveyances, claims title to the same land by virtue of its assignment and location, according to the provisions of the statute, as one of the lots reserved in the grant for public uses; and the case finds that, in pursuance of previous proceedings in the late District Court in the county of Piscataquis, at the September term thereof, 1842, a committee, who had been previously appointed by the Court to make the location, made report of their doings, by which they located the same as one of the public lots, which report was accepted, and judgment rendered thereon.

If the tenant has title to the demanded premises, it is by virtue of the statutory proceedings, by which the location and

assignment were made. A statute title must always be perfect; that is, every thing which the statute requires to make it perfect, must have been done. *Williams* v. *Amory*, 14 Mass. 20, Rand's edition.

The return of the warrant and the doings of the committee was made to the Court, and accepted, and judgment rendered thereon, the second day of the September term, 1842, but was not entered of record in the registry of deeds, until the tenth day of June, 1843, a period of more than eight months after its acceptance. By R. S., c. 122, § 4, it was provided that "the committee shall make return of said warrant, and their doings thereon, under their hands, to the next District Court in the county, after having completed the service; which, being accepted by the Court, and recorded in the registry of deeds for the same county, within six months, shall be a legal assignment and location of such reserved proportions, for the uses designated."

The recording of the proceedings in the registry of deeds, within six months after their completion in Court, having been made by the statute an essential element of "a legal assignment and location," and no such record having been made within that time, the tenant's title, under the assignment and location, fails, and the demandant must prevail.

And, as agreed by the parties, the action must stand for trial, upon the question of betterments.

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

GOODENOW, J., did not concur with the Court, and gave his views of the case in the following dissenting opinion: —

I am not ready to concur in the foregoing opinion of the Court, that "the recording of the proceedings in the registry of deeds, within six months, after their completion in Court" has been made, "by the statute an *essential* element of a legal assignment and location," and that "no such record having been made, within that time, the tenant's title under the assignment and location fails."

Where the reason ceases, the law ceases. A record of a

deed is not essential in all cases, although the language of the statute would seem to make it so.

The proceedings were recorded before the conveyances between the plaintiff and his grantee. The title to these reserved lots remained in the State. It was never in the plaintiff only as a tenant in common.

The sixth section of c. 122, provides, that "the severance and location of such reserved lands may be made and completed in the manner prescribed in the fortieth section of c. 121, as circumstances may render it convenient." The fortieth section of c. 121, provides that the commissioners shall first set off, by metes and bounds, such reserved lots, &c.; "and the return being accepted by the Court, and recorded as *before provided,* shall be valid, as a location of such reserved lands."

The 29th section, c. 121, provides that the return shall be recorded "in the registry of deeds, for the county or registry district where the lands lie." No limitation as to time. The same section provides, that if the doings of the commissioners "be confirmed by the Court, judgment shall be thereupon rendered, that said partition be firm and effectual forever."

This is unlike the case of *Williams* v. *Amory,* 14 Mass. 20. This was not an attempt to make title to the demandant's land by the provisions of a statute, by the extent of an execution upon it.

I am disposed to consider the recording of the proceedings *within six months,* as only directory and not indispensable; *ut res magis valeat, quam pereat.* 15 Mass. 139; 17 Maine, 249; 22 Maine, 105.

I am of opinion that the commissioners having returned that they met "agreeably to previous notice," we may well presume that they gave the notice required by the statute, after their report has been accepted by a Court having jurisdiction of the subject matter.

For these reasons I think the demandant should become nonsuit.

COUNTY OF HANCOCK.

GEORGE H. EMERSON, *Pet. for review, versus* JAMES MCNAMARA.

A Judge at *Nisi Prius*, having denied a petition for review, *solely* on the ground that the facts presented would not, as matter of *law*, entitle the petitioner to retain a verdict, should one be found in his favor by the jury, it is proper for this Court to determine the question raised by the exceptions taken to such ruling.

Ordinarily, however, in questions of this kind, addressed as they are to the discretion of the Court, exceptions will not lie.

A vendor who has, by the fraud of the other party, been induced to part with his property, may, within a reasonable time after the discovery of the fraud, rescind the contract and reclaim his property.

Such contract is not void, but voidable only; and the vendor, in order to avoid the contract and to reclaim his property, or to recover its value, must first return or tender what he received in payment therefor, unless payment was made by the note of the vendee.

But no action for this purpose can be maintained, unless the return or tender is made prior to the commencement of the suit.

The possession of property obtained by a sale that has been rescinded for fraud, is tortious.

It seems a party cannot waive the tort and bring his action of assumpsit against the tort-feasor, except where the property has been converted into money or its equivalent.

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

This was a PETITION FOR REVIEW, which having been denied by the presiding Judge, the case came up on exception. The points involved are stated by the Court.

C. J. Abbott, for petitioner.

B. W. Hinkley, for respondent.

MAY, J. — In this case, which is a petition for review, upon the ground of newly discovered evidence, the Judge presiding at *Nisi Prius*, "being of opinion that the testimony presented by the petitioner, would not authorize a verdict in his favor, upon legal principles applicable to such cases, denied the

review." The case now comes before us upon exceptions, taken by the petitioner to this ruling. Ordinarily, in questions of this kind, addressed as they are to the discretion of the Court, exceptions will not lie; but in this case, as the Judge, at the hearing, seems to have denied the review, *solely* upon the ground that the facts presented would not, *as matter of law*, entitle the petitioner to retain a verdict, if the jury should find one in his favor, we deem it proper to determine the question which is raised by the exceptions.

The ground, upon which the action is claimed to be maintainable, is that the plaintiff, on November 25th, 1852, was induced by the fraudulent representations of the defendant, to deliver to him the ox sued for in his writ, with $17 in money, in payment or exchange for a negotiable note against one John Dorr, dated June 2, 1851, for the sum of $51,21, and payable on demand and interest, which note the defendant then held, the same having been indorsed to him in blank by Alexander Fulton, the payee. The alleged fraud consisted in representations made by the defendant, at the time of the trade, that said Fulton, who appears to have been a man of property, was liable as indorser on said note, when the defendant well knew that said Fulton was not liable. The testimony given at the trial of the action, and the newly discovered evidence presented at the hearing upon this petition, were regarded as having a tendency to establish such fraud, and, for the purposes of our decision, the facts and fraud alleged are to be taken as proved. The plaintiff's writ bears date, March 22, 1853. There was no evidence that the plaintiff had returned, or offered to surrender said note to the defendant, before the commencement of the suit; but it appears that, at the trial and before the verdict, the plaintiff did offer to surrender said note to the defendant.

The question submitted to our consideration is, whether the plaintiff, upon these facts, can maintain his suit. That a party to such a contract, who has parted with his property under it, when it was induced by the fraud of the other party, may, at his option, within a reasonable time after the discov-

ery of the fraud, rescind and reclaim his property from the possession of the vendee, is too well settled to require the citation of authorities. But such a contract is not void, but voidable only; and if the defrauded party desires to avoid it and reclaim his property, or to recover its value, he must first return or tender back what he has received in payment or exchange for it, unless it be in a case where the payment was in the vendee's own notes; and without doing so before the inception of any suit, the action cannot be maintained. In this case, the note being against a third person, and apparently of some value, it should have been returned or tendered to the defendant before suit brought, and this not having been done, the plaintiff must fail in his suit. This case cannot be distinguished in principle from that of *Cushing* v. *Wyman*, 38 Maine, 589, and other cases there cited.

The case of *Ayers & al.* v. *Hewett*, 19 Maine, 281, referred to in the argument, differs from this in the particular above mentioned. There the payment for the property which the plaintiff had parted with under a contract influenced by the fraud of the purchaser, was wholly paid for in the vendee's own notes; and the Court remark, upon the authority of *Thurston* v. *Blanchard*, 22 Pick. 18, that it may be, that the plaintiffs on another trial, by tendering the notes, may become entitled to a verdict in their favor; but they held in the same case, that a tender of the defendant's own notes after verdict and before judgment was too late. These cases, however, are only exceptions to the general rule; and both of them are strong authorities to sustain it. That rule is too clearly established in the books to admit of doubt.

If the rule were otherwise, whether this action, being assumpsit upon an account annexed to the writ for the ox, could have been maintained, except upon a new count for money had and received, and upon proof that the defendant had sold or converted the ox into money or money's worth, would deserve consideration. That the possession of property acquired by means of a sale, which has been rescinded on the ground of fraud in the vendee, is tortious, seems to be settled

in the two cases above cited, of *Ayers & al.* v. *Hewett,* and *Thurston* v. *Blanchard;* and that a plaintiff cannot waive a tort and bring assumpsit against a tort-feasor, except in cases where the property has been converted into money or money's worth, appears to have been established in *Jones* v. *Hoar,* 5 Pick. 285; see 2 Greenl. Ev. § 117; but upon this question we give no opinion. *Exceptions overruled.*

TENNEY, C. J., and HATHAWAY, APPLETON, and GOODENOW, J. J., concurred.

HANCOCK BANK *versus* ALFRED JOY.

In England, the husband may authorize his wife to indorse or accept bills for him in her own name, and he will thereby be bound as indorser or acceptor.

Such is also the law in the State of Pennsylvania.

By the common law, a note made payable to a married woman, is a note to the husband. It instantly becomes his property; and her indorsement of it transfers no property in the note.

By the statutes of this State, the wife is allowed to act as *sole,* in reference to the management of her own estates.

