REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By JOHN MILTON ADAMS,
REPORTER TO THE STATE.

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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questions of law, &c., should consist of four members of the Court, to be designated by the Governor and Council, was repealed by the Act of April 9th, 1856. The Act of 1856 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 *Moor* v. *Cary*, p. 29; *Brown* v. *Moran*, p. 44; *Munroe* v. *Gates*, p. 178; *Heywood* v. *Heywood*, p. 229; *Haskell* v. *Putnam*, p. 244; *Jewell* v. *Gage*, p. 247; *Haynes* v. *Hunnewell*, p. 276; *Mayhew* v. *Paine*, p. 296; *Gray* v. *Kimball*, p. 299; *Crooker* v. *Tallman*, p. 329; *Phillips* v. *Russell*, p. 360; *Beal* v. *Cunningham*, p. 362; *State* v. *Phinney*, p. 384; *Lord* v. *Chadbourne*, p. 429; *Fuller* v. *Loring*, p. 481; *Noble* v. *Steele*, p. 518, were presented to the Court prior to the repeal of the Act of March 16, 1855, while the Court for hearing and determining all questions of law, &c., consisted of four members. During a portion of this period, to wit, from the expiration of the term of SHEPLEY, C. J., to the appointment of GOODENOW, J., but three members of the law Court were in commission.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1856.

COUNTY OF PENOBSCOT.

STATE OF MAINE *versus* JOEL WILSON.

A ferry is a liberty to have a boat upon a river for the carriage of men and horses for a reasonable toll. Its limits are high water mark upon either shore.

It necessarily requires such privileges as will make it effectual. Passengers may be received and landed at the margin of the water upon the shore, at all times of tide and in all states of the river.

When the space between high and low water is in part or wholly bare, passengers may pass over the shore without hindrance, and without liability for damages to the riparian proprietor.

A reservation in a deed sometimes has the force of an exception, and these terms are frequently used indiscriminately. A saving or exception is always a part of the thing granted and in being; a reservation is of a thing not in being, but is newly created out of lands and tenements devised.

When land is granted, and a right of way *reserved*, that right of way becomes, in a legal sense, a new thing, separated from the right of the grantee in the land.

A way had been laid out, and used by the public for nearly twenty years, across the land of A., when he conveyed it to B. After the description in his deed, he used the following language: — "reserving to the public the use of the way laid across the same from the county road to the river": —

Held, that this saving clause applied to "the way" then in existence, and should be treated as an exception.

Public ways may have a legal existence by dedication, not only to a corporate body capable of taking by grant, but also to the general public, and limited only by the wants of the community. If accepted and used in the manner intended, the owner and all claiming in his right are precluded from asserting ownership inconsistent with such use.

The right of the public in such case does not rest upon a grant by deed, nor upon twenty years' possession, but upon the *use* of the land with the *assent* of the owner, for such length of time that the public accommodation and private rights might be materially prejudiced by an interruption of the enjoyment.

To constitute a way by dedication, two things are necessary, the *act* of dedication, and the *acceptance* of it by the public.

But it does not follow, because of the dedication of a public way by the owner of the soil and the use of it by the public, that the town, or other public corporation, is bound to keep it in repair. In order to this, *it seems* that there should be proof of acquiescence or adoption by the corporation itself.

In this State, if a county, town or plantation, against which a suit is brought, or an indictment found, has, at any time within six years before the injury for which damages are sought, made repairs on the road alleged to be defective, it is not competent for such county, town or plantation to deny the location of such road.

By virtue of the proviso contained in the Colonial ordinance of 1641, persons had a right to use the shore of the Penobscot river, including the right of mooring their vessels thereon and of discharging and taking in their cargoes.

The establishment of a ferry on that river in 1798, by the Court of Sessions, was neither an enlargement nor a restriction of that right.

The use of the shore, as a way for travel, is the exercise of a right which the owner of the shore cannot abridge or restrict. When the river is covered with ice his rights and those of the public remain unchanged. Citizens may still traverse the river at pleasure.

The use of a way by the public, the right to which is fully supplied by law, raises no presumption of dedication. The owner, by silence, assents to its use, only as in any other case where he sees citizens exercising privileges which are clearly their own.

It is a well settled principle that highways may have a legal existence from immemorial usage.

Long occupation and enjoyment of a way, unexplained, will raise a presumption of a grant, not only of the easement, but of the land itself; and not only of a grant, but of acts of legislation and matters of record.

But such presumption is predicated on the existence of some right or title which is the subject of the grant. No one is presumed to have granted to the public a right, when it is by law in the public to the fullest extent.

By the change of the common law of this State from what was the common law of England, in regard to the rights of the proprietor of lands adjoining flats upon or about tide waters, it must be presumed that some benefit was designed to such owner. It has never been held that he is precluded from erecting wharves and piers on his own flats, thus preventing the passage of vessels over flats covered by such erections, provided he did not thereby materially interrupt general navigation.

By the erection of such permanent structures as he may thus lawfully place upon his own premises, he acquires no exclusive right to those portions remaining open. The public have still, in common with him, the right to use the open space, provided they do not interfere with his erections.

A public way cannot be laid out across a navigable stream, or extending further than to high water mark, except by authority from the Legislature.

A *landing*, though for the purpose of direct transit, is more than a highway. In the latter case, the owner of the soil, subject to the right of mere passage, is still absolute master.

The public have no right to use and occupy the soil of an individual adjoining navigable waters, as a public landing and place of deposit for property in its transit, against the will of the owner, although such *user* has been continued for more than twenty years.

Such *user* affords no foundation for the presumption of a grant, nor evidence of a dedication. Prescription will give no right to the exclusive occupation of another's land, for such purpose, as it may give the traveler the right to pass over it without the power of halting thereon; and any such use of it amounting to an invasion of the rights of the proprietor, would be similar to a trespass upon upland, and the remedy would be the same.

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

This was an indictment for a nuisance. The act complained of was the erection of a wharf on the eastern shore of Penobscot river, between high and low water marks, at a place known as "Chamberlain's ferry," leading from Brewer to Bangor.

The facts are fully stated in the opinion of the Court.

After the testimony was all in, the presiding Judge suggested, that as there was no conflicting testimony, and as the issue depended entirely upon the law, the questions in regard to which were important, the case should be put in form to be presented to the law Court; and thereupon it was agreed by the County Attorney, on the part of the government, and by the respondent Wilson, that a verdict of guilty *pro forma*, should be taken, and the case sent up to the law Court on report.

If, upon examination of the testimony and the law, the Court should be of opinion that the respondent ought to be acquitted, the verdict was to be set aside and a *nolle prosequi* entered; otherwise the verdict of guilty was to stand.

In accordance with that agreement a verdict of guilty was entered, and the case continued on report.

J. A. Peters, for the State.

1. The *locus in quo* in this case is set out as a parcel of *shore* upon Penobscot river. The word *shore* is a technical term, meaning land between high and low water marks. 4 Hill, (N. Y.) 375; 6 Cowen, 547.

2. We contend that the *locus in quo* belonged to the public by a dedication. That Wilson's grantor dedicated it by act *en pais* and by deed.

The language of the deed under which Wilson claims, contains these words, "reserving to the public the use of the way laid across the same, from the county road to the river." This language is a clear reservation, binding upon Wilson, reserving from Wilson what the grantor had given to the public. See 36 Maine, 60, where the Court discuss the meaning and effect of these words, to wit, "the said land is to be common and unoccupied."

The doctrine of the dedication of streets has now become well settled. *Larned* v. *Larned,* 11 Metc. 423; *Call* v. *Sprowl,* 35 Maine, 161.

Dedication may be to the general public, instead of to any person or body capable of taking by grant. 10 Peters, 662; 2 Greenl. Ev. § 662.

No act of dedication need be proved, only the fact. No particular time and no particular ceremony is required to prove a dedication and assent. I refer particularly to *Call* v. *Sprowl,* 35 Maine, 170, and the cases there cited by the Court, also, *Dwinel* v. *Barnard,* 28 Maine, 564.

What time is necessary depends upon the circumstances of each case. If the act of dedication be unequivocal it may take place *instanter.* 5 Taunt. 125.

Lapse of time is among the elements to constitute a dedi-

cation, but not a basis on which it necessarily exists. *Commonwealth* v. *Fisk*, 21 Pick. 243.

Six years user has been held sufficient to presume a dedication from user. 11 East, 375.

Twelve years in case, in 2 Johns. 424.

"A considerable time," in 3 N. H. 335.

Six or seven years, in 6 Peters, 498, 513. See 2 Greenl. Ev. before cited.

If six years user is necessary in this case, we show it. If twelve, or even twenty, we show that. If unequivocal and positive acts are better evidence of the grantor's intention, than mere lapse of time, we have shown them.

3. The respondent puts in the establishment of certain record roads as a piece of evidence. We avail ourselves of them for a single purpose, and that is, to show an intention upon the part of the public to accept the grant. Otherwise we see no force in that evidence, because the controversy is now about the "shore." If roads have been made and unmade, they never extended over the "shore," inasmuch as a record road cannot be legally laid out over flats between high and low water marks, by a town or by County Commissioners. 5 Pick. 492; 1 Greenl. 112.

But an easement can be had between high and low water mark by dedication. 6 Peters, 431, 498. To same point, 10 Peters, 663; 6 Greenl. 118; 8 Pick. 504.

"Easements created by reservation or grant may be enlarged by prescription." 20 Pick. 291, 302.

It does not appear that a dedicated way can be discontinued by the county. The way is reserved to the public; the county is only a part of the public. 2 Pick. 44.

It does not follow, because an owner dedicates, and the public uses, that the town or county is bound to repair. 2 Greenl. Ev. § 662, and the numerous cases cited in a note to same in the last edition.

4. Even if the existence or non-existence of a statute road could affect this question, and there could be such on the shore, still, nineteen years have elapsed since the statute

road was discontinued, during which time there is proof of dedication and acceptance.

The respondent, and also the government, put in evidence the existence of the ferry. The fact of a ferry shows also the necessity of a road or way; a reason for its dedication by the owner and acceptance by the public. The ferry is a right upon the water; the way over the shore to the water was necessary. Here lies an objection to the obstruction of the ice on the shore, because, although the ferryman is obliged to make and keep open a sled road in the winter, this wharf has been an obstruction in the way of his so doing. R. S., c. 27, § 10, and other sections.

5. But if there was not a road by dedication, the very absence of the elements to make a dedication would make it a road by *user*. Even if the part of the road to *high water* mark was not a road by *user*, the "*shore*" must be. An easement on a "shore" can be acquired by user. 19 Pick. 110; 18 Pick. 312; 8 Pick. 504; 6 Greenl. 118.

It was contended at *Nisi Prius*, that an easement cannot be acquired upon an easement. Of course, an easement cannot be acquired in the way, so as to obstruct the passage of Penobscot river, but it can be acquired servient to it. But we contend, not for a right over the *water*, but over the shore to get *to the water*.

But flats are not appurtenant to the upland. 25 Maine, 51, and other cases.

There is the easement of tow paths, which has been acknowledged for a century or more. The doctrine is also acknowledged in the case of *Thornton* v. *Foss*, 26 Maine, 402.

In *French* v. *Camp & al.*, 18 Maine, 433, the Court say, "all have a lawful right to travel on a public river upon the ice, and a winter way may be acquired by twenty years user."

In the case at bar there had been a winter way for sixty years or more, and Wilson obstructed it, and this is the real grievance now complained of.

6. The legal meaning of the words "to the river," has been clearly and judicially settled. It means at least to low

water mark. The reservation must be as extensive as the land conveyed. *Bangor House* v. *Brown*, 33 Maine, 309; *Hatch* v. *Thomas*, 3 Sumner, 170. The same point is settled in similar cases in 6 Peters, 431, 498; 10 Peters, 663.

I refer particularly to the case of *Dovaston* v. *Payne*, 2 Smith's Leading Cases, and all the notes, English and American, as giving a general elucidation of the subject.

Rowe & Bartlett, for defendant.

1. The indictment describes the river as navigable; no highway for land travel, therefore, can exist across it, or upon its shore, but by license of the Legislature. Such a highway, without such license, could exist only by sufferance, and not by law, being liable to be indicted and abated as a nuisance at any time. *Commonwealth* v. *Charlestown*, 1 Pick. 185; *Keene* v. *Stetson*, 5 Pick. 492; *Arundel* v. *McCulloch*, 10 Mass. 70.

2. The case shows that, instead of a common and public highway across the river, there has been a legally licensed ferry at this point, for more than fifty years past. The two cannot co-exist at the same place.

Up to August, 1834, there was a highway to the river. The traveler stepped from that highway on to the ice which covered the shore, and touched the line of the highway. This travel the riparian proprietor had no right to interrupt, for the public right to the use of the water of a navigable river is not cut off by the frost, though its mode of use may be changed by it. That travel never touched the shore, but was confined to the waters of the river in a congealed state. *French* v. *Camp*, 18 Maine, 433.

3. Besides, by statute the ferryman was bound to level the ice and keep it clear, so that the public could have a passage at the ferry. R. S., c. 27, § 10.

The winter road then existed there as a part of, or adjunct to the ferry, and not by adverse *user* on the part of the public.

4. The admission that the fee is in respondent, is an admission that there was no reservation, at that point, for a

town landing. Is any other public landing known to our law?

Whether the existence of a public landing can be established by proof of user, is, at least, doubtful.

In *Pearsall* v. *Post*, 20 Wend. 111, where the subject was fully discussed, the Supreme Court of New York decided that the existence of a public landing cannot be thus proved; that such *user* is neither the foundation of the presumption of a grant, nor evidence of a dedication. And the decision in that case was affirmed by the court of errors in *Post* v. *Pearsall*, 22 Wend. 425.

5. If it can be thus established, the proof in this case is insufficient.

Besides the use of the *locus* as a ferry-way, for landing passengers and goods, the proof of user is confined to the laying an occasional raft of lumber there when the tide was out. Rafts rightfully floated there at high tide, it being navigable water, and when the lumber was taken out, it was piled not on the shore, which alone is in question here, but on the bank, which was, till August, 1834, a highway.

In *Greene* v. *Chelsea*, 24 Pick. 80, where the question was like this, the Court say, "the doctrine of dedication, if it be adopted in this State, does not extend to land like the demanded premises; and if it did, would not bar this action. Dedication must originate in the voluntary donation of the owner of the land, and be completed by the acceptance of the public. And to support a dedication, there must be such a user, and so accompanied by corroborating circumstances, as clearly to demonstrate both. Now here does not appear to be a user sufficient to show either. And it is unaided by any acts on the part of the owner indicative of an intent to give the use of this land, or on the part of the public to accept it. The occasional, trifling and irregular use made of the land or flats, is altogether too imperfect an occupation to prove a dedication."

In *Bethum* v. *Turner*, 1 Greenl. 111, the same doctrine is laid down.

6. It was not a public landing on July 4, 1798, when the ferry was first established by law, for the record describes it there as "Burr's landing," and there is no evidence to rebut the inference to be drawn from that description. Ever since, it has been used as a ferry-way by the owner of the fee or those claiming under him, and could not by any usage become a public landing; for the sole control of a ferry-way is vested in the ferryman. R. S., c. 27, § § 15, 17. While at a public landing all must have equal rights.

In the case of *Deering* v. *Long Wharf*, 25 Maine, 64, 65, 66, it was decided that, under the ordinance of 1641, "so long as flats remain open and free from such erections as stop and hinder the passage of boats, &c. there is reserved for all, the right to pass freely to the lands and houses of others besides the owners of the flats; this includes the right of mooring their vessels thereon, and of discharging or taking in their cargoes." "The owner of the flats has no power to take away or restrict this right, while the space is unoccupied." "The owner then is deprived of none of his rights by this enjoyment by others, has no power to restrain them, and loses nothing of his legal title to possession by suffering that which he had not the effectual means to prevent."

TENNEY, C. J. — In the first count of the indictment, it is alleged, that at the time of committing the offence charged, there was and still is an ancient, common and public highway in the town of Brewer, commencing at a point in the county road leading from Eddington to Orrington, through the town of Brewer, near the post office in Brewer, thence running westerly to Penobscot river, and thence across said river to the city of Bangor. In the second count is described an ancient, public and common highway, existing from a time whereof the memory of man is not to the contrary, near an old ferry-way commonly called "Chamberlain's ferry," and leading from the same point in the county road, across land formerly owned by John Wilkins, down to the Penobscot river, at low water mark. And in the third count, an ancient,

common and public landing place, on the easterly bank and shore of the Penobscot river, at the old ferry-way called "Chamberlain's ferry," which ferry leads from Brewer to Bangor, is alleged to have existed from a time whereof the memory of man is not to the contrary. And the defendant is charged in the indictment with having erected upon said highway and landing place, between high and low water mark, upon the shore of said river, which is alleged to be navigable, a wharf, to the great damage and common nuisance of all the good citizens of this State, &c.

In the year 1798, a ferry was established by the Court of Sessions for the county of Hancock, from this landing, then called Burr's landing, to two points on the Bangor side of the Penobscot river, one above and the other below the mouth of the Kenduskeag stream; and one Bridge was appointed the ferryman for the term of seven years.

In the year 1802, a road was laid out and established by the Court of Sessions of the same county of Hancock, from the said county road to this ferry, then called in the records "Crane's ferry," across the land now owned by the defendant, three rods wide.

In the year 1824, a road was laid out and established, four rods wide, by the Court of Sessions for the county of Penobscot, (which county had been formed from the county of Hancock between the years 1802 and 1824, and embracing with other towns, those of Brewer and Bangor,) from high water mark, at this ferry-way on the east side of Penobscot river to the east line of Brewer, which road was discontinued by the Court of County Commissioners for the county of Penobscot in 1833, so far as it lay between the ferry and its intersection with a road laid out and established from Penobscot bridge in Brewer, and extending in an easterly direction.

On August 7, 1822, John Wilkins conveyed to the defendant, by deed of that date, four acres of land in Brewer, embracing the site of the wharf and a considerable length of shore above and below, and the land extending back from all

of said shore to, or nearly to the county road leading from Eddington to Orrington. After the description of the premises in the deed, is the following language: "reserving to the public the use of the way laid across the same from the county road to the river."

It is admitted by the counsel for the State, that the fee of the land upon which the wharf is erected, is in the defendant; and by the defendant, that the wharf was erected by him, and is standing on the shore as is alleged in the indictment. And it is admitted by both, that the landing had been a ferry-way from the time when a ferry was first established across the Penobscot river, in that neighborhood; and that there never was any other ferry near there, till after Penobscot bridge was carried away, in 1846. And it is satisfactorily shown by the evidence, that from the time of its establishment in 1798, to the year 1846, a ferry has been constantly kept there without interruption, for the transportation of passengers on foot, and with horses, teams and carriages, and in the various modes of travel usual on public highways and over ferries. And since the year 1846, a licensed ferry has been kept at the same place, and the ferryman has had control of the landing place since that time. It was also proved, that when the Penobscot river has been covered with ice, the general travel across the river has been from and to the same ferry-way.

The ferry-way has been used for fifty years at least as a landing place for lumber and other materials brought to the shore of the river near that spot, in vessels, boats and rafts, and such as have been designed to be transported therefrom in the same manner.

The charge in the indictment is not for the erection of the wharf, as an interruption of the free passage and navigation of the Penobscot river, but as an obstruction upon the shore of the river, as an impediment to the travel across, to and from the river, upon the highway described in the indictment, in the town of Brewer, and as having greatly obstructed, choked up, narrowed and rendered unsafe and inconvenient the land-

ing place for the citizens of this State, in the use thereof, for the various purposes for which it is alleged it has been appropriated.

It is contended, on the part of the government, that the public had acquired an easement in the shore covered by the wharf erected by the defendant upon the part of the shore described in the indictment, by a dedication thereof; that the defendant's grantor dedicated the same by acts *in pais*, and by deed. Under this position assumed by the counsel for the State, it is proper to see what were the rights of the public, independent of any act of the defendant or of his grantor.

A ferry is a liberty to have a boat for passage upon a river, for the carriage of horses and men for a reasonable toll. It is usually to cross a large river. *Termes de la Ley.* It was provided by the statutes of Massachusetts, in an Act for the regulation of ferries, passed Feb. 14, 1797, that no person or persons whatever, "shall keep a ferry within this Commonwealth so as to demand and receive pay, without a special license first had and obtained from the Court of General Sessions of the peace for the county wherein such ferry may be; and the said Court is hereby empowered to grant such licenses to such person or persons, as shall be judged suitable for such service, by the same Court, and to state the fare or ferriage at each ferry for passengers, horses and other creatures, carriages, wagons, carts and other things, there transported."

The purpose of a ferry necessarily requires such privileges as will make it effectual. Passengers with their horses, carriages, &c., which may be transported, may be received and landed at the margin of the water upon the shore, at all times of the tide and in all states of the river. When the tide is out, and the shore or space between low and high water is partially or wholly bare, passengers may pass over the shore without exposure to pay damages to a riparian proprietor, and without hindrance. When the river is full, the ferry extends to high water mark, and the passenger is entitled to be there landed

with his team and goods transported. The limits of the ferry, consequently, are high water mark on each side of the river.

The highway laid out by the Court of Sessions in the year 1802, by its terms was *to* the ferry; and that of 1824 was *from* the ferry-way at high water mark.

It was decided in Massachusetts, in the case of *Kean* v. *Stetson*, 5 Pick. 492, that the selectmen of a town have no authority to lay out a town way, between high water mark and the channel of a navigable river. And the reason given for the denial of the power will equally apply to the Court of Sessions, or Court of County Commissioners. The Court say, "a public highway cannot be laid out across a navigable stream, except by license from the Legislature. Why? Because it will destroy an existing highway, the river itself, in which all the citizens have an interest."

The highway established in 1802, and that in 1824, could not have extended, by the language used in the records, below high water mark, at the ferry-way; the former being *to the ferry*, and the latter commencing at the westerly terminus, at high water mark. And if the language can admit of a different construction, the location of the highway below high water mark would have had no legal validity.

Before the conveyance of Wilkins to the defendant, he was the owner of the fee in the premises of the deed, not only of the upland, but of the shore between the lines of high and low water, not, however, to the hindrance of the passage of boats and other vessels, in or through the Penobscot river, to other men's houses and lands. Colonial Ordinance of 1641; *Green* v. *Chelsea*, 24 Pick. 71; *Deering* v. *Long Wharf*, 25 Maine, 51; *Storer* v. *Freeman*, 6 Mass. 435; *Lapish* v. *Bank*, 8 Greenl. 85.

Do the public possess any right in the shore covered by the defendant's wharf, by virtue of the reservation in the deed from John Wilkins to him? A reservation has sometimes the force of a saving or exception. Co. Litt. 143. Exception is always a part of a thing granted, and of a thing in being; and a reservation is of a thing not in being, but is newly cre-

ated out of land and tenements devised; though exception and reservation have often been used promiscuously. Co. Litt. 47, (a). And a construction given to a clause, called a reservation, is, that it is an exception, if it will fall within that definition, and if such was the design of the parties. *Bowen* v. *Conner*, 6 Cush. 132. Where land is granted and the right of way is reserved, that right of way becomes in the sense of the law a new thing, derived from the land; and, although before the deed, the grantor had the right of way over the land, wherever he chose to exercise it, yet when he conveyed the land, the reservation was a thing separated from the right of the grantee in the land. *Gay* v. *Walker*, 36 Maine, 54.

In giving a construction to the reservation in the deed from Wilkins to the defendant, we are to ascertain, if possible, from the deed itself, and the situation of the parties, and the relation they hold to the public, the intention which was entertained by the grantor and the grantee. And we think their design was, manifestly, to withhold from the operation of the conveyance of the whole land described, the use then enjoyed by the public of the way, which had been laid out and established from the county road to the river, *as of a thing in being*. The reference must have been made to a particular way, which had been laid out to the river. One way had been laid out to the river from the county road, and used by the public for nearly twenty years, at least, and the case finds, that there was no other road between the county road and the river. This way was across the land described in the deed, and it cannot be doubted, that the reservation actually applied thereto as "the way" then in existence. The fair and plain design of the parties was, that the grantor should relieve himself from all liability, which he would otherwise have been under, if the deed had contained covenants of warranty, on account of the public easement in the highway. *Haynes* v. *Young*, 36 Maine, 557. It was proper that the premises should be so described, as to exhibit precisely, the title as it actually existed in the grantor. The part reserved, therefore,

may be treated as an exception, consistently with the intention of the parties. And the reservation or exception, in the deed, did not embrace the shore of Penobscot river, but was limited in its operation to high water mark.

When the road laid out by the Court of Sessions was discontinued, it ceased as a highway established by record, and the public had no further right therein. Nothing is found in the case tending to show, that it had ever become a public road by such *user* as would create an easement over the ground covered by it, and the question is not presented, whether a road existing by immemorial usage can continue after a discontinuance by a court competent to lay out and establish highways.

Was there dedication by the defendant's grantor of the shore on which the wharf was erected, as a highway?

For a long time serious doubts were entertained by distinguished judges in other States, whether, under the general statutory provisions for laying out and establishing roads and highways, such as have existed in this State, a public highway could be constituted by dedication. But it may now be regarded as a question no longer open, but it is the settled doctrine, that in this mode, ways may be proved to have a legal existence. And it is not necessary that the dedication be made specially, to a corporate body, capable of taking by grant; it may be to the general public, and limited only by the wants of the community. If accepted and used by the public, in the manner intended, it works an estoppel *in pais*, precluding the owner, and all claiming in his right, from asserting an ownership inconsistent with such use. The right of the public does not rest upon a grant by deed, nor upon a twenty years' possession; but upon *the use of the land*, with the *assent of the owner*, for such a length of time, that the public accommodation and private rights might be materially affected by an interruption of the enjoyment. *Pawlett* v. *Clark*, 9 Cranch, 292; *New Orleans* v. *United States*, 10 Peters, 662; *Cincinnati* v. *White*, 6 Peters, 431; *Jarvis* v. *Dean*, 3 Bing. 447.

To constitute a way by dedication, two things are essential to be proved; the *act of dedication* and the *acceptance* of it on the part of the public. *Marq. Stafford* v. *Coyney*, 7 B. & C. 257; 2 Greenl. Ev. § 662. Whether it has been dedicated or not by the owner of the land, and accepted by the public, is a question of intention, and therefore may be proved or disproved by the acts of the owner, and the circumstances under which the use has been permitted. But it does not follow, that because there is a dedication of a public way by the owner of the soil, and the public use it, the town or other public corporation is bound to keep it in repair. To bind a corporation to this extent, it seems to be required that there should be some proof of acquiescence or adoption by the corporation itself. *Rex* v. *Benedict*, 4 B. & Ald. 447; *Sprague* v. *Waite*, 17 Pick. 309; 2 Greenl. Ev. § 662; *Todd* v. *Rome*, 2 Greenl. 55. But in this State, if the county, town or plantation, against which a suit is brought, or an indictment found, has at any time within six years before the injury, for which damages are sought, made repairs upon the road alleged to be defective, or as the cause of such injury, it is not competent for such county, town or plantation to deny the location of such road. R. S., c. 25, § 101.

By the proviso in the Colonial ordinance of 1641, that the owner of the flats should not hinder the passage of boats or other vessels in or through any sea, creeks or coves, to other men's houses or lands, persons had a right so to use the shore of Penobscot river, including the right of mooring their vessels thereon, and of discharging and taking in their cargoes. The establishment of the ferry, in 1798, by the Court of Sessions, was neither a restriction nor an enlargement of this right. It did not profess to give to the ferryman or his passengers rights which all did not possess before, in the use of the space denominated the shore of the river. It was providing a convenient mode for the public to pass the river, and authorizing, as a compensation for the services expected to be rendered, a toll, which could not legally be received without authority emanating from the sovereign power of the State.

And the use of the shore, now covered by the defendant's wharf, as a way for travel upon the waters of the river, was the exercise of a right which the owner of the shore could not in the least restrict or abridge; and his assent could not be inferred from the omission to object to that, over which he had no control, when the river was open and in a condition to be used in the passage of vessels and boats. The rights of the riparian proprietor was not changed in the least, when the surface of the river was covered with ice; all the citizens had still a right to traverse the river in that state, at pleasure. *French* v. *Camp*, 18 Maine, 433.

The ordinary reason for the dedication of a way to the public, is not perceived to have had the least foundation in this instance. All the wants of the public in the means of passing the river, which were ever exercised, were fully supplied by the law, and its ministers, in the provision of a mode to pass the water with facility and to communicate with a road which was early laid out by the appropriate authority; and which we are to presume was in a proper condition to be used for the object intended.

The report of the evidence of the case, which is represented therein to be of the whole which was introduced, contains nothing indicative of any positive act of dedication of this shore as a highway, by any proprietor thereof; neither is there any proof having any tendency to show express consent to the use as it was by the public. It does not appear, that his conduct differed in the least from that of any one, who remains silent, when he sees other citizens exercising the privileges which are clearly their own.

It is insisted, in behalf of the State, that if the shore in question did not become a highway by dedication, it was such by *user*.

That highways may have a legal existence from immemorial usage, is certainly a well established principle. Indictments against towns, for the omission to keep in proper repair highways, &c. are often sustained, where there is no proof of their establishment excepting such usage. Long occupation and

enjoyment, unexplained, will raise a presumption of a grant, not only of an easement, but of the land itself; and not only of a grant, but of acts of legislation and matters of record. And grants may be presumed, not only to individuals and corporations, but to the State. *Williams* v. *Cummington*, 18 Pick. 312. But this presumption is predicated upon the existence of some title or right, which is the subject of the grant. No one is presumed to have granted an easement in the right of passage to the public over his land, when that right is in the public to the fullest extent.

The use of the shore, at the place referred to in the indictment, as a way for travel by the public, was a privilege secured by law, as we have seen, and the proprietor thereof could not interfere to hinder that use. No rights of his were invaded thereby, and consequently he had no power to maintain an action for damages which he had never sustained.

The view which we took of the evidence, that there was, as matter of fact, no dedication of this shore to the public, is satisfactory, that the public obtained no rights additional to those which they possessed when they first began their exercise, and that nothing was obtained by them, or lost to the proprietor, by the usage which has been proved; and that no way by *user* has been shown as a matter of law.

By the common law of the State, the proprietor of the lands adjoining the flats, upon and about tide water where the sea ebbs and flows, having property to low water mark in the flats, we are to suppose that some benefit to such owner was designed in the change of what was the common law of England. And it has never been held, that such proprietor has been precluded from erecting wharves and piers upon his own flats, notwithstanding it would prevent the free passage of vessels and boats, so far as the ground was so covered, provided he did not encroach upon the public domain, in materially interrupting the general navigation. And it has been held by this Court, that by the erection of permanent structures, such as wharves and piers, which he may lawfully make on his own land, he acquires thereby no exclusive right,

to the portion remaining open, so as to exclude persons from passing and repassing to and from the land and houses of others. In common with him, the public have the same rights to the open space, which they had before, provided they do not interfere with his permanent erections. *Deering* v. *Long Wharf*, before cited. It has never been understood, that in giving the qualified ownership in flats to the proprietor of the adjoining upland, that he was bound to keep the space forever open, and thereby be prevented from making the improvements, in a harbor having natural advantages as such, so essential to the wants of a people coming from a country where commerce and navigation received the fostering protection of its government, to this land, in which it was early perceived and felt, that prosperity was to be realized in the same great pursuit.

Is the defendant liable under this indictment, on account of having erected the wharf to the great damage and common nuisance of the citizens of this State, upon the shore as a public landing place?

The affirmative of this question, the counsel for the State does not seem to have seriously maintained in argument, unless the landing place can be treated in law as a highway by dedication or by *user*.

If the defendant was protected in the erection of the wharf, notwithstanding the objections thereto, on the ground that the site on which it stood was a highway, the erection cannot be held as a nuisance, when existing upon the same spot as a landing place.

"A *landing*, even though for the purpose of direct transit, is more than a highway. The relative rights, both of owner and passenger, in a highway, are perfectly understood and dealt with by the law. Subject to the right of mere passage, the owner of the soil is still absolute master." *Pearsall* v. *Post*, 20 Wend. 111; same case, 22 Wend. 425.

By the terms of the indictment in the present case, the defendant is charged with having obstructed the landing place, which is alleged to have been occupied from time immemorial

without interruption by all the citizens of this State, not only to travel thereon, but to enter upon, deposit, lade and unlade lumber and other materials, land boats, and take water from the river, &c. So far as the public had authority to use the shore under the common law of the State, as declared in the proviso of the Colonial ordinance of 1641, the defendant had no power to impose any hindrance; and this use being continued, would be no foundation for the presumption of a grant. Subject to this public right, his title to the shore was as ample as to the upland, and he would not be restrained from making permanent erections thereon, notwithstanding the same may have been used as a landing place, in addition to its use as a highway.

But if the public had made the shore a place of deposit for lumber, merchandize, &c., in a manner, and to an extent unauthorized by the proviso of the Colonial ordinance, this unauthorized use would not take away any of the rights of the defendant, as they would have existed, independent of such usage. If the deposit upon the flats, as a landing place, was of such a character as to amount to an invasion of the right of the proprietor thereto, it would not differ in principle from a trespass upon his upland; and his remedy might be the same in one case as in the other.

The deposits of lumber, merchandize, &c., such as are alleged to have been made in this indictment upon the shore as a landing place, at the time of the commencement of the same, did not differ from the deposits of wood upon a landing place, in the town of Wells, as appears in the case of *Littlefield* v. *Maxwell*, 31 Maine, 134, and which constituted a trespass, unless they were authorized under the Colonial ordinance. In that case, the deposits were held to have been so made, as to be a profitable use of another's soil; and hence they differed essentially from easements acquired by prescription, in the right of passage over another's land; and the claim to make such use of the land could not be sustained by custom. In the opinion, the case of *Pearsall* v. *Post*, 20 Wend. 111, was relied upon as authority, where the whole matter is

very elaborately considered, and the doctrine deduced from the decisions, which are reviewed, is, that the public has not the right so to use and occupy the soil of an individual adjoining navigable waters, as a public landing and place of deposit of property in its transit, against the will of the owner, although such use has been continued for more than twenty years. The *user* cannot be urged as the foundation of a legal presumption of a grant, and thus justify a claim by prescription; nor as evidence of a dedication of the premises to public use. Prescription will give no right to the exclusive occupation of another's land, as it may give to the traveler the right to pass over it, without the power of halting thereon. *Bethum* v. *Turner*, 1 Greenl. 111; *Cortelyou* v. *Van Brundt*, 2 Johns. 357.

Upon the undisputed testimony, and the admission of facts in the case, the law does not authorize a verdict of conviction against the defendant, and, according to the agreement,

The verdict is set aside.

HATHAWAY, APPLETON, MAY and GOODENOW, J. J., concurred.

CYRUS MOOR *versus* SHEPARD CARY.

An agreement to allow secondary evidence in regard to the contents of a paper alleged to be lost, cannot be construed as an agreement to dispense with proof of its execution.

There being no proof of the genuineness of the signature to an original paper, a copy of it, proved to be a correct one, is not legally admissible in evidence.

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

This was an action of assumpsit on account annexed and for money had and received. The general issue and the statute of limitations were pleaded. A part of the testimony introduced by the plaintiff was the deposition of William R. Smith, touching the contents of a certain paper alleged to have been lost. The defendant waived, by agreement, any objection to the introduction of testimony in regard to its

contents, arising from lack of proof of its loss. Smith testified that he had compared the paper attached to his deposition, marked A, with the original, and that it was a correct copy, and that he was acquainted with the handwriting of the defendant, by whom it was alleged to have been signed. He did not, however, state that the signature was genuine. The defendant objected to the admission in evidence of the paper A, but the Court admitted it. To this ruling and others the defendant excepted.

Blake, for plaintiff.

Kent, for defendant, contended:—

That the due *execution* of the paper marked A, annexed to Smith's deposition, was not proved. The witness says, that he was acquainted with the handwriting of Cary. But he does not say that the signature on the paper was in his handwriting.

Where secondary evidence is resorted to for proof of an instrument which is lost, it must, in general, be proved to have been *executed*. *Kimball* v. *Morrell*, 4 Greenl. 368; 1 Greenl. Ev. § 558; 16 Johns. 196, and cases cited in Greenl. Ev. as above.

TENNEY, J.—By the agreement entered into by the attorneys of the parties at the April term, 1854, of the Court, not only was it admitted, that George W. Stanley would testify that he made a thorough search among his papers for the written agreement marked "A," and did not find it; but it is expressed to be the intention of the parties, that William R. Smith's deposition should be received without legal objection founded upon any want of proof of the loss of the original paper referred to. It was evidently the design, that there should be no objection to the introduction of the proper secondary evidence of the contents of the paper, on account of any further proof of its loss, but other objections to its introduction were not waived. The deposition of Smith, not including the copy of the paper marked "A," was properly admitted.

The deposition shows, that Smith compared the copy, which is marked "A," with the original, and found it to be correct, and that he is acquainted with the handwriting of the defendant. But it contains no statement whatever, that the name of "Shepard Cary" upon the original is in his opinion genuine. The agreement provides, that the plaintiff may proceed in the trial, just as if Stanley was a witness and testified to his unsuccessful thorough search for the agreement among his papers. This certainly is not a consent to waive the requirement of proof of the execution of that paper.

The loss of a paper, purporting to be signed by a party to a suit, and the allowance of secondary evidence of its contents, do not dispense with the proof of the execution. If this could be done, the loss of a paper, the execution of which is denied, might be of great benefit to the party wishing to introduce evidence of its contents, by taking away an important branch of the defence, and possibly the only defence designed to be set up. This cannot be admitted, and the authorities forbid it. There being no other proof of the genuineness of the name of the defendant, which appeared upon the original, than that contained in Smith's deposition, the copy was improperly allowed in evidence.

The agreement touching the paper purporting to be the receipt of the defendant in the treasurer's office, is that the signature is admitted to be genuine, and that the papers produced at the former trial from the treasury and state departments, shall be admitted as legal proof of the facts which they set forth. And the case finds, that the certificate of Samuel Cony, treasurer, was the same referred to, in the agreement aforesaid, read to the Court. The treasurer's certificate contains a copy of the receipt, the signature of which is admitted, as a part thereof, and this copy was properly introduced as evidence. *Exceptions sustained, verdict set aside, and new trial granted.*

RICE, J., concurred.

MARK FISHER, *in Equity, versus* CHARLES SHAW *& als.*

A. conveyed to B. certain real estate subject to a mortgage given by himself to a third person. B. gave back a bond conditioned to reconvey to A. by quit-claim deed, a certain portion of the premises, whenever the latter should clear the remainder from incumbrance. B. afterwards obtained an assignment of the mortgage to himself. — *Held*, that the bond created no obligation on the part of B. to cause the mortgage to be discharged, and that it did not preclude him from subsequently acquiring any additional title to the premises.

C. agreed verbally with A. to take up this mortgage and to assign it to the latter, on payment of the amount by him within a specified time. C. obtained an assignment of the mortgage to himself, and before the expiration of the time agreed upon with A., assigned it to B., who still held the premises by the conveyance from A.: —

Held, that the contract was for the sale of an interest in lands, and not being in writing, that no action could be maintained thereon: —

Held also, that being without consideration, it was not a waiver of the right to a repayment of the mortgage within the time required by law to prevent a foreclosure: —

Held also, that as A. did not furnish the consideration paid for the assignment, there was no foundation for a *trust* in C. by implication of law: —

Held also, that the non-fulfilment of said agreement, by C. or his assigns, furnished no substantial basis for a suit under the head of *fraud*.