Whether the husband will in any event be liable for the acts of his wife in relation to her own property, *quære.*

The wife of A. having, in his absence and by his authority, accepted a draft for him in her own name, the rights of the parties are to be determined by the rules of the common law, which are not affected in their application to this case by the statutes of this State. Such indorsement will therefore bind the husband.

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

This was an action of ASSUMPSIT on a draft drawn in California, on a house in Boston, payable to the order of defendant's wife, which she indorsed in her own name and transferred to the plaintiffs for a valuable consideration.

The draft was protested for non-payment. There was evidence introduced by the plaintiffs tending to show, that the defendant was asked to pay over the amount of the draft, which he declined to do; that he was asked if he authorized his wife to indorse the drafts, to which he replied that he

did, and that he inquired as to the best method of transmitting money, and had all his drafts drawn in favor of his wife, and had directed her to indorse them.

Kent and *Drinkwater*, for plaintiff.

1. The defendant is liable on the ground of agency. *Shaw* v. *Emery*, 38 Maine, 485.

2. If this be considered the contract of the wife, it was made by the request of her husband, and received his assent and ratification. An action may be maintained upon it against him alone or against both. The counsel cited *Petty* v. *Anderson*, 2 C. & P. 38; *Clifford* v. *Burton*, 1 Bing. 190; *Smallpiece* v. *Daws*, 7 C. & P. 40; *Menard* v. *Wells*, 5 C. & P. 583; *Rukert* v. *Sanford*, 5 Watts & Sargent; *Harris* v. *Davis*, 1 Ala. 259; *Hughes* v. *Chadwick*, 16 Ala. 651; *Read* v. *Leyard*, 4 Eng. L. & E., 523.

3. "In order to render the husband liable for a negotiable note, *indorsed by his wife*, it must be shown that it was indorsed by his authority, express or implied." *Leeds* v. *Vail*, 15 Penn. (3 Harris,) 185. This distinctly sustains our case.

A husband is liable for his wife's contracts only where his assent, express or implied, is shown. *Field* v. *Eves*, 4 Harr. 385.

From these cases it is clear:—(1.) That a husband may be held on contracts made by his wife, which are voidable by her. (2.) That he may be thus held on such contracts (in many cases) where his name is not used. (3.) That he may be held on negotiable instruments made and signed by his wife in her own name, and as her own contract, apparently.

4. His liability, as indorser, is fixed by the protests and the testimony of the cashier. The notices were properly given to the wife, as the party indorsing, her husband being absent. 6 Mass. 386.

5. If it is held that the indorsement created no contract valid against either husband or wife, then justice and law require that the bank should be considered merely as collectors of this draft for them, and as having advanced the money; not as purchasers of the draft, but as a convenient medium

for collection; and that the bank is entitled to recover it back.

J. A. Peters and *Rice*, for defendant.

The bank did not take the draft to collect, but purchased it. The defendant's name is nowhere on it nor in either of the protests. He neither signed nor indorsed it, nor was he notified as indorser. He never had any thing to do with the bank about it. There is no evidence that he authorized his wife to sign *his* name; and if he did, she did not indorse it in his name; nor did he direct her to sell it to the bank. And if he had, there was no representation made to the bank of such a fact. The bank did not rely on any statement, but relied merely on the paper itself. The name of Mrs. Joy was taken merely to give the draft negotiability. Of course, there is not so much reason to hold him in this case as if he had presented it himself and got the money; but even in that case he would not be holden without an indorsement.

The count for money had and received does not enlarge plaintiffs' claim upon the paper as it stands. In the first place, defendant never had the money; the wife had lent and used it. Then, again, he did not receive the bills of the bank, and would not be liable under the count for "money had and received." *Mercantile Bank* v. *Cox*, 38 Maine, 500.

In truth, the only reason that is suggested why defendant should be holden, is because Sarah is his wife, his "partner;" a "sleeping partner" she indeed is, but, therefore, to hold him liable in this case, would be to carry the doctrine further than the authorities will justify.

But by our statutes and decisions now, a married woman can own notes and sell them and negotiate them separate from her husband, and can receive them directly from her husband. And our Court has gone so far as to decide that a man can convey real estate directly to his wife. *Johnson* v. *Stillings*, 35 Maine, 427.

So could defendant give his wife this draft, and the legal presumption is, that it was hers, and there is nothing in the case to remove such a presumption.

APPLETON, J.—The defendant, having funds in California, and wishing to transmit them to this country, purchased, for that purpose, at Columbia, (Cal.,) of Adams & Co., a draft on their house in Boston, (Mass.,) payable to the order of his wife, which he transmitted to her.

It is clearly established by the evidence, that the funds with which the draft was purchased, belonged to the defendant, and that his wife was to use the draft and receive the proceeds thereof by his direction and authority.

The wife of the defendant indorsed the draft in suit, which she received from him, to the plaintiffs, and received of them the amount for which it was drawn. The acceptors having failed, the draft was protested for non-acceptance and non-payment, and seasonable notice thereof was forwarded to the indorser.

By the common law, a note made payable to a married woman is a note to the husband, and becomes instantly his property, and her indorsement transfers no property in the note. *Savage* v. *King*, 17 Maine, 301. But the wife may convey a title by indorsing in her own name with her husband's authority. *Prestwick* v. *Marshall*, 7 Bing. 565.

The material question for determination in the case under consideration, is, whether the husband is liable upon a contract made by the wife, in her own name, but with his authority. If the wife can bind the husband under such circumstances, it is immaterial whether it be as the maker of a note or the indorser of a draft.

To determine satisfactorily the rights of the parties, it may not be amiss to examine the various decisions in England and in this country, which bear upon the points involved in this case.

In *Prestwick* v. *Marshall*, 4 C. & P., 594, it was held that the indorsement by a married woman, *with her husband's assent*, of a bill of exchange, drawn by her, is binding upon him, and will pass the interest in the bill so as to enable him to sue the acceptor. In this case the indorsement was by the wife in her own name. The case came subsequently before the

Court upon a motion to set aside the verdict obtained at *Nisi Prius*, but, upon argument, the ruling of the Justice, before whom the cause was tried, was sustained. *Prestwick* v. *Marshall*, 7 Bing. 565.

In *Prince* v. *Brunatte*, 1 Bing. N. C., 435, the suit was against the acceptor of a bill of exchange, alleged to have been drawn and indorsed by Sarah Ellwood. The defence was, that the indorser was the wife of Thomas Ellwood, who was then alive. It was there held to be sufficient to pass the title to the bill that it was drawn and indorsed by the authority of the husband.

In *Linders* v. *Bradwell*, 5 Man., Grang. & Scott, 583, a bill of exchange was addressed to the defendant by the name of William Bradwell, his true name being William David Bradwell, and was accepted by his wife, by writing across it her own name, "Mary Bradwell." There was no evidence of any express authority in the wife so to accept the bill; but, on its being presented to the husband, after it became due, he said he knew all about it, that it was a millinery bill, and that he would pay it shortly. The Court held the husband was liable as acceptor. MAULE, J., in delivering his opinion, says, "if a man says to his wife, 'accept such a bill, drawn upon me in your own name,' unless he means to be bound by it, he means nothing. Unless such an acceptance operates to charge him, it has no operation at all. The defendant clearly meant to bind himself, if in law he could do so. It is said that a drawee cannot bind himself otherwise than by writing his name on the bill. Here the defendant has, by the hand of his wife, written 'Mary Bradwell' on the bill. If he had done this with his own hand, it clearly would have been his own acceptance; and I know of no rule of law, that makes such an acceptance void. * * I admit that nobody but the defendant could accept this bill so as to charge him; but he has accepted it in the hand and by the name of his wife, and that, I think, is a sufficient acceptance to bind him." It is therefore manifest, that in England the husband may author-

ize the wife to indorse or accept bills in her own name, and render him liable by such indorsement or acceptance.

In Pennsylvania, the same principles of law have been recognized as sound. In *Rukert* v. *Sanford*, 5 W. & S., 164, the note in suit was given by the wife, in her own name. It was there held that the husband was liable on the promissory note of the wife, given, by his authority and approbation, in her own name. "Our law," says BURNSIDE, J., in *Leeds* v. *Vail*, 3 Harris, 185, "is, that a negotiable note, given or indorsed by a wife, in the hands of a *bona fide* holder, cannot be given in evidence against the husband, unless it be first shown that it was given with his approbation or under his authority." The same general doctrines are affirmed by the Court in *Field* v. *Eves*, 4 Harr. (Del.) 385.

In *Stevens* v. *Beal*, 11 Cush. 291, it was held that a wife, with the consent of her husband, might indorse in her own name a promissory note made payable to her during coverture, and pass a good title to the indorsee. But such indorsement, if valid to pass the title, is equally so to impose upon the indorser the usual liabilities arising from the contract of indorsement.

The draft in this case being the property of the husband, and the wife indorsing it by his authority, in her own name, but on his account, we think his liability the same as if the indorsement had been by him.

By the statutes of this State the wife is allowed to act as sole in the management of her own estates. Whether the husband will, in any event, be liable for the acts of the wife relating to her own property, is not a matter before us. The draft in suit belonged to the husband and not to the wife, and the rights and liabilities of parties are to be determined by the rules of the common law and not by the special provisions of our statute. *Defendant defaulted.*

TENNEY, C. J., and HATHAWAY, MAY, and GOODENOW, J. J., concurred.

COUNTY OF AROOSTOOK.

JOHN F. H. HALL *& al. versus* JOHN HUCKINS.