It may be true that a mortgage can be kept open, by the express agreement of the parties, or by facts and circumstances from which an agreement may be satisfactorily inferred, when but for such agreement it would be foreclosed; but in order to be an effectual *waiver* of the right to hold it foreclosed, it must be made by the mortgagee or some one having an interest under him.

If the interest in the mortgage has not been acquired at the time of the agreement, the mortgage is not so opened.

Whether such an agreement, made prior to the possession of an interest, but *followed* by an assignment of the mortgage, would suspend the foreclosure, *quaere*.

A waiver subsisting entirely in contract cannot be available if the contract is invalid.

If a party trusts to an invalid contract, a court of equity can grant him no relief against the other party for treating the contract as the law regards it. To do otherwise, and hold that the refusal of one party to execute a contract which has no legal validity, is a fraud upon the other party, would be for the Court to assume, under one clause of the statute, the very jurisdiction intentionally denied it under another clause.

This Court has equity jurisdiction, in all suits, to compel the specific performance of contracts in writing, &c., when the parties have not a plain and adequate remedy at law.

If the contract appears only in the condition of a bond secured by a penalty, the Court will act upon it as an agreement, and will not suffer the party to escape from a specific performance by offering to pay the penalty.

A written contract, by which a party agrees to do a certain act for the benefit of another, *or* to pay a certain sum as liquidated damages for the omission, as the party who is to do one or the other may elect, is not a case to which the jurisdiction of this Court, as a court of equity, will attach. By the contract itself, there is a plain and adequate remedy at law. The failure to perform either alternative cannot, of itself, confer equity powers.

BILL IN EQUITY.

This was a bill praying for relief and for an injunction, to which a general demurrer was pleaded.

The cause was heard upon bill and demurrer. All the material facts appear in the opinion of the Court.

A. W. Paine, for plaintiff, contended:—

A complete waiver of a written contract may be made by parol. *Woolam* v. *Ham*, 2 White & Tudor's Leading Cases, 553, and cases cited. There can be no doubt of this in equity, even though there may be in law.

The agreement for an extension is not in itself a contract, but, like a waiver of notice and demand on a note, is something extraneous to the note, and may be made by parol, and no consideration even is necessary.

The agreement for extension here, as alleged, was at least binding, and a court of equity will enforce the rights of the parties accordingly.

The knowledge of fraud binds defendants and they can claim no rights superior to what their assignor could. 2 Story's Eq. §§ 788, 790; *Evans* v. *Chism*, 18 Maine, 220.

When, as here, the extension has been granted, and that grant is by *parol*, surely the Court will not hold the party to a strict legal construction of the terms and mulct him with loss, if he has either honestly mistaken those terms, or, from the unwarrantable interference of others, has been prevented from complying with them. 2 Story's Eq. §§ 771, 775: *Getchell* v. *Jewett*, 4 Greenl. 350; *Rogers* v. *Saunders*, 16 Maine, 92.

This is in fact a case of one who in confidence of the parol

promise of another has omitted to perform an act, the non-performance of which, defendants allege, has led to a forfeiture of his legal rights. In such case the Court will not allow the party to suffer by reason of the want of good faith on the part of him in whom he trusted. And his relief will be equally strong against him who has participated in depriving him of his trust and knowingly taken advantage of him, as against the man who made the promise on which he relied. 2 Story's Eq. § 781.

J. Crosby, for defendants, among other points, argued:—

The understanding or agreement between Eben Wyman and Foss can avail nothing in any view:—

1. Because it is an attempt to create "a trust concerning lands by parol," contrary to R. S., c. 91, § § 31, 32; *Brown* v. *Lunt*, 37 Maine, 434.

2. It cannot be a trust by implication of law:—

Because the $500, was not paid by the first of January, 1855, nor tendered till long afterwards, viz., May, 1855. Wyman was under as much obligation to pay to the Shaws, Foss' assignees, as to Foss, if there had been no assignment. Foss was under no legal or moral obligation not to assign his interest by virtue of the Farrar mortgage; nor were the Shaws under any obligation not to take an assignment. The allegation of fraud in the matter is simply absurd. 2 Story's Eq. 771; *Lawrence* v. *Fletcher*, 8 Met. 347.

3. Because it is contrary to sound policy and the sound construction of our statutes upon mortgages and foreclosures, to permit a foreclosure to be waived by parol. 1 Hilliard on Mortgages, 400–1; *Pease* v. *Benson*, 28 Maine, 336.

Foreclosure must be according to statute. R. S., c. 125, § § 5, 6.

It makes confusion of the records, is equivalent to a parol conveyance, and therefore contrary to the statute of frauds. *Norton* v. *Webb*, 38 Maine, 218; *Lyford* v. *Ross*, 33 Maine, 197.

A foreclosure will not be opened, by reason of a *parol* agreement. 2 Hilliard on Mortgages, 139.

4. But if plaintiff relies upon "parol agreement" to extend the time of foreclosure, he must take the whole of it. Time was to be extended only "upon payment as aforesaid," viz.: $500 by first of January, which was not tendered till May 2d. *Lawrence* v. *Fletcher*, 8 Met. 347.

5. This parol agreement was utterly without consideration and void. 2 Hilliard on Mortgages, 316.

Specific performances of parol contracts will not be decreed, in any case, in this State, even in case of fraud, (*Wilton* v. *Harwood*, 23 Maine, 131, *Stearns* v. *Hubbard*, 8 Greenl. 320,) even though a parol contract be confessed in the answer.

A parol discharge, or waiver of a written contract, is no where allowed except in defence. It cannot be the foundation of a bill for specific performance. 2 Story's Eq. 770, and note.

TENNEY, J.—It is alleged in the bill, that on June 16, 1851, Eben Wyman conveyed to Fayette, Brackley and Lorenzo Shaw certain real estate situated in the town of Dexter and county of Penobscot, and at the same time the defendants Fayette Shaw and Brackley Shaw, contracted with the grantor in a bond, to reconvey, by a quit-claim deed, a part of the premises described in the deed of conveyance, whenever he should clear the remaining portion of the premises, (which portion was designed to be sold absolutely to said Fayette, Brackley and Lorenzo,) from all incumbrance; also to quit-claim to said Wyman the store recently occupied by him, and the land on which it stands, within two years from the date of the bond, or to pay him the sum of three hundred dollars. It is further alleged in the bill, that at the time of the conveyance by said Wyman, and the making of the bond to him, certain attachments were existing upon the premises, made in suits against said Wyman, then pending in Court, in the county of Penobscot.

The plaintiff alleges in his bill, that at the time of the execution of the bond, a mortgage upon the portion of the premises, (which by the contract in the bond was to be recon-

veyed, upon the condition mentioned,) given by said Wyman to Isaac and Samuel Farrar, on March 18, 1845, was outstanding; and that the mortgagees had taken legal steps to foreclose the same; and that the time of redemption had almost expired; that Wyman had agreed with and procured one Simon Foss to advance the money thereon to the mortgagees, with the understanding and agreement, that the said Foss should take an assignment to himself, of said mortgage, but for the use of said Wyman, whenever he should repay, with interest, the sums so to be advanced to the mortgagees; it being also at the same time agreed, that said Wyman should pay said Foss the sum of $500 thereof, the first part of January, and the balance, of about $800, the first part of May then next; that, in said arrangement and agreement with Foss, it was agreed, that upon the payment as aforesaid, by said Wyman to said Foss, the time for the payment and the redemption of said mortgage was enlarged, so that it should extend to the first part of May aforesaid; that this agreement and arrangement, between said Wyman and Foss, was fully known to the defendants; that on January 2d, they purchased and procured said Foss to assign said mortgage to them, or for their benefit, by deed of that date, for the consideration of the sum of $70, in addition to the amount due thereon; and that they fraudulently and wrongfully procured said assignment and conveyance from said Foss to them, in order to deprive said Wyman of all his interest and right of redeeming the same.

And it is further alleged in the bill, that, on the second day of May aforesaid, being within the time agreed upon between Foss and Wyman for the payment of the amount due upon said mortgage, the said Wyman tendered, and was ready to pay to the defendants the whole of said amount, and thereupon requested them to receive the same and to discharge said mortgage, which they refused to do; that the said Wyman has repeatedly since that time, requested the defendants to release the premises, according to the contract in said bond, which they have wholly refused to do.

And it is further alleged in the bill, that the defendants have ever refused, and still do refuse to elect not to pay the sum of $300, provided in and by said bond to be paid for the store and lot, to said Wyman or his assigns; and they have been repeatedly and often requested to make such conveyance, but they have refused and neglected to do so; that all said attachments have long since been released and discharged, and that no other incumbrances exist upon the premises so sold to the said Fayette, Brackley and Lorenzo, other than the premises to be reconveyed by them on the performance by said Wyman of the condition mentioned, whereby the defendants are or should be released from the obligations mentioned in said bond; and that before the bringing of this bill, the plaintiff tendered and offered to pay the defendants the full amount due therefor and on account of the said mortgage, and thereupon demanded a deed of the premises described in the bond, to be reconveyed to said Wyman on the performance of said condition, and the defendants thereupon refused to make such conveyance.

It is alleged in the bill, that the said Fayette, Brackley and Lorenzo, on March 29, 1853, conveyed all their interest in the premises to the defendant Charles Shaw, and on March 30, 1853, said Charles conveyed one half thereof to the defendants, said Brackley and Fayette and William Shaw; and that said Wyman, on Feb. 10, 1854, by his writing on the back of said bond, signed and sealed by him, assigned the same to Nathan Wyman, who, on the same day, under his hand and seal, assigned the same to Elizabeth B. Wyman, and that the said Elizabeth, in like manner, on June 5, 1854, sold and transferred the same to the plaintiff.

The relief prayed for in the bill is, that the defendants be decreed to convey to the plaintiff the premises described in said bond, by a good and sufficient deed to convey the same, free from all said mortgages, and from all incumbrances by them or either of them created upon the same.

To the bill a general demurrer is filed.

At the time of the execution of the bond, the mortgage to

Isaac and Samuel Farrar was in existence, and to that the obligors were then strangers. Consequently, they were under no obligation by their contract, which was to give a quit-claim deed, on the performance of the condition by Wyman, to cause the mortgage to be discharged; and such quit-claim deed, given at any time before they became the assignees of the mortgage, would leave the same unextinguished. They did not preclude themselves in the bond from the exercise of the right of acquiring subsequently any other title in the premises, beside that obtained from Wyman. Such other title would not enure to a grantee of the same premises in a quit-claim deed delivered before the grantor acquired such other title. *Pike* v. *Galvin*, 29 Maine, 183.

The assignment of the mortgage to the defendants did not operate to the prejudice of the plaintiff or of Wyman. To acquire a perfect title to the premises, the mortgager, or the one claiming under him, was under the necessity of extinguishing the mortgage, whether it remained in the hands of the mortgagees, or was assigned to others.

If Foss had entered into a valid contract with Wyman, by which he was bound to discharge the mortgage, or release his right in the premises, to be afterwards acquired, upon the tender of payment of the amount due thereon, the assignees of Foss, with a full knowledge of the agreement between Wyman and Foss, at the time of the assignment to the defendants, would be under the like obligation. On the other hand, if Foss was not bound by such an arrangement and agreement, as is alleged in the bill, his assignees can be under no greater or further obligation.

The agreement between Wyman and Foss, relied upon in the bill by the plaintiff, touching the advancement of the money due upon the mortgage, and the waiver of the right to its repayment within the time required by law to prevent a foreclosure, are understood to have been verbal, and not in writing. By the allegations in the bill, this verbal agreement was made previous to the assignment of the mortgage to Foss; and the bill alleges no consideration for the agreement,

which was at most a contract for the sale of an interest in lands, and no action could have been maintained thereon. R. S., c. 136, § 1.

Again, the suit is sought to be maintained on the ground of a trust in Foss, which, on the assignment of the mortgage to them, with their knowledge thereof, they were bound to execute. The money was paid by Foss, in consideration of the assignment to him; it was his money, in which Wyman had no interest, and was under no obligation to refund it; and it cannot be treated as a loan to him. Consequently there was no trust, which arose or resulted by implication of law, as there might have been if the consideration paid for the assignment had been furnished by Wyman. The supposed trust, therefore, had no foundation, excepting in a verbal agreement; and was not created in the mode required by the statute, in order to have a binding effect. R. S., c. 91, § 31.

It is insisted, that the mortgage was open to redemption, till subsequent to the time when a tender of the whole amount due thereon was legally made, and a discharge of the same wrongfully refused by the defendants.

It may be true that a mortgage can be kept open by the express agreement of the parties, or by facts and circumstances, from which an agreement may be satisfactorily inferred, when it would be foreclosed, were it not for such agreement, express or inferable. But an effectual waiver of a right to hold the mortgage foreclosed, must be by the mortgagee, or some one having an interest under him. If the interest in the mortgage has not been acquired at the time of the supposed waiver, by the person, who, it is contended, has made it, the mortgage itself is not so opened that the time of redemption is extended beyond the legal period when it would be foreclosed. A valid contract, made by one who had agreed with the mortgager to take an assignment of the mortgage, to extend the time of redemption, followed by such assignment, might suspend the foreclosure accordingly; of this, however, we give no opinion. But if such contract is one, which cannot be enforced on account of a defect therein, which

renders it utterly invalid, it can have no such effect; the waiver, consisting entirely in contract, cannot be available if the contract fails. According to the allegations in the bill, the waiver relied upon, was before Foss became the assignee of the mortgage to Isaac and Samuel Farrar.

The plaintiff having no equities, which entitle him to redeem from the mortgage on the ground of trust, after the supposed foreclosure, he can have no more substantial basis for the suit under the head of fraud. There is no such allegation of fraud in the defendants, or in Foss, under whom they claim, as will entitle him to relief. At any time within three years after the mortgagees took measures to foreclose the mortgage, the same was open to redemption by Wyman, or whoever held his interest. Nothing is alleged to have been done by the defendants, or Foss, which could in the least abridge the mortgager's legal or equitable rights. If he trusted to a contract, which had no validity, to postpone the time of payment of the sum due upon the mortgage, he cannot have relief from the Court, on account of the other party's having treated the agreement as the law regards it. As was said in another case, "if it were a fraud upon one party for another to refuse to execute a conveyance, the effect would be to assume under that clause of the statute, the very jurisdiction, intentionally denied under another and a more appropriate clause." *Wilton* v. *Harwood*, 23 Maine, 131.

It is insisted, that the obligors in the bond having entirely failed to pay the sum of $300 for the store and the lot on which it stands, or to give a quit-claim deed thereof, the plaintiff is entitled to a decree for a specific performance of this part of the contract.

This Court have equity jurisdiction in all suits to compel the specific performance of contracts in writing, &c., when the parties have not a plain and adequate remedy at law. R. S., c. 96, § 10. If the contract appears only in the condition of a bond, secured by a penalty, the Court will act upon it as an agreement, and will not suffer the party to escape from a specific performance by offering to pay the

penalty. 2 Story's Eq., § 751. But in a written contract, by which a party agrees to do a certain act for the benefit of another, or to pay a certain sum as liquidated damages for the omission, as the party who is to do one or the other may elect, this is not a case to which the jurisdiction of this Court, as a court of equity, will attach. It is not an absolute engagement to do the act, instead of paying the equivalent agreed upon. The essential element in equity jurisdiction is wanting; for by the contract itself there is an adequate remedy at law. And the failure to perform, in either alternative, cannot of itself confer equity power.

This part of the bond was evidently a contract, by which the obligors could at their own option discharge their obligation by giving the deed, or pay the stipulated value of the land in money. The remedy at law is plain and adequate.

Many other objections to the maintenance of the bill are urged. Some are founded in a supposed want of right in the plaintiff, and others from the obligations of the defendants under the conveyance by Wyman and the bond to him, and subsequent transactions, alleged in the bill. We have deemed it unnecessary to give consideration to these supposed obstacles, inasmuch as the plaintiff has not presented a case upon the merits, which would entitle him to the relief sought, if the other objections could be overcome.

Demurrer sustained. —
Bill dismissed with costs.

HATHAWAY, APPLETON, GOODENOW and MAY, J. J., concurred.

THOMAS J. WEYMOUTH *versus* ASA W. BABCOCK *& al.*

A plaintiff having received of C., one of two partners, a sum, (less than half the amount due,) "in full discharge" of their firm note, then in suit, "not meaning to discharge B.," (the other defendant and partner,) "from the balance due on said note, and the suit to be entered neither party," — *Held*, that the plaintiff might discontinue as to C. without costs, and have his judgment against B.; but for *no more* than *half* the amount due on the note at the date of C.'s discharge, deducting any subsequent payments.

Under the statute of 1851, c. 213, no action can be maintained in any court in Maine, upon any demand or claim which has been *settled* by the payment of any sum of money, or other valuable consideration, however small.

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

ASSUMPSIT, on a note for $19,69, given Feb. 23, 1849, on demand and interest, and signed A. G. Brown & Co.

When the action came on for trial, at the October term, 1854, Brown was defaulted, and the plaintiff's attorney offered to enter neither party as to Babcock, the other defendant, or to discontinue as to him without costs.

This offer was declined, the defendant pleaded he never promised with Brown, and issue was joined.

Evidence of the partnership and of the execution of the note, having been introduced, the note was read to the jury.

The defendant Babcock offered, in defence, a receipt in the words following:— "Orono, April 19, 1853.

"Received of A. W. Babcock ten dollars, in full discharge for a note signed A. G. Brown & Co., for $19,69, or thereabouts, given me for balance of labor in 1848 or 1849, not meaning to discharge A. G. Brown from the balance due on said note, said note having been sued, and the suit to be entered neither party. "Thomas J. Weymouth."

The defendant's counsel had caused, at the October Term, 1853, a general entry to be made under this action, of "neither party," which was subsequently stricken off on plaintiff's motion. Defendant claimed his costs.

The cause was then withdrawn from the jury, and, upon this evidence, submitted to the decision of the full Court.

W. C. Crosby, for defendants.

1. In April, 1853, the parties intended to put an end to this suit, and in a mode that neither party should be liable for costs. The entry was made by defendant, to carry out his contract.

It was beneficial to plaintiff. He has waived the benefit of that entry and should not now complain if the suit is brought to a close in a manner less beneficial to him. The defendant has been wrongfully kept in Court by the bad faith of plaintiff.

2. The contract is not carried out, if plaintiff is allowed to recover any thing, in this suit, against either defendant. No recovery can be had in a suit in which "neither party" is entered. The defendants were partners, having a common interest, and it may properly be inferred, that a portion of the $10 was paid in consideration that the *suit* should be dropped.

N. Wilson, for plaintiff, argued, that there was only one point in the case, and that was, as to the construction to be given to the paper offered in defence. It was not a release, not being under seal, and could not discharge the other defendant. *Walker* v. *McCullock*, 4 Maine, 421; *Bailey* v. *Day*, 26 Maine, 88; *Ruggles* v. *Patten*, 8 Mass. 480; *Shaw* v. *Pratt*, 22 Pick. 305; *Smith* v. *Bartholomew*, 1 Met. 276; *Lunt* v. *Stevens*, 24 Maine, 534, and same, 566.

GOODENOW, J.—The defendant Brown has been defaulted, and thereby admits his liability to have judgment rendered against him. The receipt given by the plaintiff to Babcock, dated April 19, 1853, was intended as a discharge of Babcock from his moiety of the note in suit, and not intended as a discharge of Brown. Brown was not a party to it.

Whatever may have been the law as to the effect of payment of part of the demand in lieu of the whole, and as a discharge of the whole, before the statute of June 3, 1851, c. 213, it is now the law that no action can be maintained in any court of this State, on a demand or claim which has been settled, canceled or discharged by a receipt of any sum of

money less than the amount legally due thereon, or for any good and valuable consideration, however small.

As to Babcock, whether the full amount of his moiety of the note was paid by him, or *less* than that, the receipt discharges him. And, by the terms of the receipt, we are of opinion that he is not entitled to costs.

The plaintiff is entitled to judgment against Brown for one moiety of the amount due on the note, April 19, 1853, before the payment made by Babcock, and interest on the same, deducting any payments since made by Brown. *Shaw* v. *Pratt*, 22 Pick. 305; *Pond & al.* v. *Williams*, 1 Gray, 630.

Plaintiff has leave to discontinue as to Babcock without costs. Judgment against Brown for damages, as above stated, and for costs.

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

JOHN H. BROWN *versus* PATRICK MORAN.
SAME *versus* SAME.

When jurors have had opportunity to examine for themselves in regard to matters testified to by witnesses produced before them, their verdict will not be disturbed by the Court, on a motion for a new trial, because it differs in some respects from the testimony given in the case.

When evidence legally inadmissible is introduced without objection, it must be understood to be in the case by consent. Each party may then insist on its being considered by the jury in making up their verdict; and instructions by the Court to that effect afford no legal ground of exception.

When a party has recovered, in an action of assumpsit without objection, his damages for the tortious doings of another, he cannot, in trespass, recover damages for the same cause on the ground that the previous proceeding was illegal.

A refusal of the Court in such action of trespass, to instruct the jury that it was not competent for the plaintiff to have recovered in the action of assumpsit for the articles declared for in the present suit, was not erroneous, although it might have been a proper instruction in the action of assumpsit.

The whole question in regard to the articles alleged to have been tortiously taken, having been presented, without objection, to the jury in the action of assumpsit, and *passed upon* by them, it became *res adjudicata* so far as a verdict could make it so.

On Exceptions and Motion for New Trial, from *Nisi Prius*, Hathaway, J., presiding.

These actions were tried at the October term, 1854.

The first was *assumpsit* for labor and materials in building three small houses for defendant. Plea, the general issue.

The plaintiff nearly completed one of the houses and had the others in progress, under a special contract, when a difficulty occurred, and he quit the job. Defendant then took possession of the houses and finished them.

Under instructions from the Court the jury returned a verdict for the plaintiff.

The plaintiff filed exceptions to the instructions, and also a motion for a new trial, on the ground that the verdict was against evidence.

The former were not relied upon at the argument, and the evidence exhibited in support of the latter is indicated in the opinion.

The second action was *trespass* for taking some of the plaintiff's materials provided for finishing the houses. It was commenced on the same day as the other, and was tried at the same term, on a day subsequent to the trial of the action of assumpsit.

The plea was the general issue, and a former recovery.

It appeared in evidence that after nearly finishing one house the plaintiff left for two or three days to attend to another job. On his return he found that some of the materials which he had furnished (those sued for,) and left in the houses, had been removed by defendant. On this account difficulty arose. The plaintiff claimed that they should all be returned. The defendant expressed a willingness to return such part of them as he thought sufficient for the continuance of the work.

On the trial of this action the defendant gave in evidence, without objection, the writ, bills of particulars, and the whole record of proceedings in the action of assumpsit. And there was much other evidence.

The Judge instructed the jury, that although defendant

was a trespasser by intermeddling with plaintiff's materials, yet it was competent for plaintiff to bring an action of assumpsit for his labor, and materials furnished for defendant's houses, and to recover his pay therefor, but that he was not entitled to be paid twice for the same materials; that he could not recover in this action for any of the articles and materials furnished for building the houses which were sued for, and pay for them recovered in said action of assumpsit, between the same parties; that they would have with them the writ, vouchers and bills of particulars introduced by the plaintiff in said action of assumpsit, and the whole record of proceedings therein; and if the articles sued for in this action were embraced in said action of assumpsit, the verdict in that case, so long as it should stand, must be considered conclusive as to the rights of the parties concerning all matters embraced in the action, and rightfully submitted to the jury therein.

The counsel for plaintiff requested the Judge to instruct the jury, "that it was not competent for the plaintiff to have recovered for these articles in the other suit, unless the defendant actually sold the articles taken," and the Judge refused so to instruct them.

The verdict was for defendant, and the plaintiff excepted to the rulings and to the refusal to instruct as requested.

Knowles & Briggs, for plaintiff.

1. The verdict in the action of assumpsit was at most a matter in abatement only, and as it was not pleaded, was waived. Gould's Plead., c. 5, § 153. The instructions in regard to it were erroneous. 2 Greenl. Ev. § 26; *Commonwealth* v. *Churchill*, 5 Mass. 174.

2. The instruction requested should have been given. *Webster* v. *Drinkwater*, 5 Greenl. 323.

3. The tort cannot be waived and assumpsit brought, where property has been stolen, nor could it in this case. *Foster* v. *Tucker*, 3 Greenl. 458. After the property has been sold by the tort-feasor, assumpsit will lie, but the proof shows no such

fact in this case. *Hathaway* v. *Burr*, 21 Maine, 567; *Miller* v. *Miller*, 7 Pick. 136.

4. The articles sued for in this action, could not, therefore, have been lawfully recovered for in the action of assumpsit, and if a recovery had been attempted, (which we deny,) and their value included in the verdict, the amount could be recovered back.

Waterhouse, for defendant.

TENNEY, J. — In the action of assumpsit, which was to recover payment for work and labor done, and materials furnished for building certain houses, and for that part of the materials furnished for that purpose which had been removed by the defendant, the verdict was for the plaintiff, and exceptions were taken to the instructions of the Judge, and a motion filed, that the verdict be set aside. Those exceptions are not relied upon. No copy of the motion has been presented to the Court; but it is understood from the argument, that the ground of the motion is, that the verdict should have been for the defendant, because the payments made by him exceeded the amount of the value of the labor and materials furnished by the plaintiff; but, if not so, because the verdict for the plaintiff was unreasonably large.

At the trial, evidence was introduced in the opinions of witnesses, touching the work done by the plaintiff, and that left undone, according to the contract made between him and the defendant, and the value of each part; and also in relation to work done and materials furnished, in alterations agreed upon, and extra work performed, and the value thereof. The jury inspected the buildings for the purpose of more fully understanding the facts in controversy. Their general knowledge of such matters, and that obtained from inspection, may have essentially controlled and corrected certain opinions, expressed by witnesses, and enabled them to form an opinion differing in some respects from those given in evidence. When all the facts and circumstances, presented by the report, are considered, we are not satisfied that the jury were influenced

by such causes as are held authority to the Court to disturb verdicts, and it is not shown, that they failed to understand the evidence adduced.

The two actions were commenced on the same day, and that of trespass was for causes embraced in the one of assumpsit, which was first tried. Exceptions were taken by the plaintiff in the action of trespass, the verdict having been for the defendant, upon a plea of the general issue, and a former recovery, and upon evidence introduced by both parties.

The plaintiff had the benefit, which he sought, on account of the materials alleged to have been removed by the defendant, in the action of assumpsit; proof having been offered and introduced therein without objection of any kind. It does not appear, that any obstacle to a recovery was presented in any ruling or instruction of the Judge; and if the evidence satisfied the jury, that the defendant had the benefit of the materials, it was included in the damages found; if otherwise, the matter was passed upon by them, and became *res adjudicata*, so far as a verdict could make it so.

In the trial of the action of trespass, the writ, bills of particulars, which had been presented in evidence in the action of assumpsit, the verdict, and the whole proceedings of record therein, were submitted to the jury without objection; and they were instructed that the plaintiff was not entitled to his pay twice for the same materials, and that he could not recover in this action for any of the articles and materials furnished for building the houses, which were embraced in, sued for, and proved in said action of assumpsit, between the same parties.

No objection was made to the plea of general issue and former recovery, and the evidence introduced without objection, must be understood as given under that issue by consent. The jury therefore had the right to consider the evidence before them, and each party could claim that it should be so considered; and the instructions in this case, in effect, were no more than to allow them to come to such a result in their verdict, as they should find the facts to warrant. No question

was made during the trial and the introduction of the evidence in either of the cases, whether assumpsit could be maintained for the labor and materials furnished for building the defendant's houses, if he, as a trespasser, intermeddled with the plaintiff's materials. The proofs were offered, the trials proceeded and the juries were charged, on the idea, that such action could be maintained without any objection; and it is difficult to perceive how the plaintiff was aggrieved by the instructions in the action of trespass, at the time they were given.

The instruction requested by the plaintiff's counsel, and refused, was, that it was not competent for the plaintiff to have recovered, in the action of assumpsit, for the articles which were the cause of action in the writ of trespass, unless the defendant actually sold the articles taken. This might have been a proper instruction for the defendant to have requested in the action of assumpsit. But he did not invoke the principle embraced in the request, but was willing that the plaintiff's claim should be wholly considered in the case in which it was made. The party now making the request for this instruction, brought his action of assumpsit for these materials, presented his proof in support of the claim, without objection, and after securing his verdict, upon which he now asks judgment, insists that the claim for these materials could not be supported in that action. The law does not lend its aid, in support of such an absurdity, to work injustice.

An exception was taken to another ruling, at the trial, but it is understood to be abandoned by the plaintiff.

In the action first named,

Exceptions and motion overruled.

In the other action,

Exceptions overruled.

RICE and APPLETON, J. J., concurred.

ISAAC DANFORTH *versus* JOTHAM S. PRATT.

An inn-keeper without license, to whom a horse is committed to be *doctored and cured*, has a lien thereon for his reasonable charges; and until such lien be discharged, replevin by the owner is not maintainable.

A lien may be waived or lost by voluntarily parting with the possession of the goods.

It may be surrendered by agreement between the parties; but as the lien must be regarded as something of value, such agreement, in order to be obligatory, must be based on a legal consideration.

The promise, not in writing, of a third party, to pay the amount necessary to discharge the lien, is an undertaking to pay the debt of another, void by the statute of frauds, and furnishes no consideration for such an agreement.

The verbal agreement, not executed, of an inn-keeper to send home a horse which he has kept and doctored, in consideration of such promise of a third party, is not a waiver of his lien.

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

REPLEVIN, for a mare.

Defendant pleaded the general issue, with a brief statement of a special property in the mare for feeding, keeping, doctoring and curing her, for the space of thirty days.

The plaintiff owned the mare and kept a livery stable in Bangor. A. W. Noble, an employee of a Mr. Babb of Oldtown, hired the mare of plaintiff, and while in his charge she was badly injured, and he took her to the stable of defendant, who was an inn-keeper in Oldtown, (no evidence was offered that he was licensed to keep an inn,) and requested his ostler to take care of her. He called a farrier.

The next day, plaintiff went up and saw her; said she might get well in a month, and might not in six months; that he would have to leave her there till she got so he could turn her out to pasture, and told the ostler to take good care of her. The farrier was present, and those instructions were shortly after communicated to defendant. The ostler, under the instructions of the farrier, took care of the mare, and when she got better, plaintiff went up and ordered him to take her to the depot of the railroad. He led her out, but before he had delivered her to plaintiff, the defendant came along and asked if the bill for taking care of her had been

paid. Learning that it had not, he directed the ostler to lead her back to the stable, and she was subsequently replevied.

Hastings Strickland testified for plaintiff, that being informed by plaintiff that defendant had refused to let him have the mare, he went to see defendant on account of Mr. Babb, and told him Babb was perfectly responsible; that he was then away, and that he, (Strickland,) would be responsible to him for keeping the mare. Whereupon defendant said he would wait till Babb came down, and would send the mare down by the first team—the first opportunity he had to send her down.

Upon this evidence the cause was withdrawn from the jury and submitted to the decision of the full Court.

A. Sanborn, for defendant.

1. Inn-keepers have a lien upon the property of their guests for all reasonable charges. Yel. 67; Story's Bailments, 476; 2 Kent's Com. 634.

2. If defendant had no lien as inn-keeper, he had as a farrier. 2 Kent's Com. 634; Story's Agency, 455; *Lord* v. *Jones*, 24 Maine, 439.

3. This lien was not waived by the conversation with Strickland. He kept possession. Strickland had no interest in the matter; he was a stranger, and the promise to him was without consideration. *Swann* v. *Drury*, 22 Pick. 485.

It was a collateral undertaking to pay the debt of another, and not being in writing, was void.

Knowles & Briggs, for plaintiff.

GOODENOW, J.—This is an action of replevin. The general property in the mare replevied, it is admitted, is in the plaintiff. The defendant claims to hold possession of said mare by virtue of a lien thereon, for "feeding, keeping, doctoring and curing said mare."

We are of opinion, upon the undisputed facts in the case, that the defendant had such lien, if not as an inn-keeper, as a farrier. *Lord* v. *Jones*, 24 Maine, 439.

Has the defendant relinquished or waived his lien?

Hastings Strickland, introduced by the plaintiff, testified, "that the plaintiff told him, he had been to Oldtown, and that the defendant refused to let him have the mare. Whereupon he went to see the defendant on account of Mr. Babb; that he told the defendant that Babb was perfectly responsible; that Babb was up river on a drive, and would not be down before July, and that he, (Strickland,) would be responsible to him for keeping the mare. Whereupon the defendant said he would wait till Babb came down, and would send the mare down by the first team—the first opportunity he had to send her down." It is in evidence that A. W. Noble, in the employment of Babb, hired the mare of the plaintiff; that she was badly injured while in his possession, and that she was put up at the defendant's stable by him; and that the plaintiff the next day called and examined her, said she was badly hurt, &c., and that he should have to leave her there till she got so he could get her out to pasture, and told the ostler to take good care of her.

A lien may be waived or lost, by voluntarily parting with the possession of the goods; or by any act or agreement between the parties, by which it is surrendered or becomes inapplicable. The defendant, in this case, did not voluntarily part with the possession of the mare.

The agreement with Mr. Strickland was not such an agreement as the law contemplates.

It was not between the parties, the plaintiff and defendant. Mr. Strickland says he went to see the defendant on account of Babb.

It was a promise on the part of the defendant, without any consideration. It was not intended by either party to cancel or extinguish the original claim which the defendant had on Babb or on the plaintiff, and to substitute a new contract with Strickland, in lieu of it. The promise of Strickland to be responsible for the keeping of the mare, was only a promise to pay the debt of another, and not being in writing, was

void by the statute of frauds. It furnished no consideration for the promise of the defendant. It was *nudum pactum.*

A lien must be regarded as something of value. It may be given up without any valuable consideration. But an *agreement to give it up,* in order to be obligatory, must be based on a legal consideration.

According to the agreement of the parties, as reported by the presiding Judge, a nonsuit must be entered in this case, and judgment for defendant for costs, and also for a return of the mare replevied, unless the plaintiff shall cause the defendant's claim for which he has a lien, to be discharged forthwith.

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

DAVID PINGREE *versus* CHARLES H. SNELL.

A. offered to be defaulted for a given sum, in a suit brought against him by B., which offer B. accepted at a subsequent term. A. then claimed his costs of B. from the date of his offer to the time of its acceptance. — *Held,* that A. could not recover costs.

In order to give a defendant, who has filed his offer to be defaulted, a right to costs under the R. S. of 1841, c. 115, § 22, the plaintiff must, 1st, "proceed to trial," and, 2d, fail to recover a "greater sum for his debt or damage" than that for which the defendant offered to be defaulted.

If there has been no trial in the suit, the defendant is neither entitled to costs by reason of his offer, nor thereby relieved from the payment of costs to the plaintiff.

When a statute is revised and parts are omitted in the revision, those provisions are not to be revived by construction.

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

This was an action of ASSUMPSIT.

The defendant filed an offer to be defaulted, at the first term, which offer was accepted by plaintiff at the second term, and a default entered accordingly.

The defendant then moved for his costs, from the date of his offer to the time the default was entered, which motion the Court overruled.

To this ruling the defendant excepted.

A. W. Paine, for defendant.

Rowe & Bartlett, for plaintiff.

1st. The defendant is not entitled to cost by R. S., c. 115, § 22. The original statute on this subject, (Act of 1835, c. 165, § 6,) contains two separate and independent provisions; 1st, that defendant shall recover full costs, if the plaintiff, on the trial, recover less than the sum offered; 2d, that if plaintiff shall accept the offer more than two days after it is made, the defendant shall recover costs accruing after the offer, or after the two days. On the revision of the statutes, the first provision was altered so as to limit defendant's recovery, in case of trial, to costs accruing after the offer, and the second provision was omitted entirely. So the case does not come within the statute as it now stands, the sole contingency, on which defendant can claim costs, not having arisen.

2d. The plaintiff is entitled to full costs.

There is but one state of facts that can prevent the operation of the general rule, which gives costs to the prevailing party; i. e. proceeding to trial and failure, by plaintiff, to recover more than the sum offered. That state of facts does not exist here.

APPLETON, J.— It is provided by R. S., c. 115, § 22, that "in any action founded on judgment or contract, the defendant may offer and consent in writing to be defaulted, and that judgment may be entered against him for a specified sum as damages; and the same shall be entered of record, and the time when the offer was made; and if the plaintiff *shall proceed to trial and recover no greater sum for his debt or damage,* up to the *time* when the offer was made, the defendant *shall recover his costs* of the plaintiff, from the time of such offer *up to the time of trial,*" *&c.* According to the clear and express words of the statute, the defendant is entitled to costs only upon the happening of two events; *first,* that after such offer, the plaintiff shall proceed to trial, and *secondly,* that upon such trial he shall fail to recover "a greater sum for his debt or damage" than that for which the defendant offered to be defaulted. Both must concur to bring a defend-

ant within the provisions of this section. Now in any ordinary use of language, the acceptance of an offer cannot be regarded as proceeding to trial. It rather obviates the necessity of one. If the offer made be accepted, there is not and cannot be a trial.

The costs to be taxed, are from the date of the offer "*up to the time of trial,*" but if there has been no trial, there can be no taxation, for there is no terminal point, *up to which* costs are to be taxed. The words of the statute must be distorted from their natural and accustomed meaning, to allow the defendant his costs.

But upon examining the preceding legislation on this subject, all doubts, if any could be supposed to exist, are removed. Provision was first made by statute of 1835, c. 165, § 6, by which the defendant, upon making an offer to be defaulted, might not merely be relieved of costs, but in certain contingencies might recover them of the plaintiff, notwithstanding he might have been indebted to him. Upon the revision of the statutes, a portion of § 6 was reënacted, with some slight verbal alterations. The last clause of the section was in these words: — "and if after such offer and consent, the plaintiff shall *neglect to accept* of judgment for the sum so offered, for more than two days, the defendant shall be entitled to *recover costs afterwards*, until the plaintiff shall *accept of such offer or surcease his suit*, or shall recover a greater sum," &c. This clause of § 6 was omitted in the revision of our statutes, and this omission can leave no doubt of what was the legislative intention. When a statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. *Ellis* v. *Paige*, 1 Pick. 43.

The defendant has not brought his case within the provision, upon which alone he can be relieved from the payment of costs. *Exceptions overruled.*

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

See dissenting opinion of Mr. Justice MAY, in *Mercer* v. *Bingham.*

NANCY E. TEMPLE *versus* CUTLER PARTRIDGE.

A. sued B. to recover of him damages for obtaining from plaintiff, by fraud, the conveyance of certain lands for less than their value, and proved in the case, that B. received the deed of the lands with covenants of warranty for $350, and sold them two weeks after with like covenants, for $625, to C., who had negotiated for them prior to the conveyance from A. to B.; the title to the same not having been called in question. In defence, B. offered to prove that A's title to the lands was derived through a grantor — married at the time of the conveyance, and since deceased — whose widow had not released her right of dower in the premises; that said grantor was seized of his interest in common with other persons, and that there had been no partition thereof: — *Held*, that the testimony offered by the defendant was not admissible.