A. having agreed in a settlement with B. for stumpage, that he would "account to or allow" B. "any and all deductions" which A. might obtain from the State on account of the stumpage, B. having first to "pay or allow" A. "all his expenses, costs and trouble" in obtaining them; — *Held*, that as the deductions had to be effected through the agency of A., who would thus know when they were made and to what amount, he was bound to account to or allow B. the amount of the same, less his reasonable expenses, costs and trouble in obtaining them. —

Held also, that A. having by a transfer of the judgment which he held against B. put it out of his power to "allow" the amount thereon as contemplated when the agreement was made, he was bound to "account" to him for the same. —

Held also, that a reasonable time having elapsed after the deductions were made, B. could maintain his action against A. for the amount due him, without any previous demand on A. —

Held also, that B. was entitled to interest on the balance due him from the time when the deductions were made.

It seems, that the true principle, upon which to base the allowance of interest in the absence of express stipulation, is to charge it upon the party who is in fault.

To enable a plaintiff to recover in an action of assumpsit on the money counts, it is not always necessary to show that the *money* has actually been received by the defendant. If any thing has been received by defendant as payment in lieu of money, as negotiable promissory notes, specific chattels, and even real estate, it equally entitles the plaintiff to recover.

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

ASSUMPSIT.

The writ was dated May 16, 1854, and contained a count on account annexed, one for money had and received, and one on the special contract recited in the opinion of the Court. The further facts of the case appear in the opinion of the Court.

The case was reported for the Law Court, to order such judgment as they should see fit.

J. A. Peters and *Wentworth*, for defendant.

1. The paper on which the action is founded, if received as a promise to pay any thing, is void for want of consideration. It states one dollar as a consideration; that is merely nominal, and is to be regarded as nothing.

2. An action cannot be maintained on this paper, until the plaintiffs perform an act precedent. They must "pay and allow all costs, expenses and trouble."

3. An action will not lie, because of the want of proof of a previous demand. It is an agreement to "account and allow," and not an agreement to pay.

4. There is no sufficient declaration to support an action upon the agreement of Nov. 8th; and no action can be supported upon it, but one alleging a demand and refusal to account. *Ayers & al.* v. *Sleeper*, 7 Met. 45.

Rowe, *Tabor* and *Madigan*, for plaintiffs.

1. The agreement on the part of Hall & Smith to be defaulted in the Huckins suit, and Huckins' agreement to account for deductions, bear date the same day, and constitute one transaction. In his bill, Huckins charged and was allowed the full stumpage. Had he charged the amount he actually paid afterwards, there would have been a large balance due the plaintiffs.

2. Plaintiffs claim interest from July 1, 1846, the deduction having been made as of that day.

3. The case shows the amount due to Massachusetts to have been $2750,91, on which defendant charged and received interest from July 1, 1846.

4. The only matter in which the plaintiffs are interested, is the amount of the reduction. How the defendant paid the reduced amount, whether in cash or other property, is his affair.

APPLETON, J.—It appears that, on December 12, 1846, the present defendant commenced a suit against Hall & Smith, the plaintiffs in this action, containing, among other items under that date, a charge of $2785,37 for stumpage, and one

for interest from July 1st to that date. The action was duly entered, and, on November 8, 1847, Hall & Smith agreed to be and were defaulted, for the sum of $1692,50, as the balance due. The charges for stumpage and interest were included among the debits against Hall & Smith, and constituted a part of the account then adjusted.

When this adjustment was made, Huckins was indebted to the Commonwealth of Massachusetts for the stumpage and interest included in his judgment against the plaintiffs. Upon the basis of the settlement between the parties, in pursuance of which the default was entered, if the unpaid stumpage and interest had been deducted, there would have been a balance in favor of Hall & Smith, of $1112,87.

At the same time Hall & Smith were defaulted for the sum agreed upon, the defendant signed the following agreement:—

"Bangor, November 8, 1847.

"In consideration of one dollar, I hereby agree *to account to and allow* Hall & Smith *any and all* deductions, which I may obtain from the States of Maine and Massachusetts, on account of stumpage on timber which I purchased of said Hall & Smith in December, 1846, should any reduction on the stumpage be made by said States of Maine and Massachusetts. That said Hall & Smith shall first pay or allow said Huckins all costs, expenses and trouble, which he may be at in obtaining any deduction on the said stumpage, or endeavoring so to do. "John Huckins."

The stumpage and interest included in the judgment obtained by the defendant against Hall & Smith, was the same which he was to pay the Commonwealth of Massachusetts, and of which he was to obtain, if possible, a reduction. It is apparent, therefore, that any reduction he might obtain would enure equally for the benefit of Hall & Smith, as for his own.

After various negotiations between the defendant and the Commonwealth of Massachusetts, a compromise was effected by which the defendant was discharged from his indebtedness

for stumpage, by transferring the judgment against Hall & Smith and paying one hundred dollars.

It is conceded, that a deduction has been obtained from the liberality of Massachusetts, and in consequence thereof there is something due the plaintiffs, but it is insisted, that they cannot recover in this suit, because no demand has been made previous to its commencement.

The writ contains a count upon the special contract, as well as the usual money counts.

As the deduction was to be effected through the agency of the defendant, he would know when it was made. The plaintiffs could make no effectual demand till after the desired deduction had been obtained. The knowledge of that fact was to come from the defendant. The defendant, knowing when the deduction was made, was bound "to account to or allow" the amount discounted, less the expenses of obtaining it, as by his contract he had agreed to do. Regard being had to the relations of the parties on Nov. 8th, it is apparent, that it was their mutual expectation that the discount obtained was primarily to be applied in satisfaction of the judgment which the defendant on that day obtained against the plaintiffs. As the defendant transferred the execution, it was out of his power to make this application. As the judgment was in full force and the execution might be enforced at any time, it was his duty to account to the plaintiffs for the deduction obtained on the stumpage, to enable them to discharge the execution assigned to Massachusetts.

The defendant had "agreed to account to or allow Hall & Smith any and all deductions," which he might obtain. It was out of his power to allow them upon his judgment, because he had transferred it. It was not out of his power to account, and it was his duty so to do. He had had the benefit of the plaintiffs' judgment, by which his own indebtedness had been discharged. His contract was not "to account to and allow" on demand, but "to account to and allow," and that he should have done, and that he has neglected to do. He has, therefore, failed to perform his contract. A reason-

able time in which it should have been performed, had elapsed long before the institution of this suit.

It is true that Hall & Smith were to first pay or allow said Huckins "all costs, expenses or trouble," which he might incur in procuring, or endeavoring to procure, the desired reduction. These expenditures were peculiarly in the knowledge of the defendant. The plaintiffs are not in fault in not paying or allowing expenses of which they were not aware and of which this defendant should have rendered an account. This defendant had in his hands the funds out of which these expenses were to be allowed, and neglected equally to render an account of the deductions obtained as of the expenses incurred in procuring them.

To enable the plaintiffs to recover upon the money counts, it has not been held necessary in all cases to show that money has actually been received. If any thing has been received in lieu of money, it equally entitles the plaintiffs to recover. Negotiable notes, recovered by a defendant, are regarded as money. *Willie* v. *Green*, 2 N. H., 333; *Clark* v. *Penney*, 6 Cow., 297. The value of a specific chattel, received in payment of rent, may be recovered in this form of action. *Ames* v. *Ashley*, 4 Pick, 71. It may even be maintained when the payment is received in real estate. *Miller* v. *Miller*, 7 Pick. 136. Whatever reduction might be obtained would be for the eventual benefit of the plaintiffs. Had the stumpage been paid to the Commonwealth of Massachusetts, the reduction would have been by re-payment to the defendant of the amount discounted. Whether the reduction were made by passing a specified sum to the credit of the defendant, or whether, the stumpage having been paid, the amount discounted were repaid to the defendant, would make no difference to him nor to the plaintiffs, who were to have the benefit of whatever allowance might be made.

"It is a rule that the person to be discharged from liability, by the performance of a certain act, is impliedly bound to do, or cause to be done, the act which is to exonerate him." Chitty on Contracts, 728. The omission to render an account,

after a reasonable time, makes a demand unnecessary. *Dodge* v. *Perkins*, 9 Pick. 393.

The defendant, having funds of the plaintiffs in his hands, or what are to be regarded as funds, was bound either "to account to, or allow" the plaintiffs for the same. A reasonable time had elapsed in which it should have been done, and the defendant having neglected to do, what, by his contract, he had agreed to do, an action may be maintained without demand.

It remains to consider what principles are to govern in the assessment of damages.

In the account upon which judgment was recovered, in the suit *Huckins* v. *Hall & Smith*, it appears that the plaintiff in that action claimed stumpage and interest thereon. The defendants, by submitting to a default, acknowledged the justice of that claim. The necessary inference, therefrom, is, that Huckins was liable to Massachusetts for interest on the amount due for stumpage, otherwise he was guilty of unfairness in charging interest when he was not liable to pay the same. Hall & Smith must have so understood it, else they were guilty of imbecility in submitting to a default in which an unjust claim for interest was allowed. The right of Massachusetts to interest on the stumpage due, may be regarded as admitted by both parties. To deny it, would be to impute want of integrity to one party and want of intelligence to the other.

The defendant, either in consequence of original liability or a subsequent assumption, and it is immaterial which may be the case, was bound to pay the stumpage and interest included in his judgment against the present plaintiffs. In either alternative his claim against them arose from his liability to Massachusetts. The justice of his claim was conceded. The reduction to be obtained was dependent upon the liberality of Massachusetts. In effecting a compromise he was at liberty as to the mode and the means to be used. The judgment he had recovered was due him and he was not precluded from transferring it as part of the payment to be made in

his settlement. In so doing he assigned a debt due to him to discharge a debt due from him.