A grantor is not permitted to prove that his solemn declarations, in covenants of warranty in the deed given by him, are false; no person having asserted any claim to the premises, which, if valid, would constitute an incumbrance.

Unless evidence is before the jury, which, with that offered and excluded, may be sufficient, if found true and viewed in the most favorable light, to establish the proposition for which it is offered, the party offering it cannot be regarded as really prejudiced by the exclusion.

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

This was an action of the case brought by the female plaintiff before her marriage, under the name of Nancy E. Temple, alleging that, on the fourth day of May, 1854, she was the owner of a strip of land situated in Oldtown, on the east side of Marshe's Island, containing twenty-five acres; that the defendant was her agent authorized to sell said land; that she resided in Boston, and was ignorant of its value; that the defendant, with the intention of defrauding her, falsely represented its value to be $350, when in fact it was of the value of $800, and thereby induced her to sell said land to him for the sum of $350. The writ was dated Sept. 18, 1854.

The plaintiff introduced a deed from herself, as administratrix of the estate of John Temple, to E. B. Pierce, of the premises, dated July 28th, 1851, and a quit-claim deed from Pierce to herself, dated July 31st, 1851, reconveying it to her; also a deed containing the usual covenants of warranty dated May 16th, 1854, from her to the defendant, conveying said premises to him for the consideration of $350; also a deed of

warranty from the defendant to one Twitchell, dated June 1st, 1854, conveying said premises for the consideration of $625 to him. The plaintiff also introduced evidence in relation to the agency of defendant.

Some correspondence between the parties was introduced, and also the testimony of Twitchell, in regard to offers made by him to defendant for the lands before the latter had purchased them of plaintiff.

The defendant then offered to prove certain facts which are fully stated in the opinion of the Court, but the evidence was excluded by the presiding Judge.

In all the negotiations between the parties and representations made by the plaintiff, it did not appear that the title to the premises was ever called in question.

The jury found a verdict for plaintiff for $208,40.

The defendant excepted to the rulings of the Court excluding the evidence offered by him.

G. P. Sewall, for defendant, cited *Crosby* v. *Chase*, 17 Maine, 369; 2 Smith's Leading Cases, 438, note in Duchess of Kingston's case; 2 Smith's Leading Cases, 457, note, and cases there cited.

A. W. Briggs, for plaintiff, cited *Wilkinson* v. *Scott*, 17 Mass. 249; *Campbell v. Knight*, 24 Maine, 334; 1 Greenl. Ev. 28.

TENNEY, C. J.—This action is for the recovery of damages, arising to the plaintiff, by reason of a fraud alleged to have been practiced by the defendant, in procuring title to lands, in the town of Oldtown, from her at a price below the actual value.

In her writ, the plaintiff alleges an authority in the defendant from her, to make sale of the lands, as her agent, she living at the time in Boston; and she proved that he received her deed of the lands, with covenants of warranty, for the consideration of the sum of $350, and in two weeks after conveyed the same with like covenants, to one, (who had, prior to the deed from the plaintiff, been in negotiation for the pur-

chase,) for the consideration of the sum of $625. The case finds, that it did not appear, that the title to the lands had been called in question.

The defendant offered to prove, that the husband of the plaintiff had no title to the lands, which she had shown were sold by her, as administratrix of his estate, to one Pierce, and by Pierce conveyed afterwards to her, except under a deed from one Thomas Bartlett, dated in 1846; that at the time of the conveyance from Bartlett, he had a wife, who is now living, that she did not release her right of dower in the premises, and that Bartlett was dead. Evidence was also offered, that Bartlett was seized of the interest, which he had in the lands, in common with other persons, and that there had been no division thereof. This evidence was not permitted to be introduced.

If the evidence offered had a tendency of itself to prove an incumbrance upon the lands, it would have contradicted the declarations in the covenants of the deed, which the defendant received from the plaintiff, and the deed, which he gave afterwards. No person having asserted in any mode a claim, which, if existing, would constitute an incumbrance in himself, the defendant is not permitted to prove those solemn declarations, made by himself, to be false, in the manner proposed.

But the proof offered, when taken alone, was insufficient to show an incumbrance upon the land, inasmuch as no proof was offered, that the widow of Bartlett was entitled to dower in the premises. It may have been land in such condition during the coverture, that she was not dowable therein. And no evidence was in the case, as shown by the exceptions, to supply this defect. Unless evidence is before the jury, which, with that offered and excluded, may be sufficient, if found true, to establish the proposition for which it is offered, when taken in the most favorable light for the party offering it, he cannot be regarded as really prejudiced by the exclusion.

Exceptions overruled.

HATHAWAY, APPLETON, MAY and GOODENOW, J. J., concurred.

BENJAMIN SHAW *versus* SETH EMERY.

The plaintiff in a suit upon a promissory note, having shown without objection that the defendant's name was subscribed to it by his wife in his absence, and that it was given by her in exchange for another note of defendant of a like amount; the Court *held* that the conversation which took place at the time in regard to the transaction was part of the *res gestæ* and might be put in evidence in the case.

The plaintiff having introduced proof of the execution of the note by defendant's wife and of the conversation attending the transaction, without any infringment of legal principles, the evidence thus properly adduced could not become illegal, in consequence of plaintiff's failure to show that defendant had ratified the acts of his wife.

Evidence to impugn the character of a witness is commonly to be confined to his character for truth.

Testimony to show the improbability of a transaction as stated by a witness, but having no tendency to show that he had given a different account of it, is not a mode of impeaching him known to the law.

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

This was an action of ASSUMPSIT upon an alleged promissory note payable to bearer and witnessed.

The subscribing witness testified that the note was written and signed by the wife of the defendant; that the defendant was not present, and that the note was delivered by her to one William H. Snell; that Snell came to defendant's house in his absence with a note similar in amount, which the defendant had previously given to said Snell, payable to one Ellis, and induced her to sign her husband's name to the note in suit and give it in exchange for the one brought by Snell.

The plaintiff then called William H. Snell as a witness to prove that he sold the note to the plaintiff as his own property, and without telling the plaintiff that defendant's wife gave the note.

The Court excluded the witness. The plaintiff gave him a release, and he was then examined.

The defendant objected to the witness' stating to the jury the conversation that took place between him and defendant's wife at the time she gave the note; he did not object to proof of the acts done at the time. The Court overruled the objec-

tion and allowed the witness to detail fully the conversation that took place between the witness and the defendant's wife.

Snell also testified that he sold the note to the plaintiff the day he received it from the defendant's wife, without telling him that the wife gave the note; and he testified that he was authorized to dispose of it; that about ten days after, he met defendant alone in a swamp forty or fifty rods from any person or house, informed him what he and defendant's wife had done, and that defendant replied, "It was all right; he should have done just so if he had been at home." He also testified that he had no authority from the plaintiff to procure a ratification of said note.

The defendant introduced evidence to show that the witness, soon after the transaction, had given an account of the meeting with the defendant widely different from that testified to by him at the trial; and also to impeach the general character of the witness for truth. He also relied upon the position of the witness in the matter as affecting his credibility.

He also offered to prove for the purpose of showing the improbability of any such ratification as that testified to by the witness, that the witness Snell, a short time previous to the giving of the note by the wife, sold the defendant a horse for which he paid him forty-five dollars; that he warranted the horse to be sound and kind and not exceeding twelve years old, and agreed at the same time that if the horse was not what he warranted him to be, he would take him back and furnish another satisfactory to the defendant; that the horse proved to be twenty-two years old, was unable to eat hay, was unsound and worthless, and that Snell was therefore called upon by defendant to make good his warranty; that he took back this horse and brought the defendant another horse which he said was just such a horse as defendant wanted for his family's use, and he warranted the horse to be sound, kind, and worth seventy-five dollars; that the defendant, relying upon his representations, was induced to give him the thirty dollar note spoken of in the testimony of the subscribing witness to the note in suit, in addition to the forty-five

dollars already paid him, all of which was the price agreed upon for the last horse; that it was agreed at the time and as part of the trade that if this horse did not prove to be what Snell warrranted him to be, the note was to be given up to the defendant and to be void; that within four days after he received the last horse and several days prior to the time when Snell testified he met the defendant in the swamp, as before stated, the defendant ascertained that the last horse was very different from what he was warranted to be by Snell, was unsound, unfit and unsafe for his family's use, and had the heaves badly, and was not in fact worth over twenty dollars. This evidence the Court excluded, and the jury returned a verdict for the plaintiff.

D. D. Stewart, for defendant.

1. The witness was allowed to detail fully, against the defendant's objection, the whole conversation between himself and defendant's wife, though defendant was not present; this evidence was *hearsay* of the broadest kind. His reasons and the wife's replies, were entirely inadmissible. 1 Greenl. Ev. 124. They were no part of the *res gestæ*, because neither the witness nor defendant's wife was authorized to act for him. *O'Kelley* v. *O'Kelley*, 8 Met. 440; *Wright* v. *Deklyne*, 1 Peters' C. C. R. 203.

2. The ratification attempted to be proved was not made to the plaintiff, or any person by him authorized to receive it. There was no *assent of the two minds*, necessary to the contract. *Whitney* v. *Bigelow*, 4 Pick. 113.

3. The defendant offered to prove, for the purpose of showing the improbability of ratification, certain facts, which, if admissible, would have convinced any person of the improbability of such ratification. The evidence offered related to the *execution itself* of the note, and therefore was admissible, though the plaintiff was indorsee. Testimony cannot be excluded which would have a tendency, however remote, to establish the probability or improbability of the fact in controversy. *Trull* v. *True*, 33 Maine, 367.

J. A. Peters and *J. Hill*, for plaintiff.

1. The conversation accompanying the act of giving the note, was clearly admissible as part of the *res gestæ*.

2. The testimony as to the consideration of the note, was offered to impeach the witness, and for no other reason. For such purpose, it could not be received. 1 Greenl. Ev. 52; *Robinson* v. *Heard*, 15 Maine, 296; *Scott* v. *Hall*, 16 Maine, 326.

TENNEY, C. J. — According to evidence not objected to, the defendant's wife, in his absence, was induced by William H. Snell, to sign her husband's name to the note in suit, and to exchange it for one of the same amount given by the defendant to Snell, but running to Charles B. Ellis; and, on the same day, Snell sold the same to the plaintiff.

Snell being released by the plaintiff, was allowed, against the objection of the defendant, to detail fully the conversation which took place between the witness and the defendant's wife, at the time the note was signed by her; but the defendant made no objection to proof of the acts done at the same time.

In order to maintain the action, the plaintiff undertook to prove, first, the manner in which the note in suit came into existence, and by whom it was signed; and second, that the signature of the wife of the defendant, upon the note, was adopted by him, and her act ratified. No objection was made to this, if the proof was competent.

The acts performed in preparing and signing the note in suit, and exchanging it for the one produced by Snell, cannot be supposed to have occurred without any conversation connected therewith, especially if the defendant's wife was induced by Snell to perform the acts done by her. The expressed wish for the change of notes, of Snell, and the willingness of the wife to sign the note for her husband, must have been made known by one to the other, through the means of speech, when they were in each other's presence. Such conversation was clearly a part of the *res gestæ*, so far

as it took place in connection with the acts stated in evidence. Other conversation may have taken place at the time, having no relevancy to the issue; but the case does not so find, and it cannot be assumed.

When Snell informed the defendant, afterwards, what he and his wife had done, the latter replied, "it was all right, he should have done just so, if he had been at home." The conversation attending the signing of the note, though verbal, were acts, equally with others, and were equally embraced by the most precise rules in the use of language within the meaning of the witness' statement, that he told the defendant "what he and the defendant's wife had done." If Snell had omitted to inform the defendant of the material parts of the conversation pertaining to the transaction, the statement, that he told him what he and his wife had done, was untrue.

If, however, the conversation was not in fact communicated by Snell to the defendant, in connection with the information of the acts done, the ruling of the Court, to which exceptions were taken, upon this point was not erroneous.

It being competent for the plaintiff to prove that the note was signed by the defendant's wife, with conversation connected with it, as we have already decided, it did not become otherwise, because subsequently in the course of the trial, he failed to prove the ratification by the defendant, of her act in putting his name to the paper. The former being established without any infringement of legal principle, the failure to prove the ratification, did not render the evidence, which was proper when adduced, entirely illegal afterwards. If it did not appear, from Snell's testimony, that he stated the conversation between himself and the defendant's wife, as well as the other acts, to him, the Judge could have been requested to instruct the jury on the consequence of such omission. But on the point of ratification no exceptions are taken to any ruling, instruction or refusal to instruct.

The defendant's counsel insists, that as it appears in the evidence reported, that at the time of the supposed ratification of the acts of the wife of the defendant, by him, his con-

versation was with Snell, and after he had parted with all interest in the note, the ratification, even if otherwise sufficient, cannot avail the plaintiff. When this case was before the law Court at a previous term, this point was presented by the defendant, and it was then open to him; but the fact does not appear to have been regarded by the Court as fatal to the plaintiff's recovery. *Shaw* v. *Emery*, 38 Maine, 484. But this point was not taken at the last trial, and the argument thereon is inappropriate.

The testimony offered by the defendant to show the improbability of the transaction, as stated by the witness Snell, was not a mode of impeaching the witness known to the law. The evidence offered had no tendency to show, that the witness had given a different account of the transaction, concerning which he testified, and it does not appear that his attention was called to the matter, which the defendant offered to prove. Evidence to impugn the character of a witness is commonly to be confined to his character for truth. *Commonwealth* v. *Moore*, 3 Pick. 194. *Exceptions overruled.*

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

RICE, J., dissented.

JOHN PRESCOTT *versus* JACOB CURTIS *& als.*

A complaint for flowage, under R. S. of 1841, c. 126, § 6, must contain such a description of the land alleged to be overflowed, and such a statement of the damages caused thereby, as will exhibit in the record with sufficient certainty the matters determined in the suit.

In such complaint, it is not necessary to allege that the lands were overflowed by reason of the head of water made *necessary* for the mills of the respondents.

Nor is it required to allege that the respondents built their dams and mills upon their own land, or upon the land of another with his consent.

The respondent may, by R. S., c. 126, § 9, plead to the complaint, that the complainant has no right or estate in the lands alleged to be flowed; that the respondent has a right to maintain the dam complained of for an agreed price or without compensation; or any other matter which may show that

the complainant cannot maintain his suit; but he cannot plead in bar that the land is not injured by the dam.

The only ground of complaint under the statute is, that the complainant has sustained damage in his lands *by their being overflowed by a mill-dam.*

The issue, whether he has suffered such injury or not, must first be made before the commissioners appointed by the Court. Their report may be impeached; and then this question, with others, if such exist in the case, may be regularly presented to a jury for decision.

The issue presented by a plea in bar, that the lands were not overflowed by reason of the head of water raised by the dam, is virtually the issue, whether the complainant has or has not suffered injury; and must be presented to the commissioners before it can be submitted to a jury.

A prescriptive right to flow lands cannot be acquired, unless it appear that the owner of the lands has suffered injury or sustained damage by the flowing; and such injury or damage must be *proved.*

A plea by respondents, that they had flowed the lands more than twenty years prior to complaint, *doing the same damage, if any,* as during the period covered by the complaint, is peculiar, and embraces an issue to be tried by the commissioners and not by the jury in the first instance.

The complaint, in this case, meets every requirement of the statute, and is sufficient.

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

This was a complaint under R. S. of 1841, for flowing lands.*

It was dated January 9th, 1855, and returnable to the April term of the Court. In vacation, Nov. 23d, 1855, the respondents filed their declaration, that they verily believed they

* The complaint in this case was as follows: —

To the Supreme Judicial Court to be holden at Bangor, in and for Penobscot County, on the first Tuesday of April, A. D. 1855.

Complains John Prescott of Hermon, in said county, against Jacob Curtis, Jr., and William L. White and Philander P. Crosby of Hampden, in said county, that said Curtis and White and Crosby, on the last day of October, A. D. 1852, erected and have ever since maintained a water mill, to wit, a saw mill, on the Sowadabscook stream in said Hampden, and a mill-dam upon and across said stream, which is not navigable, to raise water for working said mill, and still maintain said mill and dam; that the lands of your complainant, bounded and described as follows, to wit: Commencing at a point where the Sowadabscook stream crosses the town line between Hampden and Hermon, and running in a westerly direction on said town line one hundred and thirty rods; thence north five degrees east thirty-seven rods; thence north forty-five degrees east two hundred and fifty rods; thence northeasterly about one hun-

had a good defence to the whole of the complainant's claim, and that they intended in good faith to make such defence. Their specifications of defence set out: —

1. That the dam complained of, did not, by the head of water raised thereby, overflow the complainant's land in any degree.

2. That the mill and dam had stood more than twenty years where they then stood, causing the same head of water, and the same damage, if any, to the complainant, without objection on his part.

3. That the respondents had a right to raise such head of water without compensation.

4. That the complainant had no title to the premises alleged to have been flowed.

At the April term of the Court in 1856 the cause came on for a hearing, when the respondents objected to the sufficiency of the complaint and moved that it be dismissed, because it did not contain an allegation that the complainant's land therein described was overflowed by reason of the head of water made necessary to work defendants' mill; and because that the complaint did not allege that the respondents had built their dam and mill therein named upon their own land, or upon the land of another with his consent. Both of these objections the Court overruled.

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dred and thirteen rods; thence northwesterly about eighty rods; thence easterly forty-five rods to a small pond; thence along the shore of the pond and along the shore of the outlet to said pond, to Wheeler stream; thence along the shore of said Wheeler stream to a pond, and along the shore of the pond and the shore of the outlet to the last pond, to the Sowadabscook stream; thence along the said Sowadabscook stream to the point of starting, according to a plan of said land made by Charles D. Bryant, and dated September 20th, A. D. 1852, have been overflowed by said mill-dam ever since the erection of said mill and dam, and still are overflowed by said dam; and that your complainant has sustained damage in his lands by their being overflowed by said mill-dam, yearly, since the erection thereof, in the sum of one hundred dollars a year. Wherefore he prays this Honorable Court that compensation for damages so sustained by him may be given and awarded to him, according to the provisions of the statute in such cases made and provided.

JOHN PRESCOTT.

The defendants then pleaded in bar, that the complainant's land was not flowed by reason of the head of water raised by the defendants' dam.

Also that they had flowed the plaintiff's land for upwards of twenty years doing the same damage, if any, that had been done within three years last before the date of the complaint.

The two issues presented by the pleadings were, that the plaintiff's land was not flowed by defendants' dam, and a prescriptive right to flow.

The plaintiff introduced a witness whose testimony tended to show that the dam did overflow the plaintiff's land, when the Court ruled that no testimony need be introduced to this point, as the defendants could not in this stage of the case deny the flowage and present that issue to the jury, but must do so, if at all, before the commissioners to be appointed by the Court under the statute.

The plaintiff then rested his case, and the defendants moved a nonsuit, which was overruled by the Court.

The defendants then introduced testimony to show a prescriptive right, and examined a large number of witnesses, from whose testimony it appeared that the mill site was an old one, the first dam and mill having been built before A. D. 1801; that both dam and mill had often been repaired prior to 1852, when the present dam and mill were built upon the old site, the dam having been built nearly new, and the mill thoroughly repaired.

The testimony of these witnesses tended to prove on the part of the defence:—

1st. That the dam built by defendants was not higher than the old one, but of the same height.

2d. That, from the nature of the stream and of its connections with three large ponds, to wit, the George pond, the Hermon or "*Big*" pond, and the Little pond, the position of the plaintiff's land and the height of the water at the dam and above it, as shown in admeasurements made by an engineer, the land of complainant could not be flowed by the dam.

3d. That the meadows upon this stream and these ponds were not flowed any more since the defendants built their dam than before.

4th. That the water in the Sowadabscook stream and these ponds drained off as readily from the adjacent meadows in times of freshets, since 1852, as before; and generally, that the flowage since 1852 was the same as before that period.

The Judge instructed the jury that the respondents could not have acquired a prescriptive right to flow the complainant's land without the payment of damages, unless the latter had suffered injury or sustained damage by reason of such flowing; and that they were not permitted to infer injury or damage to the complainant, but that such fact must be proved. To these rulings and instructions the respondents excepted.

A verdict was taken for complainant on the last issue, *pro forma;* the Court having intimated, at the suggestion of counsel, what instructions he should give the jury. And the questions of law arising in the cause were reserved in this form.

A. H. Briggs, for respondents.

1. The complaint should allege, that the overflowing was occasioned by the head of water which it became necessary to raise, in order to run the mill. Stat. of 1821, § § 1, 2, 3; R. S. 1841, c. 126, § § 1, 6. *Farrington* v. *Blish & al.,* 14 Maine, 423.

2. Defendants had a right to trial by jury of the issue of *flowage.* If not flowed, the plaintiff had no right to damage or appointment of commissioners to assess damage. The injury he is forbidden to plead by statute is not "flowage," but damage arising from flowage. *Farrington* v. *Blish & al.,* before cited; *Axtel* v. *Coombs,* 4 Maine, 322; R. S. & Stat. of 1821, before cited.

3. The instructions of the Court, that the jury could not infer injury and damage, but that the same must be specially proved, were erroneous. Plaintiff alleges and acknowledges injury, by his complaint, for three years prior to its date, and the respondents prove that it had been the same for forty

years. *Seidensparger* v. *Spear*, 17 Maine, 123; *Hathorne* v. *Stinson & al.*, 12 Maine, 183; same case, 10 Maine, 224.

A. Sanborn, for complainant.

1. All the allegations required by the R. S. of 1841, c. 126, are found in the complaint. The provisions of this statute in this respect, are essentially different from those of the statute of 1821. *Farrington* v. *Blish & al.*, 14 Maine, 423; Laws of 1821, c. 45.

2. The ruling of the Court that respondents could not, at that stage of the proceedings, deny that the complainant's land was overflowed, but that this was a question for the commissioners, was correct.

The R. S. expressly forbid the plea, that the land is not injured. The plea put in by the respondents, that the land was not overflowed, was, to all intents, tantamount to a plea that it was not damaged by the flowage. *Axtell* v. *Coombs*, 4 Maine, 322; Stat. of 1824, c. 261, § 1; R. S. of 1841, c. 126; Statute of Massachusetts of Feb. 9, 1796; Statute of Massachusetts of Feb. 28, 1798.

3. The ruling of the Court upon the subject of prescriptive right is fully sustained by the authorities. *Seidensparger* v. *Spear*, 17 Maine, 123; *Wentworth* v. *Sanford Man. Co.*, 33 Maine, 547.

TENNEY, C. J. — Under R. S., c. 126, § 6, the complaint shall contain such a description of the land, alleged to be overflowed, and injured, and such a statement of the damage, that the record of the case shall show, with sufficient certainty, the matter which shall have been heard and determined therein. The complaint in this case contains a specific statement of every thing required by this provision.

The Court overruled a motion made by the respondents, to dismiss the complaint, because it is not alleged therein, that the lands described were overflowed, by reason of the head of water, made *necessary* to work the respondents' mills; and because it did not contain the allegation, that the respondents built their dam and mills on their own land, or on land of

another with his consent. Such allegations are not required in terms by the statute of 1841, c. 126, as they were by that of 1821, c. 45. And on an examination and comparison of the two statutes, the change was obviously intended. The motion was properly overruled.

The respondents pleaded in bar, that the complainant's lands were not overflowed, by reason of the head of water raised by the respondents' dam. The Judge ruled substantially, that whether it were so or not, was not an issue, which could be there tried, by the jury; but one, that must be determined by the commissioners to be subsequently appointed by the Court, under the statute, if tried at all.

By R. S., c. 126, § 9, the respondents may plead, that the complainant has no right, title or estate in the lands alleged to be flowed; or that he has a right to maintain such a dam, and flow the lands for an agreed price, or without any compensation; 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.

The only ground for the complaint under the statute is, that the complainant has sustained damages in his lands *by their being overflowed by a mill-dam.* Sect. 5. If the lands have not been overflowed by the mill-dam alleged in the complaint, they have not been injured by such dam. But the respondent is precluded from pleading that the land is not injured by such dam; consequently, that it was not overflowed thereby.

It is said by the Court, in *Nelson* v. *Butterfield*, 21 Maine, 220, "but there can be no doubt, that it was the intention of the Legislature of this State, to require that defence (that the complainant had not been injured,) to be first made before the commissioners, whose report may be impeached, and this question, among others, may then be regularly presented to a jury for a decision."

The respondents, in another plea, claimed to be exonerated from liability, under an alleged prescriptive right to flow the

lands, described in the complaint, without the payment of damages, which the Judge instructed the jury, could not be acquired, unless it appeared that the complainant had suffered injury or sustained damages by the flowing relied upon to sustain this defence; that such damage must be proved. This principle is well settled by a series of decisions in this State, and affirmed in a recent case. *Underwood* v. *North Wayne Scythe Co.* 41 Maine, 291.

The plea of the respondents, last referred to, is peculiar in its form and character, in this, that it is alleged that they had flowed for upwards of twenty years before the date of the complaint, doing the same damage, if any, that had been done, within the three years, which was the subject of the complaint. Whether damage was done within three years before the origin of the complaint, was not a question to be settled at the trial, by the jury; but the damage for the twenty years and upwards must have been shown absolutely, in order to make out the prescriptive right. *Exceptions overruled.*

HATHAWAY, APPLETON, MAY and GOODENOW, J. J., concurred.

COUNTY OF HANCOCK.

ELIJAH S. DOANE *& als. versus* EDWIN HADLOCK, *Ex'r.*

In the interpretation of wills the great object of courts is to give full effect to the intention of the testator. But a will, to be effectual, must be executed in conformity with the requirements of the statute.

To give effect to an interlineation made by the testator, without a new attestation, would be to disregard the statute requirement. On the other hand, to hold the whole will void for that cause, would be to defeat the intention of the testator. Such interlineations are therefore disregarded, and the will approved according to the original draft, as if nothing had been done to it.

Interlineations, made by a stranger, when the original legacy is known, will likewise have no effect, and the will will be approved as it originally stood.

Interlineations, made by the legatee himself, will at most only avoid the legacy so altered. The other bequests will not be destroyed thereby.

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

This was an appeal from a decree of the Judge of Probate for the county of Hancock, allowing and decreeing probate of the will of Samuel Hadlock, late of Cranberry Isle.

By the ninth bequest the testator gave his daughter Abigail C. one house and ten acres of land, for her portion and share of his estate "in full."

The tenth bequest was in the words following, "I further give my daughter Abigail C. five dollars more." Evidence was introduced tending to establish the fact that the tenth bequest was inserted after the execution of the will, and it was contended that the entire instrument was thereby vitiated and made void.

Wiswell & Knowles, for the appellants, contended, that the insertion of the tenth bequest, by the testator, after the execution of the will, rendered the whole will void; it being a material alteration. R. S., c. 92, § 2; *Homer* v. *Hollis*, 11 Maine, 309; *Adams* v. *Frye*, 3 Met. 103, 104; *Brackett* v. *Mountfort*, 11 Maine, 115; *Bennett* v. *Thorndike*, 1 Maine, 73.

Kent & Robinson, for defendants, contended:—

That the will was not rendered void by the addition of another bequest, after its execution by the testator; and cited to this point, the following, among other authorities. *Wheeler* v. *Bent*, 7 Pick. 61; *Larkins* v. *Larkins*, 3 Bos. & Pull. 50; *Short* v. *Gastrell*, 4 East, 419; 13 East, 526, 537; 2 Bos. & Pull. 650.

The counsel also referred to the case of *Greeville* v. *Tylee*, in 24 Eng. Com. Law and Equity Rep. (Little & Brown's ed.) 53; also to the case of *Goods of Redding* or *Higgins*, 1 Eng. Com. Law and Equity Rep. (Little & Brown's ed,) 624. In the will, originally signed C. Higgins, the testator afterwards changed her name to Redding, and erased the name and wrote Redding. The second signature was not attested. Probate was granted of the will as it was originally executed.

See also *Simmons* v. *Rudall*, 2 Eng. Law & Equity Cases.

APPLETON, J. — This was an appeal from the decree of the Judge of Probate for the County of Hancock, allowing and decreeing the probate of the will of Samuel Hadlock. The validity of the will upon appeal was established by the verdict of the jury.

It appears from the conclusion of the report of the case, that the Court are first to consider the instructions of the presiding Judge to the jury, and if they are found to be correct, judgment is to be rendered upon the verdict, without reference to the inquiry whether the appeal was well taken or not.

By the 9th bequest in the will, the testator gave to his daughter Abigail "one house and ten acres of land, agreeable to a deed from me to her, for her portion and share of my estate in full," &c.

The 10th bequest is in these words: "I further give my daughter Abigail C. five dollars more."

Evidence was offered and received at the trial tending to show that the tenth bequest was interlined by the testator after the due execution of the will, and it was insisted by the

counsel for the appellants, if such was the fact, that the entire will was void.

In reference to this point the Court instructed the jury, "that if the testator, during his life and after the execution of the will and the attestation of the three witnesses, inserted himself the tenth bequest, (which was the alteration alleged,) *that such an insertion would not render the will void* and prevent its probate and allowance. But that if inserted after the same execution by any other person, with a fraudulent intent, or for the purpose of giving additional strength to the will, it would render the whole void."

The great object of courts in all cases is to give full effect to the intention of the testator. But the will to which effect is to be given, must be one, which is in conformity with the requirements of the statute. In case of an interlineation by the testator, without a new attestation, if effect should be given to such interlineation, the statute of wills, which requires an attestation by three subscribing witnesses, would be disregarded. If, on the other hand, the will were for that cause to be held entirely void, it might defeat the intentions of the testator.

To avoid this dilemma, of disobeying the mandate of the Legislature, or of defeating the intentions of the testator, the Prerogative Court, which in England has jurisdiction over the probate of wills, in case of an erasure or interlineation of a will after its due attestation, disregard the same, and probate the will according to its original draft. In *Goods of Sir Charles Ibbotson*, 2 Curteis, 337; In *Goods of James Beavan*, 2 Curteis, 369. It seems well settled that to burn, tear, or obliterate a part of a will is a nullity, if done *sine animo revocandi* and only for the purpose of making some new disposition or alteration; and if from want of compliance with the statutory regulations such disposition or alteration cannot take effect, then the tearing, burning, or obliterating in no degree revokes the will, but it remains in full force as if nothing had been done to it.

The maxim of the law is "*tunc prius testamentum rumpitur*

cum posterius rite perfectum est." In *Locke* v. *James*, 11 Mees. & Wells. 901, a testator, by his will duly executed, devised certain real estate to R. N. in fee, subject to and charged with an annuity of *six* hundred pounds a year, which he gave his daughter E. J. for her life, with powers of distress and entry on the devised estates in case the annuity was in arrears. He subsequently erased with his pen the word *six* and inserted over it the word *two*, leaving however the word *six* legible in each place where it occured, and on the same day he added a memorandum or codicil to his will in the presence of one witness only, recognizing the above alterations. It was held that the substitution of *two* for *six* hundred under these circumstances was inoperative and that E. J. retained a legal interest in the annuity of £600. "The substitution in the will," says Parke, B., "was inoperative, having been made after the subscription of the witnesses, not in their presence, and without republication; and the substitution for the purpose of giving effect to which, the erasure was made, thus failing, the law is clear that the erasure fails also. It is treated as an act done by mistake, *sine animo cancellandi.* What the testator in such case is considered to have intended is a complex act, to undo a previous gift for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is, that there is no sufficient reason to be satisfied that he meant to vary the former gift at all." These views have received the sanction of the English courts in many other cases. *Larkins* v. *Larkins*, 3 B. & P. 16; *Short* v. *Smith*, 4 East, 419; *Winsor* v. *Pratt*, 2 B. & B. 652; *Wood* v. *Wood*, 1 Phill. 357.

So it has been repeatedly held in this country that an interlineation, after the due execution of a will, by the testator would not have the effect of canceling or revoking the entire will. The will would remain as before the ineffectual alteration. In *Jackson* v. *Holloway*, 7 Johns. 395, the testator in his will made bequests of all lands of which he was then possessed, but subsequently becoming seized of other land, he altered his will by interlineation so as to make his devise ex-

tend to all lands of which he should die seized. It was held that the erasures and interlineations not being attested by three witnesses could not operate, but that they did not destroy the original devise, and that the subsequently acquired lands descended to the heirs at law. In *Wheeler* v. *Bent*, 7 Pick. 61, it was held that the interlineation of a legacy, after the execution of the will by the scrivener under the direction of the testator, would not make the will void.

If the interlineations were made by a stranger, they would not destroy the will and render it void. In *Smith* v. *Fenner*, 1 Gall. 170, STORY, J., says, "if the interlineation be made by a stranger and the original legacy be known, it will have no legal effect, and the legacy will be still recoverable and ought to be proved as it originally stood. If made by the legatee himself at most *in odium spoliatoris*, it will only avoid the legacy so altered, but it cannot destroy other bequests in the will either to the legatee himself or to others. This is not like the case of a contract where the alteration of a security by the obligee himself avoids it. The legatees all take by the bounty of the testator; the object is to carry his will into effect and not merely to attend to the merits or demerits of those, who claim under it." That an alteration of a will by a stranger will not destroy it, seems to be inferable from *Jackson* v. *Malin*, 15 Johns. 298.

The only exceptions to which the counsel for the appellants have called our attention or upon which they rely, relate to the inquiry whether a will altered by the testator after execution is for that cause void. It has been seen that it is not so regarded by the decisions of courts in England and in this country. There is nothing in our statute of wills in any degree in conflict with these adjudications. There is no allegation by the excepting counsel that the rulings of the presiding Judge in other respects were incorrect, and in this, they being found to be in accordance with law, judgment by agreement of parties must be entered upon the verdict.

The rulings, if erroneous in the latter clause of the instruction to which reference has been made, were so by being

too favorable to the appellants; but of that they cannot complain.

Whether the question of erasure or interlineation can be raised after probate, and whether upon appeal it must be specifically determined by a jury, and when and how it is to be tried and determined, is not material to the present inquiry. The interlineation if established would not affect the appellants. Unless, if proved, its effect would be to render the will void, it is immaterial to them whether it be in or out of the will. *Motion and exceptions overruled.*

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

JOHN TAGGARD *& al. versus* GEORGE W. BUCKMORE.

A *general lien*, at common law, is the right to retain the property of another, to secure a general balance of accounts.

A *particular lien* is a right to retain the property of another, only for a charge on account of labor employed or expenses bestowed upon the identical property detained.

The lien provided in the Revised Statutes, c. 125, § 35, is not a general lien, but the same as a particular lien at common law.

Materials, sold by one party to another, under the representation that they would be wrought into a vessel, which the latter contemplated building, or which was in process of construction by him, but which were not so used, would not create a lien on such vessel.

If, however, such materials were incorporated into a vessel other than that designated, the lien would attach to the vessel on which they were in fact used.

A. sold a quantity of iron to B. A portion was incorporated in a vessel, and the balance was appropriated to other purposes. A. afterwards recovered judgment for the whole of the iron: — *Held*, that this was a waiver of the lien, as the value of the iron not used about the vessel was merged in the judgment, and could not be separated from the other portion.

The law requires no useless ceremony. An officer is not liable, as for an omission of duty, for neglect to deliver an article which had been attached in the suit but which could not legally be sold on the execution.

ON FACTS AGREED, from *Nisi Prius.*

Taggard *v.* Buckmore.

This was an action of CASE, and came to this Court on facts agreed to be as follows:—

A. Scammons & Co., in the spring of 1854, commenced building a vessel, and applied by letter to plaintiffs to furnish iron for that purpose. Accordingly, plaintiffs, in the months of April and June of that year, furnished two bills of iron for the construction of such vessel, which was received in the yard and was ready for use. About half the amount of iron so furnished, was actually used in said vessel; but the balance was otherwise used by A. Scammons & Co., or remained unused in the yard. In July of the same year, A. Scammons & Co. failed, and the vessel and all wood materials in the yard, were attached and sold to one party by consent on the writs, the iron materials being sold at the same time to other parties; and the officer proclaimed and made known at such sale, that he offered the vessel for sale subject to all liens thereon.

Subsequent to that sale, the plaintiffs brought an action to enforce their lien, provided they had any, upon said vessel for the iron so furnished, and delivered their writ, with instructions thereon, to defendant, then sheriff, for service; and said defendant thereafter, as directed, attached said vessel then on the stocks, and on the 26th day of September, 1854, made due return thereof upon said writ. The action was afterwards defaulted, and plaintiffs recovered judgment for the whole bill and costs, and execution was duly issued thereon, and the plaintiffs thereafter, to wit, on the eighth day of May, 1855, and within thirty days of the rendition of judgment in their said action, caused a legal demand to be made on said Buckmore, who was then and there requested to produce said vessel, that the same might be taken on said execution, but he neglected and refused so to do, and said execution still remains unsatisfied.

If this action is maintainable, a default is to be entered; otherwise a nonsuit. If plaintiffs are entitled to hold for so much of such iron as was actually worked into said vessel only, then damages are to be assessed.

T. Robinson, for plaintiffs.

Plaintiffs have sued for their whole bill. It was one contract, furnished for one purpose, all being of a description subject to protection under the lien law. It was of the kind and description for which the law gives a lien; and for such only did they recover judgment against the builders of the vessel, which was seasonably attached by defendant, by their directions, and in the mode to secure their lien; and if they fail to hold defendant responsible, they lose their entire demand.

Persons furnishing materials cannot be held to follow the materials *furnished* and witness the appropriation of the whole to the purpose designed. If it is the material for which the law provides the lien, unmixed with other things, delivered in good faith, and appropriated in the main to the object intended, it would be greatly unjust to allow any misappropriation, or non-use of a part, to defeat the intent of the law; for if the provisions of the law can be thus evaded, it will but serve to entrap, rather than protect the rights of those dependent upon it. Parties should only be held to a reasonable compliance with the terms of the law, to claim its benefits. The words of the statute are plain and of unmistakable import; affording a safe exposition of the meaning and intent of the law. It reads, "any person, who shall *furnish* materials, for, or on account of any vessel building, or standing on the stocks, shall have a lien on such vessel," "and may secure such lien," &c. Now, in the case at bar, it is agreed that plaintiffs furnished the iron for the vessel, and that it was so received, and had been in part applied, when the failure of the owners occurred. The lien had clearly attached, before that event, and the vessel stood charged with the whole amount furnished by plaintiffs. The letters in the case, and other facts agreed, place the claim in a favorable light, and leave no doubt as to the meaning and intent of the parties; an equally liberal interpretation of the law as obtained in *McCrillis* v. *Wilson*, 34 Maine, 286, will secure all that is claimed by plaintiffs. A lien, in that case, was suffered to

attach for labor *not* performed, and upon logs upon which *no* labor was shown to have been expended. Plaintiffs' lien having once attached, cannot be disturbed by the subsequent sale of the vessel by the general creditor.

A. Wiswell, for defendant.

1. If plaintiffs had a lien for any part of their bill, by taking judgment for the whole amount of both bills, upon some items of which there was no lien, they have waived it.

In each bill rendered there is an item for "truckage." No lien could attach for those items. The plaintiffs could have charged and taken judgment for the freight of the iron from Boston with the same propriety. The amount of the items charged is of course immaterial. A person may enforce a lien for his own labor, but not for the labor of another. In this case the plaintiffs undertake to enforce a lien for the labor of the truckman. *Pearsons* v. *Tinker,* 36 Maine, 384; *Johnson* v. *Pike,* 35 Maine, 291; 34 Maine, 273 and 286.

2. The case finds that only about one half of the iron furnished, and for which judgment was taken, was used in the vessel; the other half having been used by A. S. & Co., and sold by the sheriff to parties other than those who purchased the vessel. If the iron had been furnished for and on account of the vessel, in compliance with the statute, it is contended that no lien could be enforced for that portion not used.

It has been expressly decided in the case *Phillips* v. *Wright,* 5 Sandford, N. Y., 342, that "the material man has no lien unless he proves that the materials he furnished were used in the construction of the vessel. He has a lien for all proved to be so used."

In the case at bar, provided plaintiffs had furnished and charged the iron, in accordance with the statute, and had sued and recovered judgment for all proved to have been used in the vessel, then it is admitted plaintiffs would have had a lien for such part of the iron.

Neither of these conditions has been complied with, and this suit, it is believed, cannot be maintained. *Hull of New Ship,* Davies, 199.

TENNEY, C. J. — Any shipcarpenter, 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, &c., shall have a lien on such vessel, &c. R. S., 1841, c. 125, § 35.

As in other cases, we must resort to the common law, to ascertain the meaning of the term "lien;" and it is there thus defined: "A general lien is the right to retain the property of another for a general balance of accounts; but a particular lien is a right to retain it only for a charge, on account of labor employed, or expenses bestowed upon the identical property detained." 2 Kent's Com. 634. The author adds, "The one is taken strictly, but the other is favored in law. The right rests upon principles of natural equity and commercial necessity."

The lien referred to in the statute cannot be a general lien; the language forbids such construction. But in its character, it is the same as a particular lien, at common law.

The principle embraced in the statute is founded in natural justice, that the party, who has enhanced the value of the property, by incorporating therein his labor or materials, shall have security on the same, though changed in form, and inseparable from the property. But justice does not require, that he should be allowed the security, in the same property, for the price of materials, which became no part thereof.

Materials, sold by one party to another, under the representation that they would be wrought into a vessel, which the latter contemplated building, or which was in the process of construction by him, and afterwards diverted from that purpose, by being disposed of by the purchaser, or taken and sold on an execution against him, so that they never became a part of the vessel, have not been bestowed upon the identical vessel, for which they were purchased; but may in fact have been incorporated into another vessel, to which the lien could with greater propriety attach.

If the doctrine advocated by the plaintiffs' counsel should prevail, the laborers upon a ship, and those who provide mate-

rials which are actually used in its construction, may be deprived of their respective liens thereon, by a previous suit and attachment, in favor of a party who has sold materials for the same ship, but which have never been used upon it.

It cannot be doubted, upon a true construction of the statute, that the lien provided thereby, can extend no further, than to be security for the price of the labor and materials actually expended upon the property to which it attaches.

About one-half of the iron which the plaintiffs sold and delivered to A. Scammons & Co., was incorporated into the vessel, and the balance thereof was otherwise used by the purchasers, and remained in the yard and was sold by the officer who had attached it; at the same time of the sale of the iron, the vessel was also sold by the officer, subject to all liens thereon, she then remaining unfinished upon the stocks. Subsequently, the plaintiffs instituted their suit, to secure and enforce their lien upon the vessel for the iron furnished by them. The defendant, as sheriff of the county of Hancock, made return upon the writ in that action of the attachment of the vessel; judgment was afterwards rendered in the action for the full price of all the iron delivered; an execution was issued on that judgment, and within thirty days after the rendition of the judgment, the vessel was duly demanded of the defendant that it might be taken and sold on the execution; and the defendant neglected to deliver the same. To recover damages for that neglect, this action is brought, the judgment remaining in no part satisfied.

The value of the iron, not used about the vessel, was merged in the judgment, and could not be separated from the value of the other portion. This was a waiver of the lien. *Bicknell* v. *Trickey*, 34 Maine, 273. The vessel having been previously sold to satisfy other debts, it could not be sold again, unless to enforce existing liens. Upon the delivery of the vessel, when demanded of the defendant, it could not have been legally sold upon the plaintiffs' execution; and they have lost nothing by his neglect. The law requires no useless cere-

mony, and the defendant was guilty of no omission of duty, for which the plaintiffs are entitled to damages.

Plaintiffs nonsuit.

HATHAWAY, APPLETON, MAY and GOODENOW, J. J., concurred.

LEMAN S. ORCUTT *versus* WILLIAM BUTLER *& al.*

An award may be good in part, and bad in part; and the part which is good will be sustained if it can be so disconnected from the remainder, that no injustice will be done.

An award decided that A. was entitled to the "crops raised on said B's place" the last season, and that he was to have the "privilege" of taking them off: *Held*, that this referred to annual crops, and that A. was entitled to a reasonable time within the year, in which to remove them.

ON FACTS AGREED, from *Nisi Prius.*

This was an action of DEBT on a bond, conditioned to secure the payment of an award of referees.

The facts in the case are stated in the opinion of the Court. If the action could be sustained, judgment was to be for the plaintiff; otherwise a nonsuit was to be entered.

A. F. Drinkwater, for plaintiff.

An award at common law is not examinable, except on the ground of corruption, partiality, or *evident excess of power. Yarmouth* v. *Cumberland*, 6 Maine, 21. A liberal construction should be given to awards. 8 Mass. 398. It is well settled, that no intendment shall be indulged in to overturn an award, but every reasonable intendment shall be allowed to uphold it. *Karthans* v. *Ferrers & al.*, 1 Pet. 222.

An award, good in part and bad in part, may be sustained as to that part which is good. 6 Maine, 247; 18 Maine, 255.

Wiswell, for defendants.

1. The referees exceeded their authority, by deciding on matters not submitted to them. No power was given the arbitrators to determine whether the conveyance made by Orcutt to Wasson was valid, or not.

Wasson was no party to the reference. Kyd on Awards, 140; 10 Mass. 398.

2. The award is void for uncertainty, and by reason of the referees exceeding their powers in other respects.

The referees gave Orcutt the privilege of taking off the crops raised on Butler's farm the previous season.

No time was specified, within which the crops were to be taken off. Com. Dig., Arbitrament, E. 11; Kyd on Awards, 194.

He might, therefore, consult his own convenience about it, to the manifest injury and annoyance of Butler.

This was evidently an assumption of power on the part of the referees, and the acts permitted to be done by Orcutt were not sufficiently certain and specific, provided the referees had the power. *Banks* v. *Adams*, 23 Maine, 259.

"The whole matter was left by the award in a condition to cause further contest and difficulty." Ibid. 260.

By the language of the award, Orcutt was to have the *privilege* of paying the costs, as well as to take off the crops. He might decline, or be unable to avail himself of this privilege.

3. The award could not be performed without a violation of law.

By giving Orcutt the privilege of going on to Butler's farm, of entering his barn and granaries, whenever he saw fit, to take off the crops of the preceding season, they attempted to authorize acts of trespass for which Orcutt would be liable.

APPLETON, J. — The parties, Orcutt and Butler, having agreed to submit "all demands of every description, and all controversies now existing between the parties," to the determination of certain referees, the defendant Butler gave the plaintiff a bond with surety, the condition of which is, "that if the said Butler shall *abide* by the decision of said referees, and *pay all sums* of money that may be awarded against him to the said Orcutt, within thirty days from the publishing of

said award, then this obligation to be void, otherwise to remain in full force and virtue."

The referees awarded that "the said Leman S. Orcutt recover against the said William Butler three hundred and sixteen dollars as damages; said Orcutt to have the privilege of taking off the crops raised on said Butler's place the last season, and to *pay* the costs of reference, taxed at twenty-six dollars and ten cents; the *conveyance heretofore made by said Orcutt to Samuel Wasson is to be valid, the consideration for the same having been allowed to said Butler.*"

The award having been duly published, the plaintiff seeks in this action to recover damages for its non-performance. To this the defendants object, on the ground that the referees have exceeded their authority, by embracing in their award matters not submitted, and that consequently the same is void.

The submission is most general in its terms. It includes "all demands of every description, and all controversies between the parties." It was held in *Munroe* v. *Maine*, 2 Caines, 320, that a submission of matters of the realty and of "divers other matters," was equivalent to a general submission of all questions and controversies between the parties, and that under it general releases might be awarded. In *Noble* v. *Preble*, 13 Serg. & Rawle, 319, the Court held that a submission "of all business of whatever kind in dispute between the parties" included prosecutions for assaults and batteries. In the present case it is difficult to perceive what was properly excluded from the consideration of the referees.

It has been determined by a series of decisions that an award may be good for part and bad for part. The Court will sustain the part which is good, if it can be so disconnected from the remainder of the award, that no injustice shall be done. *Banks* v. *Adams*, 23 Maine, 259; *Boynton* v. *Frye*, 33 Maine, 216. "An award," says WOODWORTH, J., *Cox* v. *Jagger*, 2 Cow. 633, "may be good in part and void in part, when the part, which is void is not so connected with the rest as to affect the justice of the case. It is then void only *pro tanto*."

That portion of the award relating to "the conveyance heretofore made" to Wasson, is vague and indefinite. This conveyance is declared valid, "the consideration for the same having been allowed to said Butler." This may have been one of the matters in controversy between the parties and therefore properly considered. But whether that be so or not is immaterial. It is sufficient that there is no connection between this portion and the residue of the award. The damages do not relate to the Wasson conveyance, and are obviously separated from it.

The award clearly and definitely specifies the damages, and costs of reference, for which the plaintiff is entitled to recover. To so much of the award there can be no legal objection.

From the award it would seem that the plaintiff was entitled to the "crops raised on said Butler's place," and that he was to have "the privilege" of taking them off. This obviously refers to annual crops. The plaintiff having the privilege of removing them, is entitled to a reasonable time within the year in which to remove them. If they have been removed and the plaintiff has received them, he has no cause of complaint. If the defendant Butler has prevented the plaintiff from removing them within the year, and has appropriated them to his own use, he is liable in damages for their value.

Defendants defaulted.

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

ELISHA MARKS *versus* NICHOLAS GRAY.

In an action for malicious prosecution, the question whether the circumstances of a particular case afford to the accuser, a *probable cause* for making the accusation, is a question of *law* which arises from the facts established in evidence.

A. brought an action of trespass against B. and others. "Neither party" was entered, by agreement, in the suit, on payment by defendants of a certain

sum of money. B. then commenced a suit against A. for malicious prosecution: — *Held*, that B. under these circumstances, could not contend that A. had not *probable cause* for his suit, and that a nonsuit must be entered.

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

This was an action for malicious prosecution. Plea, the general issue, with brief statement.

The alleged malicious prosecution, was a suit commenced by the defendant against the plaintiff in this case, and others, for trespass, which was settled at a subsequent term of the Court, as appears by the agreement signed by C. J. Abbott and B. W. Hinckley, attorneys for the parties. The agreement was performed by the parties, and "N. P." entered on the docket.

The plaintiff offered testimony to prove that said action was without probable cause, and malicious; that he was made a party in the trespass suit in order to prevent his being a witness; and that he suffered damage thereby.

Whereupon the defendant moved for a nonsuit, and by consent of parties, the case was taken from the jury and submitted to the whole Court. If, upon the facts presented and the testimony offered, the action could be legally maintained, it was to stand for trial, otherwise a nonsuit was to be entered.

B. W. Hinckley, for plaintiff.

1. The entry of "neither party" has no effect beyond the taxable cost in the action, and does not preclude the plaintiff from commencing another action for the same cause.

2. To maintain this action, it is not necessary there should have been a judgment in the defendant's favor, nor a trial in the prosecution complained of. Espinasse, N. P. 527; *Martin* v. *Lincoln*, Bell's N. P. 23; 2 Greenl. Ev. § 452, and cases cited; *Pierce* v. *Thompson*, 6 Pick. 193; *Clark* v. *Cleveland*, 6 Hill, 344; *Burnham* v. *Sanford*, 19 Wendall, 417.

3. This action is maintainable for other injuries than malicious arrests, or excessive attachments of property. Espinasse, N. P. 527, 528; 2 Greenl. Ev. § 449, and whole title Mal.

Pros. And it is not necessary to prove an arrest. *Stepp* v. *Partlow*, Dudley, (Geo.) 176.

4. To give evidence in a court of law is a personal right incident to every citizen, who has not been convicted of crime; and any malicious act by which he is deprived of it, is an injury for which he should have redress by action.

5. The prosecution complained of was an abuse of legal process for which the plaintiff should maintain his action. 2 Dane's Abr. 726.

C. J. Abbott, for defendant.

1. The prosecution complained of, having been a civil action in which there was no arrest of the body nor attachment of property, and no other special damage alleged and offered to be proved, no damage other than that ordinarily arising in civil actions, and for which the law provides what it considers proper indemnity in the way of costs, this action cannot be maintained. Oliver's American Prec. 368; *Preston* v. *Hosmer*, 1 Bos. & Pul. 205; 1 Salkeld, 14; 2 Chitty on Plead. 241, note; 2 Phil. on Ev. 116, note; *Vanduzer* v. *Lenderman*, 10 Johns. 106; *Sinclair* v. *Eldred*, 4 Taunt. 9; 2 Starkie on Ev. 917, note; *Potts* v. *Imlay*, 1 South. 330.

2. The alleged malicious prosecution having been adjusted by the parties, and this plaintiff having allowed in the settlement the damages for which that action was brought, and agreed to the entry of "neither party," conclusive proof of probable cause is thus furnished. *Savage* v. *Brewer*, 16 Pick. 453.

3. The present plaintiff, having voluntarily adjusted the defendant's action against him, on the terms set forth in the agreement of the parties, and those terms having been fulfilled by defendant on his part, is estopped from maintaining this action.

TENNEY, C. J. — The action of Nicholas Gray against George Snow, David M. Hooper and Elisha Marks, was trespass for a breach of the close, and cutting and carrying away the grass growing thereon. The defendants pleaded jointly

the general issue, and filed a brief statement alleging that the seizin and possession of the land was in Snow, and that Marks had a license from Gray. From the writ, pleadings and agreement, signed by the attorneys for the parties in that action, we infer that the alleged trespass was upon land on which Snow had attempted to levy an execution in his favor against one Albion P. Gray.

The basis of this suit is alleged to be, that Marks, the plaintiff therein, was made a party defendant, in the other action above referred to, for the purpose of preventing him from being a witness in the trial of the same.

The settlement of that action, by the agreement, must be treated as made by all the parties thereto; and the defendants in the same, consent to the payment of the sum of eight dollars for the hay claimed by the defendant Gray.

Whether the circumstances of a particular case, afford to the accuser a *probable cause* for making the accusation, is a question of *law*, which arises upon the facts established in evidence. 2 Stark. Ev. 912.

When the defendants in the original action so far admitted the charge in the writ as to agree to allow, in the settlement, a certain sum on account of the trespass, and the action was disposed of according to that settlement, it cannot with propriety be contended by them that there was a want of probable cause. *Plaintiff nonsuit.*

RICE, APPLETON and GOODENOW, J. J., concurred.

HASKELL W. HINCKLEY *versus* INHABITANTS of PENOBSCOT.

All business, traveling, and recreation on the Lord's day, "works of necessity or charity excepted," are, under R. S. of 1841, c. 160, § 26, offences punishable by fine.

A town is not liable for an injury, occasioned by its defective highway, to a horse with which a person is traveling on the Sabbath day before sundown, unless the traveling is a work of charity or necessity.

Hinckley *v.* Penobscot.

It is necessary, in an indictment or complaint under a statute defining an offence with certain exceptions, to negative by averments all the exceptions, and to charge all the circumstances constituting the offence.

But it is not necessary in the trial, for the government to prove negative averments.

If the defendant relies upon an exception he must prove himself within it.

In an action against a town for an injury to a horse in consequence of a defective highway, it being shown that it occurred while traveling on the Lord's day before sundown, the burden of proof is upon the plaintiff to show that the traveling was a work of charity or necessity.

THIS was an action of the CASE for an injury to plaintiff's horse alleged to have been caused by a defect in the highway in the town of Penobscot. Plea, the general issue.

The evidence introduced, tended to show that the horse was let by plaintiff, the keeper of a livery stable in Bluehill, to the Misses Henry to go to their father's house, in Brooksville, on a Saturday in November, 1855, and that while returning to Bluehill on the next day, being Sabbath day, and before sundown, the alleged injury, if any, was inflicted. Defendants' counsel contended that said use of the horse on the Lord's day, except for purposes of "necessity or charity," was in violation of law, and therefore that plaintiff could not recover for the injury occasioned.

One of the instructions given to the jury by the presiding Judge, and the only one necessary to refer to here, was, that traveling on the Lord's day was in violation of law, except for purposes of necessity or charity; but that, inasmuch as traveling for those purposes on that day was lawful, the legal presumption would be that the traveling in question was lawful, unless there was proof to the contrary; and that, as the defendants alleged that it was illegal, the burden was upon them to prove it.

The verdict was for the plaintiff. The defendants excepted to the foregoing ruling of the Court.

Hinckley, for plaintiff.

The defendants contend that the plaintiff could not recover in this action, because the use of the horse was on the Lord's day, and therefore prohibited by law.

1. The statute does not prohibit all traveling on that day. It permits it for purposes of necessity or charity. There was no evidence of the occasion of the traveling. Miss Henry was not inquired of in respect to this point. The evidence leaves the case to the presumption of law. The right of going from place to place at will is one of the natural personal privileges belonging to every individual. Any restraint upon it must be by positive enactment. If the restraint is partial, then it is the exception to the general right, and must be shown by the party who would avail himself of it. The presumption of law is, that the traveling on that day was lawful.

Greenleaf, in vol. 1, § § 33 and 34 of his Evidence, speaking of presumptions, says: "As men do not generally violate the penal code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption." He further says: "The same presumption arises in civil actions, where the act complained of was unlawful."

This case is in principle the same with *Nason* v. *Dinsmore & al.*, 34 Maine, 391, where the bond in suit was dated Sunday. The Court decided that, inasmuch as it might have been made after sundown, when it would be lawful to make it, it was incumbent on the defendants, who alleged its invalidity, to show that it was made before sundown, and that "the presumption is, that the parties acted in conformity to law, and not in opposition to it, and the bond must be regarded as valid."

2. The presumption is, therefore, I insist, that these young ladies were lawfully traveling, and such was the fact, although it did not appear from the evidence in the case. They went to see their sick mother, and one of them was obliged to return on Sunday in order to commence her school on Monday morning according to her contract with the district. This was a sufficient necessity to make the traveling lawful. *Commonwealth* v. *Knox*, 6 Mass. 76.

C. J. Abbott, for defendants.

Plaintiff's action is for an injury to his horse through a defect in a highway in Penobscot.

It appears that the horse was let to go to Brooksville, and on its return on Sunday, before sundown, the injury occurred.

The burden of proof is upon plaintiff to show that the injury has arisen without fault on his part. *Adams* v. *Carlisle*, 21 Pick. 146; *Garmon* v. *Bangor*, 38 Maine, 443; *Moore* v. *Abbott*, 32 Maine, 46; *Farrar* v. *Green*, 32 Maine, 574; *Merrill* v. *Hampden*, 26 Maine, 234; *French* v. *Brunswick*, 21 Maine, 29.

As plaintiff must show he was free from fault, the burden of proof is on him to show that the use of the horse on the Lord's day was a work of necessity or charity, or justifiable, so far as he was concerned. *Bosworth* v. *Swansey*, 10 Met. 363.

The decisions in our own Court are to the same effect. For where the defence set up against the validity of instruments has been that they were made on the Lord's day, it has never been considered necessary to show that they were not works of necessity or charity. *Towle* v. *Larrabee*, 26 Maine, 464; *State* v. *Suhur*, 33 Maine, 539; *Hilton* v. *Houghton*, 35 Maine, 143.

Appleton, J. — By R. S., c. 160, § 26, all business, traveling and recreation, "works of necessity or charity excepted," are made offences and punishable by fine.

Where the enacting clause of the statute describes an offence with certain exceptions, it is necessary in a complaint or indictment to state all the circumstances constituting the offence and to negative all the exceptions. *State* v. *Keen*, 34 Maine, 500; *State* v. *Adams*, 6 N. H. 532.

Upon the trial of the accused in such case it is not necessary for the government to prove negative averments. The facts constituting the offence being established, it is incumbent upon the defendant, if he relies upon the exceptions of the statute, to bring his case within those exceptions. *State* v.

Crowell, 25 Maine, 173; *State* v. *Whittier*, 21 Maine, 341. The burthen of exculpatory proof is on him.

In the present case, the fact of traveling on the Sabbath, as defined by R. S., c. 160, § 28, *prima facie*, made out a violation of the statute by which such traveling is prohibited. The burthen was on the person so traveling to show that it was a work of charity or necessity. *Bosworth* v. *Swansey*, 10 Met. 360. *Gregg* v. *Wyman*, 4 Cush. 322. The instructions given were erroneous. *Exceptions sustained.*

TENNEY, C. J., and RICE and CUTTING, J. J., concurred. HATHAWAY, J., concurred in the result.

COUNTY OF WASHINGTON.

JONES A. BOHANAN *versus* S. W. POPE *& al.*

Where, by simple contract, a party stipulates for a valuable consideration with another, to pay money or do some other beneficial act for a third person, the latter, if there be no objection other than a want of privity between the parties, may maintain an action for breach of such engagement.

But if such third person elect, as he may do, to seek his remedy directly against the party with whom his contract primarily exists, there is an implied abandonment of the other remedy.

The two remedies are not concurrent, but elective.

A. contracted to haul logs for B., who agreed to pay A.'s men. D. worked for A. in getting the lumber into the stream: — *Held*, that he might recover pay for his labor of either A. or B.: — *Held*, also, that having elected to look to A., and by suit having recovered a part of his pay of him, he could not afterwards maintain an action against B. to recover pay for the same labor.

ON FACTS AGREED from *Nisi Prius.*

This was an action of assumpsit brought upon a contract. The general issue was pleaded and joined, with a brief statement, setting forth that the plaintiff had been paid for the labor named in his writ by one Henry P. Whitney, or by reason of the judgment hereinafter mentioned, for whom he

worked, and that said plaintiff recovered judgment against said Whitney in a suit for the same labor, and enforced his lien for said labor upon the logs he worked upon, by a sale of the same by D. G. Wilson, deputy sheriff, on the execution, at public auction.

It was agreed that the plaintiff was hired by Henry P. Whitney and worked upon said logs in hauling and cutting them. That before hiring him, Whitney showed him said contract, and plaintiff read it, and Whitney told him he had no other way of paying except through the contract; that there was due from Whitney to plaintiff for his labor $50,85, for which Whitney gave plaintiff an order on defendants; that plaintiff presented the order soon after to defendants, who refused to accept or pay it, and said order has never since been paid, unless by reason of a sale of said logs upon execution. Whitney put a four ox team into the woods, and hauled logs in accordance with the contract. He did not drive the logs, but the defendants drove them and charged Whitney for the same in account. There has been no settlement between Whitney and defendants for the operation. Defendants have an account against Whitney for supplies, &c., under said contract, amounting to $1160,29, and a credit of $1020,73 in his favor, and there was a balance of account against Whitney at the date of the writ.

On May 22d, 1853, plaintiff sued said Whitney for said sum of $50,85, claiming a lien for labor on the logs marked five notches and a cross, on which writ, the said mark of logs then in the boom, were attached May 27, 1853; the action was defaulted October term, 1853; and the execution duly issued, was seasonably put into the hands of D. G. Wilson, a deputy sheriff, who seized the said mark of logs, and duly advertised and sold the same at public auction, Nov. 3, 1853, for the sum of five dollars, to one Folsom, and discharged upon said execution the sum of ninety-six cents, and returned the execution satisfied for that amount and no more. And the same has never been satisfied or paid, except so far as may be by said sale of logs.

If, upon the above statement of facts, the full Court should be of opinion that the plaintiff can maintain his action, the defendants are to be defaulted; otherwise, the plaintiff is to become nonsuit.

George W. Dyer, for plaintiff.

1. Defendants are liable in this action, because by their contract with Whitney they agreed to pay Whitney's hired men one-third of their wages when the logs got into the boom, and two-thirds in three months afterwards.

The case finds that this contract was made known to plaintiff before hiring, and that he was informed by Whitney that he had no other way of paying him; that plaintiff hired with Whitney, and performed the labor mentioned in the contract; that the logs were in the boom May 27, 1853, more than three months before this action was commenced; that defendants have not actually paid plaintiff, and that he is still unpaid.

It does not affect plaintiff, whether Whitney did or did not perform his contract with defendants.

2. The pleadings put the defence to this action upon the ground of *payment* through the execution *Bohanan* v. *Whitney*, and do not offer the judgment, &c., in that action as a *bar* to the recovery in this action.

The case finds that the debt sued in this action was not in fact paid through the execution of *Bohanan* v. *Whitney*, except to the extent of ninety-six cents, and that the said execution was satisfied for so much, and for no more.

3. If the judgment in *Bohanan* v. *Whitney* is in effect pleaded in bar, then the parties to this action, and to *Bohanan v. Whitney*, are not the same, nor privies. 1 Greenl. Ev. § § 523, 535. The plaintiff had his right of action against defendants, as well as against Whitney, severally, and the judgment *Bohanan* v. *Whitney* is no bar to this action. 1 Greenl. Ev. § § 533, 539, and cases there cited.

Defendants have their right of action over against Whitney.

George Walker, for defendants.

The plaintiff had a contract with two branches to it. Either he might hold Whitney or the defendants, but not both. To

select one was to relieve the other. After plaintiff had selected Whitney as the party with whom he had contracted, and who was to be liable, and that liability was perfected by a judgment, defendants then had a right to suppose that they were relieved from the contract, and might settle with Whitney and pay him.

It follows, that the judgment against Whitney is in the nature of a bar or estoppel to the plaintiff's right to recover; and for the reason that estoppels are applied to prevent litigation and circuity of actions, the plaintiff should not have his action first against Whitney, then against defendants, and the defendants over again to Whitney.

Nor was it necessary that the judgment *plaintiff* v. *Whitney* should be pleaded in *bar*. It is sufficient if it be set out in the brief statement. *Potter* v. *Titcomb*, 16 Maine, 423.

Dyer, for plaintiff, replied.

MAY, J.— It is undoubtedly true, as a general proposition, that no action can be maintained upon a contract, except by some person who is a party to it. But this rule of law, like most others, has its exceptions; as, for instance, where money has been paid by one party, to a second, for the benefit of a third, in which case the latter may maintain an action against the first for the money. So, too, where a party for a valuable consideration stipulates with another, by simple contract, to pay money or do some other act for the benefit of a third person, the latter, for whose benefit the promise is made, if there be no other objection to his recovery than a want of privity between the parties, may maintain an action for a breach of such engagement. This principle of law is now well established both in this State and Massachusetts. *Hinckley & al.* v. *Fowler*, 15 Maine, 285; *Felton* v. *Dickinson*, 10 Mass, 287; *Arnold & al.* v. *Lyman*, 17 Mass. 400; *Hall* v. *Marston*, 17 Mass. 575; *Carnigie* v. *Morrison*, 2 Met. 381, and *Brewer* v. *Dyer*, 7 Cush. 337.

In this last case, it is said by BIGELOW, Justice, as the opinion of the full Court, that the rule "does not rest upon the

ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate; nor upon the reason, that the defendant by entering into such an agreement, has impliedly made himself the agent of the plaintiff; but upon the broader and more satisfactory basis, that the law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded."

But while the law does this in favor of a third person, beneficially interested in the contract, it does not confine such person to the remedy which it so provides; he may, as the authority last cited shows, if he choose, disregard it and seek his remedy directly against the party with whom his contract primarily exists. But if he does so, then such party may recover against the party contracting with him, in the same manner as if the stipulation in the contract had been made directly with him and not for the benefit of a third person. The two remedies are not concurrent but elective, and an election of the latter implies an abandonment of the former.

Applying these principles to the facts in the present case, it appears that the plaintiff, he being one of "the hired men" whom the defendant by the terms of his contract with Whitney was to pay, might, if he had chosen so to do, have brought his action in the first instance against the defendant, relying upon the beneficial interest secured to him in said contract; or, disregarding this remedy, he might have elected to rely upon the original undertaking of Whitney, and therefore have proceeded against him. The facts show that he elected the latter mode, and having done so, he must be regarded as having thereby consented that Whitney should be at liberty to avail himself of the funds, which he had set apart in the contract for the payment of the plaintiff, (if any such there were,) in order that he might be able by means of such funds, if necessary, to satisfy such judgment as the plaintiff might recover against him. By such election the plaintiff relinquished all claim upon the particular funds appropriated for his benefit and gave to Whitney the control and disposition thereof.

This defence, avoiding and repelling, as it does, the promise declared on, may properly be shown under the general issue. Gould's Pleading, c. 6, § § 47, 48. *Plaintiff nonsuit.*

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

JOHN L. GILMAN *versus* DANIEL CUNNINGHAM.

A., owning a mining "claim" in California, agreed with B. to work it with him, dividing equally between them what should be taken out of the claim. B., after receiving a certain amount of gold taken from the claim, left the country, no settlement between the parties having been made. Whether there were any outstanding debts against A. and B., growing out of the transaction, did not appear. — *Held*, that an action of assumpsit for money had and received, would lie to recover of B., A.'s share of the gold, or its proceeds in the hands of B. —

Held, also, that evidence in regard to the customs or usages prevailing among persons mining in company in California, and also as to the reputation of a place, as being dangerous and unsafe for persons known to have money, was inadmissible.

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

This was an action of ASSUMPSIT for money had and received.

The specification of the plaintiff's claim, filed in notice, was as follows:—

"Daniel Cunningham to John L. Gilman, Dr.

"For one half of the money received for the gold belonging to said Cunningham and Gilman, and sold by said Cunningham, and converted to his own use, in September, 1854."

The plea was the general issue, which was joined, with a brief statement that before the time of the commencement of this action, to wit, on the first of September, 1854, the defendant entered into co-partnership with the plaintiff, in the business of mining in California, which co-partnership had not been dissolved, and of which co-partnership business there had never been any final settlement; that the defendant had, at the date of the writ in this action, and still had, an equal

interest in a large amount of said co-partnership property in the possession of plaintiff, and upon a fair adjustment of the partnership business nothing would be due the plaintiff. That plaintiff has made no application for a dissolution of the partnership, and that defendant was about returning to California for the prosecution of the partnership business, when he was arrested on the writ in this action.

The plaintiff read the deposition of Ansel Olmstead, who testified that he resides in Sonora, Tuolumne county, California. Knew plaintiff in September, 1854, and the defendant from February, 1854, until he left California in the September or October following. The defendant showed him a gold specimen, which he said weighed 24 ounces, also some other specimens. This was at Adams & Co.'s banking house in Sonora. He also told him, at the same time, that he had a piece of gold at Columbia that weighed 64 ounces. He said he dug the gold on a claim at the head of Negro Gulch, near Columbia, county of Tuolumne; said he and his partner were offered $500 for one-third interest of the claim; said he had made some $2000 or $2500. He had this conversation in September, he thinks, and on Sunday previous to defendant's departure for the Atlantic States. The next Saturday deponent went up to the "claim," and found John L. Gilman at work in it. "*Cunningham left unbeknown to Gilman.*"

The sentence in italics was objected to, as containing matter which could only be derived from plaintiff, but it was admitted by the presiding Judge.

Plaintiff read the deposition of Wm. S. Cooper, who testified that he resided in Sonora. Previous to defendant's leaving California, had a conversation with him about gold dust, &c., the Sunday before he left. Defendant told him he had a large piece of gold, weighing some 24 ounces. Told deponent he had deposited with Wells, Fargo & Co. $1500 more. Said that and the gold dust he showed me belonged to him and John L. Gilman. Said he had $500 at D. O. Wells & Co.'s of his own. Defendant told me he and John L. Gilman mined together, near Columbia; that they were

mining together in August and September, 1854; that he and plaintiff owned the mining claim, and they were equal partners and worked the claim together; said he took charge of the gold dust as it came out of the claim, and deposited it at the banking house; that it was usual with miners for one to take charge of the gold dust. On cross-examination, deponent testified as to the personal moral habits of the plaintiff and defendant; also as to Caleb Gilman's keeping a drinking and gambling saloon.

Plaintiff read deposition of *Caleb Gilman*, who testified, among other things, that defendant told him he and plaintiff were in partnership in mining at a place called Negro Gulch, in August and September, 1854; went with defendant to the claim at that time. Defendant said he went to plaintiff's claim to try some of the dirt with a pan, and in doing so, found a lump of gold weighing nearly $1000. Said he then made an arrangement with plaintiff to go into partnership; that plaintiff was to have an equal interest in the lump he found, and that they were to divide equally the balance they should take out of the claim; that on arriving at the claim, he found plaintiff at work there; that defendant then showed him a certificate of deposit of Wells, Fargo & Co. for the $1000 lump; the certificate was in defendant's name; that they said they were going to deposit all they took out at Wells, Fargo & Co.'s, and when they had worked their claim out, and were ready to go home, they were going to make a division of the money and go home together.

Plaintiff read deposition of Edward S. Hopkins, who testified that defendant, previous to the time he worked with plaintiff, had earned in mining $300. This was stated by deponent in answer to the interrogatory of plaintiff. "Please state what you know, if any thing, about plaintiff and defendant mining together — when it was, and where, and on what terms?" The answer was objected to by defendant as irresponsive and irrelevant; but was admitted by the presiding Judge. On cross-examination, deponent testified to the good

moral character and habits of plaintiff, and also that his credit was good.

Wm. Dangear, for plaintiff, deposed, that on the 4th Sept., 1854, defendant deposited with him, as agent of Wells, Fargo & Co., a piece of gold worth $1000; on the 26th, same month, another piece, valued at $500; that he afterwards bought of him two pieces for some $1400.

There was other testimony, as to the amount of gold received by defendant, and his converting it to his own use, which it is not deemed important to report.

Defendant read deposition of Warren Gilman, who produced a letter from plaintiff, who was his son, to him, dated Sept. 23, 1854. Among other things, the writer stated, in speaking of the claim in which plaintiff and defendant were working, that it cost a good deal to work it, as we have to pay $4 a day for a mule and cart, and $6 a day for water.

Defendant offered to prove by a witness, that Caleb Gilman, in 1854, was engaged in keeping a drinking and gambling house in California; that W. S. Cooper told him that plaintiff was in the habit of drinking and gambling; that Columbia had, in 1854, the reputation of being a bad and dangerous place, and unsafe for one having money; that it was the usage of miners to divide their gold every Sunday; *all which was excluded by the presiding Judge.*

Defendant offered to prove by another witness, that, by the usage and custom among miners in California, the purser of a mining company kept the joint earnings of the company, only during each week; that companies settled among themselves and divided the gold taken during each week, every Sunday; that the purser did not make deposits with the banker for the company; that when a large lump of gold was found by one of a company, the individuals of the company bid for it among themselves, and if no one would buy it, the whole company went together to the banker's and disposed of it, and divided the proceeds; and that it was dangerous to have money about the person in Columbia, in 1854; and that persons having

money there did not usually allow it to be known; *all which was excluded by the presiding Judge.*

If, in the opinion of the Court, the action could not be maintained upon so much of the evidence admitted, as was legally admissible, the plaintiff was to become nonsuit. If the Court should be of opinion that the action is maintainable upon such evidence, and that any of the evidence which was material, offered by the defendant, and excluded by the Court, ought to have been received, a new trial was to be granted. If, in their opinion, the action could be maintained, and the evidence offered and excluded was inadmissible, then defendant was to be defaulted, the Court to determine for what sum judgment should be rendered.

F. A. Pike, for plaintiff.

1. Is the action maintainable? It is quite clear that it should be, unless there is some positive rule of law prohibiting it.

Whether the parties were technical partners or not, is deemed immaterial. That they called themselves so, does not settle the question. The circumstance that they operated together, each taking half of what they obtained, is not sufficient to make them partners. *There was no agreement to share losses.*

2. But, admitting they were partners, this suit will settle all their affairs. There was no property left, as the "claim," if of any value, belonged to Gilman, after defendant left. By the terms of the partnership and the nature of the case, the partnership was dissolved when defendant left the country. There are no outstanding claims shown to exist against the concern. The expenses were undoubtedly paid from day to day.

3. No demand could be necessary, before commencement of suit.

4. In equity and good conscience, the defendant ought to pay the plaintiff his proportion of the money by him received. 2 Greenl. Ev. § 113.

George W. Dyer, for defendant.

1. If the parties were partners at the date of the writ, or had been partners, and the partnership remained unsettled, this action cannot be maintained. *Chase* v. *Garvin*, 19 Maine, 211. The plaintiff's own witnesses prove the partnership. The parties themselves called their business relations a partnership.

The partnership having been proved to exist, the presumption is, that it still exists, no evidence of dissolution having been produced.

There were no terms as to the time of dissolution. Leaving the country did not necessarily operate as a dissolution; the defendant might have intended to return.

2. The testimony that defendant left the country without the knowledge of plaintiff, was inadmissible, for the knowledge that he so left could be derived only from the plaintiff himself.

3. Was the partnership unsettled when this action was commenced?

This action was brought to enforce a settlement; and it is so avowed by the plaintiff.

4. The plaintiff's remedy is in equity, under the provisions of R. S., c. 96, § 10, or by action of account. *Chase* v. *Garvin*, 19 Maine, 211; Story on Partnership, c. 11.

The argument of plaintiff is based upon the law as it seems to be settled in *Williams* v. *Henshaw*, 11 Pick. 79, and in some later cases. We do not admit these cases to be law in Maine. *Fanning* v. *Chadwick*, 3 Pick. 420; *Shepard* v. *Richards*, 2 Gray, 424; R. S., c. 115, § 57.

5. There are partnership effects still existing. The "claim" is the joint property of the plaintiff and defendant.

6. The partnership being proved, the plaintiff must show there were no partnership debts subsisting. *Williams* v. *Henshaw*, 11 Pick. 79. Debts must have been incurred; so the evidence shows. *Williams* v. *Henshaw*, 12 Pick. 378.

7. A judgment in this case would be no bar to a suit for other moneys received by the defendant. Thus this suit will not settle all claims.

8. The parties here were not tenants in common, or part-owners. *Maguire* v. *Pingree*, 30 Maine, 508; *Shephard* v. *Richards*, 2 Gray, 424.

9. The plaintiff should have made a demand before suit. The property was rightfully in defendant's possession, and in such case, even though they were tenants in common, a demand should have been made.

10. The evidence excluded, particularly that in regard to usages in California, should have been admitted.

GOODENOW, J. — This is an action of assumpsit for money had and received, to recover the value of a certain amount of gold dust, or the proceeds thereof.

The position has been taken by the defendant, that this action cannot be maintained, because, as he alleges, he was a partner of the plaintiff at the time the dust was received; that the partnership has not been dissolved, and that there has been no adjustment of the affairs of the company.

From the evidence exhibited to us, we are led to the conclusion that the defendant has money in his hands, which, upon the principles of equity and good conscience, he was in duty bound to pay over to the plaintiff, before this suit was commenced.