From the stumpage due Massachusetts and the interest thereon to the day when they discharged it, is to be deducted the execution in favor of the defendant against the plaintiffs and interest thereon to the same date and one hundred dollars; and the difference will show the deduction made by Massachusetts, and is to be regarded as so much money in the hands of defendant for which he was then bound "to account to and allow" the plaintiffs.

It seems that the defendant purchased a large amount of lumber of the plaintiffs in December, 1846. The evidence shows, that an allowance was made by the agent of Maine for timber cut by the plaintiffs. It does not distinctly appear whether the lumber on which this deduction was made, was included in the amount purchased in December. If it was, the same rules as to the adjustment of the plaintiffs' claim are to apply as have been considered just in reference to the deduction obtained from Massachusetts, so far as they may be applicable. Interest should be charged or not upon the deduction made by Maine, if it be within the contract in suit, accordingly as the defendant was or was not liable to pay the same.

The deductions being ascertained, the inquiry arises whether the plaintiffs are to recover interest thereon from the time when they were obtained or from the date of the writ.

Interest is to be allowed when the law by implication makes it the duty of the party to pay over the money to the owner, without any previous demand on his part. *Perkins* v. *Dodge*, 9 Pick. 368. In an action for money paid by a surety, interest is recoverable from the time of payment without proof of a demand for re-payment. *Ilsley* v. *Jewell*, 2 Met. 168. "It is a well settled rule," says RADCLIFF, J., in *Lynch* v. *DeViar*, 3 Johns. Cases, 310, "that money received to the use of another, and improperly retained, carries interest." In *Reid* v. *Rensalaer Glass Co.*, 3 Cow. 426, it was

regarded as settled law in New York, that interest is recoverable on an open mutual cash account. This case came before the Court of Errors, 5 Cow. 587, where the allowance of interest was elaborately discussed. "It seems to me," says SANFORD, Ch., in that case, "that the Courts of Pennsylvania have seized on the true principle. They appear to put the allowance of interest on the fault of the party, who is to pay the money." In *Purdy* v. *Phillips*, 1 Kernan, 406, it was held that a sum of money payable by an instrument in which interest is not mentioned, which does not specify any time of payment, or that the money is payable on demand, draws interest from the date of the instrument.

When the defendant assigned his execution and paid the sum of one hundred dollars, the whole amount due Massachusetts for stumpage had been paid him by the plaintiffs; that is, by the credit on his account and by the judgment recovered for the balance in his favor, and by him assigned without recourse. The defendant must be regarded as holding the deductions to be allowed the plaintiffs or to be accounted for in some other way. He could not make any allowance on his judgment against them, for he had transferred it. Had the judgment been his, the amount discounted would at once have been applied to its discharge. But he had ceased to own it. The defendant should be in no better, and the plaintiffs in no worse condition, by reason of the transfer. The defendant is not, by his acts, to affect injuriously the rights of the plaintiffs. Interest was accruing on the judgment, the payment of which Massachusetts might enforce. The defendant had obtained judgment against the plaintiffs, as appears by his account, for the entire stumpage due from him to Massachusetts, and interest thereon. By the settlement effected he obtained a large discount. As the plaintiffs had paid, and were liable to pay interest, so they should receive it, otherwise the defendant would make a clear gain of interest.

The plaintiffs are entitled to interest, from the date of the settlements made respectively with Massachusetts and with Maine, on the deductions which were made on the stumpage

of the lumber referred to in the memorandum of the defendant as having been purchased in December, 1846.

The defendant is to be allowed for any reasonable costs, expenses or trouble, which may be shown to have been incurred in obtaining, or in endeavoring to obtain a deduction on the stumpage debts already referred to.

A default is to be entered and the damages are to be assessed by the Court, or some one appointed by them, if the parties thereto agree. *Defendant defaulted.*

TENNEY, C. J., and HATHAWAY, MAY, and GOODENOW, J. J., concurred.

COUNTY OF WASHINGTON.

BION BRADBURY *& als. versus* THOMAS JOHNSON.

The register of a vessel is not of itself, evidence of title, except as it is confirmed by auxiliary circumstances, showing that it was made by the authority or assent of the one who is sought to be charged as owner.

Without such connecting proof, it is not even *prima facie* evidence to charge a person as owner; and it is not conclusive evidence, even with such proof.

The register is no evidence in favor of a person claiming as owner, and is not legally admissible for that purpose.

In an action against a person as owner of a vessel, the register, if the oath of ownership is made by himself, is treated as an *admission*, which may be given in evidence to charge him. If the oath is made by another, without his assent, the person sought to be charged cannot be affected by it.

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

This was an action of ASSUMPSIT for a portion of the earnings of a brig.

The plaintiffs produced in evidence of their title, a copy of the register of the vessel. The particulars of the case fully appear in the opinion of the Court.

B. Bradbury, for plaintiffs.

Granger, for defendant.

RICE, J. —To establish their title to the brig the plaintiffs put into the case a copy of the register, issued at Machias, October 27, 1849, by which it appeared, that Albert Pillsbury owned one-half and Martha E. Bucknell, Otis Woodruff, John Mareen and the legal representatives of Jeremiah Bradbury, one-eighth each. Also a bill of sale, dated June 25, 1851, of one-eighth part of the brig from Martha E. Bucknell to the defendant. It was admitted that Bion Bradbury was administrator on the estate of Jeremiah Bradbury.

Plaintiff also introduced a writ in favor of Albert Pillsbury, Benjamin F. Bucknell & als. against this defendant, dated Jan. 15, 1852, and the defendant introduced the judgment recovered against him in that action.

To entitle the plaintiffs to maintain the action, they must prove title in themselves. For this purpose the copy of the register is relied upon. The registry acts are considered as institutions purely local and municipal, for purposes of public policy. The register, therefore, is not, of itself, evidence of property, except so far as it is confirmed by some auxiliary circumstance, showing that it was made by the authority or assent of the person named in it, and who is sought to be charged as owner. Without such connecting proof the register has been held not to be even *prima facie* evidence to charge a person as owner; and even with such proof it is not conclusive evidence of ownership; for an equitable title in one person may well consist with the documentary title, at the custom house, in another. Where the question of ownership is merely incidental, the register alone has been deemed sufficient, *prima facie*, evidence. But in favor of the person claiming as owner, it is no evidence at all, being nothing more than his declaration. 1 Greenl. Ev. § 494; *Tinkler* v. *Walpole*, 14 East, 226; *Frazer* v. *Hopkins*, 2 Taunt. 5; *McIver* v. *Humble*, 16 East, 169; 1 Starkie's Ev., part 2, § 53; 1 Phil. Ev., 411.

But though the production of the register or certificate, in which his name is omitted, is conclusive to negative the interest of the assured, yet its production with the name inserted,

is not, in itself, without *more*, even *prima facie* of his title. Arnold on Ins., 1327.

The register cannot be rendered evidence in favor of the person who procured it to be made, though it may be against him. *Ligon* v. *Orleans Navigation Company*, 7 Martin's Lou. Rep. N. S. 682. The certificate of registry is not even *prima facie* evidence of ownership. *Pirie* v. *Anderson*, 4 Taunt. 652; 2 Saund. Plead. & Ev., 237.

In an action against a person, as owner, the register, if the oath of ownership is made by himself, is treated as an *admission*, which may be given in evidence to charge him; if made by another person, and his assent thereto is not proved, it is the *declaration* of another party, which cannot affect him. But when offered by a party to establish his own title, it is simply a proposition to prove his own declarations for his own benefit, and therefore inadmissible for that purpose.

There is no evidence, aside from the register, which tends to prove title in the plaintiff. The writ and judgment in the former case, repels such a presumption. They tend to prove that *Benjamin F. Bucknell*, was one of the owners, and there is no evidence that he has parted with his interest. The account rendered by the defendant throws no light upon the subject, as it was rendered against the brig Agate and *owners*, and is the same that was rendered before the commencement of the former action.

We think the evidence introduced wholly fails to establish ownership in the plaintiffs, and therefore, according to the agreement of the parties, the action must stand for trial.

New trial granted.

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

OBADIAH HILL *& ux. versus* GILBERT NASH.

To invalidate a deed at common law, on the ground of insanity of one of the parties to it, an entire loss of the understanding must be shown. But weakness of intellect is a fact to be weighed by the jury, in determining whether the conveyance was fraudulent.

While a man is legally *compos mentis*, though of weak mind, he has the right of disposing of his property, and neither courts of law nor of equity will inquire into his wisdom, or want of it, in the disposition of it.

Where there is conflicting evidence on the question of insanity, the jury must settle the question as one of fact. Difference of opinion on this point between the Court and jury would not authorize the former to set the verdict aside.

ON MOTION FOR NEW TRIAL. From *Nisi Prius*, MAY, J., presiding.

This was an action, in a plea of land, in which the plaintiffs demanded, in right of Mrs. Hill, one of the plaintiffs, a certain lot of land. The declaration alleged seizin in Mrs. Hill within twenty years, and a disseizin by the tenant, and also contained a claim for the rents and profits for six years. The general issue was pleaded, and the following specifications of the grounds of defence were filed:—

1. Tenant did not disseize.

2. Mrs. Hill had no seizin or possession within twenty years before the commencement of the action.

3. Legal title in the heirs of Holmes Nash, deceased, and derived by conveyance from Abraham Nash, deceased, the ancestor of Mrs. Hill.

4. (As amended,) legal title in defendant, and was so at the commencement of the action, by descent from George W. Nash, his father, by whom it was derived by descent from Holmes Nash, his grandfather, the legal grantor of said Abraham Nash.

It was proved and admitted, that the title and seizin of the demanded premises were in Abraham Nash in 1835 and 1836; that he deceased in 1845 or 1849; that Mrs. Hill was one of his seven children; and that the tenant is the grandson of Holmes Nash, deceased, and the son of George W. Nash, deceased.

The verdict was for the tenant, and the demandants moved that the verdict be set aside and a new trial granted:—1. Because it was against law;—2. Against evidence;—3. Manifestly against the weight of evidence.

The main point in issue was whether Abraham Nash, at the time of the conveyance, was incompetent, by reason of mental imbecility, to make a valid transfer of the estate.

J. A. Lowell and *R. K. Porter*, for demandants.

1. The Courts will set aside the verdict and grant a new trial when the verdict is against the *law;* against the *evidence;* or manifestly against the *weight* of *evidence*. *Goddard* v. *Cutts & al.*, 11 Maine, 440; *Warren* v. *Gilman*, 15 Maine, 70; *Smith & al.* v. *Richards*, 16 Maine, 200; *Bank of Cumberland* v. *Bugbee & al.*, 19 Maine, 27; *Kidder* v. *Flagg*, 28 Maine, 407; *Wells* v. *Waterhouse*, 22 Maine, 131; *Thomas & al.* v. *Hatch*, 3 Sumn., 170; *Glidden* v. *Dunlap*, 28 Maine, 379; *Eveleth & al.* v. *Harmon*, 33 Maine, 275; *West Gardiner* v. *Farmingdale*, 36 Maine, 252; *Weld* v. *Chadbourn*, 37 Maine, 221; *Coombs* v. *Topsham*, 38 Maine, 204.

In Massachusetts the whole current of decisions is the same way. It is sufficient to cite a few of them. The following are among the leading cases. *Hammond* v. *Wadhams*, 5 Mass. 353; *Bryant* v. *Commonwealth Insurance Co.*, 6 Pick., 131, and same case, 13 Pick. 543; *Coffin* v. *Phœnix Insurance Co.*, 15 Pick. 291; *Cunningham & al.* v. *Magoun & al.*, 18 Pick. 13; *Davis* v. *Jenney*, 1 Metc. 221.

2. If Abraham Nash was not of sound mind, then the conveyance, although not absolutely void, was voidable, and might be set aside by him or his heirs. 2 Black. Com. 291; 2 Kent's Com. (4th ed.) 451; 2 Kinne's Law Comp. 133; 1 Bouv. Law Dic. 510; 2 Greenl. Ev. § 369, 370; and various other citations.

G. F. Talbot, for respondent.

APPLETON, J.—On the 12th of December, 1836, Abraham Nash conveyed to Holmes Nash, under whom the defendant derives his title, the premises in dispute. The deed is sought

to be set aside on the ground of mental imbecility in the grantor at the time of the conveyance.

"A person being of weak understanding, is not, of itself, any objection in law to his disposing of his estates, if he be legally *compos mentis;* whether wise or unwise, he is the disposer of his own property; and his will stands as reason for his actions. Neither courts of law nor equity examine into the wisdom or prudence of men in disposing of their estates. The rules of judging of insanity are the same in courts of equity as in courts of law." Shelford on the law of Lunatics and Idiots, 267.

In *Jackson* v. *King*, 3 Cow. 207, the facts very much resembled those in the case at bar. In that case it was held that to affect a deed at common law, an entire loss of the understanding must be shown, but that weakness of intellect is a fact to be weighed in determining whether the conveyance was fraudulent or not.

It was held, in *Beals* v. *See*, 10 Barr. 56, that an executed contract for the purchase of goods, before the day from which the inquest finds the vendee to have been *non compos*, cannot be avoided by proof of insanity at the time of the purchase, unless there has been a fraud committed on him by the vendor, or he had knowledge of his condition.

The intellectual capacity of the grantor and the circumstances attending the conveyance were submitted to the decision of the jury, with instructions to which no exceptions have been taken. There was conflicting evidence before them, the force and effect of which was for their consideration. The Court might have come to a different conclusion as to the weight of evidence. To set aside a verdict for such a cause merely, would be to withdraw the final determination of facts from the jury and transfer that duty to the Court.

The jury have settled the facts in the case, and no sufficient reason is perceived for disturbing their decision.

Motion overruled.—Judgment on the verdict.

TENNEY, C. J., and HATHAWAY, MAY, and GOODENOW, J. J., concurred.

WILLIAM FREEMAN, JR., *versus* WILLIAM MOREY.

A motion for a new trial, because the verdict was against evidence, should set forth what the verdict was, in whose favor, and should be accompanied by a report of the evidence in the case.

A. contracts with B. to deliver him, at a time and place specified, certain mill machinery, a part of which is iron castings and which it is agreed by the parties shall be made by D. — *Held*, that A., having contracted to deliver them, would be responsible for the non-delivery of them, although prevented from so doing by the failure of D. to have them ready.

The true rule for the government of a jury in the assessment of damages in an action for a breach of contract, is to hold the defendant responsible for such damages and such only as are the *immediate and necessary* result of the defendant's breach of his contract with the plaintiff.

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

This was an action of ASSUMPSIT upon a contract. The writ, dated December 14, 1854. Plea, the general issue. Specifications of defence were waived by plaintiff. The contract was stated by George W. Wakefield, a witness called by plaintiff, to be as follows: — "Morey was to furnish the machinery and iron works for the mills which the plaintiff was about erecting in Cherryfield, a schedule of which articles was given him. The first part of the work was to be furnished by the first of March, and the last part by the first of May, 1854. There were no prices mentioned. The work was to be delivered in Cherryfield."

"The work that came first was received the first of May, being the gates, racks and slides for carriages which came direct to Freeman from Scales & Robinson. We received gang dogs, and spiders to get the work along in March and to do the shop work. The great body of the articles arrived the last of May or first of June."

One of the articles to be furnished by defendant was Babbitt metal to pack the boxes on the hand of the gang, and evidence was introduced to show that it was of an inferior quality.

Damages were claimed upon two grounds: — 1. For delay and additional expense in the construction of the mill, in con-

sequence of the failure of the defendant to furnish the machinery at the time stipulated in the contract.

2. For furnishing a poor quality of Babbitt metal for packing the boxes on the hand of the gang saw, whereby he sustained further loss of the use of his mill and was subjected to additional expense.

After the evidence was in, defendant's counsel requested the presiding Judge to instruct the jury that if, from the evidence, they found that, at the time of the contract between the plaintiff and the defendant, it was agreed between them that Scales & Co., (machinists,) should make the castings for the plaintiff, then Morey would not be responsible for damages resulting from any failure of Scales & Co. to furnish the castings in season; which he declined to do, but did instruct the jury as follows:—

That defendant would be responsible for damages resulting from the omission to deliver the castings at the time and place agreed upon, if the contract for their delivery was with defendant, notwithstanding the parties had agreed that they were to be cast by Scales & Co., and that what was the agreement between plaintiff and defendant, was for the jury; that, if defendant was not bound to furnish the castings, he would not be responsible for any damage arising from their not having been seasonably furnished; that, if the defendant furnished Babbitt metal which was worthless, he would be responsible for damages arising therefrom; that the measure of damage would be the loss accruing to the plaintiff for the inability to use, or the loss of the use of his mill, till he could, after he was apprised of the character of the metal, in the exercise of due diligence, have obtained the kind of metal required for his mill, together with the difference in value between good Babbitt metal and the article actually furnished at the time and place of its delivery.

The verdict appears to have been for the plaintiff. Exceptions to the above instructions were taken, and a motion for a new trial was made, by defendant.

Bradbury and *Walker* argued in support of the exceptions,

and cited *Furlong* v. *Polleys*, 30 Maine, 493; *Bridges & al.* v. *Stickney*, 38 Maine, 361.

J. Granger and *Freeman*, for plaintiff, cited *Furlong* v. *Polleys & al.*, 30 Maine, 491; *Miller* v. *Mariners' Church*, 7 Greenl. 51; *Fox* v. *Harding*, 7 Cush.; *Johnson* v. *Arnold*, 2 Cush. 46; *Medeeston* v. *Mayor of Brooklyn*, 7 Hill, 61.

HATHAWAY, J.—Exceptions and a motion for new trial because the verdict was against evidence.

Concerning the motion for a new trial, the case does not show what the verdict was, nor in whose favor, only as it may be inferred from the defendant's motion; and there are a number of depositions referred to as constituting a part of the evidence, copies of which have not been furnished, and without which, the Court cannot decide the question, with the requisite knowledge of the facts proved; and, besides, there seems to be no doubt, that the plaintiff was entitled to recover something for the deficiency in the Babbitt metal, and the Court has no means of knowing, whether the verdict was rendered upon that ground alone, or upon that, in connection with the other grounds upon which damages were claimed. As the case is presented, the motion for a new trial cannot be sustained.

As to the exceptions, no error is perceived in the rulings of the Judge who presided at the trial, only in relation to the measure of damages sustained by reason of the worthless or unsuitable character of the Babbitt metal, furnished by the defendant.

The principles, upon which damages should be assessed in such case, have been so recently and elaborately examined and determined by this Court, in *Bridges* v. *Stickney*, 38 Maine, 361, that a reference to that case is sufficient to show that the instructions upon that subject were erroneous, according to the law as therein decided.

Exceptions sustained and new trial granted.

TENNEY, C. J., and APPLETON, MAY, and GOODENOW, J. J., concurred.

EDWARD A. MANSFIELD *versus* ISRAEL D. ANDREWS.