We are not satisfied that the parties stood in such a relation to each other by their contract, that the plaintiff cannot enforce his claim by an action at law against the defendant. There is a difference between partners and part owners. These terms are not unfrequently misapplied. *Cessante ratione legis, cessat lex.*

We cannot perceive any equitable claims on the part of the defendant against the plaintiff, which might not have been fairly adjusted in the trial of this action, by an account in set-off. If the defendant has acted as agent of the plaintiff in disposing of the gold dust, or in taking care of the proceeds or investing the funds arising from the same, he may be entitled to a reasonable compensation.

We are of opinion that this action can be maintained; that

the evidence offered and excluded was inadmissible, and that a default must be entered. The plaintiff is entitled to recover one half of the money received for the gold belonging to said Cunningham and Gilman, and sold by said Cunningham and converted to his own use, with interest from the date of the writ; deducting a reasonable compensation for any services which the defendant may have rendered, in disposing of and taking care of the joint property. We are of opinion, that the precise amount of damages should be settled, upon the grounds stated above, by the Judge who may preside at *Nisi Prius.* *Defendant defaulted.*

Parties to be heard in damages.

TENNEY, C. J., and HATHAWAY and MAY, J. J., concurred. APPLETON, J., dissented.

WINSLOW BATES *versus* ROBERT ENRIGHT.

The wife of A., having been convicted of selling spirituous liquors in violation of law, was, in default of payment of fine and costs, committed to prison. While in prison, and as a condition of her release, she was required, under R. S., c. 175, to give her promissory notes, payable to the county treasurer, his successor in office or his order, for the amount of fine and costs, and for her board while in prison. These notes were indorsed in blank by the payee to the plaintiff, who commenced a suit upon them against A., the husband. The Court *held*, that the action could not be maintained and ordered a nonsuit.

ON FACTS AGREED.

ASSUMPSIT on two promissory notes. The cause was submitted to the full Court upon the following agreed facts.

The first note declared on is dated April 2, 1849, payable to Samuel A. Morse, treasurer of the county of Washington, or his successor in office, or his order, signed by Hannah Enright, wife of the defendant, for the sum of fifty-three dollars, payable on demand with interest, and indorsed in blank by Samuel A. Morse, treasurer.

This note was given by the said Hannah Enright while in

prison; having been committed upon a mittimus issued by a magistrate upon the failure of the said Hannah to pay a fine and costs, imposed by him, for selling spirituous liquors contrary to law. Said note was given for the fine and costs, and for her support in prison. The other note declared on was signed by the said Hannah Enright, payable on demand with interest to George Walker, treasurer of the county of Washington, or his successor in office, or his order, and indorsed in blank by said Walker in his capacity of treasurer. This note was given by said Hannah while in prison; she having been committed upon legal conviction for the third time before a magistrate for selling spirituous liquors in violation of law. She was sentenced to imprisonment in the common jail for the term of six months, and to pay the fine and costs of prosecution. Said note was given for fine, costs, and her board during the term of sentence.

Both of said notes were demanded of the said Hannah under the 175th chapter of the Revised Statutes of 1841 as a condition of her liberation.

The Court were authorized to draw such inferences from the foregoing facts as a jury might, and upon them to enter such judgment as the law applied to the facts of the case should require.

George F. Talbot, for plaintiff.

1. The action on the note is properly brought against the defendant, the husband of Hannah Enright, the person who signed it. A husband is liable for all his wife's contracts. "It is a strict rule of law that throws upon a husband the obligation of all his wife's contracts during coverture." 2 Kent's Com. 143, 144.

2. The note in suit was negotiable and was legally transferred to the plaintiff. It has ever been the policy of the law to promote and not to restrict the negotiability of promissory notes. The statute of 3d and 4th Anne made promissory notes payable to a person and to his order, or to bearer, negotiable, like inland bills, according to the custom of merchants. That statute, says Kent, has been generally adopted in this

country, either formally or in effect, and promissory notes are every where negotiable. 3 Kent's Com. 72; Story's Promissory Notes, 7.

The notes in this case were given in payment of fines and costs imposed by law and for support in prison at the expense of the State. They were given to the county treasurer, as an officer of the government, and in trust for the State. They were, therefore, given to the government in payment of a debt due the government, and notes given to the government, are negotiable, even if not made payable to bearer or order. Judge STORY, in his work on Promissory Notes, page 45, says: "Indeed the rule," (i. e. of restricting negotiability,) "never did apply to promissory notes, or bills of exchange, assigned to the king or government by the payee, although not originally payable to bearer or order, for those, like other choses in action, always were assignable to the king or government upon principles of public policy, so as upon assignment thereof to be suable in the name of the king or government. And bills of exchange and promissory notes originally made payable to the king or government, are, upon the like policy, held assignable to third persons without any words of negotiability in the instrument; and cites, *United States* v. *Buford*, 3 Peters, 30; *United States* v. *White*, 2 Hill, (N. Y.) 59.

3. In answer to the defence that the notes were given for a larger sum than was legally due. This defence, as well as that of illegality and duress subsequently considered, is not open to the defendant. The notes have been indorsed, and for aught that appears, are in the hands of an innocent holder for value. Nothing is more familiar than the principle, that under such circumstances the consideration of the notes cannot be inquired into.

If this defence is open to the defendant, it is good only for the purposes of reducing the plaintiff's claim upon the notes, by the amount of the excess of the actual debt, as the items of the consideration are all specifically set forth. Bayley on Bills, 494–5.

The statute, under which this note was taken, provides:

"When any person convicted of a criminal offence shall be sentenced to pay a fine and costs, or costs alone, and stand committed until sentence be performed, if the sentence be not complied with by the payment of the sum due, within thirty days next following, the sheriff may liberate him from prison if committed for no other cause, *and if he be unable to pay such fine and costs*, upon his giving his promissory note for the amount due," &c., &c.

The expense of board in prison was also legally chargeable. The Act of which chap. 175 of the Revised Statutes is a revision, viz., c. 83, § § 1 & 2, Act of 1821, allowed persons imprisoned for non-payment of costs to be sold to service for that purpose. When the liberty of a citizen has become forfeited by the commission of a crime, whereof he has become duly convict, the State assumes the right to control his employment. Thus, convicts in the State prison are required by their labor not only to pay the expense of their maintenance but a revenue to the State over and above this maintenance. Houses of correction, being in the theory of our system of criminal law the permanent places of minor punishment, as the State's prison is the place of graver punishment, are regulated upon the principle of compulsory labor, whereby persons sentenced to them are required to pay the expense of their own support. Poor debtors in prison become a charge upon the creditor committing them or the towns where they have their legal settlement. Persons committed to prison on complaint, and awaiting a requisition to be taken to another State for trial, may have the costs of their board in prison charged to the person upon whose complaint they were arrested. But § 16 of c. 152, R. S., provides that "the expenses of supporting prisoners committed by due process of law, and *unable to support themselves*, in any jail, upon charges or conviction of crimes and offences committed against the State, shall be refunded by the State; the jailer in each county shall render on oath to the county commissioners at each session thereof an account of all such expenses, stating the time when each prisoner was committed, for what offence, how long held,

and if his term has expired when discharged, and shall exhibit the warrants of commitment and discharge; and the jailer *shall credit all moneys and effects received or to be received of the prisoner* or of other persons on his account; and the Court, on due examination into the nature of the accounts *and the ability of the prisoner to refund any part of such expenses,* shall order such sum as they think reasonable to be paid to the jailer, not exceeding one dollar a week, from the county treasury."

Here the State assumes the payment only of the board of prisoners "unable to support themselves," and requires the jailer to credit all payments of money or property received from the prisoner, and then only pays the bill for his support in case he is adjudged not able to pay at some future time.

But if the expense of board in prison was not legally taxable to defendant, it was a perfectly good consideration for her note. Suppose she could not have been compelled to pay it as a condition of release, it was something beneficial, — something she had received, and was a good consideration for the promise in her note. An act lawful in itself, and which is for the benefit of one party, or to the prejudice of another, constitutes a sufficient consideration to support a promise. *Cabot* v. *Haskins,* 3 Pick. 83. Story, in his work on Promissory Notes, § 186, says: "A valuable consideration in the sense of the law may in general terms be said to consist, either in some right, interest, profit or benefit, accruing to the party who makes the contract, or some forbearance, detriment, loss, responsibility, or act, or labor, or service on the other side. And if either of these exists, it will furnish a sufficient valuable consideration to sustain the making or indorsing a promissory note in favor of the payee or other holder." * * * "A preëxisting debt is equally as available as a consideration, as is a present advance or value given for the note. Even the settlement of a doubtful claim preferred against the party will be a sufficient and valid consideration without regard to the legal validity of the claim if it be fairly made."

4. There was a legal consideration for said notes; for a part of said notes, i. e. fine and costs, without question, and for the rest a valuable consideration. There was certainly no illegality in the consideration. There is nothing illegal in a discharged prisoner promising to repay to the State the expense of his support in prison, even if he was not compelled by law to do so. The consideration of a note can be illegal only because it is against the general principles and doctrines of the common law, as contracts against sound morals, public policy, public rights or public interests, and because it is specially prohibited or interdicted by statute. These are all the kinds of illegal considerations allowed by Mr. Story. Promissory Notes, § 189.

Nor were the notes obtained of defendant under duress. She was legally imprisoned. Legal imprisonment is not duress. Chitty on Contracts, 167, 168; *Richardson* v. *Duncan*, 3 N. H. 518; *Watkins* v. *Baird*, 6 Mass. 511; *Crowell* v. *Gleason*, 10 Maine, 325; *Eddy* v. *Herrin*, 17 Maine, 338.

Bion Bradbury, for defendant.

1. In reference to the second note, I maintain that the law gives the sheriff no authority to liberate a poor convict in any case where the sentence conjoins the payment of a fine and costs *with imprisonment.*

This authority, if it exists, is derived from the R. S., c. 175; but the language of that chapter restricts the power to cases where the sentence is "to pay a fine and costs, or costs only."

This note, then, is illegal and void.

2. Both notes were given under duress, and are, therefore, void.

The case shows that these notes were demanded by the sheriff as a condition of release. They were, therefore, given under the fear of detention in prison. The notes demanded included charges which were illegal.

It is submitted that these facts bring this case within the rule of *Whitefield* v. *Longfellow*, 13 Maine, 146.

3. The notes taken, being for a larger sum than the sheriff was authorized to require, were illegal and void.

The sheriff's power in reference to cases of this description is derived from R. S., c. 175, § 1. That statute, as will be seen upon inspection, only authorizes the note to be taken for the amount for fine and costs.

Both these notes include the convict's board while in prison.

Now it is provided in R. S., c. 205, § 22, that, in cases of imprisonment under the laws imposing penalties for the sale of intoxicating drinks, the keeper of the prison shall receive his compensation for the board of the convict out of the county treasury under the direction of the county commissioners.

4. This action, being brought in the name of Winslow Bates, as indorsee of the notes, cannot be maintained, because the county treasurer had no power to negotiate or indorse them. They are not negotiable paper; they are *sui generis*, the mere creatures of statutory enactment, and regulated and controlled by statute law.

The law directs that they shall be made payable to the county treasurer. R. S. of 1841, c. 175, § 1.

It provides that in case judgment shall be rendered upon any such note in any action brought thereon *by such treasurer*, the same proceedings may be had on the execution as in other cases of contract. R. S., c. 175, § 3.

It provides that the sheriff, as often at least as once in six months, shall deliver such notes to the county treasurer. R. S., c. 152, § 28.

It provides that, at the next session of the county commissioners, the county treasurer shall lay before them a schedule of such notes. R. S., c. 152, § 29.

It provides that the county commissioners shall, from time to time, examine such notes, and order the county attorney to take legal measures for their collection, and they may authorize the treasurer to compound or cancel them upon such terms as the board may direct. R. S., c. 152, § 30.

The power of the sheriff, treasurer, commissioners and attorney of the county over these notes is regulated, limited, and restricted by the laws of the State.

This action is not brought by the county attorney, nor un-

der his direction. It is not instituted in the name of the county or the treasurer. It is brought in the name of the indorsee of the notes, who claims them as his own.

The position, assumed by plaintiff's counsel, that the husband is liable for all the wife's contracts during coverture, is true so far only as she has a right to contract. But she can make no contracts during coverture binding upon the husband except for necessaries. 2 Kent's Com. 146.

The theory of the common law is, that the wife has no legal, independent existence during the period of coverture, and that she is absolutely *sub potestate viri.*

So the husband is liable for the torts or frauds of the wife, but if the tort or offence be punished criminally by imprisonment, unless there be evidence of coercion or command by the husband, he is not liable. 2 Kent's Com. 149–50.

Blackstone, (vol. 1, page 443,) says: "In criminal prosecutions, it is true, the wife may be indicted and punished separately; for the union is only a civil union."

If a wife commit an indictable offence without the presence or coercion of her husband, she alone is responsible for the offence. *State* v. *Jones,* 2 Blackf. 484.

George F. Talbot, for plaintiff, in reply.

MAY, J. — The facts in this case show that the wife of the defendant was in prison for the non-payment of certain fines and costs, which had been imposed upon her by a magistrate, upon conviction for offences committed by her against the statute prohibiting the sale of intoxicating drinks. The notes in suit being required were given by her to procure her release from such imprisonment. It is contended by the counsel for the plaintiff that these notes, being authorized by the Revised Statutes, c. 175, § 1, are valid, and that the defendant, as husband of the maker, is liable therefor.

Are the notes in controversy valid contracts as against the defendant's wife? By her marriage the right of a wife to all her personal estate, at common law, vests in her husband, and he becomes liable to make provision for her suited to her

necessities, and his degree in life; but while he is not guilty of any cruelty, or conduct which will justify her in leaving him, and is willing to provide her a home, and all reasonable necessaries, he is not ordinarily bound to furnish them elsewhere. 2 Kent's Com. 147. She will, however, in case she commit adultery or elope, forfeit all claim upon her husband to make such provision. *Hunter* v. *Boucher*, 3 Pick. 289; *McClutchen* v. *McGahay*, 11 Johns. 281. But while she is free from any impropriety which by the rules of law will deprive her of these rights, the obligation of the husband suitably to provide for her, will continue, whether she reside in his family or elsewhere; and if he fails to do so, or if he turns her away without a justifying cause, his very treatment or neglect will be a general letter of credit which will authorize her to contract in his name for such necessaries as her situation requires, and his condition in life renders proper. Bacon's Abr., 1st Amer. Ed., vol. 1, p. 488, Letter H; *Hancock* v. *Merrick*, 10 Cush. 41; *Kimball* v. *Keyes*, 11 Wend. 33. Even in cases of misconduct on her part the husband will be held liable to third persons, for necessaries furnished her, unless furnished under such circumstances that the person providing them, had notice, or may reasonably be presumed to have had notice, of the circumstances under which she was living. *Norton* v. *Fazen*, 1 Bos. & Pul. 226. If, however, the wife voluntarily separates herself from her husband's home, such separation will be sufficient to put all persons, supplying her necessities, upon inquiry as to the cause and circumstances of her living apart from him; and if they supply her without doing so, they will do it at their peril. *McClutchen* v. *McGahay*, before cited. But involuntary separation, without the wife's fault, and in some instances where, by operation of law, it exists through her fault, will not relieve the husband from his legal responsibility to provide for her. If, therefore, she be imprisoned for felony, he will be liable for necessaries. 2 Starkie's Ev., part 4, p. 698. But while she cohabits with her husband, such cohabitation will be sufficient evidence of his assent to her contracts for necessaries,

obtained on his credit, and of her authority to bind him therefor as his agent. *Furlong* v. *Hysom*, 35 Maine, 332. Such are some of the rights of the wife, and such are some of the duties and liabilities of the husband, as they exist at common law, for her support and protection; and these are so ample that that law, for these and other reasons springing from the conjugal relation, deemed it unnecessary that the wife should have ability to contract on her own account, and therefore debarred her from such power. *Shaw* v. *Thompson*, 16 Pick. 198. So completely has the common law incapacitated a *feme covert* to contract in her own name, that she cannot, even in cases where her conduct has absolved her husband from his obligation to provide for her, bind herself by note or contract for the payment of such necessaries as her situation may require. *Marshall* v. *Rutton*, 8 Durn. & East, 545. Having no power or capacity to contract, she cannot sue or be sued with or without her husband on her contracts made during coverture. *Howe* v. *Wildes*, 34 Maine, 566, and authorities there cited. The notes declared on are, therefore, at common law, void contracts as against the defendant's wife; and, being void, the defendant cannot under that law be held liable thereon.

The question then arises whether the notes in suit are valid as against the defendant's wife, under the statute c. 175, § 1, before cited; and if so, whether that fact will make the defendant responsible in this suit therefor. Does, then, that statute give to a married woman, who is in prison and unable to pay the fine and costs for which she is imprisoned, a capacity to bind herself by note for the amount due, for the purpose of procuring her release? If she has not such capacity, then no mode seems to be provided by law for her discharge; and her imprisonment may be for life, unless her husband or some friend volunteers and pays the amount required as the condition of her release. By the statute the sheriff is authorized to take the note of the convict only who is imprisoned and unable to pay his fine and costs. In terms, it applies to "*any person convicted of a criminal offence;*" and in favor of

personal liberty, there seem to be good reasons for applying it to married women and minors as well as to others. No reason is perceived why they should be excluded from its benefits. If the notes in suit are not the notes of the defendant's wife, then they are not statute notes; and, if they are her notes, then they are not the contracts of her husband, and, in the absence of any statute creating such liability, he can only be held responsible for their payment upon the ground of some legal obligation incident to the marriage relation.

By the common law there are many cases where such an obligation on the part of the husband, to pay and discharge the debts and liabilities of his wife, is implied. He is liable for her debts contracted before marriage. He is also liable with her for her torts and frauds, committed by her during the coverture, where the remedy for the tort is only damages by suit or fine. 2 Kent's Com. 149. So, too, he may be held liable in an action upon a penal statute, to recover a forfeiture incurred by her, especially where such forfeiture goes to the plaintiff, and is in the nature of damages for injuries sustained by reason of her tortious acts. *Harbroach* v. *Weaver*, 10 Johns. 247. But when the wife is prosecuted by indictment, for an offence to which her husband is in no way privy, he shall not be included in it, because it is a proceeding grounded merely on a breach of the law. 1 Bacon's Abr. 487, and cases there cited. It is also said, in a note on the same page, that the husband is not liable to pay the forfeiture recovered on an indictment against the wife. It has also been held, that the husband is liable with the wife to an action of debt or *scire facias*, upon a judgment recovered against her for costs during the coverture, but his property cannot be taken, nor his body arrested, upon an execution against her alone. *Haines* v. *Corliss*, 4 Mass. 659.

In the cases before cited, where the husband is held responsible for the debts, torts and liabilities of his wife, his obligation arises principally from the fact that he is supposed to have in his hands, by virtue of his marriage, all the wife's per-

sonal estate, so that she is destitute of the means wherewith to pay them or make satisfaction. By our present statutes the wife is placed in a very different position. Her property, held by her at the time of the marriage, does not thereby become the property of the husband; and she is allowed to retain, as against his creditors, all which may subsequently come to her "by direct bequest, demise, gift, purchase or distribution," unless the same came to her from her husband. Stat. 1844, c. 117, § 1. She is also authorized to commence, prosecute or defend in her own name, or jointly with her husband, any suit at law or in equity, in relation to all such property. Stat. of 1848, c. 73, § 1.

If the notes, then, now in suit, may be regarded under the statute as valid contracts of the wife, since the principal reasons which were deemed sufficient at common law to create a legal liability on the part of the husband, to pay and discharge her legal liabilities, have ceased to exist, we are of opinion that they should not be now applied for the purpose of extending the husband's liability to cases in which they were never before applied, even though by the principles of that law the cases might have fallen within it. The common law liability of the husband, has never been extended to any contracts of the wife made during coverture, for the simple reason that by that law, as we have seen, no such contracts could exist. The notes in suit, if valid as against the wife, under the statute relied upon as authorizing them, having been given before the passage of the statute of 1844, c. 117, § 1, before cited, are only the contracts of the wife, and not the contracts of the husband; and she alone can be held liable thereon, although for the sake of the remedy, the husband might perhaps be joined with her in the suit, as he now may be in actions upon her contracts before coverture, in which case execution can only be levied upon her estate. Stat. 1852, c. 291, § 1. If the notes are her contracts, no action can be maintained upon them against the defendant alone.

It is, however, contended, that if the notes in suit are not valid contracts as against the wife, they are nevertheless valid

as against the husband. It is urged that this is so, because the consideration of the notes is made up of items for which the defendant was legally responsible before the notes were given, and the authority of his wife to execute them in his behalf may therefore be presumed. It is true, as we have seen, that he might have been responsible for her board while in prison, the nature of her offence not being such as to deprive her of her claim upon him for the necessaries of life while there. But so far as relates to the fine and costs, which went into the note, we do not find, in the examination we have made, nor in the authorities before cited, any principle upon which he was liable. These were imposed *upon her* as the sentence of the law, and, so far as appears, for offences in which he was in no way implicated. They were imposed upon her, not as damages for injuries sustained by her tortious acts, but simply as a punishment for her crimes; and it is not apparent to us upon what principles the husband can be made to bear that punishment. No person can be made to suffer twice for the same offence; and, in our judgment, any rule of law, by which an innocent person could be made to suffer, for an offence which he did not commit, by reason of his relation to the offender, would be equally unjust. Yet, such would be the direct effect, if the defendant could be held responsible, against his will, to pay the fine and costs imposed upon his wife.

But, if it could be made to appear, that the defendant was liable at common law, for the items which constitute the consideration of the notes, this fact would not necessarily make him a party to the notes. According to all the authorities which have been examined, the husband's liability for necessaries rests wholly upon his supposed assent to her contracts, made upon his credit, or rather upon his promise implied from his marital duties and the circumstances of the case; and his liability for her torts and upon judgments recovered against her during the coverture, results from an obligation imposed by law; but such promise or legal obligation arises only to such persons as furnish the necessaries, or are injured by her

torts, or are her judgment creditors, and cannot be enforced in the name of an assignee. The mere right of the wife to procure necessaries on the credit of her husband, or any other liability arising on his part for her, will not authorize her to give his negotiable notes therefor, especially for a past or executed consideration.

The simple fact of being a man's wife does not confer authority upon her to sign her husband's name to any contract, (*Shaw* v. *Emery*, 38 Maine, 484,) and she cannot bind him by signing her own signature, except it be in cases where she is authorized to use her own name as his, or where his assent to such use may be fairly inferred; as where a note or draft is made payable to her with her husband's consent, and afterwards, by his authority, either express, or implied from accompanying circumstances, is indorsed by her in her own name. In such a case the note or draft, though literally payable to her, is in fact payable to her husband, and her name, in legal contemplation, stands for his. *Hancock Bank* v. *Joy*, 41 Maine, 568.

In the case at bar, so far as appears from the statement of facts, the notes were signed by the defendant's wife without his knowledge or consent, and they cannot, therefore, be regarded as binding on him. If she had signed the defendant's name instead of her own, he could not have been held without proof of her authority; and it has been held, in a case where the wife signed her husband's name, that he was not bound, because her authority to make the note was not referred to, or recognized upon its face, neither in the body of it, nor in the signature. *Minard* v. *Mead*, 7 Wend. 68.

In view of all the facts, we are satisfied that this action cannot be maintained. *Plaintiff nonsuit.*

TENNEY, C. J., and HATHAWAY and GOODENOW, J. J., concurred in the result.

APPLETON, J., concurred.

SAMUEL A. MORSE *& al. versus* MACHIAS WATER POWER AND MILL COMPANY.

The process of injunction should be applied with the utmost caution. It must be a strong case of pressing necessity, or the right must have been previously established by law, to entitle a party to call to his aid this strong arm of the Court.

The interposition of a court of equity by injunction, must be based on a clear and certain right in the petitioner, to the enjoyment of the subject in question, and an injurious interruption of that right, which, on just and equitable grounds, ought to be prevented.

If it shall appear to the Court, when an injunction is asked, that other parties than those named in the bill are interested in the result, the Court itself may state the objection and refuse to make a decree; or, if a decree be made, it may, for this defect, be reversed on a re-hearing or an appeal; or, if it be not reversed, it will bind none but the parties to the suit and those claiming under them.

The general rule in equity is, that all persons legally or beneficially interested in the subject matter of a suit should be made parties thereto.

BILL IN EQUITY. The cause was heard upon bill, answer and proof. The prayer of the bill was, that the respondents might be restrained by a decree of the Court from making wider and deeper the channels through which certain mills upon the Machias river were supplied with water.

The facts in the case, are fully stated in the opinion of the Court.

George Walker, for petitioners.

By the R. S., c. 96, § 10, general chancery powers are conferred so as to embrace the whole field of chancery jurisdiction. This case comes within the class denominated nuisance. U. S. Equity Digest, Title Nuisance, paragraphs 40, 41.

This Court, as a court of equity, will interfere, when the act threatened, if done, would work irreparable mischief. The ground of the jurisdiction is to prevent the threatened injury; to preserve the property with its natural advantages. 2 Story's Equity Jurisprudence, § § 710, 926, 927, 928; *Livingston* v. *Reynolds*, 26 Wend. 115.

Also, when a plain, adequate, and complete remedy at com-

mon law cannot be had. 2 Story's Equity Jurisprudence, § § 710, 718; 1 Story's Equity Juris. § 33.

Also, when the act done would lay the foundation for a multiplicity of suits, and vexatious litigation. 2 Story's Equity Jurisprudence, § § 901, 926.

The respondents, by their deed of Dec. 8, 1847, to the complainants, covenanted that they and those claiming under them should have the property named in the bill with all the privileges and appurtenances to the same belonging. By their act they were taking away the privileges in violation of their covenants. 2 Story's Equity Jurisprudence, § § 710, 718, 721, 722, 850, 927; 2 U. S. Digest, (Equity) Title Mill, paragraph 1; *Kennedy* v. *Seavel*, 12 Con. 317; *Livingston* v. *Reynolds*, 26 Wend. 115; *Pennsylvania* v. *Wheeling Belmont Bridge Company*, 13 Howard, 519.

The injury in this case would be irreparable, the common law would give no adequate relief, it would lay the foundation for a multiplicity of suits, and is in violation of express covenants.

The license or grant from the Phœnix mill owners to Smith & Bowles, under which the defendants attempt to justify, was between other parties, and does not bind the old Rock mill owners or those claiming under them.

As to the question of damages, there is no rule as to what amount of damages must be suffered before equity will interfere. It is sufficient if a right has been infringed upon, which, if persisted in, will end in great damage to, or total destruction of the right. *Webb* v. *Portland Manuf. Co.* 3 Sumner, 189; *Boliver Manuf. Co.* v. *Neponset Manuf. Co.* 16 Pick. 241.

Any unlawful deepening of a channel, or diverting water, is an injury, and a good cause of action. *Blanchard* v. *Baker*, 8 Greenl. 258; *Pender* v. *Wadsworth*, 2 East, 154; *Hodsdon* v. *Todd*, 4 T. R. 71, 73.

Peter Thacher, for respondents.

The rights of the owners of the single mill, as to the excavation of the channel leading by their mill to the defendants'

mill, are co-extensive with those granted by the owners of the Phœnix mill to Smith & Bowles, Aug. 30, 1848.

The corporation defendants are entitled to all the rights touching such excavation that belong to the owners of the single mill, and to any defence which they could make, were they parties defendant to this bill.

Such channel as excavated, or as proposed so to be, is still within the conditions of such original grant to Smith & Bowles.

The plaintiffs are, therefore, estopped by the deed to the defendants, dated May 9, 1837, to deny to the new owners of the single mill the rights as to water originally granted Bowles & Smith, and expressly confirmed by said deed, and by consequence to maintain this suit against the corporation.

This is none the less true, if it be admitted that the Rock mill (to wit, the old Rock mill,) had rights, as an ancient mill, to its proportion of the water of the pond and river, which could not be controlled by any grant of the proprietors of the Phœnix.

The plaintiffs are also estopped by the deed of Morse & Holway to the defendants of May 1, 1837, conveying the Rock mill and the new Rock mill, to deny to the defendants the right to deepen the channel to the extent claimed. Such grant necessarily carries with it a right to the water equal to that possessed by the old Rock mill, certainly all that was necessary to the beneficial use of the new Rock mill. *Wyman* v. *Farrar*, 35 Maine, 64; Angell on Water Courses, Ed. of 1851, § § 155, 157; *Bardwell* v. *Ames*, 22 Pick. 358.

The new Rock mill is entitled to draw its water and receive its logs directly by the channel of the old Rock mill. Nor could it be debarred of such right except by an exclusion from this channel of twenty years, or by grant. The evidence shows the defendants' using this channel up to 1844 or 1846. The defendants' deed to Morse, senior, of Dec. 8, 1847, is not such a grant. *Wyman* v. *Farrar*, 35 Maine, 64.

The plaintiffs present no equitable grounds of complaint or for relief. The excavation is decidedly for their advantage; it leaves them with a channel fifteen inches deeper than

defendants', with a disclaimer of intention of further deepening, instead of being obliged to divide with defendants the waters of the old channel, attended with all the inconvenience of the passage through it of defendants' logs.

The deepening is reasonable in any view, and essential for the purpose of floating logs to the defendants' mill, so that the mill may be used so long as it receives water enough to carry it.

The presumption, from the fact that the owners of the north saw in the old Rock mill, make no complaint, is, that they regard the deepening of the channel as rightful, or as no injury.

But if the excavation cause any diversion of the water, it is too trifling to justify any interference of the Court. At most, it is only *damnum absque injuria. Shrove* v. *Vorhees,* 2 Green's Ch. 25.

If there be a cause of complaint, it is not such an one as will authorize the Court to grant an injunction. There is a plain and adequate remedy at law. There is no such irreparable, remediless injury, as affords ground for an injunction, until the question of right is settled at law. *Dana* v. *Valentine,* 5 Met. 8; *Webster* v. *Clark & al.,* 25 Maine, 313; *Galvin* v. *Shaw,* 12 Maine, 454; *Attaquin & al.* v. *Fish,* 5 Met. 140, pp. 148–9; Lord Elden, in *Norway* v. *Rowe,* 19 Ves. 146; *Porter & al.* v. *Witham & al.,* 17 Maine, 202; *Ingraham* v. *Dunnell & al.,* 5 Met. 118; 3 Danl. Chanc. Prac. p. 1850, note 1, p. 1854, note; *Olmsted* v. *Loomis,* 6 Barb. Chanc. 187; *Read* v. *Gifford,* 6 Johns. 19; U. S. Equity Digest, "Equity," § § 238, 242–4.

Webb v. *Portland Manuf. Company,* 3 Sum. 189, is not a case in point against us, because this Court has but limited equity jurisdiction. See *Attaquin* v. *Fish,* 5 Met. 140.

In *Stevens* v. *Stevens,* 11 Met. 251, the dam and ditch complained of had been adjudged a nuisance at common law. And so in *Bemis* v. *Upham & al.* 13 Pick. 169. See also *Porter & al.* v. *Witham & al.* 17 Maine, 292.

An injunction cannot be granted, because the acts to pre-

vent which, it is solicited, have been done. The channel has been excavated. *Att'y General* v. *New Jersey Railroad & Transportation Co.* 2 Green's Ch. 136.

But if no one of these grounds can be sustained, the plaintiffs must fail, because the bill is fatally defective in the want of the appropriate parties defendant. Defendants and the owners of the single mill, should have been joined. The objection is now well taken. *Felch* v. *Hooper*, 20 Maine, 159; Story's Eq. Pl. § 72; 1 Daul's Chanc. Prac. 240, 329; *Houghton* v. *Davis*, 23 Maine, 28; *Hussey* v. *Dole*, 24 Maine, 20.

TENNEY, C. J. — It appears from the bill, answer and proof, that the mill Phœnix was built in the year 1763; — that it stands upon the north side of the Machias river, upon or below a dam erected across the same at the lower falls, and was the first mill built at that place; — that the privilege extends to the thread of the stream; — that at a time not particularly specified, another saw-mill, having therein two saws and other machinery for the manufacture of lumber, was erected by the owners of the Phœnix on the land and privilege belonging to them, called the "Rock mill"; — that on August 30, 1828, George S. Smith and Stephen S. Bowles were owners of a portion of the privilege on which the mill Phœnix stands, and of that mill and of the "Rock mill," situated thereon.

On that day, all the owners of these mills and the privilege on which they stand, excepting said Bowles and Smith, conveyed to said Bowles premises, including a water privilege, upon the lower falls on Machias river, particularly described in their deed, for a mill privilege; and, "also the right of drawing water from the pond for any kind of water-works, to be taken out on the premises above described, and used each season, so long as both saws in the mill Phœnix shall go without taking turns"; that on Sept. 4, 1828, the proprietors of Machias laid out and located to said Smith and Bowles, the same tract of land, which was conveyed to the said Bowles by said deed, dated Aug. 30, 1828, of the proprietors

of the mill Phœnix, on which was built the "single saw-mill," so called;—that on Feb. 8, 1830, Stephen S. Bowles released to George S. Smith all his interest in one undivided third part of a certain mill privilege, being the same on which the said Bowles and said Smith built a single saw-mill, during the year then last past, and improved by them in the proportion of two-third parts by said Bowles, and one-third part by said Smith, meaning to release and convey one-third part of that privilege, to which he was entitled under the deed from the owners of the privilege on which the mill Phœnix stood, dated August 30, 1828.

It further appears, that by clearing out the logs and drift from the river, and by blasting the ledge in the bed thereof, and the removal of rocks and other materials, and by the erection of a bulkhead, a channel or conduit from the dam and mill-pond was constructed, through which water was taken out on the premises described in the deed of August 30, 1828, for the operation of the wheels and machinery of the "single mill";—that afterwards, in the year 1836, Smith and Bowles, and other owners of the mill Phœnix, the "Rock mill" and the privilege on which they stood, built a double saw-mill, with lath mills and machinery attached, upon the southern side of the "Rock mill," upon the same privilege, called the "new Rock mill";—that the machinery of the latter has been propelled by water taken from the dam and pond, through the channel or conduit leading to the "single mill," and therein through another channel or conduit from the "single mill" to the "new Rock mill."

It is shown also by the bill, answer and proof, that Samuel A. Morse, one of the plaintiffs, and John Holway, having obtained title to a portion of the mill Phœnix, a portion of the "old Rock mill," a portion of the "new Rock mill," and a portion of the "single mill," including lath mills, and all machinery therein, and the privileges and appurtenances respectively belonging to each of said mills, in the same proportion of the title to the mills, conveyed the same to the defendants on May 9, 1837, with all the privileges and appurtenances

belonging to the same, as they were conveyed to them, with covenants of warranty; and on Dec. 8, 1847, the defendants conveyed with like covenants, to the plaintiff, Samuel A. Morse, one undivided half of the mill-site on which the "old Rock mill" stands, together with the south side or saw in the same, and the lath mill belonging to the said south side or saw of said double saw-mill, with all the privileges and appurtenances belonging to said south saw and lath machine; — and that afterwards, the said Samuel A. Morse conveyed one-fourth part of the same to Samuel A. Morse, jr., the other plaintiff.

It is admitted in the answer, that before the bill was filed, it was the design of the defendants to make deeper and wider the channel from the dam and pond to the "single mill," and to make a similar change in the channel thence to the new Rock mill; that contracts had been executed, under which the change in the channels was expected to be made, which contracts were partially fulfilled, and were in progress of completion, when the bill was filed.

The prayer of the bill is, that the defendants may be restrained by a decree of this Court from further deepening the channels aforesaid, or from bringing the water through the same when so deepened.

The defendants insist that as the deed from the owners of the "single mill" privilege to Bowles of Aug. 30, 1828, confers the right to draw water from the pond for any kind of water-works, subject only to the limitation therein expressed; and as the plaintiffs claim under deeds from the owners of the "Phœnix," the "old Rock mill," the "new Rock mill," and the "single mill," and the respective privileges and appurtenances of each, and as the defendants' title to the same is by virtue of a deed with covenants of warranty, one of the grantors of which was Samuel A. Morse, the plaintiff, he is bound by all the grants, stipulations and covenants, contained in the deeds to which he was so a party, or a privy; and that the alterations aforesaid, as designed by the defendants, will

not take water from the dam and pond when the saws in the mill Phœnix will go by turns only.

Whatever were privileges and appurtenances belonging to the portions of the mills conveyed by Samuel A. Morse and John Holway with the mills, passed by their deed to defendants. The grantees in the deed of the site of the "single mill," having the express right to take water out on the premises for any kind of water-works, &c., that right by subsequent conveyances passed to the defendants. And as the defendants' grantor, Samuel A. Morse, had at the time of the conveyance of the "new Rock mill" with its privileges and appurtenances an interest therein, under those who had title to the same, and as the water for the operation of the wheels and machinery in that mill, passed through the channel from the pond and dam to the "single mill," and thence to the "new Rock mill," it is not seen how he can legally insist that the right thus to take the water for the latter, as used by him and other proprietors, did not pass to the defendants as appurtenant to that mill. But as it appears that in 1836, the time the "new Rock mill" was erected, a channel was constructed to it from the "single mill," and water taken through it and used for the latter, not *on* the premises described in the deed to Bowles of Aug. 30, 1828, the use of that channel would have been in violation of the rights of any owner of the "old Rock mill," who sustained injury thereby, provided he had given no consent to its construction. Samuel A. Morse, a present owner in the Rock mill, as owner or privy to those who were owners in that mill, and in the "new Rock mill," did consent thereto, by aiding in the construction of that channel; and that right has passed to the defendants, (so far as Samuel A. Morse owned it,) by his deed.

But it may be doubtful at least, whether the right claimed to make deeper and wider the channel to the "new Rock mill," after the plaintiff, S. A. Morse, has parted with his interest therein, and after he has acquired an interest in the "old Rock mill" from the defendants, can be sustained in law.

As privy to the former ownership of the mill Phœnix and the old Rock mill privilege, when the proprietors thereof conveyed the site of the "single mill" and privilege with the right to take water, &c., he cannot object to the exercise of that right, according to its legal interpretation. As an owner in the "new Rock mill," with the privileges and appurtenances thereto belonging, his deed thereof transmitted the right to convey water thereto in the channel from the "single mill," because he had so used it to the date of his deed, and it passed as appurtenant to that mill. The deed to Bowles of Aug. 20, 1828, did not convey the right to take water out of the pond on the site of the "new rock mill;" and the defendants having only the right of Morse and Holway to them, can they enlarge the channel beyond its condition, when it passed to them to the injury of the estate acquired by the plaintiffs since that time?

The channel from the pond and dam, to the "single mill," having remained unaltered, so far as any thing appears in the case, from the time of its construction, it is a question of law whether the defendants, as owners in that mill, are entitled to deepen and extend in width the same, and disturb the rights of other parties which may have since commenced and matured without objection.

These are questions of great importance, and we are to consider whether they can be entertained and decided in the action as it stands before us.

The process of injunction should be applied with the utmost caution. In the language of Chancellor KENT, in *Attorney General* v. *Utica Insurance Co.*, 2 Johns. Ch. 378, "it is the strong arm of the Court, and to render its operation benign and useful, it must be exercised with the greatest discretion, and when necessity requires it." "The English court of chancery rarely uses this process, except when the right is first established at law, or the exigency of the case renders it indispensable." But there are cases, where the jurisdiction will be exercised, notwithstanding the plaintiff has not established his title at law; and this is done, to prevent or remove

a private nuisance, erected to the prejudice or annoyance of a right, which the other party has long *previously* enjoyed.