An action on a contract made in New Brunswick, and to be performed there, must be governed by the laws of that province.

A discharge in bankruptcy in New Brunswick on such contract, if held valid in that province, will also be held valid in this State.

The certificate of such discharge is admissible in the Courts of this State as evidence, *prima facie*, of the facts stated therein, and that the proceedings in bankruptcy were regular. But the certificate must show when the defendant became a bankrupt, and when the fiat in bankruptcy issued; and there must also be evidence that the contract in suit was provable under such fiat.

When the protection of a bankrupt law is invoked, the defendant must show, in the first instance, that he is within its provisions.

ON AGREED STATEMENT OF FACTS. From *Nisi Prius*, CUTTING, J., presiding.

This was an action of ASSUMPSIT on two promissory notes, executed by the defendant, at St. John, N. B., Nov. 20, 1848.

The plea was the general issue, with a brief statement setting forth the discharge of the defendant in bankruptcy, under the bankrupt laws of New Brunswick.

It was admitted that the defendant resided at St. John, N. B., at the date of the notes.

The defendant put into the case certain bankrupt Acts passed by the General Assembly of New Brunswick. He also offered a certificate of discharge "from all debts due by him when he became bankrupt, and from all claims and demands provable under a fiat in bankruptcy, awarded and issued against him," (said defendant.) The certificate bore date January 30th, 1849, and there was indorsed thereon a certificate of conformity, dated May 2, 1849.

To the admission of said certificate the plaintiff objected, until the defendant should show that the proceedings in bankruptcy had been in all things conformable to law. But the Judge overruled the objection, and permitted said certificate to be read to the jury. The plaintiff contended that the defendant was bound to show the date of defendant's becoming bankrupt, the date of the fiat, and what debts and

demands were provable under the same, that it might appear whether the said discharge extended to and embraced the notes sued in this action; and the Judge ruled that it was incumbent upon the plaintiff to produce such proof.

The case was then taken from the jury by consent, and referred to the full Court. If the Court be of opinion that the evidence put into the case by the defendant, or any part thereof, should not have been admitted, or if admissible, that such evidence constitutes no defence to the action, the defendant is to be defaulted; otherwise the cause is to stand for trial.

Thacher, for plaintiff.

1. The certificate of discharge, if rightly admitted, is no bar to the suit, because it discharges the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made provable under the fiat. Unless it be shown, in some way, when he did become bankrupt, and whether the contracts sued in this action were provable under the fiat, the Court cannot determine whether the discharge applies to this contract. Laws of New Brunswick, 5 Vict. c. 43; 6 Vict. c. 4.

2. The defendant should have pleaded that the cause of action accrued before he became bankrupt; or, under our statute, filed a brief statement to that effect, and proved the fact in evidence. Laws of New Brunswick, 7 Vict. c. 31, p. 29.

B. Bradbury, for defendant.

The defence to this action is a discharge from the debt sued for by virtue of the bankrupt laws of the British Province of New Brunswick.

The Act of April 4, 1842, (section 14,) provides, "that every bankrupt who shall have duly surrendered, and in all things conformed to the provisions of this Act, shall be discharged from all debts due by him at the time of issuing the fiat, and from all claims and demands against him, in case he shall obtain a certificate of such conformity so signed and allowed," &c.

The counsel contended, — 1. That by this section of the Act, the bankrupt is to be discharged from all debts due by him at the time of granting his certificate.

2. That this general provision is not repealed by the subsequent Act of April 11, 1843.

3. The bankrupt's certificate of discharge is *prima facie* evidence, that all the prior proceedings were regular and proper, and of all the facts stated therein. *Morrison* v. *Albee*, Allen's New Brunswick Reports, vol. 2, p. 157.

4. The statutes of New Brunswick nowhere provide as to what debts, claims or demands are provable under a fiat in bankruptcy.

RICE, J.—Assumpsit on two promissory notes for $200 each, dated St. John, N. B., Nov. 20, 1848, and payable, one in three months and one in six months. The defence is a discharge in bankruptcy, under the laws of New Brunswick. The contract having been made in New Brunswick, and that being the place for its performance, the case will be governed by the laws of that province. A discharge of the defendant in bankruptcy, which would be held valid under the laws of New Brunswick, will, therefore, be held valid here. *May & als* v. *Breed & al.*, 7 Cush. 15.

The defendant put into the case a certificate of discharge in bankruptcy, and also the several Acts of the province of New Brunswick, now in force, in relation to bankruptcy.

By Act of 6th Victoria, c. 4, passed April 11, 1843, § 24, it is provided, "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 provable 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."

By § 5, c. 31, of Act of 7th Vict., passed April 13, 1844, it is provided, "that any bankrupt who shall, after such certifi-

cate shall have been confirmed, be arrested, or have any action brought against him for any debt, claim or demand, provable under the fiat against such bankrupt, shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this Act and this special matter in evidence."

The certificate of conformity and discharge were properly admitted in evidence, and they are to be received as evidence, *prima facie*, of the facts stated therein; and that the proceedings in bankruptcy were regular. But this certificate does not show when the defendant became a bankrupt, nor when the fiat issued; nor is there any evidence that the notes in suit were provable under such fiat. These facts should be made to appear to constitute a defence. The burden was on the defendant to show, in the first instance, that he was within the provisions of the bankrupt laws, whose protection he invokes. This he has failed to do, and therefore, according to the agreement of the parties, a default must be entered.

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

INHABITANTS OF CUTLER *versus* EBENEZER C. MAKER.

A justice of the peace is not authorized by the statute to take depositions in cases where he is, or has been counsel or attorney.

But such justice may issue notices to the adverse party, returnable before another magistrate.

The cause of action by one town against another for the support of a pauper, accrues at the time of the delivery of the notice that the expenses have been incurred. At that time the statute limitation of two years, within which the action is to be commenced, begins.

Under R. S., c. 32, § 50, a town may recover of a pauper the expenses incurred by it for his support, whether legally settled in such town or not.

A form of notice to be given by the overseers of the poor of one town to those of another in relation to supplies furnished to, or expense incurred for a pauper, may be found in the case of *Kennebunkport* v. *Buxton*, 26 Maine, 61.

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

This was an action of ASSUMPSIT to recover a sum of money,

alleged by the plaintiffs to have been paid by them to the town of Rockland, for the support and relief of the defendant as a pauper.

The general issue was pleaded and joined. To make out the case, on the part of the plaintiffs, they offered the deposition of one Elkanah S. Smith, taken in Rockland; but the adverse party was not present.

The magistrate who took the deposition, certified that the adverse party was notified by George F. Talbot, justice of the peace, said Talbot being the *attorney of the plaintiffs.*

The deposition was objected to by the defendant on the ground, that he was not notified of the taking according to law. But the presiding Judge overruled the objection. The plaintiffs also introduced, and read as evidence to the jury, the deposition of George S. Wiggin. The plaintiffs also introduced as a witness one Isaac Wilder, who testified, that he resided in Cutler; has resided there about fifteen years; is acquainted with defendant, Ebenezer C. Maker; that he is usually called "*Eb Maker;*" no other Eben'r Maker in Cutler; that he knew the defendant went to Rockland in the spring of 1852, that is, that he *started* to go there; that from 1852 to the present time, the pecuniary circumstances of the defendant have been very poor; that he, Wilder, was postmaster in Cutler in April, 1852; that the memorandum on the top of the envelope annexed to Smith's deposition, dated April 28, 1852, is in his, (Wilder's,) handwriting, and was made by him at the time the letter was received in Cutler, &c.

Upon this evidence, the defendant contended, that the action was not by law maintainable; that there was no proof of the identity of defendant with the person who fell into distress and was relieved by the overseers of the poor of Rockland; that no legal notice was given to Cutler; that defendant had no legal settlement in Cutler at the time the supplies were furnished and the expenses incurred; and that the inhabitants of Cutler were not obliged by law to pay the money to Rockland when it was paid, more than two years having

expired after the supplies were furnished and the expenses incurred. But the several points of law, raised by the defendant, were, for the purposes of the trial, overruled by the Court. The jury returned a verdict for the plaintiffs.

To the foregoing directions, judgment and opinions of the presiding Judge the defendant excepted.

George F. Talbot, attorney for plaintiffs.

1. The deposition of Elkanah S. Smith, was properly admitted by the Court. Section 5 of c. 133 of the Revised Statutes, provides that a justice of the peace, upon application to him by either party to procure the deposition of a witness, may issue a summons to the deponent, and also a notice to the adverse party, to take the deposition of such witness, before himself or any other justice or notary. It does not require the justice to be disinterested or not of counsel, probably for the reason that the act of giving notice is a mere ministerial act, and one which cannot affect the character of the evidence, or the result of the judgment betwixt the parties litigant. The filling up of the notification is a mere clerical act; the party, and not the magistrate, indicating the names of the witnesses, and selecting the time and place for taking their testimony, to suit his own convenience. An interested or corrupt magistrate, though disposed, could not prejudice either party by his manner of giving notice, because if his notification was irregular in form or objectionable in substance, a magistrate, required to be disinterested, or in case the notification was annexed to the deposition, the tribunal to try the rights of the parties, would set it aside.

If a notification to take a deposition be given by the attorney of one of the parties, and such attorney should undertake to take such deposition, it would be illegal, not because the *notice* was illegal, but because the *taking* was illegal.

2. The question of the identity of the person named in the notice and the defendant, is only open to the defendant, as a reason for excluding the deposition. The fact of iden-

tity, upon the evidence given by Wilder, and the whole testimony, has been found by the verdict of the jury.