It must be a strong case of pressing necessity, or the right must have been previously established by law, to entitle the party to call to his aid the jurisdiction of this Court. *Van Bergen* v. *Van Bergen*, 3 Johns. Ch. 287.

In Brown's case, 2 Vesey, 414, Lord HARDWICKE intimated that the title must have been established at law, or the party have been in the previous enjoyment of the subject for at least three years, before he would interpose by injunction in the case of a private nuisance.

In *Bush* v. *Western*, Prec. in Ch. 530, a plaintiff who had been in possession for a long time, of a water course, was quieted by an injunction against the interruption of the defendant, who had diverted it, though the plaintiff had not established his right at law. Chancellor KENT, in view of this and other cases, remarks, that they show the ancient and established jurisdiction of this Court, and the foundation of that jurisdiction is the necessity of a preventive remedy, when great and immediate mischief or material injury would arise to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which on just and equitable grounds ought to be prevented. *Gardner* v. *Village of Newburg*, 2 Johns. Ch. 164.

But it was said by Lord ELDON, that there were private nuisances, which would support an action on the case, but which would not support an injunction. The jurisdiction of the Court was put upon the ground of material injury, and of that special and troublesome mischief, which required a preventive remedy, as well as a compensation in damages. *Attorney General* v. *Nichol*, 16 Vesey, 338.

In this case, the defendants have attempted to make changes in the channel leading to the single mill, and thence to the new Rock mill, which they must be supposed to consider for the improvement of those mills. The channel, before the

attempted change, had been for nearly twenty years in use as it was first constructed in all its parts; and between the dam and the single mill from the year 1828.

The contemplated alteration may operate so essentially to the injury of the plaintiffs that the preventive remedy ought to be applied; on the other hand, the mischief may be so inconsiderable, that the remedy at law may be fully adequate. If the questions involved were presented in a suit, where all parties interested were before us, we might with propriety determine those questions, in restraining the party by the decree sought; or in dismissing the bill because the rights of the parties under their deeds had not been established at law, or on the ground that the law furnished an adequate remedy.

But it is quite apparent from the bill, answer and proof, that other parties are interested equally with those named in the bill.

If the proper parties are not made, the Court itself may state the objection, and refuse to proceed to make the decree; or if a decree is made, it may for this very defect be reversed on a rehearing or an appeal; or if it be not reversed, yet it will bind none but the parties to the suit, and those claiming under them. Story's Equity Pleadings, § 75.

The general rule in equity is, that all persons legally or beneficially interested in the subject matter of a suit should be made parties. Story's Equity Pleadings, § 77.

Bill dismissed without costs.

APPLETON and GOODENOW, J. J., concurred. RICE, J., concurred in the result.

WILLIAM M. STEDMAN, JR., *versus* CHARLES PERKINS.

A. mortgaged to B. "all and singular the shipbuilding materials *now* in my shipyard in Calais, consisting of timber of various descriptions, and iron and tools of various kinds." This mortgage was dated 29th November, 1854, but was by mistake recorded as a mortgage dated 29th March, 1854. A. on the 16th day of July, 1855, conveyed a vessel built in his yard of some of the above materials, by bill of sale to C. On the 18th day of said July, B. attached the schooner as the property of A., and claimed possession under the mortgage and by a claim of lien for materials furnished: —

Held, that if the mortgage, properly recorded, would have been valid to encumber or defeat C.'s title, the mistake rendered it ineffectual for that purpose.

Held, that, as the writs, by virtue of attachments on which B. claimed to hold the vessel, only commanded the officer "to attach the goods and estate of" A., and as the declarations in them set forth no claim *in rem* against the vessel then sold to and in the possession of C., those precepts gave the officer no authority to take the vessel from C.'s possession.

ON AN AGREED STATEMENT OF FACTS from *Nisi Prius*.

This was an action of replevin for a schooner. The facts of the case appear in the opinion of the Court.

George W. Dyer, for plaintiff, cited the following authorities: *Chinnery* v. *Blackburn*, Abbott on Shipping, 44; *Bicknell* v. *Trickey*, 34 Maine, 281; *Fairfield* v. *Baldwin*, 12 Pick. 388; *Stanley* v. *Stanley*, 26 Maine, 191; *Russ* v. *Butterfield*, 6 Cush. 242.

F. A. Pike, for defendant, cited, among other authorities, *Breed* v. *Hurd*, 6 Pick. 357; *Crosby* v. *Chase*, 17 Maine, 369.

HATHAWAY, J. — The plaintiff acquired title to the schooner Belcher, replevied, by purchase of Joshua Pettygrove, as by bill of sale of July 16, 1855, and had possession of her.

The defendant pleads that he was justified in taking the schooner, as the servant of Zachariah Chipman, in whom, he alleges, the right of possession was, by virtue of a mortgage, from Pettygrove to him, of November 29, 1854; and, also, as a deputy sheriff, by virtue of two writs of attachment, against Pettygrove, in favor of said Chipman, and Chipman and als., to secure whose lien claims, he avers, he attached the schooner.

The mortgage conveyed to Chipman, "all and singular the

shipbuilding materials *now* in my shipyard, in Calais, consisting of timber of various descriptions, and iron and tools of various kinds."

This mortgage was dated November 29, 1854; but, by the facts agreed, it appears, that it was recorded in the registry of mortgages, in Calais, as a mortgage dated March 29, 1854. The record, therefore, was notice to the plaintiff of a mortgage of materials, &c., in the shipyard, March 29, 1854; and although it appears to have been so recorded, by mistake, yet if the mortgage, being properly recorded, would have been valid to defeat or encumber the plaintiff's title, the mistake was fatal, as affecting its validity for that purpose. R. S., c. 125, § 32.

The precepts, under which the defendant claims that he was justified, were against Pettygrove, and commanded the officer (the defendant,) only "to attach the goods or estate of Joshua Pettygrove."

There was no claim, *in rem*, set forth in the declaration, in either of them, against the schooner; nor did either of them command the officer to attach her, for on the 18th July, 1855, the date of the precepts, the schooner was not "the goods or estate of Pettygrove;" he had, previously, sold and conveyed her to the plaintiff, who retained her under that sale and conveyance, until she was attached and taken from him by the defendant.

Hence the precepts, under which the defendant acted, gave him no authority to take the schooner from the plaintiff.

Defendant defaulted.

TENNEY, C. J., and APPLETON, MAY and GOODENOW, J. J., concurred.

WILLIAM M. STEDMAN *versus* MATHIAS VICKERY, AND JAPHET H. MCALLISTER AND SAMUEL G. PIKE, *Trustees.*
JOSIAH ATKINS *& al. versus* SAME.

Foreign attachment, or the trustee process, is regarded as a species of equitable action.

The Court may, in its discretion, allow a person summoned as trustee, to withdraw a bill of exceptions, filed by him at a previous term, to the ruling of the Court adjudging him trustee on his disclosure, and may then give him leave to disclose further.

Whether a supposed trustee, after having completed and filed his disclosure, shall have leave to disclose further, is a question addressed to the legal discretion of the Court, upon the facts and circumstances of the case.

A supposed trustee disclosed that, having become liable for the principal defendant to a large amount, he took as security therefor, a mortgage of his house, and an absolute conveyance of his store, giving back a memorandum to reconvey upon being indemnified: — *Held,* that he was not trustee.

The question whether the conveyances disclosed by the trustee, are void for any cause, cannot be considered or determined upon exceptions to the judgment of the Court upon the disclosure.

A person cannot be held as trustee for goods of the principal defendant mortgaged to him, of which he has not actual, but only constructive possession.

If the plaintiff wishes to avail himself of the goods of the defendant mortgaged to the supposed trustee, he must apply to the Court for an "order and decree" in accordance with R. S. (1841,) c. 119, § 58. These provisions are not applicable, however, to such goods as have been in the possession of the trustee and have been sold by him.

If he neglect to procure and comply with such order he has no right to claim that the mortgaged property shall be exposed to the officer having the execution issued in the case.

A. conveyed a vessel to B. by bill of sale, upon an agreement that B. should appropriate the proceeds of the vessel to the discharge of A.'s debts for which B. was surety: — *Held,* that this agreement was a sufficient consideration for the conveyance.

The sale being without fraudulent intent and valid between the parties, the fact that some of the parties may have incurred penal liabilities for infractions of the revenue laws cannot have the effect to charge the trustee.

It *seems* that even if the conveyance were fraudulent in fact, the trustee might hold the property to secure his *bona fide* liabilities.

In determining the liability of a trustee, the facts disclosed by him are to be taken as true.

A mortgagee may permit his mortgager to use or dispose of the mortgaged property, until the rights of third parties intervene.

If, after a person has been summoned as trustee, he permit property of the principal defendant in his possession to be disposed of, he must account therefor.

A trustee is entitled to deduct from the property in his hands, or the proceeds thereof, all sums which he had paid for the principal defendant; and to hold the balance as security for all his outstanding liabilities on defendant's account, and for all his demands against him of which he could avail himself, had he not been summoned as trustee. He is to be charged only for the balance after their mutual demands are adjusted.

When a plaintiff alleges, in pursuance of the R. S. of 1841, c. 119, § 33, "any other facts than those not stated nor denied by the supposed trustee," the allegations must be clear and distinct, setting forth the "other facts" to be proved. A mere allegation that a certain sale by the principal debtor to the trustee was fraudulent or without consideration, when the trustee in his disclosure has stated the circumstances and the consideration, and when no "facts" to be proved by the plaintiff are disclosed, is insufficient.

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

TRUSTEE'S DISCLOSURE.

Joseph H. McAllister, one of the supposed trustees, who resided in St. Stephens, New Brunswick, disclosed at Calais before a magistrate, by consent of parties; he appeared by his attorney at the first term and filed his disclosure, upon which he was charged. A motion was then made by the trustee for leave to make a further disclosure; which motion was overruled by the presiding Judge, and exceptions to the judgment of the Court, charging the trustee and denying the motion, were duly filed and allowed.

At the second term of the Court the trustee appeared in person and renewed his motion for leave to disclose further. The presiding Judge declined to grant such leave, as the case was then pending on the exceptions; whereupon, by leave of Court, the exceptions were withdrawn. The Court then granted leave for the trustee to disclose further; to all of which the plaintiff duly objected. Said trustee made a further disclosure, and the plaintiffs filed allegations of facts to be proved; to which allegations the said trustee demurred, and the demurrer was joined. Upon the disclosure, demurrer and allegations, the presiding Judge charged the trustee for the value of the brig Black Hawk, mortgaged to him by the principal debtor, and for her earnings, so far as they ex-

ceeded the amount of the liabilities of the trustee, as indorser for Vickery, at the date of the mortgage, and which were secured by it.

The principal defendant was defaulted at the second term.

The full Court are to enter such judgment as the law requires.

Samuel G. Pike, the other person summoned as trustee in these actions, having made his disclosure, the plaintiffs filed allegations in pursuance of R. S., 1841, c. 119, § 33, to which the said trustee demurred, and there was a joinder in demurrer. After a hearing in the case, the presiding Judge ordered the said trustee to be discharged, to which order the plaintiffs excepted.

The facts and questions of law involved in both disclosures, are stated in the opinion of the Court.

F. A. Pike, Joseph Granger, jr., George W. Dyer, jr., and *Downes & Cooper,* for plaintiffs.

T. J. D. Fuller, for trustees.

APPLETON, J. — The trustee, McAllister, having been charged on his disclosure, at the April term, 1855, by the presiding Justice, duly alleged exceptions thereto. At the October term following, the trustee moved for leave to disclose further. As his exceptions to the ruling by which he had been charged were then pending, the motion was denied. Thereupon, by leave of the Court, he withdrew his exceptions, and he was then allowed to disclose further, to all which the plaintiffs excepted.

In cases brought from the Common Pleas to the Supreme Judicial Court by appeal, it was the constant practice to receive further disclosures, the appeal being regarded as a continuation of the proceedings in the Court of Common Pleas. "And," remarks SHAW, C. J., in *Hovey* v. *Crane,* 12 Pick. 167, "until a final judgment rendered, there seems nothing to restrain the general power of the Court from receiving further disclosures, if necessary to the rights of the parties." In *Carrigan* v. *Sidebottom,* 3 Met. 297, where, in an answer, a

fact had been stated incorrectly, or in terms which would admit of an inference or implication not intended, the trustee was allowed, without further interrogatory, to make an additional answer, correcting or qualifying the supposed erroneous answer. In *Boynton* v. *Foster*, 7 Met. 415, it was held, that a trustee, who had been discharged in the court below, must, upon the removal of the cause, follow the same in the Supreme Court, and there answer further interrogatories, if required by the plaintiff. Whether persons summoned as trustees, having once answered interrogatories, shall further answer, is a matter entirely within the discretion of the Court. *Warren* v. *Perkins*, 8 Cush. 518.

By R. S., c. 119, § 79, the trustee, though he may have disclosed in the original suit, may be permitted, or required, to disclose anew on *scire facias*. Now, no reason is perceived why that which may be done in a subsequent suit, may not much more properly be done in the original process, and thus the subsequent litigation be avoided. It is for the interest of the public that there be an early termination to suits; and it is better for all that the facts be ascertained and the legal rights of the parties be determined now, than to await a second suit, in which to receive what might have been heard in the first with a great saving of delay and expense.

The trustee McAllister, states, that having become liable for the principal debtor for a large sum, in January, 1852, he took a mortgage of his house and an absolute deed of his store, giving back a memorandum to reconvey upon being indemnified. He cannot be charged for this real estate. If those conveyances are void for any cause, that question cannot be here considered or determined.

The trustee discloses a mortgage of the goods in Vickery's store, valued at $3000 at the date of the mortgage, and at $2000 at the time of the service of this trustee process. The trustee had previously become liable for a large amount for the mortgager, and there are ample reasons disclosed in the relations between the parties, why the trustee should ask, and

why the mortgager should give a mortgage, without imputing any fraudulent design to either party.

If the trustee had merely a constructive, and *not* an actual possession of the mortgaged goods, he cannot be charged as trustee. *Pierce* v. *Henries*, 35 Maine, 57.

If he was in actual possession, his disclosure shows outstanding liabilities, for an amount exceeding by thousands of dollars the value of the goods mortgaged in the store. If the plaintiff wished to avail himself of these goods, he should have moved the Court to "order and decree" the sum of money, upon payment of which, "within such time as the Court shall order, and while the right of redemption exists," the alleged trustee "shall deliver over the property to the officer serving the process, to be held and disposed of in like manner as if it had been attached on mesne process," &c. R. S., c. 119, § 58. This the plaintiff has neglected to do. He has, therefore, no right to claim that the mortgaged property shall be exposed to the officer having the execution which may finally issue in this case.

Some of the property of the principal defendant, in the hands of the trustee, has been sold by him. In such case, the provisions of § 58 are not applicable.

The arguments of the counsel mainly relate to the brig Black Hawk, which, on Dec. 1, 1854, was mortgaged to the trustee, and of which subsequently and on the same day he received an absolute bill of sale. The trustee discloses that being desirous to sell the brig, and with the avails relieve himself from the onerous liabilities he had incurred for the debtor Vickery, he took the bill of sale, he agreeing to pay the creditors where he was surety, the whole which he might realize from her, including earnings, as well as the money received on her sale, and allowing to said Vickery what he received from her. Without this arrangement it is obvious that he would have been unable to effect a sale, however desirable it might be, with the consent of the mortgager. With it, he was enabled to dispose of the brig whenever it might in his judgment become expedient.

It is insisted that this bill of sale is void as being without consideration; and further, that though thus void, it nevertheless is so far valid as to destroy or defeat the mortgage previously given.

The bill of sale, whether valid or not, does not appear to have been given with any fraudulent intent.

It was held in *Little* v. *Little*, 13 Pick. 427, that an outstanding liability as surety for another, together with a promise, express or implied, by such surety to the principal, that he will pay the debt, and so indemnify the principal, is a valid consideration for a promissory note from the principal to such surety, payable on demand. In *Garden* v. *Webber*, 17 Pick. 407, it was decided that where a promissory note, secured by mortgage, was given in order to indemnify the promisee against any loss he might suffer by reason of his subsequently indorsing for the accommodation of the promisor, and the promisee did accordingly indorse for the promisor, that such note was valid as against creditors of the promisor, whose claims accrued after such indorsements were made. The same doctrines were re-asserted in *Swift* v. *Crocker*, 21 Pick. 241. According to these decisions, the promise of the trustee to appropriate the proceeds of the brig to the discharge of debts for which he was liable with Vickery as surety, must be regarded as a sufficient consideration for the conveyance to him.

"This form of process," remarks PARKER, C. J., in *Boardman* v. *Cushing*, 12 N. H., 105, "is regarded as an equitable action, and it would not consist with equity to deprive the party of a mortgage security by reason of a mere mistake in the mode of taking it." In that case, as in the one under consideration, the conveyance was taken with no design to defraud, but on the supposition that in this mode the rights of the trustee could be more effectually secured.

If the bill of sale were to be regarded as void, still it is not readily perceived how the giving of a void bill of sale would defeat a previous valid mortgage; or why, if void, it should be upheld merely to destroy an honest claim. The

mortgage was given in good faith, and for a sufficient consideration. It has never been canceled. The trustee entered into possession of the property mortgaged; and it would be a strange result if he were to lose security otherwise valid, by an act which was either voidable, or if valid, strengthened and enlarged his prior rights. It would seem, according to *Ripley* v. *Otis*, 6 Pick. 475, that even if the bill of sale were to be regarded as fraudulent in fact, still the trustee would be entitled to hold the property to secure himself against his original liabilities.

It is alleged, and for the purposes of this decision it may be conceded, that the trustee was an alien, and having taken the bill of sale of the brig, conveyed the same in trust for himself to Samuel G. Pike, in whose name she was registered, and by whom, when sold by the trustee, the transfer was made.

It is insisted, that these conveyances were in conflict with the revenue laws of the United States, and that the brig is liable to forfeiture. It is immaterial how that may be, for the attaching creditors have no privity with the United States, and can derive no aid therefrom. The plaintiffs cannot interpose any liability to forfeiture, thereby to charge the trustee. If the brig had been forfeited, and an adjudication to that effect been made, the trustee could not be charged, for the title would be in the United States. If there was a liability that such would be the result, the possibility that the trustee might lose the vessel, would furnish no argument for holding him. The sale was valid as between the parties, and whether some of the parties may or may not have incurred penal liabilities for some infractions of the revenue laws, it will be time enough to consider when the question is so presented that it will be our duty to determine it.

By R. S., c. 119, § 33, "the plaintiff or trustee may allege and prove any other facts not stated nor denied by the supposed trustee, which may be material," in deciding how far the trustee is chargeable.

Many of the allegations filed, are to the effect, that the conveyance of the Black Hawk was without consideration and

fraudulent and void. In these allegations no new facts are stated, but rather the inferences the plaintiffs seek to have drawn from the facts disclosed by the trustee.

To enable the plaintiffs to charge the trustee, the allegations must be clear and distinct, setting forth the "*other facts*" to be proved. The trustee has disclosed all the circumstances attending the conveyance and the consideration for which it was made. The mere allegation that it was fraudulent, or without consideration, when the trustee has stated the circumstances and the consideration, and where no facts to be proved are disclosed, is not enough. *Pease* v. *McCusick*, 25 Maine, 73; *Gouch* v. *Tolman*, 10 Cush. 105. In determining the liability of the trustee the facts disclosed were taken as true. If the statements of the trustee are false, the plaintiffs have their remedy. *Laughran* v. *Kelley*, 8 Cush. 199. In the present posture of the case, the disclosure must be regarded as true.

The allegation, that McAllister has permitted the debtor to use the earnings of the brig, is not sufficiently definite to be perceived to be material. If this was before the plaintiffs' writs were served, it is unimportant. The mortgagee may permit the mortgager to use or dispose of the mortgaged property. Till the rights of third persons arise, it is a matter solely between them. It is only when creditors intervene that inquiry becomes important. If, after he was summoned, the trustee permitted property of which he was in possession to be disposed of by his debtor, he may be held to account therefor. But that is not alleged.

The allegations asserting a violation of the revenue laws of the United States, are entirely irrelevant to the question under consideration. The trustee is neither to be charged for violating them nor refraining from their violation.

The trustee does not disclose specifically when his liabilities for the principal debtor accrued. The fifth allegation is, that a large portion of them accrued subsequent to the conveyance of the brig Black Hawk from the trustee to Pike, the other trustee. The times when the trustee became liable, may be-

come important in determining the state of the accounts between the principal defendant and the trustee, and in ascertaining whether or not there is any balance in his hands. The trustee may have leave to disclose further. If, in his further disclosure, this question is left in doubt, the plaintiffs may offer proof on this point.

From the personal property, or the proceeds of the same in his hands, the trustee is entitled to deduct all payments of sums for which, previous to the conveyance of the defendant to him, to which reference has been had, he had incurred liabilities, and to hold the balance as security for all outstanding liabilities thus incurred. He is further to "be allowed to retain or deduct out of the goods, effects and credits in his hands, all his demands against the principal defendant, of which he could avail himself if he had not been summoned as trustee, whether by way of set-off on a trial or by a set-off of judgment on executions between himself and the principal defendant; and he shall be liable for the balance only after their mutual demands are adjusted." R. S., c. 119, § 70; R. S. of 1857, c. 86, § 64.

The trustee McAllister, having the Black Hawk in his possession, and having disposed of the same, is to be held for the amount for which it was sold, subject to the deductions already specified. It is obvious, therefore, that the trustee Pike cannot be charged for the same property.

The exceptions in the case of the trustee Pike are overruled. The exceptions in the case of the trustee McAllister are sustained.

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

CHARLES PERKINS *versus* WILLIAM PIKE *& al.*

By the general maritime law, mechanics and material men have a lien on foreign, but not on domestic vessels, for labor and materials furnished by them, for the construction or repair of such vessels.

By the Revised Statutes of 1841, c. 125, § 35, laborers and material men have a similar lien on *all* vessels, domestic as well as foreign.

The equity of a lien claim arises from the fact that the labor and materials furnished have increased the value of the article to which they have been applied.

The general owner by mortgage, of property thus benefited, holds it equitably subject to a lien for what, by accession, has vested in himself, and enhanced the value of his interest in that of which it has become a part.

The lien *in rem*, attaches only to the extent of labor actually performed and materials used. It does not attach for labor or materials expected or agreed to be applied, but which, in fact, have not been.

When lien and non-lien claims are embraced in the same judgment, the lien is lost.

A lien is not secured by attachment in the usual form, on a writ simply commanding the officer to attach the goods and estate of the defendant therein named.

A. sued out a writ against B., commanding the attachment of the goods and estate of the debtor; the officer attached a vessel belonging to B., upon which a mortgage existed, and the mortgagee receipted for it; — *Held*, that the attachment being subsequent to the mortgage, and the writ containing no specific command to the officer to attach the vessel, to secure a lien claim, the rights of the mortgagee were superior to those of the lien creditor in the suit.

Where a writ gives no indication of a lien claim, an attachment confers on the plaintiff in the suit no special or peculiar rights in the property attached, by reason of his having furnished labor or materials for the construction or repair thereof. He stands on the same footing as any other creditor.

A practical difficulty in cases of lien, arises from the omission of the Legislature to require notice to all parties interested, as is the practice in admiralty. Without such notice, the judgment cannot bind other than the parties to the suit.

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

This was an action of ASSUMPSIT, brought by the plaintiff as deputy sheriff, upon a receipt given to him by the defendants for a vessel which he had attached in a certain suit, *Thomas Sawyer* v. *Michael McCurday*. The facts sufficiently appear in the opinion of the Court.

The defendants, in their specifications of defence, denied "any liabilities on account of the receipt sued in this action, because the plaintiff, acting as deputy sheriff, in the service of the writ in the case *Thomas Sawyer* v. *Michael McCurday*, made no legal attachment of the property; because the property purported to be attached in said action, and for which the receipt sued in this case was given, was not the property of the defendant Michael McCurday, or liable to be attached on the debt of the plaintiff Thomas Sawyer, but was the property of Wm. Pike." These specifications were filed under the law of 1855.

The plaintiff read the writ in the action, *Sawyer* v. *McCurday* and William Pike, trustee, based upon the following account annexed: —

"1854, Aug. 5.

Michael McCurday to Thomas Sawyer, Dr.

To 12,442 ft. pine deck plank, at 25,	$311 10
" hauling same to planing shop,	12 44
Cash.	$323 54."

The direction upon the writ was, "Mr. Officer, attach vessel to enforce plaintiff's lien for the within claim." The officer's return states, among other things, that he attached a vessel on the stocks, being built by said defendant, by order of the plaintiff's attorney, as the property of the defendant within named, to enforce lien for the within claim, and by direction of the plaintiff took William Pike and Levi L. Lowell as receiptors for the safe return and forthcoming of said property, &c., and on same day served process on defendant.

The plaintiff put into the case the judgment in the case of *Sawyer* v. *McCurday & Trustee*, and the execution issued thereon.

The officer's return upon the said execution, stated that he had that day notified the trustee, who had neglected and refused, &c.; and on same day notified the defendants in this action, and made a demand upon them for the property attached on the original writ, for which they had given the re-

ceipt, and that each of them refused and neglected to deliver the same, &c.

The defendants offered, and were allowed by the Court to read, subject to the objection of the plaintiff, a mortgage from McCurday & Harvell to William Pike, dated May 17, 1854, being prior to the commencement of the original suit, of a ship to be built by McCurday & Harvell. The condition of the mortgage was to pay advances and indebtedness according to a contract between the parties made Dec. 17, 1853. McCurday & Harvell to have possession unless they abandon. It was admitted that this mortgage was duly executed and properly recorded, and that the ship mentioned in it is the one referred to in the various depositions in this case.

Wm. Pike, one of the defendants, was defaulted at the opening of the trial.

If, upon the above stated facts, the Court be of opinion that the plaintiff's action can be maintained, then the defendant is to be defaulted; otherwise, a nonsuit is to be entered.

Geo. W. Dyer, for plaintiff.

1. The defendant Pike having been defaulted, we have only to consider the liability of Levi L. Lowell, the other defendant.

Lowell is liable, because he signed the receipt, and there has been a breach of that contract.

From the case, it would appear that Lowell defends upon the ground, that in the action of *Sawyer* v. *McCurday and William Pike, trustee*, the attachment of the ship receipted for was insufficient in form or invalid, because the ship was not the property of McCurday, but was the property of William Pike.

2. As to the form of the attachment.

The case finds, that in the attachment, all the forms of the statute were complied with; and it is submitted, that if this were not so, this defence could not be made by Lowell, as it could not have been made by the attaching officer, if the action had been against him, for not holding the ship to be taken on execution. *Haynes* v. *Small*, 22 Maine, 14.

3. The receipter takes the place of the officer, and has the same rights and is subject to the same liabilities. *Sawyer* v. *Mason*, 19 Maine, 49.

4. As to the property of McCurday in the ship.

Admitting, for the argument, that the mortgage of McCurday and Harvell to William Pike, was valid and subsisting at the date of the attachment, Sept. 15, 1854, then, by the provisions of the statute, McCurday had property in the ship, which was attached in that suit, where Pike was summoned as the trustee of McCurday.

It is however denied, that the mortgage to Pike was valid and subsisting at the date of the attachment, and it is submitted that, the case finding that the officer, having attached the ship in the possession of McCurday, the presumption of law is, that the ship was the property of McCurday, and the burthen of proof is upon Lowell to show affirmatively, that the property was not McCurday's. *Bradford* v. *McLellan*, 23 Maine, 302.

5. The case finds that the ship was mortgaged to William Pike by McCurday & Harvell, May 17, 1854, and was "*to be built.*" The officer's return shows that Sept. 15, 1854, the ship was built by McCurday, and on the stocks.

It is submitted, that a mortgage of a ship before she is built, gives no rights as against Sawyer, and, so far as he was concerned, the ship was McCurday's.

The case does not find that Pike ever made any advances under the mortgage, or that there was any indebtedness to him, at the date of the attachment, from McCurday & Harvell, or either of them; and, so far as Sawyer is concerned, the case does not find that the mortgage was valid and subsisting at that time.

It is submitted, that by the principle decided in *Bradford* v. *McLellan*, 23 Maine, 302, Lowell must show the ownership of the ship to have been, Sept. 15, 1854, in Pike, or not in McCurday; and if in Pike, then by *Fisher* v. *Bartlett*, 8 Maine, 122, that the ship has been restored to Pike. *Lathrop* v. *Cook*, 14 Maine, 414.

F. A. Pike, for defendants.

1. The receipt in this case is peculiar. It does not allege the property attached to be McCurday's. It states purposely that the ship attached was "now being built in the shipyard of the defendant, Michael McCurday;" and was attached on a precept in favor of Sawyer against McCurday. It purposely avoids stating the ship to be McCurday's property. Neither of the defendants having acknowledged the property to be McCurday's, is precluded from setting up property in himself or another. In this particular, it is similar to the receipt in *Lathrop* v. *Cook*, 14 Maine, 416, of which Judge SHEPLEY says, "the defendant has not, by virtue of the receipt, disenabled himself to allege and prove it to have been his own property."

2. The mortgage being *prima facie* evidence of title, there was no need of further proof of indebtedness to the mortgagee. 18 Pick. 394.

3. The mortgage is of something more than "a ship to be built." It describes a vessel in frames at the time the instrument was executed, and that the materials of which she was to be composed were then in the yard. That a person cannot grant or mortgage property of which he is not possessed and to which he has no title, is an axiom of Lord BACON'S which I am not disposed to controvert. But it is equally well established that a person may grant personal property of which he is potentially though not actually possessed. A man may grant all the wool which shall grow on the sheep which he owns at the time of the grant, but not the wool which shall grow on sheep not his, but which he may afterwards buy. *Lunn* v. *Thornton*, 1 Man. Grang. & Scott, 383. In *Macomber* v. *Parker*, 14 Pick. 497, the same principle is enforced. In *Abbot* v. *Goodwin*, 20 Maine, 408, it is carried still further, and applied to goods exchanged for goods mortgaged, a stretch of principle which is not needed to cover the case at bar. Certainly a mortgage on a colt will cover subsequent growth. A mortgage on a building partly finished will cover the erection in its completion. The finishing of

the article mortgaged is the "new act done by the donor for the avowed object and with the view of carrying the former grant or disposition into effect." *Lunn* v. *Thornton*, before cited.

At the time of the attachment, then, in September, 1854, Pike had a valid and subsisting mortgage upon the ship. Such being the case, McCurday had no attachable property in her. The law does not allow personal property under mortgage to be attached. The provision of the R. S., c. 117, § 40, allowing attachment, was repealed by c. 31, laws of 1842. It is liable to *seizure* on execution, but not to attachment.

4. The plaintiff had no lien claim on the ship.

5. If Pike shall be defaulted on the ground of breach of contract in not returning property receipted for, although the property was his own, still judgment can only be rendered against him for nominal damages. It can at most be but a technical breach of contract. Had the ship been returned to the officer in accordance with the contract, he could only have sold the individual interest of McCurday, after the payment of the partnership debts and the discharge of Pike's mortgage. It does not appear that this interest could have been of any value. As matter of fact it was entirely worthless. If of no value, Perkins would have been liable to Sawyer only for nominal damages in any event; even though he had neglected to levy the execution. The liability of the receiptor to the officer is measured by that of the officer to the creditor; it can never exceed it.

Dyer, for plaintiff, in reply.

APPLETON, J. — It appears from the proof, that, in December, 1853, one Michael McCurday, or McCurday & Harvell, made a contract with the defendant Pike, for supplies for a vessel then building. On May 7, 1854, they gave him a mortgage on the vessel then in frames, and of the materials then on hand, to secure him for supplies furnished and to be furnished. On August 5, 1854, Thomas Sawyer sold McCurday about twelve thousand feet of plank for the deck of the ves-

sel. On September 15th following, and when only a portion of the deck plank had been used, Sawyer commenced a suit against McCurday for all the deck plank, claiming a lien therefor, and attaching the vessel to secure the same, for which the defendants gave their receipt to the present plaintiff, by whom the attachment was made. Sawyer prosecuted his suit to final judgment, which was rendered in his favor for the amount in suit. The execution was seasonably placed in an officer's hands, and a demand duly made of the receiptors, who refused to give up the vessel.

This action is brought by the officer making the attachment, against the receiptors, one of whom, Pike, the mortgagee, denies Sawyer's lien upon the vessel, and claims to hold the same under his mortgage.

"According to the doctrine in the Pandects, if one repairs his vessel with another's materials, the property of the vessel remains in him." "The property in a vessel is supposed to follow the keel, *proprietas totius navis carinæ causam sequitur.*" 2 Kent, 360. The same doctrine seems to have been incorporated in and to be acknowledged as part of the common law. It is recognized in *Merritt* v. *Johnson*, 7 Johns. 473. It is fully affirmed in *Glover* v. *Austin*, 6 Pick. 214. The defendant Pike, having a valid mortgage, duly recorded, shows a good title against all but those having an elder or better title as lien claimants. His title, in point of time, is prior to that of Sawyer. The rights of the parties, therefore, depend upon the existing validity of Sawyer's lien at the time judgment was rendered in his favor.

By the general maritime law, mechanics and material men have a lien on foreign vessels for the price of their labor and materials; but not on domestic vessels. To extend further protection to the laborer and the material man, the Revised Statutes of this State, c. 125, § 35, give to those who perform labor or furnish materials for or on account of any vessel building or undergoing repairs, "a lien on such vessel for his wages or materials;" and this lien may be secured by an

attachment of the vessel within four days "after said vessel be launched or such repairs afterwards have been completed."

In the case at bar, one of the builders of the vessel, upon which the lien is claimed, had purchased of the plaintiff for the vessel, a quantity of deck plank, which had been delivered. At the date of the suit by the vendor for the price of the plank sold, but a small portion had been used in the vessel. The whole amount sold had not entered into the structure of the vessel, till some two or three months after the commencement of the suit by which the lien was to be enforced.

It remains to ascertain the extent of the vendor's lien at the time his suit to enforce it was commenced. Had Sawyer a lien at that time for all the plank sold, or only for those which had entered into and become a part of the vessel? Had he a lien because of the expectation on his part that they would, and of the promise on the part of the builder that they should, enter into and become a portion of the vessel then building? Did the lien attach instantly upon the sale, irrespective of any subsequent use or disposition of the plank?

It must be remembered in cases of this description, that the controversy is not so much between the vendor and vendee, as between the vendor and the mortgagee or general owner of the vessel, to the prejudice of whose interests the lien is asserted. The builder of the vessel was liable for the lumber, whatever may be the use he may have made of it. The judgment was rightfully rendered against him for the whole amount sold. Was the interest of the general owner liable for the same amount?

The plank were sold for the vessel. They had not then been applied to the purpose for which they were purchased. They might never be. They might be sold or used in building other vessels. Their future use was problematical. If they were used for other vessels, or sold, would a lien attach? It would certainly be a novel doctrine that a lien should attach for materials never used, because of an expectation that they would be used for a particular purpose.

The equity of a lien claim arises from the fact that the labor done, and the materials used, have increased the value of the thing upon which it has been done, and for which they have been used. The general owner, having been thus benefited, equitably holds his property subject to a lien for what by accession has vested in himself, and enhanced the value of his interest in that of which it has become a part.

The law follows and adopts this equity. The lien *in rem* attaches only to the extent of the labor done and the materials used; not for labor hereafter to be done, nor for materials hereafter to be applied. It cannot attach for labor which may never be performed, nor for materials which may never become a part of the vessel. Such was not the lien as to foreign vessels. That was only for labor done and materials used, and no more. The statute of this State was designed only to apply the maritime law to domestic vessels, for the same object and to the same extent. The *Young Mechanic*, 2 Curtis, 404; *The Kearsage*, 2 Curtis, 421; *Phillips* v. *Wright*, 5 Sandf. 342; *The Hull of a new Ship*, Daveis, 199.

It is apparent, therefore, that Sawyer sued and recovered judgment for materials for which, at the time he instituted his suit, he had no lien. If the mortgagee had wished to relieve the vessel from the attachment, he would have been obliged to pay for only such lumber as had then been used. The lien of the material man can only be enforced by attachment. It cannot be asserted prospectively. The extent of Sawyer's lien was limited by the materials used, and not by those which might or might not be used. The judgment, therefore, manifestly embraces lumber for which a valid lien *then* existed, and lumber for which there was then no lien. In such case it has been repeatedly held that the lien is lost. *Bicknell* v. *Trickey*, 34 Maine, 273; *McCrillis* v. *Wilson*, 34 Maine, 286; *Pearsons* v. *Tinker*, 36 Maine, 384.

But a fatal objection to the plaintiff's claim arises from the fact that the writ, by virtue of which the attachment was originally made, and the receipt taken, commanded only the attachment of the goods and estate of the debtor therein nam-

ed. There was nothing indicating a lien claim. The attachment, therefore, could give the plaintiff in that suit no special or peculiar rights, by reason of any materials he may have furnished toward the building of the vessel. He stands on the same footing as any other creditor, and his rights must be postponed to those of the mortgagee.

The practical difficulty, in cases of lien by statute, arises from the omission on the part of the Legislature to make provision for notice to all persons interested, so that the judgment rendered shall be conclusive upon all. In admiralty, the process is *in rem*, and notice being given, the judgment binds the rights of all. Until provision is made for general notice, the judgment may conclude the parties to the suit, but it cannot bind others.

The attachment being subsequent in time to the mortgage, and the writ containing no command authorizing the officer specifically to attach the vessel, the rights of the mortgagee, as here presented, are superior to those of the creditor in the suit in which the attachment was made, and a nonsuit must be entered. *Plaintiff nonsuit.*

TENNEY, C. J., concurred in the result. HATHAWAY and GOODENOW, J. J., concurred.

WILLIAM N. KNOX *versus* BENJ. G. CHALONER.

The right of erecting mills and mill dams, and of flowing land, conferred by the R. S. of 1841, c. 126, is subject to the paramount right of passage of the public, across and upon streams, in all cases where the streams in their natural state are capable of floating boats or logs.

All hindrances or obstructions to navigation, without direct authority from the Legislature, are public nuisances.

A dam erected over navigable waters, under authority from the Legislature, in such a manner as to impede navigation beyond what the Act authorizes, is *pro tanto* a nuisance.

This principle applies also to rivers which are not navigable, in the strict sense of the word, as used in the common law — to streams capable in their natural state of floating boats and logs.

Knox *v.* Chaloner.

The settled doctrine that important individual rights as against individuals may be acquired and lost by adverse possession and enjoyment for a period of more than twenty years, does not apply to the rights of the public in a navigable river.

A public nuisance can never be legitimated by lapse of time, for every continuance of it is an offence.

It *seems* that the remedy against a public nuisance by abatement is in all respects concurrent with that by indictment.

The case, *Brown* v. *Chadbourne*, 31 Maine, 9, affirmed.

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

This was an action of the case for maintaining a dam across Chase's stream, and thereby obstructing the passage of plaintiff's logs. The evidence, on the part of plaintiff, shew that the dam complained of had been built seventy-two years, during which time it appeared that the owners of logs had driven them into the defendant's mill pond, and then hauled them by the falls dam to the stream below, whence they were run into the East Machias river. There was no evidence that logs had ever been driven over the falls before the dam was built, nor since. There was testimony from various witnesses, called by the plaintiff, that in their opinion logs might be driven in high water over the falls where the dam now is, if the dam were removed.

There was testimony from other witnesses, called by the defendant, that in their opinion logs could never have been driven over these falls with the stream in a state of nature.

The defendant offered to show that the dam had existed for a much longer period than that shown by plaintiff, and that no claim had ever before been made upon the owners of the dam for damages, and that they had never been before called upon to make, and had never made, any sluice, or in any other mode aided the owners of logs above to pass them over the dam and falls.

The presiding Judge excluded this evidence upon the ground that, if this was a public river, no right could be shown, nor any grant inferred from a user or exclusive enjoyment, however long continued.

The Judge also instructed the jury, that if the river in its

natural state was capable of being useful for floating boats, logs, &c., for purposes of trade or agriculture, the plaintiff was entitled to recover, however long the dam of the defendant might have stood; and notwithstanding his user of the river had been open, notorious, and adverse, and although no logs had ever been floated over the falls where the dam now is.

The jury returned a verdict for the plaintiff.

In answer to interrogatories proposed at the instance of the plaintiff, they found this a public river.

If the rulings were erroneous, and the jury were authorized to infer a grant from the uninterrupted enjoyment of the dam for so long a time, the verdict is to be set aside, and the plaintiff to become nonsuit; otherwise, judgment is to be rendered on the verdict.

J. A. Lowell, for defendant.

1. If none but private rights were in question in this case, the authorities are abundant, that the erection of the dam and twenty years open, notorious and peaceable possession and enjoyment, would give the defendant a right to maintain it; and that the plaintiff's right of action would be barred by lapse of time.

2. That the regulation of the navigable waters within this State is vested in the sovereign power, to be exercised by laws duly enacted; and that the navigation may be impeded, if, in the judgment of that power, the public good requires it; and if the more apparent object be the profit of the grantee, that it is the right and duty of that power, to determine whether the public interest is so connected with the private, as to authorize the grant, is settled by a long and uninterrupted series of legislative enactments, commencing in Massachusetts at a very early period, and continued in this State since our separation, extending down to the present time, many of them, after solemn argument, sanctioned by the adjudications of our highest Judicial Courts.

Many of these enactments were grants to erect dams, bridges, causeways, and other obstructions, impeding the navigation, not for the purpose of giving greater facilities in an-

other mode, but for the promotion of a common benefit in a manner entirely disconnected with navigation; such as dams, to create a water power for different manufacturing purposes, and to control and withdraw the water to supply aqueducts, and bridges and causeways to facilitate intercourse by land. *Moor* v. *Veazie*, 32 Maine, 343, and cases there cited by SHEPLEY, C. J., in his learned and elaborate opinion, p. 359.

As the regulation of the navigable waters within this State is vested in the sovereign power, to be exercised by laws duly enacted; and it is competent for that sovereign power, through its Legislature, to *impede* navigation, if in their judgment the public good requires it, it follows that they had the power to *grant* to those under whom the defendant claims, the right to erect the dam in question.

3. The defendant offered evidence, proper for the consideration of the jury, which if not conclusive, tended strongly to show that such a right had been *granted* by the sovereign power, and that the grant had been lost by time and accident, which evidence should have been received. But it was rejected by the presiding Judge, who erroneously instructed the jury, "that if the river in its natural state was capable of being useful for floating boats, logs, &c., for purposes of trade and agriculture, the plaintiff was entitled to recover, however long the dam of the defendant might have stood; and notwithstanding his user of the river had been open, notorious and adverse; and although no logs had ever been floated over the falls where the dam now is." 3 Starkie on Ev. 1202, 1203, 1204, 1205, 1207, 1219, and note, (r) and cases there cited; 1220, and note (1,) and cases there cited; 1221, and note (2,) and 1222; 1 Greenleaf on Evidence, § 17, and notes; § 45, and notes; 2 Greenl. on Ev. § 539, and note 1, and cases there cited, and § § 541, 543 and 546; 3 Greenl. Cruise, 217, and note 1; 220, and note 1, and cases there cited; 222, and note 1, and cases there cited; 215, 218 and 219; *Tyler* v. *Wilkinson*, 4 Mason, (C. C. R.) 397; opinion of STORY, J., 401 and 402; *Inhabitants of Arundell* v. *McCullock*, 10 Mass. 71; *Crooker* v. *Pendleton*, 23 Maine, 339;

Jackson v. *McCall*, 10 Johns. 377; *Mather* v. *Trinity Church*, 3 Sergt. & Rawl, 590; *Goodtitle* v. *Baldwin*, 11 East, 480.

Walker, for plaintiff.

1. The stream in question is navigable and a public river. The jury have so settled as a fact.

2. The only question that remains is, has the defendant and those under whom he claims, maintained the dam for such a length of time, that the public are barred from the use of the river for the purposes of floating boats, rafts, &c., for the purposes of trade and agriculture?

Did the rule that regulates private rights prevail, the plaintiff's action would be barred by lapse of time; for then twenty years of open, notorious, and peaceable adverse possession, would give the defendant a right to maintain his dam. But in case of public rights, a different rule prevails. No length of time that the public may not have exercised a right, will prevent it from resuming the right when it may have occasion to do so. *United States* v. *Hoar*, 2 Mason, 311; *Cottrill & al.* v. *Myrick*, 12 Maine, 222; *Inhabitants of Stoughton* v. *Baker*, 4 Mass. 528; *Inhabitants of Arundel* v. *McCullock*, 10 Mass. 70; *Weld* v. *Hornby*, 7 East, 195.

3. All the citizens of this State have a right to the use of the navigable waters within it, and this right is not limited to waters in which the tide ebbs and flows, but is extended to lakes and fresh water streams. *Berry* v. *Carle*, 3 Greenl. 269; *Wadsworth* v. *Smith*, 2 Fairfield, 278; *Brown* v. *Chadbourne*, 31 Maine, 9.

An obstruction in a navigable river, that prevents or hinders the public in the use of it, is a public nuisance. Angell on Water-courses, 138; *Commonwealth* v. *Ruggles*, 10 Mass. 390.

4. From no length of time of adverse occupancy of a navigable stream can a grant from the public to the occupant be presumed, so as to give the occupant the right to prevent any one of the public from passing up and down the stream with boats, rafts and lumber, because such occupancy being a nuisance, could never have had a legal commencement. 1 Greenl.

Ev. 50; *Mills* v. *Hall*, 9 Wend. 315; *Inhabitants of Arundel* v. *McCullock*, 10 Mass. 70.

5. A grant can be presumed only when a grant can be lawfully made. It is not in the power of the sovereign of any government to grant a license to commit a nuisance. *Stetson* v. *Faxon*, 19 Pick. 147; *Moor* v. *Veazie*, 32 Maine, 343.

APPLETON, J.—The jury have found the stream, upon which the defendant's dam was erected, to have been a public river, capable, in its natural state, of being useful for floating boats, logs, &c., for purposes of trade and agriculture.

It was decided, in *Brown* v. *Chadbourne*, 31 Maine, 9, that a stream, such as the one across which the jury have found the defendant's dam to have been erected, though it be private property and not strictly navigable, is subject to the public use as a passage way. The Supreme Court of New Brunswick, in *Rowe* v. *Titus*, 1 Allen, 326, held, that all rivers above the flow of the tide, which may be used for the transportation of property, as for floating rafts and driving timber and logs, and not merely such as will bear boats for the accommodation of travelers, are highways, and subject to the public use. In *Boissonnault* v. *Oliv*, Stuart, (Low. Can.,) 565, the same rule of law seems to have prevailed in Lower Canada. "The *Riviere du Sud* appears," says REED, C. J., in that case, "capable of floating only single logs, and not rafts or batteaux, from the frequent interruption of the navigation from the rocks, shallows and rapids, and therefore is not to be considered a navigable river; but, allowing it to be of the description of *seigneuriale et banale*, the use of it, even in that case, must be free and open to the public; for, according to *Freeminville*, vol. 4, c. 4 p. 434, the King preserves his right over all such rivers as may be used for the floating of timber, inasmuch as he is considered to be the protector of commerce and the public interest."

It follows, that the right of erecting mills and mill dams and of flowing land, conferred by R. S., c. 126, must be deemed as in subjection to the paramount right of passage of the pub-

lic in all cases where the streams in their natural state were capable of floating boats or logs.

All hindrances or obstructions to navigation, without direct authority from the Legislature, are public nuisances. *Williams* v. *Wilcox*, 8 Ad. & Ell., 314. When the Legislature give an individual the right of erecting and maintaining a dam upon navigable waters, if the dam is so constructed as to impede the navigation beyond what the Act authorizes, this renders the erection *pro tanto* a nuisance.

The same principle must apply, where the river is not navigable in the strict sense in which the word is used in the common law. A dam which impedes or obstructs the right of the public, in floating boats or logs in a stream in which they can be floated in its natural state, must, for the same reasons, be held *pro tanto* a nuisance.

Important rights, as against individuals, may be acquired and lost by adverse enjoyment for a period of more than twenty years. But this principle does not apply as to obstructions in a public navigable river. "In such case, if the impediment offered to navigation should have existed for a season far beyond twenty years, no private right can demand its continuance, for a nuisance can never be legitimated." Woolwych on Waters, 270. "It is very well settled," says COWAN, J., in *Renwick* v. *Morris*, 3 Hill, 621, "that lapse of time will not bar a prosecution for a public nuisance, (1 Rus. on Crimes, Amer. ed. of 1836, *Folkes* v. *Chad*, 3 Doug. 340, 343,) and I am aware of no case denying that the remedy by abatement is in all respects concurrent with that by indictment. (*Coales* v. *New York*, 7 Cow. 558, 600; *Mills* v. *Hall*, 9 Wend. 315.)" The same case came before the Court of Errors in 7 Hill, 575, when the Chancellor remarked, "the length of time the public nuisance had continued, did not legalize it, for every continuation of the obstruction was in itself an offence."

The same principle applies to rivers which may be used for the floating of logs, rafts, &c., for the same reasons. The public right of passage is not affected nor intended to be af-

fected by the statute in relation to mills. The right of passage still remains to the public for which the mill owner must make suitable provision at his peril, or pay, upon suit, the damages arising from his omission.

Exceptions overruled.

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

EDWARD L. RICE *versus* JOHN H. MCLARREN.

A vessel like any other chattel may, *as between the parties*, pass by delivery. The property will vest in the purchaser without a bill of sale, and an action can be maintained for the purchase money in case she is lost before paid for.

A. offered to sell his interest in a vessel to B. for a given price. B. accepted the proposition, took possession of the vessel, loaded and sent her on a voyage. Two days out she was lost. B. had received no bill of sale of her, and the terms of payment had not been definitely agreed upon. A. brought his action to recover the agreed price. *Held*, that the plaintiff was entitled to judgment for that sum.

Property, agreed to be paid for on delivery, having been delivered without requiring payment, the right to payment at the time of delivery must be taken to be waived, and the time of payment left to be arranged by the parties.

Where goods have been purchased and delivered, under an agreement to pay for them by a note with surety, payable at a future time, if the note be not seasonably furnished, the seller may have an action of assumpsit immediately for the money.

As to what facts constitute a delivery of chattels.

The difficulty of ascertaining the construction of a contract is no reason for making it nugatory. Such a consequence is to be avoided if possible.

A principal having given directions to his agent to perform an act in his behalf, and the agent having performed the act before receiving the directions, it was *held*, that the action of the agent was ratified by the receipt of the instructions.

ON REPORT from *Nisi Prius*.

This was an action of ASSUMPSIT to recover the price of five-eighth parts of the brig Typee, alleged to have been sold by the plaintiff to the defendant. The writ was dated December 11th, 1854. At the trial the plaintiff, under general leave to amend, filed a new count, stating it to embrace the same claim already set forth in the writ, but the question

raised in regard to it did not become material in the disposition of the case. The plaintiff introduced the correspondence between defendant and himself and much other evidence to show the sale of the part of the brig to defendant. On Oct. 21st, 1853, the defendant wrote to the plaintiff, using the following language in the letter: "Understanding you wished to sell the brig Typee, and as she is coming here, I will now like to have you give me your price and terms. I should like to purchase her if you will sell for a fair value." On the 24th of the same month the plaintiff replied that he would take at the rate of $7500, for his five-eighths. On the 4th of November the defendant wrote: "Your favor is received in reference to the Typee; your price is too high; if you will take at the rate of seven thousand dollars, I think I would close for her, and it is all she is worth."

In his letter of Nov. 10th to the plaintiff the defendant said: "Your dispatch is at hand. I will take the Typee at your offer; say at the rate of seven thousand dollars. I expect you will give me a good long time for a part at least, as it may be convenient, and you said you would make the terms accommodating."

In a letter of November 26th, 1853, defendant said: "Mr. Wheeler informs us that your terms of payment were one-fourth down, balance in three, six and nine months, with interest. From your proposal to make the terms accommodating, we were expecting something more favorable. From the extreme pressure in the money market we feel inclined to ask all the indulgence you can reasonably grant. We propose to pay one-third cash, one-third in six months, and one-third in twelve months, interest after six months, which we trust will be satisfactory."

James P. Wheeler, who was acting as ship's husband of the vessel at the time of the alleged sale, and who was agent of the plaintiff in the transaction, testified that defendant came into his office, and stated to him that he had a dispatch from the plaintiff, accepting of his, defendant's, offer for the Typee; that he inquired about repairs, what sails she would want,

&c., and what offers had been made for freight. The witness informed him where the vessel lay, explained to him about the insurance and other matters, and "told him the vessel was to be at his, (defendant's,) expense and risk, from that date." On cross-examination, Wheeler testified, that "McLarren went on board the vessel and loaded her, and I had nothing to do with her after the 10th or 11th of November."

The vessel sailed on the 26th of November, and was wrecked the 28th of the same month, near Cape May. No bill of sale of the brig was ever executed to the defendant, nor were the terms of payment agreed upon. Much testimony was introduced on both sides showing a disagreement between plaintiff and defendant in regard to terms of payment, and tending to show that the plaintiff's agent, Wheeler, did not regard the sale complete; but the testimony herein stated, with the facts which appear in the opinion of the Court, will be sufficient to an understanding of the case. From the evidence produced by the parties, the Court were authorized to draw such inferences of fact as a jury might, and to render such judgment thereon as the law applicable to the facts should require.

Bradbury, for plaintiff.

1. No delivery of a bill of sale was necessary. A parol sale is good to pass title as between vendor and vendee. Neither a change of registry, nor a bill of sale is necessary. 7 Johns. 308; 36 Maine, 89 and 91; 28 Maine, 463; 8 Pick. 86; 16 Pick. 401.

A bill of sale is only one evidence of delivery. In this case, actual delivery was shown. 8 Pick. 443; 3 Pick. 38; 6 B. & C. 360; 2 B. & A. 753.

2. No act remained to be done in this case *to the property*. Even if something was to be done, if it appears to have been the intention of the parties that the property should pass, it was a valid sale. 20 Pick. 280; 3 B. & A. 321; 5 B. & A. 557; 39 Maine, 98.

3. A sale may be made, and the question of payment left open, and even where cash is to be paid, or sureties furnished,

and a delivery made, or allowed to be taken, without payment or sureties offered, the title passes. 3 Sanford Sup. Ct. 203; 13 Penn. State R. 146; 10 Maine, 252.

Hayden, for defendant.

1. After the vessel was lost, there could be no sale. Story on Sales, 161; 2 Kent's Com. 468; *Curtis* v. *Hanney*, 3 Esp. 82; *Allen* v. *Hammond*, 11 Pet. 63.

2. The sale was not completed, because no bill of sale, or written paper by which plaintiff was bound, at all events, to furnish a bill of sale, was given. *Weston* v. *Penniman*, 1 Mason, 317; *The Sisters*, 5 Rob. 138.

By the old law, and the admiralty law now, a bill of sale is requisite. The recent provisions of the United States laws in regard to recording bills of sale of vessels, furnish a good reason for returning to the law as it formerly stood. Stat. July 29, 1850.

3. But if the law of *Bixby & al.* v. *Franklin Ins. Co.*, 8 Pick. 86, is good law here, we think much more than was done in the case at bar is required to pass a title, without a bill of sale. In this case the *terms* of the contract as treated by all parties were unsettled.

In order that a chattel shall pass by delivery, without the memorandum required by the statute of frauds, it is absolutely necessary that the delivery should be absolute, unconditional, and without any right, under any circumstances, in the vendor to reclaim the property. Story on Sales, 249; 10 Bing. 384; 3 Barn. & Ald. 380.

The parties here had not agreed upon all the terms, and done all things, which they intended should be agreed and done before the title should pass. 2 Parsons on Contracts, 321, and note; 2 Parsons on Contracts, 324.

MAY, J. — This action is brought to recover the price of five-eighths of the brig Typee, which the plaintiff claims to have sold and delivered to the defendant, on the 10th of November, 1853. The brig was wrecked on Barnegat Shoal on the 28th of the same month, and became a total loss; and the

question arises, whether the contract of sale had become so perfected prior to her loss as to enable the plaintiff to recover. The correspondence of the parties in the negotiation for the sale, shows that the plaintiff accompanying his offer, proposed that the terms of sale should be accommodating, and the defendant in his letter of Nov. 10th, accepting that offer, writes to the plaintiff, "I expect you will give me a good long time for a part at least, as it may be convenient;" and proposes to give as security the best names in Eastport, if desired. Their subsequent letters contain propositions from each, as to the terms of payment, but no proposition of either party seems to have been accepted, until Dec. 2d, after the loss of the brig, when the plaintiff telegraphed to James P. Wheeler, his agent at Eastport, that "Capt. McLarren is owner of the Typee at terms named," and that "she is ashore at Tuckertown." Whereupon Mr. Wheeler, on the same day, informs the defendant by letter that he can settle for the vessel on the terms proposed by him, and that he is ready to make such settlement, and transfer the policies and give the bill of sale.

It is urged, in defence, that the evidence shows that the contract of sale did not become complete, because the terms of payment had not been adjusted and a bill of sale given before the loss, and that, therefore, the property which was the subject of the contract, did not pass. It is undoubtedly true, that, if it appears from the contract that it was the understanding and intention of the parties when it was made, that some other act was to be done to complete the sale, then the property, if both parties had insisted on their rights, would not have passed until such act was done. If security was to be given or money to be paid by the defendant, before a delivery of the vessel, then the plaintiff was not obliged to part with his property until this was done. On the other hand, if the defendant was to have a formal delivery of the vessel, or a bill of sale, or if the parties were to agree upon the precise terms of payment before the sale was to be complete, then, by the terms of the contract, the plaintiff could not re-

cover the price until the required acts were performed. *Higgins* v. *Chesman*, 9 Pick. 7; *Reed* v. *Upton*, 10 Pick. 522. Where the acts to be done are concurrent, and the obligations of each party are dependent upon the performance of the other, if either party fail to perform his part of the contract, the property does not pass; the party performing or ready to perform is absolved from his obligation, and the party in fault may, if the contract is complete so far as to be binding, be held liable for the damages resulting from its breach.

The parties must abide by their contract as they have made it. It is competent, however, for either party to waive his rights under a contract, so as not to require a strict performance of the stipulations which it contains for his benefit. The doctrine of waiver is of extensive application, and may always be resorted to with propriety, where the facts will warrant it, to prevent injustice.

It cannot be doubted, but that the contract between the parties, though denominated by the learned counsel in defence inchoate, contained within itself an agreement to do all those things which were necessary to complete the sale. If the contract upon its face contemplated further action of the parties, either joint or several, before it should be complete, it is also apparent that the minds of both parties so far met in it as to manifest a mutual intention or agreement to perform such action. As originally made, what further action did the contract show to have been intended by the parties? For whose benefit was it? Has such action been had, or has it been waived by the party for whose benefit it was intended? Upon the answer to these questions the rights of the parties will be found to depend.

That there is some indefiniteness and obscurity in the contract, arising from the looseness of the terms in which it was made, cannot well be denied. It is certain as to the subject matter and the price to be paid; but the terms of payment, *how* and *when* to be made, and *when* and by *whom* to be fixed, are not so clear. If the contract, however, is not altogether so unintelligible that the intention of the parties cannot be

discovered from it, they must be bound by its legal effect, even though they may have misunderstood or misapprehended its meaning when the contract was made. They must, by the well established rules of law, be conclusively presumed to have understood and intended whatever its legal construction indicates. The difficulty of ascertaining such construction is no reason for making the contract nugatory. Such a consequence is to be avoided, if possible. *Rice* v. *The Dwight Manuf. Co.*, 2 Cush. 80. In this case, such consequence is avoided, because we find the contract is susceptible of a legal interpretation.

It was in the power of the parties, if they pleased, to make a contract for the sale of the plaintiff's interest in the vessel, by which the property should pass upon delivery, without definitely fixing the terms of payment or even the price. These might be left by the express or implied terms of the contract to be determined by third persons, or by themselves; or, in case of disagreement, by a court of law. A contract for the sale of an article, accompanied by an unconditional delivery, no price being named, is of this description. In the case before us, it is plain that the plaintiff agreed to sell, and the defendant to purchase, five-eighths of the brig Typee, and the terms were to be *accommodating*. Under such a contract we think the vessel might pass by delivery.

There being no evidence that the words "terms accommodating" have, by usage, acquired any distinct technical meaning, they must be regarded as having been used by the parties in the sense which is ordinarily ascribed to them in business transactions. "In mercantile language," says Webster's Dictionary, "accommodation is used for a loan of money, which is often of great convenience." The parties, therefore, must have intended that the purchase money, or some part of it, should be permitted to remain in the defendant's hands, as if a loan, for his convenience. The accommodation was not only intended to be reasonable, but for the benefit of the defendant. But when, and by whom, was the extent or the details of this accommodation to be fixed? We may be aided

in determining this question by looking at the other parts of the contract. It is clear by the contract, that so far as the price, or purchase money, should not be paid down, security by other names than that of the defendant was to be given, if required, either *before* or *at the time of the delivery of the vessel*. The nature of the security and the time when the payments should be made, must of necessity be fixed before the security could be given. The parties, therefore, each having an equal voice in the matter, must have originally intended mutually to agree upon the precise terms of accommodation before the vessel was delivered. The parties, then, having failed to agree upon such terms before the delivery of the vessel as was contemplated by the contract, the property in the vessel did not pass, unless the defendant has either waived his right to the accommodation or the agreement in relation to the terms of it, so far as relates to the time when they were to be fixed. If he has waived the benefit of any accommodation, or so far waived the original agreement as to consent that the terms might be agreed upon *after* the delivery, and such terms have been subsequently agreed upon, *even after the loss of the brig*, then he must be held liable upon his contract for the price.

The case shows that the vessel, as early as the 11th of November, was taken into possession by the defendant, and that he, from that time, acting in connection with Capt. Larkin, as master under him, took the exclusive management and control of her. He procured freight for her, and sent her to sea a few days only before her loss. This was done with the assent of Mr. Wheeler, the agent of the plaintiff, who informed the defendant at the time he took possession that "the vessel was to be at his expense and risk from that day." The plaintiff, from that time, ceased to exercise any control over her, and would not have been liable for repairs subsequently made without his direction. *Cutler* v. *Thurlo*, 20 Maine, 213; *Tyler* v. *Holmes*, 38 Maine, 238.

These acts of the plaintiff's agent appear to have been either previously authorized or subsequently ratified. As ear-

ly as the 9th of November the plaintiff wrote to him, from Wilmington, informing him of the defendant's offer, and of its acceptance. This letter contains the following language: "You will get all the money you can, and take such security for the balance as for assurance of * * *. See that it is right. He will perhaps pay all. If so, it will suit much better. *Still, do whatever will make sale and close up Typee.*" The authority here given is very broad. It is said, however, that these important acts of the agent must have been done before the reception of the letter. This fact, if it be a fact, does not alter the case. When received, it was a complete ratification of the acts, especially as there was no subsequent attempt to revoke them. These acts of the parties, in transferring and accepting the possession and control of the vessel, amount to an absolute and unconditional delivery under the contract. There seems to be nothing in the case to qualify this delivery. If the delivery had been upon conditions not performed, the property might not have passed. *Hussey & al.* v. *Thornton & al.* 4 Mass. 405; *Smith* v. *Dennie,* 6 Pick. 262. Under the circumstances we think it did pass.

We will next inquire what was the legal effect of such a delivery upon the rights of the parties. The plaintiff, on the one hand, must be regarded as having waived by this delivery his right to a concurrent payment of any part of the money, and to the delivery, at that time, of the security of other names to which by the contract he was entitled before parting with his property. *Smith* v. *Dennie,* before cited. On the other hand, the defendant must have waived, if not his right to the accommodation or his voice in its adjustment, according to the terms of the contract as before stated, at least the *time* within which the terms of its adjustment were to be fixed; and must be regarded as consenting, either that the plaintiff might fix the terms, or that they might be subsequently fixed by the agreement of the parties. It has been often held, where goods have been purchased and delivered under an agreement to be paid for by a note with surety, payable at a future time, if the note is not seasonably furnished,

the seller may have an action of assumpsit immediately for the money. In such a case, it is true, there is a breach of the contract, but it is such a breach as amounts to a waiver of the credit. 2 Kent's Com., 3d Ed., 497.

In the present case, we are clearly of opinion, that the loss of the vessel did not operate as a suspension, withdrawal, or extinction of the defendant's offer relating to the terms of payment, and that the plaintiff, even after a knowledge of the loss, might rightfully accept it.

The parties, in their several offers as to the time of payment, must be understood as intending that the computation, as to time, should be reckoned from the day when the vessel was delivered. The contract of sale became executed from that time, and the parties were left to adjust the terms of accommodation afterward.

In view of all the facts, we have no hesitation in coming to the conclusion, that the defendant, by accepting the vessel and treating her as he did, made himself liable to pay the price agreed; and, as this action was not brought until he had enjoyed all the accommodation he at any time claimed, he has no ground of complaint. As tending to sustain these views, we cite *Carlton & al.* v. *Sumner*, 4 Pick. 516, and *Pearce & al.* v. *Norton*, 10 Maine, 252.

It is also contended that the defendant, by the contract, was entitled to a bill of sale, and that the property in the vessel could not legally pass to the defendant without it. If he was so entitled, he not only waived it for the time, by accepting the vessel without it, but there is much other testimony in the case tending to show that he expressly consented to a delay in its execution and delivery, until after the vessel was lost. In regard to the absolute necessity of such an instrument to pass the property, as between the parties, we have only to say, that the law does not require it. That a bill of sale and its registry, may be necessary for some purposes connected with navigation, is true, but that a vessel, as between the parties, like any other chattel, may pass by delivery so as to vest in the purchaser, is too well settled to require discussion.

Bixby & al. v. *The Franklin Insurance Co.*, 8 Pick. 86; *Vinal* v. *Burrill & al.*, 16 Pick. 401; *Richardson* v. *Kimball*, 28 Maine, 463; *Chadbourne* v. *Duncan*, 36 Maine, 89.

In regard to the policies of insurance, they do not seem to have been referred to in the original contract. The subsequent agreement about them, between Mr. Wheeler and the defendant, seems to have been fully performed so far as Mr. Wheeler or the plaintiff was concerned; and if the defendant has suffered loss by reason of any neglect on his part, he alone should bear it.

Something was said in the argument upon the question whether the accommodation provided for in the contract was to be without interest. We see nothing in the case, other than the subsequent statements and conduct of the parties, tending to show that such was their intention. When money is loaned interest is usually expected. But, as the plaintiff does not claim interest, except in accordance with the defendant's proposition, which he accepted, we are not troubled with that question. The judgment will be made up according to the terms of the proposition.

From the view we have taken of the law of this case, it becomes unnecessary to consider the question of amendment. A copy of the writ not having been furnished us, we presume the original counts contained in it, are adapted to the facts as proved, and sufficient to authorize a judgment in this action. According to the agreement of the parties, in the conclusion of the report, the defendant must be defaulted.

Defendant defaulted.

TENNEY, C. J., and HATHAWAY, J., concurred in the result.

GOODENOW, J., concurred.

APPLETON, J., dissented.

THOMAS R. FOSTER *& al. versus* CHARLES PERKINS.

The delivery of a mortgage to the mortgagee, or his assent to it, is essential to perfect his title.

The delivery of a mortgage to the register, and its subsequent possession by the mortgagee, are, in the absence of other controlling facts, sufficient evidence of the delivery of the instrument.

The date of a mortgage is *prima facie* evidence that it was then delivered.

The statutes of Maine make no distinction between resident mortgagees and those who are not.

Mere inconvenience, however great, in making the *tender*, as required by the Revised Statutes, c. 117, § 38, before mortgaged property can be attached, will not authorize a disregard of its plain provisions.

The statute of the United States of July 29, 1850, which provides for the recording of mortgages, &c. of vessels "in the office of the collector of the customs where such vessel is registered or enrolled," applies only to vessels which have been registered or enrolled at the time the mortgage is made.

Before such registry or enrollment of vessels, mortgages upon them are governed by the statutes of the State, relating to mortgages of personal property.

A., on different days, executed three mortgages of a vessel to B. The first two were executed before the registry or enrollment of the vessel, and were duly recorded by the town clerk. Before the vessel was registered or enrolled and the third mortgage executed and recorded in the collector's office, the vessel was attached: — *Held*, that the first two mortgages were valid and that the vessel could not be legally attached upon mesne process, without first paying or tendering the amount of the mortgage debts in accordance with the provisions of the statute.

A mortgagee in all cases, where there is no language to the contrary in the mortgage, and no other agreement restraining or controlling him, has the right of entering into immediate possession of the mortgaged property.

A. gave a mortgage of a vessel to B., conditioned, among other things, that A. should retain possession of, and keep the vessel in New York for a certain period, for the purpose of selling her to liquidate the mortgage debt: — *Held*, that the right of possession by the mortgager was not of such a nature as to deprive the mortgagee of the right to take actual possession of the vessel as against a wrongdoer.

Held, also, that the mortgager was the agent of the mortgagee, and that he had a qualified possession for the mortgagee's benefit.

In such case, the mortgagee's right of possession is not affected, where the property is withheld from him by a trespasser.

ON REPORT from *Nisi Prius*.

This was an action of replevin for the bark Mary Lee,

which was built by Gilbert Balkam at Robbinston, during the year 1854.

The general issue was pleaded and joined, with a brief statement, alleging that the property belonged to the defendant, and was not the property of the plaintiffs; and that defendant justified as deputy sheriff, under the writ of *John G. Wetherell & als.* v. *Gilbert Balkam and William Pike, trustee.*

The plaintiffs relied upon a mortgage from Gilbert Balkam to them, dated July 26, 1854, and recorded at Robbinston, August 2d, 1854. Also upon another mortgage from Balkam to the plaintiffs, dated December 9th, 1854, and recorded at Robbinston, December 11th, 1854. Also upon a third mortgage from Balkam to said plaintiffs, dated December 27th, 1854, and recorded on the same day in the collector's office for the port of Passamaquoddy; and the register for said vessel was taken out of said office the same day.

The defendant, as deputy sheriff under B. W. Farrar, sheriff of Washington county, upon the 22d day of December, 1854, attached the said bark upon the above named writ.

The writ, *Wetherell* v. *Balkam and trustee*, was dated the 22d day of December, 1854, and was entered at the April term of the Court in 1855, was continued to the October term of the Court in 1855, when the trustee was discharged, and the defendant, Gilbert Balkam, was defaulted. The action has since been continued for judgment from term to term, and no part of the debt sued for in the same has been paid.

The bark Mary Lee was launched on the 14th day of December, 1854, and is the same vessel which, in different stages of construction, is mentioned in the several mortgages above described. Said mortgages were duly executed and recorded.

If the action can be maintained upon this state of facts, the defendant is to be defaulted; otherwise, the plaintiffs are to become nonsuit, and a return of the property ordered.

F. A. Pike, for plaintiffs.

The single question involved is, whether an attaching creditor shall take precedence of a mortgagee.

1. It appears from the mortgages that the plaintiffs supplied Balkam with means to build the vessel, and took mortgages on her in different stages of progress to secure themselves for advances made. The mortgages state an indebtedness for a large sum, and it is for the defendant to show that it has been discharged, proof of the execution and record of the mortgage being *prima facie* evidence of title in the plaintiffs. *Davis* v. *Mills*, 18 Pick, 394.

Under these circumstances, dates govern. As neither party claims by virtue of statute lien, it is a mere question of priority in time.

The plaintiffs' first mortgage is dated July 26, 1854, for $6000; recorded August 2, 1854. The second one is dated Dec. 9, 1854, for $9000; recorded Dec. 11, 1854. The attachment under which the defendant claims is dated Dec. 22, 1854.

The record in this case was made by the town clerk of Robbinston, the town in which Balkam resided at the time of the conveyance. The statute of the 31st Congress, chap. 27, 1850, of course contemplates only vessels that are registered or enrolled, and not those in the process of completion. A vessel on the stocks, or lying in harbor after launching, and before enrollment or registry, cannot be said to be a vessel of the United States. *Non constat* that she ever will become naturalized. She may be built for foreign use.

The object of that statute, taken together, seems only to be to have the custom house record show the exact state of the title. It provides that the portion of the vessel owned by each owner shall appear; and when this appears, any mortgage or other conveyance by either of them should also appear. The United States statutes of 1792 do not even oblige an owner of a vessel to register or enroll. The language of the statute is that it *may* be done. If the owners wish for the privileges appertaining to vessels of the United States, they must either enroll or register them. The evident purpose of the whole navigation law is to allow owners of vessels to enroll or register them; and if they do, the portion owned by

each part owner must appear, and where this is done, all subsequent mortgages or other conveyances must appear of record. They can use the record if they please; but in case they do so, every thing must appear; and until parties owning vessels have them surveyed by the custom house officer, and furnish their bonds, the United States law does not apply to them any more than it does to the ship timber and iron out of which they are made.

The state law was complied with while the vessel was in her inchoate state, and that was the only law applicable to her until the navigation laws took effect by her entry at the custom house.

2. It would be quite impossible to apply the United States law to vessels unregistered, without first determining what is a vessel. Is it when she is in frames, or half completed, or two-thirds finished, or entirely done? But when the proper officers measure and register her, then there is no further question. They may do this before the vessel is completed or after; and whenever it is done, whether the vessel be launched or not, the United States law takes effect, and not until then. In this case it does not appear in what state the bark was when the first mortgage was given. The mortgage states that Balkam was then building her. When the second mortgage was given, the vessel was more nearly complete. Either mortgage is good as a conveyance of materials; the same attached by the defendant in this case.

George W. Dyer, for defendant, contended:—

1. That the plaintiffs' right of action depends upon their title to property in the bark at the date of their writ; and that such title, if they have any, is only in the last mortgage, dated December 27th, 1854, and that the former mortgages were *merged* in the latest mortgage. *Jones* v. *Johnson*, 3 Watts & Serg. 276.

2. The plaintiffs, by taking the last mortgage, under the circumstances of the case, and for the reasons above stated, must be considered in law to have *waived* their rights under the prior mortgages. *Paul* v. *Hayford*, 22 Maine, 236.

3. If the above positions are correct in law, and upon principle, then the plaintiffs cannot maintain this action, as they had no right of possession on December 30th, the date of their action, having by express contract parted with that right. *Wheeler v. Train,* 3 Pick. 255; *Ingraham* v. *Martin,* 15 Maine, 373; *Pierce* v. *Stevens,* 30 Maine, 184.

4. By the agreement of parties, if the plaintiffs cannot maintain their action, there is to be a return of the property.

5. If the Court should be of opinion, that the latest mortgage did not merge the others, and that they were, December 30th, valid and subsisting securities, then it is submitted, that in the case at bar, it is not enough for plaintiffs to prove simply the execution and record of the two mortgages at Robbinston.

There must be proof of the delivery of the mortgage deeds to the plaintiffs, or their agent for them, or the assent of plaintiffs before the attachment by defendant, and there is no such proof; and the words "duly executed" in the statement of facts, do not admit the delivery; and in *Davis* v. *Mills,* 18 Pick. 394, the point of delivery was not made.

Non constat, that because the plaintiffs had their deeds when this case was drawn up, that there had been any delivery of them by Balkam, at the date of Perkins' attachment, or before this action was commenced. *Jewett* v. *Preston,* 27 Maine, 400; *Witham & ux.* v. *Butterfield,* 6 Cush. 219; *Baird* v. *Williams,* 19 Pick. 381; *Maynard* v. *Maynard,* 10 Mass. 456; *Bullock* v. *Williams,* 16 Pick. 33; *Dole* v. *Bodman,* 3 Met. 189; *Lamson* v. *Thornton,* 3 Met. 275.

The record of the two mortgages in Robbinston, was not, as to the defendant, and the creditors of Balkam whom he represents, sufficient, without an actual delivery of the bark, and the keeping of her in possession.

The plaintiffs lived in New York, and it does not appear that they had any agent in this State.

The statute makes provision for attachment of personal property under mortgage, upon first making tender of the debt

due. In this case, tender became impossible, as there was no person to whom tender could be made.

If record is sufficient in all cases, it puts it into the power of parties here, to mortgage valuable property for a trifling sum, *bona fide*, to people in California, Calcutta, or any remote region, where tender would be impossible, and so to hold and use it in defiance of the rights of creditors.

It is, also, in like case, impossible to make demand on the mortgagee to state the amount of his mortgage claim, as provided in § 71, c. 114, Revised Statutes.

Pike, for plaintiff, in reply.

MAY, J.—At the time of the attachment under which the defendant claims, the title of the plaintiffs to the bark in controversy depended upon two mortgages from Gilbert Balkam to them, duly executed and recorded in the town of Robbinston, where the mortgager resided. The first was dated July 26, and the other Dec. 9, 1854, and both were given to secure large sums of money advanced, and to be advanced by the plaintiffs, and were upon the vessel then described as upon the stocks in Robbinston. No fraud is suggested in these transactions. The title of the plaintiffs must, therefore, be deemed valid, as against the attachment, unless some of the objections urged in defence can be sustained.

It is said, in the first place, that it does not appear that these mortgages had been delivered or assented to by the plaintiffs prior to the attachment. That such delivery was essential to perfect the title in the plaintiffs, cannot be denied. It is said, by SHAW, C. J., in *Davis* v. *Mills*, 18 Pick. 394, that "proof of the execution and registry of the mortgage is *prima facie* evidence of title in the plaintiff." Its delivery to the register, and its subsequent possession by the grantee, is evidence of a delivery to him. *Maynard* v. *Maynard & al.* 10 Mass. 456. In the cases cited by the counsel in defence, upon this point, there was more or less in the facts proved, tending to control the inference arising from registry and subsequent possession. In the case at bar no such facts appear.

The possession of the mortgages is therefore sufficient evidence of delivery. Their date is *prima facie* evidence that they were then delivered. *Sweetser* v. *Lowell & al.*, 33 Maine, 446.