3. The counsel for defendant makes two points against the suit being maintainable; (1st,) on the ground that the action should be brought against the defendant by the inhabitants of Rockland, and (2d,) that the suit is not maintainable because defendant is a pauper, and there was no legal consideration for a promise to pay the demand sued; which points may be answered thus: —

(1st.) The action is rightly brought by plaintiffs against defendant, under § 50, of c. 32, of Revised Statutes: — "Any town which has incurred expense," (the language is general, and covers expense incurred directly in furnishing supplies, and expense incurred by paying for supplies furnished by another town, and which plaintiff town was legally bound to reimburse,) "may recover the amount of the same against such person."

In *Alna* v. *Plummer*, 4 Maine, 258; *Hanover* v. *Turner*, 14 Mass, 227, and *Medford* v. *Learned*, 16 Mass. 215, it has been held that the relieving town might look to the town where the person relieved had his settlement, or directly to the person relieved, for reimbursement.

(2d.) The fact that defendant was a pauper, and that therefore there could be no legal consideration for a promise to reimburse a town for expenses incurred for him, would be a good defence, in the absence of any statute provision upon the subject, and the Court seemed so to construe it in the case of *Medford* v. *Learned*, where they refused to give a retroactive effect to a provision of the Massachusetts Statutes, similar to § 50, c. 133, of our Revised Statutes.

4. The town of Cutler was under legal obligation to pay the amount incurred for the relief of defendant at the time they so paid it, viz., March 1, 1854. The notice to the town of Cutler, by the town of Rockland, was mailed April 23, 1852, and received at Cutler April 28, 1852. Section 29 of c. 32, R. S., provides that the expenses incurred by any town, for the relief of a pauper of another town, found there in dis-

tress, "three months next before written notice given to the town to be charged, may be sued for and recovered by the town incurring the same against the town which is liable for the same in an action at law, provided that such action for damages be instituted within two years after the cause of action shall have arisen, but not otherwise." Here is a limitation within which this class of actions must be brought. The commencement of this period is clearly intelligible; it is three months prior to giving notice, if supplies had been furnished so early. It dates from a period calculated, not upon the time that supplies were furnished, but upon the time notice was given.

The termination of the limited period is equally explicit and unmistakeable; it is two years next after the cause of action has arisen. When does the cause of action arise? Not at the furnishing of the supplies, for that alone furnishes neither a moral nor a legal consideration of a promise to pay. Not certainly at the furnishing of the supplies; for if so, then a suit might be commenced prior to giving notice, and without giving notice. The town has no cause of action but a legal cause of action, and has not that until the legal preliminary of notice has been complied with. The cause of action arises, then, *at the giving of the notice*, and extends thence a period of two years. *Uxbridge* v. *Seekonk*, 10 Pick. 150; *Attleborough* v. *Mansfield*, 15 Pick. 19.

J. A. Lowell, for defendant.

1. The deposition of Elkanah S. Smith was improperly admitted, there having been no legal notice to the adverse party; the justice who issued the notice being the attorney of the plaintiffs of record, and conducting the case on their part at the trial. R. S., c. 133, § § 2, 5, and Act of 1849, c. 119.

2. *No legal notice was given by the overseers of Rockland to the overseers of Cutler.* Without the deposition of Smith it would not appear what notice, or whether any notice was given. The defendant's name is *Ebenezer* C. Maker. The letter from the overseers of Rockland, dated Jan. 20, 1854, attached to George S. Wiggin's deposition, says the supplies were fur-

nished to *Eben* Maker, a pauper belonging to the town of Cutler, in Feb. 1852.

3. *The action is not by law maintainable.* Section 50 of c. 32, which is relied upon on the other side, does not authorize such an action as this, where one town has paid money to another town for expenses incurred by such other town for the relief of one, who had fallen into distress in such other town. It was intended for the benefit of the town which had incurred the expense in the support of the pauper, or person relieved, that they might have a right of action against *him*, as well as against the town in which he had his lawful settlement; for they might lose their cause of action against the town, by neglect or otherwise, and, by this section, if he had property, or should thereafter procure any, the action might be maintained against him, if commenced within six years after the expenses were incurred.

The language of the section seems to warrant this construction; viz.: — "Any town which has incurred expense for the support of any pauper, whether legally settled in such town or not, may recover the amount of the same against such person, his executors or administrators, in an action of assumpsit." This would authorize Rockland to maintain the action against the person relieved. 12 Mass. 328; 4 Maine, 258; 14 Mass. 227.

4. The inhabitants of Cutler were not obliged by law to pay the money to Rockland when it was paid, March 1, 1854, more than two years having elapsed after the supplies were furnished and the expenses incurred.

The right of a town to recover for expenses incurred in the relief of a pauper by an action at law against the town in which the pauper has his lawful settlement is *conditional*, (§ 29,) "provided that such action for damages be instituted within two years after the cause of action shall have arisen; but not otherwise." *Readfield* v. *Dresden*, 12 Mass 317; *Harwich* v. *Hallowell* 14 Mass. 185; *Hallowell* v. *Harwich*, 14 Mass. 186. These were cases under the statute of Mas-

sachusetts, 1793, c. 59, § 9, which contains the same proviso, in the same language, as our own statute.

HATHAWAY, J. — The defendant contends that the rulings of the Judge who presided at the trial, were erroneous in sundry particulars, as presented by his bill of exceptions.

The statute confers general authority upon a justice of the peace to take depositions, but not in cases where he is or has been counsel or attorney.

The statute also confers general authority upon a justice of the peace to issue notices to the adverse party, without any restriction as to his being or having been counsel or attorney in the cause.

It is often convenient, in practice, for an attorney in a cause to issue such notice, and if he is a justice of the peace, he is authorized by the statute to issue it returnable before another magistrate, as was done in this case.

The notice given by the overseers of Rockland to the overseers of Cutler, seems to have been copied from the notice given in *Kennebunkport* v. *Buxton*, 26 Maine, 61, which was held sufficient.

The action is legally maintainable by R. S., c. 32, § 50.

The cause of action by one town against another accrues at the time of the delivery of the notice that the expenses have been incurred, and the statute limitation of two years, within which the action is to be commenced, begins at that time. *Camden* v. *Lincolnville*, 16 Maine, 384; *Augusta* v. *Vienna*, 21 Maine, 298.

The two years had not elapsed when the plaintiffs paid the money to Rockland, and they were then legally liable to pay it. *Exceptions overruled.*

Judgment on the verdict.

TENNEY, C. J., and APPLETON, GOODENOW and MAY, J. J., concurred.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT,

1856.

COUNTY OF CUMBERLAND.

OSBORN A. MELCHER *versus* NATHANIEL MERRYMAN *& als.*

In an action of trespass, *quare clausum*, deeds, not embracing any part of the premises in controversy, nor appearing to be important in tracing the title or explaining the possession of the parties, in short, not shown to afford either material or competent evidence, are inadmissible.

A deed having been once properly rejected as inadmissible, on the ground that it was not shown to have had any connection with the question in controversy, cannot be regarded as before the Court for admission, at a subsequent stage of the proceedings, when by the introduction of other testimony the foundation had been laid for its reception, unless it is again offered in evidence, and no exceptions can lie in such case.

If a line between lots was originally run and marked by monuments, it will remain the legally established line, so long as it can be ascertained. Monuments will control courses and distances.

An original line, shown to have been run and marked, is to be ascertained by tracing it from monument to monument, and in direct lines from one to the next, whether more or less distant.

A person's possession is presumed to be co-extensive with his grant, where there is no adverse possession.

Such possession is sufficient to enable the person to maintain *trespass quare clausum fregit.*

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

This was an action of trespass, *quare clausum*. Plea, general issue and brief statement. The verdict was for the plaintiff. The defendants filed exceptions to certain rulings and instructions of the presiding Justice, which are sufficiently stated in the opinion of the Court.

Shepley & Dana, for plaintiff.

1. The presiding Judge properly excluded the deeds offered by the defendants, which deeds did not embrace any portion of the land in controversy, as they admitted. 1 Greenl. Ev. § 145; 1 Phil. Ev., 243—245.

The principle is not different from that regulating the introduction of maps and plans. It is the same as if defendants had offered such maps or plans of premises other than the *locus*, which, even if they had related to the line in dispute, would not be admissible. 1 Phil. Ev., 250; *Doe* v. *Lakin*, 7 Carr. & P. 481; *Bridgeman* v. *Jennings*, 1 L'd Raym., 734.

2. The instruction was correct, that "If the line between the lots, (in dispute,) was originally run and marked by monuments on the face of the earth, the line so first run and marked, if it could now be ascertained where it was, would establish that line; that the jury would consider whether there was satisfactory evidence that the line was so run and marked, and, if so satisfied, that line would be ascertained by extending it from one of those monuments, or the place where it stood, to the next monument on the line, or the place where it stood, whether those monuments were more or less distant from each other," &c. *Allen* v. *Kingsley*, 16 Pick., 235.

Gilbert, for defendants, in reply, argued at length, and referred to the following authorities:—*Brown* v. *Gay*, 3 Greenl. 126; *Wyat* v. *Savage*, 3 Fairf. 429; *Lincoln* v. *Edgecomb*, 28 Maine, 280; *Pro. Ken. Purchase* v. *Laboree & als.*, 2 Greenl. 274; *Putnam Free School* v. *Fisher*, 34 Maine, 172.

Howard, J. — Whether the plaintiff was entitled to a verdict, upon the evidence, cannot now be the subject of in-

quiry, as the appropriate motion and report for that purpose are wanting. The exceptions present no such question.

Exceptions were taken to the exclusion of certain deeds offered in evidence by the defendants. The deed, Rodick to Bishop, did not embrace any part of the premises in controversy; nor did it appear to be important, either in tracing the title, or explaining the possession of the parties, or those through whom they claimed. The defendants failed to show that, when presented, it would furnish material or competent evidence, and it was therefore properly excluded.

When the deeds of Dunlap to Melcher, and Dunlap to Thomas Merryman, were offered by the defendants, the plaintiff had not shown or claimed any right or title through any of the parties to those conveyances; and, as it was admitted that they did not purport to embrace any of the land in controversy, they were not then material, and their exclusion was then proper, and furnished no just ground of exception. If, subsequently, the plaintiff, by introducing evidence of title derived through Dunlap, opened the way for the admission of Dunlap's deed to Melcher, previously offered by the defendants, and then excluded, it could not be considered as in the case, or before the Court, unless again offered as evidence. It could not be available to either party until it was offered, after it had become admissible, and was then either admitted or rejected. It appears, however, that when the counsel for the defendants referred, in his argument, to that deed as explaining, or referring to a corner named in a deed offered by the plaintiff, the counsel of the latter withdrew his objections to its introduction for that purpose. But then, even, it was not introduced, and formed no part of the evidence presented, after it had been legally rejected.

Exceptions were also taken to the directions of the presiding Justice, respecting the rules to be observed in determining the line between the lands of the parties to the suit. It was admitted, that they claimed to be owners of land in different adjacent lots; neither claimed any rights upon

the lot of the other. It became important at the trial for the jury to determine where the line between those lots would fall, and whether it was originally run and traced upon the earth. To enable them to determine those facts, they were referred to the evidence, with directions that an original location of the line, if shown to have been run and marked, was to be ascertained by tracing it from monuments established, or places where monuments were proved to have been placed or found in such location, in direct lines, whether such monuments were more or less distant from each other.

No substantial objection is perceived to these instructions, while the doctrine prevails, that in tracing and determining lines upon the face of the earth, monuments should control courses and distances, and while straight lines between given points are the shortest and most direct.

That the plaintiff's possession should be considered as coextensive with his grant, where there was no adverse possession, cannot be questioned; indeed, the principle is admitted by the defendants to be sound, though its application is held by them to be incorrect, upon the facts supposed to be proved. Such possession is sufficient to enable the plaintiff to maintain *trespass quare clausum fregit.*

Exceptions overruled.—Judgment on the verdict.

RICE and CUTTING, J. J., concurred.

SCARBOROUGH *versus* COMMISSIONERS OF CUMBERLAND COUNTY.

County Commissioners have not jurisdiction in *all* cases of refusal by towns to approve and allow of ways laid out by their selectmen.

In such cases, their jurisdiction is conferred and defined by statute.

Their records must show jurisdiction, or their proceedings may be avoided without legal process for that purpose.

The Commissioners obtain jurisdiction only when the petition on record presents a case within the provisions of statute.

Scarborough *v.* County Commissioners.

THIS was a petition of the inhabitants of the town of Scarborough for a writ of *certiorari*, ordering the Court of County Commissioners for the county of Cumberland, to certify their records for the inspection of this Court, to the end that so much thereof as is illegal and erroneous may be quashed. The petition alleged several errors.

E. L. Cummings, for petitioners, contended:—

1. County Commissioners can only have jurisdiction in a particular case, by the existence of those preliminary facts which confer it upon them. A general jurisdiction merely, by law, over the subject matter, is not enough, and their records must disclose the facts upon which their jurisdiction is founded. *Small* v. *Pennell*, 31 Maine, 270; *Pettengill* v. *County Com. Ken.*, 21 Maine, 382; *Ex parte Pownal*, 8 Maine, 271; *State* v. *Pownal*, 10 Maine, 24; *Commonwealth* v. *Coombs*, 2 Mass. 489; *Commonwealth* v. *Great Barrington*, 6 Mass. 492.

2. When County Commissioners have rendered a judgment in a matter over which they have no jurisdiction, this Court cannot refuse to grant a writ of *certiorari*. *Bangor* v. *County Commissioners*, 30 Maine, 270.

The counsel, in support of his positions, also referred to the following authorities:—R. S., c. 25, §§ 29, 34; *North Berwick* v. *County Com. York*, 25 Maine, 69.

Fessenden and *Butler*, for respondents.

SHEPLEY, C. J.—By the record of their proceedings, it appears that the Commissioners proceeded to view and adjudicate upon a town way laid out by the selectmen of the town, which the town had refused to approve and allow.

In such cases, their records must show that they had jurisdiction, or their proceedings may be avoided without any legal process for that purpose. *Small* v. *Pennell*, 31 Maine, 267.

They have not jurisdiction in all cases of refusal by towns to approve and allow of ways laid out by their selectmen. Their jurisdiction in such cases is conferred and defined by the provisions of the statute, c. 25, § 34. They can act only

upon a petition of some person aggrieved by such refusal or delay, "if such way lead from land under his possession and improvement to any highway or town way." It does not appear in this case, that the way which the town refused to approve did lead from land under the possession and improvement of any of the petitioners. It does appear to have been laid out over the land of some of them. It might be presumed from their being owners, and having damages awarded to them as such, that they were in possession. But that would not be sufficient. The way must not only lead from land under his possession, but it must be under his improvement. A person may be the owner and be in possession of land not under improvement. The intention appears to have been, to permit persons having land under their possession and improvement, when the town refused to approve of a way laid out and leading from such land to a highway or town way, to apply to the Commissioners for redress. But others, not thus situated, are not authorized to do so. The Commissioners obtain jurisdiction only when the petition or record presents a case within the provisions of the statute.

All the facts presented by the record may be true, and the Commissioners would have no jurisdiction.

It will not be necessary to notice the other alleged errors.

Writ granted.

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

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MANDAMUS.

1. *Mandamus* is not grantable of right but by prerogative, and it is the absence of a specific legal remedy which gives the Court jurisdiction to dispense it. It cannot be granted to furnish an easier or more expeditious remedy. *Baker* v. *Johnson*, 15.

2. So, also, the writ will be granted, if it be *doubtful* whether there be another effectual remedy, or if the Court does not clearly see its way to one. *Ib.*

3. There ought, in all cases, to be a *specific legal right*, as well as the want of a *specific legal remedy*, in order to lay the foundation for a *mandamus*. *Ib.*

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MARRIED WOMAN.

1. In a suit against a married woman, upon a contract entered into by her while she was married, having a husband residing in this State, but accustomed to trade and do business as a *femme sole*, and living separate from her husband, the coverture of the defendant is a perfect defence. *Fuller* v. *Bartlett*, 241.

2. Coverture, under such circumstances, may be proved under the general issue. *Ib.*

3. By the common law, a note made payable to a married woman, is a note to the husband. It instantly becomes his property; and her indorsement of it transfers no property in the note. *Hancock Bank* v. *Joy*, 568.

4. By the statutes of this State, the wife is allowed to act as *sole*, in reference to the management of her own estates. *Ib.*

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See BILL OF EXCHANGE, 1, 2. HUSBAND AND WIFE, 3, 4. INDORSER, 1. MARRIED WOMAN, 3. PRINCIPAL AND AGENT, 8. PROTEST, 1, 2, 3, 4, 5.

PROTEST.

SETTLEMENT.

See PAUPER, 1.

SET-OFF.

See CONTRACT, 9. PARTNERSHIP, 6.

SHERIFF.

SPECIFICATIONS.

See PLEADING, 9, 10, 11, 13, 14.

STATUTES AND CONSTITUTIONAL PROVISIONS CITED, COMMENTED UPON, &c.

CONSTITUTION OF UNITED STATES.

STATUTE OF UNITED STATES.

STATUTES OF MASSACHUSETTS.

CONSTITUTION OF MAINE.

STATUTES OF MAINE PRIOR TO THE REVISED STATUTES OF 1841.

REVISED STATUTES OF 1841.

STATUTE OF FRAUDS.

See Contract. Wills, 2.

SUBMISSION.

See Arbitration and Award.

SUPREME JUDICIAL COURT.

1. The Supreme Judicial Court, by the Act of 1852, c. 241, while sitting as a law court, is not a court of original jurisdiction. *Baker* v. *Johnson*, 15.

2. It is not competent for a Judge at *Nisi Prius* to *order* the evidence to be reported, or to order the parties to agree upon a statement of facts. If the parties cannot agree to raise questions of law, the cause must be heard and determined at *Nisi Prius*, and the party aggrieved may allege his exceptions. *Ib.*

3. The Supreme Judicial Court is clothed with plenary power to maintain order and decorum while in session, and may employ, for this purpose, such subordinate ministerial and executive officers as may be deemed necessary. *Ib.*

4. The fees of the sheriff and other executive and ministerial officers in attendance are taxed by the Court. *Ib.*

TAXES.

TENANCY.

TENANTS IN COMMON.

TENDER.

See CONTRACT, 21, 22.

TITLE BY STATUTE.

TITLE TO REAL ESTATE.

TORT.

TOWN.

TRESPASS.

TROVER.

TRUSTEE PROCESS.

WARRANTY.

WATER POWER.

WAY.

See County Commissioners, 1. Deed, 12, 14, 15.

WILL.

WITNESS.

WRITS AND PROCESSES.

ERRATA.

PAGE 552, line 2, read *credence* for "*evidence*;" line 10, read *trench* for "*touch*."

" 567, line 18, erase the words "the payment for."