It is also contended that the registry of a mortgage of personal property under our statutes is not equivalent to possession of the property by the mortgagees, where they reside out of the State. The statute makes no distinction between citizen mortgagees, and those who are not. No case is cited to sustain any such distinction. Mere inconvenience, however great, in making a tender before the mortgaged property can be attached, as now required by the Revised Statutes, c. 117, § 38, will not authorize the Court to disregard any of the plain provisions of the statute, or their effect. We must declare the law as it is. If inconveniences exist, it is for the Legislature to remove them, and not for the Court.

Again, it is urged that the first two mortgages, under which the plaintiffs claim, are void as against attaching creditors, whom the defendant represents, because they were not recorded in the office of the collector of the customs, as required by the statute of the United States, passed July 29, 1850, vol. 9, c. 27, § 1. By this statute it is provided, "that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, shall be valid against any person other than the grantor, or mortgager, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled." The section contains a proviso which it is unnecessary to recite. This statute clearly, by its terms, applies only to vessels which have been registered or enrolled at the time when the instrument or mortgage is made; or to cases where the title to the vessel, which is set up against such instrument or mortgage, was derived after such registry or enrollment of the vessel and before the required record had been made.

In the case at bar, the vessel had been neither registered

nor enrolled, when the attachment was made, but was probably lying at the wharf in the river, having been launched only eight days before. Under such circumstances, we cannot doubt that she was subject to our laws, and that the state of the title at that time is properly to be determined in view of our statute relating to mortgages of personal estate. R. S., c. 125, § 32, as amended in 1852, c. 262. As to what would be the effect of the federal statute, before cited, upon the rights of attaching creditors, in the case of a mortgage not recorded as it requires, the mortgage or attachment being made after the registry or enrollment of the vessel, we intend to give no opinion.

It is also said, that the first two mortgages, held by the plaintiffs, became merged in the mortgage of Dec. 27, 1854, given to the plaintiffs, by the same mortgager, upon the same vessel, then afloat, and for the purpose of securing the same debt. Assuming, without intending to admit that such is the fact, that the previous mortgages were merged or extinguished in the last, and that the plaintiffs had waived their rights under them, still, it is not perceived how the attachment made by the defendant, five days before, could be made effectual thereby. At that time there had been no merger, and the vessel being then subject to the first two mortgages could not, as against the mortgagees, under our Revised Statutes, c. 117, § § 38 & 40, as amended by the statute of 1842, c. 31, § 12, be legally attached upon mesne process, without first paying, or tendering, the full amount of the mortgage debt then due. *Smith* v. *Smith*, 24 Maine, 555. The attachment being void as against the plaintiffs, it could give to the defendant no right to hold or retain the bark, as against them. *Morton's adm'r* v. *Hodgdon*, 32 Maine, 127.

Another, and perhaps the strongest objection to the maintenance of this action, is, that the plaintiffs, even if they had the right of property, had not the right of immediate possession at the time when the suit was commenced. The validity of this objection rests upon the correctness of both the law and the fact which it assumes. The law is undoubtedly cor-

rect. It has been so often decided to be so, that authorities are unnecessary to sustain it. But the fact, as to the right of immediate possession, is more difficult to determine.

Whether the plaintiffs possessed such a right, depends upon the construction and effect of the mortgage of Dec. 27, 1854. That mortgagees of both real and personal estate, in all cases where there is no language in the mortgage, and no other agreement to restrain or control it, possess the right, is well settled. *Sibley* v. *Cushman*, 29 Maine, 429; *Welch* v. *Whittemore & al.* 25 Maine, 86; *Wales* v. *Mellen*, 1 Gray, 512. But an agreement that the mortgager shall retain the possession of the mortgaged property, either absolutely or conditionally, may be, and often is, to be inferred from the stipulations which the mortgage contains. The first two mortgages contain no such agreement, express or implied. By the third or last mortgage, it is in substance provided in the condition, that the mortgager shall pay or cause to be paid to the plaintiffs, the full and just sum of eighteen thousand dollars within or at the expiration of sixty days from its date; that he shall keep the said bark in the port of New York until the mortgage is satisfied; and that, in case of a sale of the bark before the expiration of the sixty days, the mortgage shall be paid before any transfer shall be made. If the money is paid by the time specified, then the mortgage is to be void; but if default shall be made in this or in the fulfillment of the other aforementioned conditions, then the mortgagees are authorized and empowered, at any time and place thereafter, to enter upon and take possession of the bark, and make a sale thereof; and for that purpose, they are, by a subsequent clause in the mortgage, constituted and appointed to be the true and lawful attorneys of the mortgager. From these provisions, the right of the mortgager to retain the possession of the vessel, until a breach of some of the conditions, is fairly to be implied; but it is for no other purpose than that of keeping the vessel in the port of New York, and making a sale of her, for the payment of the mortgage debt. Such a sale is manifestly the great design of the parties in the mortgage. It does

not seem to have been contemplated that either party should use the vessel until the mortgage should be paid, except so far as might be necessary to place her in New York as a market for sale. This, the mortgager was bound to do, without any unreasonable delay. Under such circumstances, we do not think that the right of possession retained by the mortgager was of such a nature as to deprive the plaintiffs of the right to take actual possession as against a wrongdoer. The mortgager may properly be regarded as the agent of the mortgagees, and his possession was a qualified possession for their benefit. This case is unlike those of *Wheeler* v. *Train*, 3 Pick. 255, *Ingraham* v. *Martin*, 15 Maine, 373, and *Pierce* v. *Stevens*, 30 Maine, 184, cited in defence. In all these, and many more that might have been cited, it will be found that there was a beneficial use of the property secured to the lessee, or mortgager, of which they could not lawfully be deprived.

This case is substantially like that of *Melody* v. *Chandler*, 12 Maine, 282, where the plaintiff claimed under a mortgage bill of sale, which contained a stipulation that the mortgager should retain the possession of the goods mortgaged, for the purpose of making a sale of them, and in which it was held that the possession of the mortgager was the possession of the mortgagee. The only distinction perceived between the two cases, is, that the latter is an action of trover, while this is replevin; and in the case cited, the mortgage contained a provision that the proceeds arising from the sale should be appropriated to the payment of the mortgage debt, whilst in this, the mortgage is without such a stipulation, and yet it cannot well be doubted that the object of the sale contemplated was for that purpose. We do not think that these circumstances change the law of the case, or that the plaintiff's right of possession, in a case where the property is withheld from him by a trespasser, is affected thereby.

At the time when the last mortgage was made, the vessel was afloat, and in the hands of the defendant, as it may reasonably be inferred from the two facts, that he had taken possession of her five days before, under color of an attach-

ment, as the property of the mortgager, and that she had not then been replevied. The mortgager, therefore, had not been in possession of her after the mortgage was executed, and before she was replevied. This possession by the officer, permitted by the mortgager, effectually deprived him of all power to fulfill the conditions of the mortgage as he had agreed. The case shows an entire want of diligence on his part to obtain the possession during the time which elapsed after the mortgage was made, and before the inception of this suit. Such possession, by the defendant, and the want of due diligence, we think, amount to a breach of that condition in the mortgage, which required the mortgager to keep the bark in the port of New York; and from these facts we may properly infer an abandonment on his part of all intention to perform it.

This, by the express provisions of the mortgage, restored the plaintiffs to the right of immediate possession, and therefore authorizes the maintenance of this suit. *Whitney* v. *Lowell*, 33 Maine, 318. *Defendant defaulted.*

TENNEY, C. J., and APPLETON, J., concurred in the result. HATHAWAY and GOODENOW, J. J., concurred.

EDWARD MUNROE *versus* EPHRAIM C. GATES.

The report of commissioners, in a process for partition, contained the following clause descriptive of a portion of the estate set off to one of the parties: "Also the water privilege now occupied by the saw-mill called Franklin:"— *Held*, that the *extent* of that privilege was matter of fact for the jury.

The presiding Judge instructed the jury that, by the partition, the owners of the Franklin mill had no right to any more water than was necessary to the full enjoyment thereof, with all its machinery, *at the time of the partition*: — *Held*, that as the report of the commissioners making the partition contained no such qualification, the construction given to it by the Court was too restricted.

A. brought his action against B. for causing back water at the wheels of his mill, by obstructing the race-way. B. offered to prove that the back water was caused by a wing dam: — *Held*, that this testimony might have been important and was improperly excluded.

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

This was an action of the case by the proprietor of the Columbus mill, so called, situated on the St. Croix river, at Calais, against the proprietor of the Franklin mill, for diverting the water from the flume of the Columbus mill, and for obstructing the race-way, thereby causing back water at said mill. Plea, the general issue with brief statement. Much testimony was introduced at the trial by both parties, and some evidence offered by the defendant was excluded by the presiding Judge. The verdict was for the plaintiff. All the material facts, and the important points raised in the exceptions to the rulings of the presiding Judge, are stated in the opinion of the Court.

Downes & Cooper, and *J. Granger*, for plaintiff.

Fuller, for defendant.

Rice, J. — This action is brought to recover damages alleged to have been sustained by the plaintiff, as proprietor of a saw-mill called the "Columbus," situated on the river St. Croix, in the city of Calais, by the acts of the defendant, who claims to be the owner of the mill "Franklin," situated upon the same river and dam, in Calais.

The injuries of which the plaintiff complains are, diverting a great part of the water from the flume of his mill, and obstructing the race-way through which the water flowed, from the wheels of said mill, thereby occasioning back water, and thus retarding the operation of said wheels.

There was evidence introduced tending to support both propositions.

The city of Calais, then plantation No. 5, was granted to Waterman Thomas, by the Commonwealth of Massachusetts, in 1790. The parties to this action derive their respective titles through mesne conveyances from this source.

It appears from the testimony, that there was supposed to be eight mill privileges, in all, upon the dam, upon which the mills of the parties are situated.

Thomas, the original proprietor, conveyed the township to

Shubael Downs, Abiel Wood, Edward H. Robbins and Thomas Brewster, in undivided fourth parts. Several mills were built upon the dam, before any legal partition appears to have been made, between the co-tenants. By whom, and under what circumstances these mills were constructed, does not appear. It does appear, however, that some of the mills, and perhaps all, were occupied in severalty from an early period; and that the plaintiff occupied the Columbus, and received the rents thereof, as early as 1818, and continued to do so until the bringing of this suit. It also appears that the defendant, and those under whom he claims, have had the sole occupation and control of the Franklin, of which he claims to be sole seized, by virtue of a process for partition, instituted by Edward H. Robbins, one of the tenants in common of the township, in 1825; the title of Robbins to that mill, having passed by mesne conveyances to him.

The report of the committee appointed by the Court to make partition, contained the following clause among others describing the estate set off to Robbins; to wit: "*Also the water privilege, now occupied by the saw-mill called Franklin, and marked on the plan No.* 7."

Among other instructions given to the jury by the Court was the following: "That by the partition of E. H. Robbins, jr. of three-sixteenths, under whom the tenant claimed, so far as regards the right of the Franklin mill to the use of water, the owners of that mill acquired by that partition no right to any more water than was necessary to the full enjoyment of the mill as it then was, and all its machinery; and the owners of that mill, as such, had no right to any overplus of water on the dam, if any there should be."

There was evidence tending to prove that there was, at times, a very large surplus of water, over and above the amount necessary to propel the mills and machinery upon the dam, at the time when the partition above referred to was made. And, as has been before remarked, there was also evidence tending to show that the water rights of all the co-tenants, on that dam, had been divided into eight "privileges."

The commissioners set off to Robbins the "*water privilege* now occupied by the Franklin." What was that privilege? The defendant contends that it embraced one-eighth of the entire water power of that dam. The construction of the Court was tantamount to the use of the words, the "water privilege *as* now occupied by the Franklin."

The report contains no such qualification, and the construction was, in our opinion, too restricted, and unauthorized. Robbins, by that partition, acquired the exclusive right to the whole privilege occupied by the Franklin. The extent of that privilege, whether one-eighth of the entire power of the dam, or not, was matter of fact for the jury.

In the other instructions given, no error is perceived, and the requested instructions were properly withheld.

The defendant offered to prove that the back water to the defendant's mills, so far as any existed, was produced by the continuation of the wing dams on the English side, as delineated on Hayden's plan. This testimony was excluded by the presiding Judge.

One of the causes of complaint on the part of the plaintiff, was, that the defendant had caused the water to flow back upon the wheels of his mill, by means of obstructions placed in the race-way through which that water passed from the wheels. In our view of the case, this testimony might have been both pertinent and important. If the evidence should fail to prove an unlawful alteration in the race-way, by the defendant, and it shall appear that the water had been thrown back upon the plaintiff's wheels to an extent greater than heretofore, it was important to determine whether that increase of back water was occasioned by the alterations which the defendant had made, in the manner in which water was discharged from his wheels, or by the wing dams on the English side. For this purpose, the testimony should have been admitted. Whether the defendant suffered from these erroneous rulings, may well admit of doubt. But inasmuch as we cannot be certain upon which point the jury rested their verdict, and as the errors in certain aspects of the case, might have had a controlling in-

fluence upon the result, a new trial must be granted according to the terms of the report.

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

TENNEY, C. J., concurred.

APPLETON, J., non-concurred.

COUNTY OF WALDO.

ABNER HURD *versus* HUGH COLEMAN.

A party, whose legal rights to real estate have been determined by the judgment of a court of law, may enter into possession as well without as with the intervention of an officer, and such entry, without force, will be equally valid and effectual for all purposes as if the officer having the execution had put the party in possession.

An actual entry by a demandant into premises for which he has recovered judgment before a court of competent jurisdiction, establishes his seizin and title although no writ of possession has issued.

The statutes of 1821, c. 39, § 1, provided that a mortgagee might enter into the mortgaged premises and foreclose the mortgage in three years, either "by *process of law*, or by the consent in writing of the mortgager or of those claiming under him, or by the mortgagee's taking peaceful and open possession of the mortgaged premises in presence of two witnesses": — *Held*, that an entry by the mortgagee, after the writ of possession had issued, or after the time within which by law it should have issued, would be an entry "by process of law," and would as effectually foreclose the mortgage as if he had been put in possession by an officer having the writ.

An assignee of a mortgage and the notes secured thereby, may prosecute suits pending thereon in the name of the assignor, to final judgment, for his own use and benefit, and derive all the resulting rights that would have accrued to the assignor.

An assignment of a mortgage, after an entry for foreclosure, will not of itself stay the foreclosure.

The assignee of a mortgage obtained a conditional judgment against a purchaser of the equity, and executed his writ of possession, the owner of the equity thereupon becoming the tenant of the assignee, and agreeing to pay him rent, — *held*, that such possession of the assignee, continued for the time required by statute, foreclosed the mortgage.

Hurd *v.* Coleman.

The assignee of a mortgage, after recovering judgment in the name of the assignor, but for his own use and benefit, and before the writ of possession issued, entered into the premises, openly, peaceably, and with the assent of the mortgager, and continued in possession *after* the writ issued: — *Held*, that from the time the writ of possession issued, the assignee could protect and justify his possession, under the statute, "by process of law," and that the foreclosure may be considered as commencing at the date of such writ and as being complete at the expiration of three years from that time.

A mortgager is bound to know of a judgment rendered against him; of its legal effect; of the issuing of a writ of possession, or when, by law, it might issue.

Twenty years undisturbed possession by a mortgagee or his assignee, operates as a bar to the right of redemption, unless the mortgager can bring himself within the proviso in the statute of limitations.

When a foreclosure is perfected, and the mortgaged premises exceed in value the notes secured, they must be deemed as paid, and no action can be maintained upon them.

The lien of a mortgagee attaches equally for the debt and for the costs necessarily incurred in the enforcement of his rights.

On Report from *Nisi Prius*.

Debt on a judgment recovered March 26, 1836, damage $130,38, and costs $21,28, and on a judgment recovered fourth Tuesday of March, 1836, for possession of a certain parcel of land situated in Unity, in said county, and for $43,43 costs.

Plea, *nil debet*.

All the facts, essential to a proper understanding of the points in issue, are stated in the opinion of the Court.

After the evidence was out, the case was taken from the jury, and submitted to the full Court.

L. W. Howes, for plaintiff.

In order to foreclose a mortgage under the statutes, the statutes must be *strictly followed*. 29 Maine, 56.

The statute requirement that possession taken by the mortgagee should be open, &c., and "in the presence of *two witnesses*," was, not only that the mortgager should have notice when the time of redemption began to run, but that it should be made *public*, so that all others might have the same knowledge of the same fact; otherwise, why does the statute say *two* witnesses instead of *one?* — or, why even in the presence of *any* witness? If the intention of the statute was only that

the mortgager should have *notice*, why did it not say *notify* him, either in writing or verbally, instead of requiring the *notoriety* of taking possession in the presence of two witnesses?

In order to give such taking possession still more publicity, our Revised Statutes require a *certificate* of such entry to be made and sworn to, by such witnesses, and such *certificate to be recorded in the registry of deeds.* Chap. 125, § 3.

But it is a general principle, well settled, that where the statutes prescribe a *specific* way in which a thing is to be done, the statute must be *strictly followed.* 29 Maine, 56; 24 Maine, 155; 2 Hilliard on Mortgages, c. 36, § 8.

Every clause and word of a statute shall be presumed to have some force and effect. 22 Pick. 573.

J. Williamson, for defendant.

1. The object of the statute, in providing that open and peaceful possession taken by the mortgagee should be accompanied by the consent in writing of the mortgager, or attested by the presence of two witnesses, was, to bring home to the mortgager notice of the time of the mortgagee's entry, that he might be aware of the exact time when the right to the property would cease, and be forever foreclosed.

There is a case in Massachusetts which applies to this point. The question was raised whether a bare entry in presence of two witnesses, as required by statute, without actual possession for three years, was sufficient to foreclose the mortgager's right to redeem. The entry had been actually made before two witnesses, and also a record of the entry had been made in the registry of deeds. But the Court held that there had not been sufficient notice to the mortgager of the mortgagee's entry. They said, "a bare entry, although in the presence of witnesses, is not sufficient for the purpose of foreclosing an equity of redemption. The entry must be open and peaceable, and actual possession must be taken. The object intended by law is, that the mortgager may know when the three years commence, beyond which his right to redeem will cease." *Thayer & al.* v. *Smith*, 17 Mass. 431.

2. "Statutes are sometimes merely directory, and, in that

case, a breach of the direction works no forfeiture or invalidity of the thing done." 1 Kent's Com. 465.

In the case at bar, the answer in equity of Hiram Hurd, jr., shows an entry on his part, and that he previously gave actual personal notice to Coleman of his intention to enter for the purpose of foreclosing the mortgage, and that Coleman expressed his entire willingness that he should so enter. *Taylor* v. *Weld*, 5 Mass. 119; *Pomroy* v. *Winship*, 12 Mass. 519; *Boyd* v. *Shaw*, 14 Maine, 58.

In *Pease* v. *Benson*, 28 Maine, 353, SHEPLEY, J., says, "It is the actual entry into possession for condition broken that may effect in due time a foreclosure, being made by the written consent of the mortgagee or his assignee. The written consent is of no effect, but to make such entry lawful."

"It has already been decided, that when the mortgagee shall enter after condition broken, it shall be presumed that he entered for that cause; and the time for foreclosure shall run from that entry." 12 Mass. 518.

3. It is well settled that the mortgagee has a choice of remedies. He may bring an action on the bond or note, or he may proceed against the mortgager on the mortgage deed, and take the land in payment of his debt. 4 Kent's Com. 183; Hilliard on Mortgages, c. 21, § 1. Even after the mortgagee has recovered judgment on his note, he may then have his remedy upon the land, because there has been no actual satisfaction of the judgment; no payment of the debt. *Hill* v. *Rider*, 5 Cush. 231. But when the debt is satisfied by execution, or by the mortgagee taking possession, and foreclosing the mortgaged property, the choice of remedies is gone. The mortgagee having once foreclosed the property mortgaged, and obtained absolute ownership thereof, can, however, still recover the balance of the debt, if any part remains unsatisfied, out of the mortgaged estate. "The foreclosure of a mortgage, given to secure the debt, may be shown as a payment, made at the time of complete foreclosure; but if the property mortgaged is not at that time equal in value to the amount due, it is only payment *pro tanto*." 2 Greenl.

Ev. 524; (also 2 Greenl. Cruise on Real Property, 199, note.)

This is the law of Connecticut, as appears from *Bassett* v. *Mason*, 18 Conn. 131. "When the value of the property mortgaged exceeds the mortgage debt, a foreclosure of the mortgage having become absolute, operates, even at law, as a payment of the mortgage debt. The law is equally well established in Massachusetts. In *Hedge* v. *Holmes*, 10 Pick. 380, SHAW, C. J., says: "It is now a well settled rule of law in Massachusetts, that when a bond or simple contract debt is secured by mortgage, and the mortgagee enters for condition broken, and proceeds to foreclose, so as to hold the land free of redemption, he shall be deemed to have taken it in payment. If the value of land equals or exceeds the debt, it shall enure by way of payment, *pro tanto*, and the value shall be ascertained by appraisement, where suit is brought for the debt." So, in *Amory* v. *Fairbanks*, 3 Mass. 562, it had before been decided that one who brings an action on a bond for which a mortgage is given, and the land entered upon, can only recover the amount of the bond after deducting the value of the land.

But it is sufficient for this case that the law in Maine is the same, with respect to the foreclosure of the mortgage and the right of the mortgagee to recover the *deficit*, as in Massachusetts and Connecticut. *Vose* v. *Handy*, 2 Maine, 322. In a recent decision, where this point was exactly raised, the Court say that it is now to be considered as well settled law that "the holder of a personal obligation, (or a judgment thereon,) for which a mortgage of real estate has been given, as collateral security, may recover the balance of the debt due, deducting the value of the mortgaged premises at the time of foreclosure." 36 Maine, 278.

4. The costs recovered in the action for possession, being a part of the mortgage debt, should be offset by the value of the mortgaged premises at the time of foreclosure.

"The mortgaged property constitutes a *fund* for the payment of the mortgage debt and costs," says the Court, in *Cox*

v. *Wheeler*, 7 Paige's Ch. 258. In *Jones* v. *Phelps*, where there were two mortgages, and a suit for foreclosure was brought, it being necessary, according to the law of New York, that there should be *a sale* of the property, WALWORTH, Ch., decreed that the amount due on the first mortgage should be *first* paid, and *also the costs and expenses of the sale*, and afterwards the second mortgage should be satisfied. 2 Barb. Ch. 440. We cite this decree to show that the costs of collection are considered as belonging to, and a part of the sum due, and secured by the mortgage.

In *Porter* v. *Pillsbury*, 36 Maine, 278, before cited, the action being brought on a judgment and costs, the Court decided that so much of the *debt and costs* as remained unsatisfied out of the property could be recovered.

So in *White* v. *Hatch*, 2 Gallison, 152, a case like the one now under consideration, payment of costs was pleaded, but it does not appear from the decision of the Court that the costs were distinguished, in their opinion, from the debt; and in the case which Judge STORY cites to this part of his decision, (*Amory* v. *Fairbanks*, 3 Mass. 562,) there was no distinction made, but it was ruled that the debt and costs must be satisfied out of the property. 15 Conn. 27.

APPLETON, J.—The proof is undisputed, that the plaintiff, holding notes, and a mortgage for their security, on certain premises in the town of Unity, commenced suits on one of the notes, and on the mortgage, which were duly entered at the March term, 1833, of the Court of Common Pleas, holden in and for the county of Waldo; that on the 6th of September, 1835, and while these actions were pending, he assigned the notes and conveyed by deed his interest in the mortgaged premises to Hiram Hurd, jr.; that these actions were continued upon the docket till March term, 1836, when judgments were rendered for the plaintiff in each action; that the assignee of the mortgage, finding the mortgaged premises vacant, with the knowledge and consent of the defendant, and for the purposes of foreclosure, entered into possession thereof.

about the 18th of April, 1836, between the rendition of judgment and the 22d of July following, when the writ of possession issued; that the assignee continuing in possession, the defendant, at the July term, 1839, filed in this Court a bill in equity for the redemption of the mortgaged estate against the present plaintiff and his assignee Hiram Hurd, jr.; that they severally appeared and filed answers thereto; that this bill not having been successfully prosecuted, said Hiram continued in possession till sometime in 1840, when he sold the premises for nearly two hundred dollars more than the amount due on the mortgage notes; and that his grantee, and those claiming under him, have remained in undisturbed possession thereof from that to the present time.

Upon these facts, the defence relied upon, is, that the mortgage to the plaintiff has been foreclosed, and being foreclosed, that the mortgage debt and the costs accruing upon the notes and the mortgage in their enforcement, have been paid by the foreclosure; and, therefore, that this action is not maintainable.

It seems well settled that a party, having his legal rights to real estate determined by the judgment of a court of law, may enter as well without as with the intervention of an officer; and that such entry will be equally valid and effectual for all purposes, as if an officer having the execution had put the party in whose favor it was rendered, in possession. "But," says HOLT, C. J., in *Withers* v. *Harris*, 2 Ld. Raym. 806, "he must take care that he do not enter with force." "That a man who has a judgment for possession," remarks PARSONS, C. J., in *McNeil* v. *Bright*, 4 Mass., 282, "may enter without a writ, is common learning, and indeed is not denied." In *Gilman* v. *Stetson*, 16 Maine, 124, this Court held that where judgment has been rendered for the land demanded, in favor of the demandant, by a court of competent jurisdiction, and he has made an actual entry, his title and seizin is thereby established, although no writ of possession has issued. These views subsequently received the sanction of this Court, in *Gilman* v. *Stetson*, 18 Maine, 428, and in *Phillips* v. *Sinclair*, 20 Maine, 269.

By the statutes of 1821, c. 39, § 1, which were in force, the mortgagee may enter into the mortgaged premises and foreclose the mortgage in three years, "provided, however, 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 presence of two witnesses."

Had the entry in the present case been by the mortgagee, after the writ of possession issued, or even after the time within which, by law, it should have issued, it is apparent that such entry would be regarded as "by process of law," and would be equally effectual to foreclose the mortgage, as if he had been put in possession by an officer having the writ of possession.

The entry being by an assignee after judgment, and before the writ of possession issued, or could legally issue, can it be regarded as an entry under and by "process of law," so as to be available against the defendant, as a foreclosure?

The mortgage notes and the mortgage were assigned to Hiram Hurd, jr., while the suits, for the collection of the note and for the possession of the mortgaged premises, were pending. The assignee, by virtue of his assignment, might prosecute these suits to final judgment, in the name of the assignor and for his own benefit. The judgment obtained, and the estate vacant, no reason is perceived why the assignee, succeeding to the rights of the assignor, might not enter upon the premises, nor why his entry should not justly be regarded as "by process of law," his title having been duly recorded. It was held, in *Cutts* v. *York Manufacturing Co.*, 18 Maine, 191, where the assignees of a mortgage, after having entered to foreclose, had released their interest in the mortgaged premises to the assignor, that he might avail himself of the entry to foreclose, made by the assignees, equally as they might if the mortgage had remained in their hands. So a mortgage may be assigned after an entry for the purposes of foreclosure, and the assignment will not, of itself, stay the foreclosure.

Deming v. *Cummings*, 11 N. H., 475. So, if the assignee of a mortgage obtains a conditional judgment against the purchaser of the equity, and executes a writ of possession, and the owner of the equity thereupon becomes the tenant of the assignee, agreeing to pay him rent; a possession thus held during the time required by the statute, will foreclose a mortgage. 11 N. H., 475.

The entry of the assignee was open, peaceable, and with the assent of the mortgager. It was after the rendition of judgment and before the writ of possession. "It was held in this Court," says HOLT, C. J., in *Withers* v. *Harris*, 2 Raym. 806, "that the plaintiff might enter pending the writ of error upon the judgment in ejectment, if he could find the possession empty; for the writ of error binds the Court but not the right of the party." After the writ of possession, the assignee of the mortgage still occupied the mortgaged premises. From the time when that issued, he could protect and justify his possession "by process of law." It is apparent from the facts, that the defendant, in 1839, filed a bill in equity for the redemption of these premises, and, from the answers of the plaintiff and his assignee, who were both parties, and whose answers are admissible in evidence, that the defendant was fully aware of the entry of the assignee and of the purposes for which it was made. He was bound to know of the judgment rendered against him and of its legal effect. He was bound to take notice of the issuing of the writ of possession, or when by law it might issue. The assignee must be regarded as being in possession, by process of law, after the writ of possession issued; and, as the defendant had full knowledge of these proceedings, the foreclosure may be considered as commencing at that time and as having been perfected after the expiration of three years from that date.

The assignee of the mortgage, Hiram Hurd, jr., and those claiming under him, have been in undisturbed possession of the premises for more than twenty years, without any interference on the part of the defendant, except his ineffectual effort to redeem by his suit in equity in 1839. It is a well

settled rule in equity, that twenty years undisturbed possession by the mortgagee or his assignees, operates as a bar to the right of redemption, unless the mortgager can bring himself within the proviso in the statute of limitation. *Phillips* v. *Sinclair*, 20 Maine, 269.

The foreclosure being perfected, and the mortgaged premises being taken in payment and exceeding in value the mortgaged notes, they must be deemed as paid.

The only remaining inquiry is as to the costs in the suits, for the purpose of foreclosing the mortgage, and on one of the notes thereby secured. Costs necessary for the enforcement of the rights of the creditor, may be regarded as incident to the debt. The lien of the mortgagee, upon the premises mortgaged, attaches equally for the debt and for the costs necessarily incurred in the enforcement of the rights of the creditor. It is in consequence of the neglect of the debtor that resort is ever had to legal process. The party imposing this necessity is not to avoid or escape the consequences of his omission to perform his contracts. The estates of the mortgager are justly chargeable with the costs which the mortgagee necessarily incurs in protecting his rights and enforcing his claims against a reluctant or dishonest debtor. *Jones* v. *Phelps*, 2 Barb. Eq. 440; *Cox* v. *Wheeler*, 7 Paige, 248; R. S., c. 125, § 9.

As the estate mortgaged is shown to have exceeded in value the mortgage debt, and the costs accruing in attempting to enforce its payment, the judgments in suit have been paid, and consequently this action is not maintainable.

Plaintiff nonsuit.

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

WM. P. HALL *versus* SILAS K. TRIBOU.

In an action upon a promissory note not negotiable, the defendant alleged that the note was given to the plaintiff for the partial performance of a certain contract made by him with the defendant, the other stipulations of which the plaintiff had since refused to fulfill; and the defendant claimed to prove his damages by reason of such non-fulfillment in set-off, *pro tanto*, to the note. Whether such a defence can be made, *quære*.

Proof that the plaintiff had entered into a contract with A., similar to that made by him with the defendant; that he had received of A. a note similar to the one in suit, for a similar part performance, and then had neglected to fulfill its other stipulations, is not competent evidence to show that the consideration of the note in suit grew out of the contract between the plaintiff and defendant.

The rulings of the Court, allowing evidence of the damages sustained by the defendant, for a partial non-fulfillment of the contract on the part of the plaintiff, to go to the jury to prevent a recovery, *pro tanto*, on the note, without any limitation as to whether the consideration of the note grew out of that contract, were erroneous.

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

ASSUMPSIT upon a promissory note not negotiable. Plea, the general issue. The defendant introduced in evidence a contract made by the plaintiff with him, by which the former agreed to deliver to him a certain quantity of ship timber for the construction of a vessel, and suitable plank for the same purpose. The defendant admitted that the timber had been delivered according to agreement, and claimed that the note declared upon in the action was given in payment therefor. He also alleged that the plank had not been delivered as contracted for, whereby he had suffered damages to a large amount, which should be deducted from, or be allowed in set-off to the note. For the purpose of showing the origin of the note in suit to be as alleged, the defendant introduced, subject to objection, a contract similar in character to the one between these parties, entered into by the plaintiff with S. Cobb & Co. for the delivery of timber and plank, and proved the delivery of the timber under that contract, the settlement for it by the receipt of a note from S. Cobb & Co., similar to the one in suit, and the subsequent failure of the plaintiff to deliver the plank according to the other provisions of said

contract. Other evidence was also introduced for the purpose of showing that the plaintiff had not delivered the plank to the defendant, and to establish the amount of damages sustained by the defendant in consequence of such breach of the contract on the part of plaintiff. Several points were raised in the case not involved in the decision of the Court, and therefore unnecessary to be stated. The cause was submitted to the jury under instructions from the presiding Judge, all material parts of which, and all additional facts necessary to the understanding of the case, fully appear in the opinion of the Court.

N. H. Hubbard, for plaintiff.

1. This action is assumpsit upon a note not negotiable, the consideration for which had no connection with the timber and plank contract.

Sec. 24 of c. 115 of the Revised Statutes, provides, that "when there are mutual debts or demands between the plaintiff and defendant, in any action, one demand may be set off against the other." Sec. 25 provides, that defendant shall file a statement of his demand on the first day of the term of the Court at which the suit is made returnable. And a defendant in an action cannot, in his defence, avail himself of any demands he may have against the plaintiff, unless the same be filed by way of set-off, pursuant to the statute; or unless they arose from an actual payment of the plaintiff's demand. *Clark* v. *Leach,* 10 Mass. 51; *Pillsbury* v. *Fernald,* 10 Maine, 168.

2. There is no proof that the note in suit was given for the timber stipulated for in the contract introduced, and no sufficient proof that the plank was not delivered according to said contract. The presiding Judge, therefore, erred in allowing testimony in regard to damages to go to the jury without any conditions or limitations upon these points. He should have instructed the jury not to consider this part of the testimony at all, unless it was satisfactorily proved to them that the note grew out of the contract.

N. Abbot and *Woodman*, for defendant.

The plaintiff, by his contract, which is made a part of this case, agreed to furnish and deliver to the defendant a certain quantity of timber and plank. The *timber* he furnished according to his contract; the *plank* he did not. The note was given in part payment of the *timber;* and as the contract for the delivery of the timber and plank was *one* contract, and the plaintiff failed to deliver the plank, the damage the defendant sustained by the breach of the contract, was rightfully allowed in defence of the note, without being filed in set-off.

The note having been given in part payment for the *timber*, if the contract for the timber had been a separate and independent contract from the contract for the plank, then there might be some reason why the amount in set-off should have been filed. But the contract for the *timber* and *plank*, was entire; and it is a well settled principle, that damages sustained by the non-fulfillment of a contract, may be given in evidence under the *general issue*, to defeat a non-negotiable note given as the consideration of the contract, or in *payment* under the contract.

TENNEY, C. J.—This action is upon a note of hand, not negotiable, given by the defendant to the plaintiff. An account filed in set-off, being objected to by the plaintiff, was excluded by the Judge.

In defence, subject to objection, was introduced a written contract, by which the plaintiff was to deliver to the defendant, within certain times, quantities of timber and plank, at agreed prices; and evidence tending to show, that the timber was delivered, and a violation of the contract in respect to the plank, to the damage of the defendant; also evidence, that a contract by the plaintiff with S. Cobb & Co., for the delivery of timber and plank, similar to that with the defendant, was entered into, under which the timber was delivered and a note taken therefor on settlement, and an omission to deliver the plank.

The Judge instructed the jury, that if the plaintiff had not performed his contract to deliver the plank to the defendant, by reason of which non-performance, the defendant suffered actual damage, whatever the plaintiff was indebted to the defendant, for such damage, should be deducted from the plaintiff's claim in this suit, and if such damage was equal to, or greater than, the whole amount due upon the note, the plaintiff could not prevail.

The counsel for the defendant attempts to sustain the instructions upon the ground, that the note was given for the timber delivered under the contract, and the note not being negotiable, the whole contract for the delivery of the plank, as well as the timber, is open; and that the damage arising from the omission to deliver the latter, according to the contract, can be taken into consideration in this action.

The question is not presented, whether such a defence to the note can be made. We are to decide, whether the rulings and instructions of the presiding Judge were correct or otherwise; and we give no opinion upon the matter discussed on the part of the defendant, touching the right of the defendant to set up the plaintiff's violation of his contract, to prevent his recovery upon the note. The evidence, that the plaintiff had made a contract with S. Cobb & Co., and had settled for timber delivered by taking a note therefor, which was not negotiable, as was stated in testimony, was incompetent, for the purpose of proving that the note in suit was given for the timber, delivered under the plaintiff's contract with the defendant; and, moreover, it is difficult to perceive, how it tends to prove the consideration of a note, having no connection therewith.

But the instructions were not given, upon the hypothesis that the note in suit was made on account of the timber, which the plaintiff delivered to the defendant under the contract between them; but the right of the defendant to a verdict, was put exclusively upon the ground, that his damage by reason of the violation by the plaintiff of his agreement to deliver the plank, was equal at least to the amount of the

note, without regard to the consideration thereof. This, we think, was erroneous. *Exceptions sustained, verdict set aside, and new trial granted.*

APPLETON, MAY and GOODENOW, J. J., concurred.

HATHAWAY, J., concurred in the result.

SIMPSON HART *versus* JOSPEH P. HARDY.

In specifications of defence, under the statute of 1855, c. 174, § 4, it is not sufficient for the defendant to aver generally that "the plaintiff has no claim whatever against him."

The specifications must be more than a plea of the general issue, and sufficient to apprise the plaintiff of the obstacles that would be presented to the maintenance of his suit; otherwise the defendant will be defaulted.

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

This was an action of ASSUMPSIT. The amount claimed was $220,62.

The defendant filed his specifications of defence with the clerk of the court for the county of Waldo, as follows:—

"WALDO, SS.—Supreme Judicial Court, Oct. term, 1855.

"*Simpson Hart* v. *Joseph P. Hardy.*

"The defendant in this action, says for a defence, that the plaintiff has no claim whatever against him. And defendant further says that he believes that there is a good defence to said action. And he further says that he intends in good faith to make a defence." (Signed,) "Joseph P. Hardy.

"Frankfort, Sept. 15, 1855."

The defendant claimed to go to trial, but the Court refused to allow it, and ordered the defendant to be defaulted.

To this ruling and order of the Court the defendant excepted.

Hubbard, for plaintiff.

J. G. Dickerson, for defendant.

TENNEY, C. J.— This is a case, wherein the defendant appeared and desired a trial, and was required to file with the

clerk of the court a specification in brief of the nature and grounds of his defence, &c., according to the statute of 1855, c. 174, § 4.

The object of the statute was, undoubtedly, that the other party might be apprised of the obstacles, which would be presented to the maintenance of his suit, in season to be prepared for a trial, without incurring useless expense. More was required than a mere statement, that the plaintiff had no claim. The plea of the general issue, which could be filed at any time before the trial commenced, would indicate all this.

It requires no argument to prove, that the statement, "the plaintiff has no claim whatever against him," is not a compliance with the provision of the statute.

Exceptions overruled, judgment on the default.

HATHAWAY, APPLETON and MAY, J. J., concurred.

GOODENOW, J., did not concur in the opinion of the Court, and expressed his dissent as follows: —

I do not concur. The specification of defence was sufficient to give notice to the plaintiff that he would be required to *prove his case*, under the general issue.

DAVID G. AMES *versus* LEMUEL R. PALMER *& al.*

A common carrier has a lien upon the goods transported by him, and the right to retain the possession of them until his reasonable charges are paid.

An action of trover will not lie without proof of property, and of the right of immediate possession, in the plaintiff.

The right of a common carrier to retain possession of goods transported by him in order to enforce the payment of his charges, does not deprive the general owner of the right of immediate possession as against a wrongdoer.

Both in England and in this country the lien of a factor is a personal privilege which is not transferable; no question upon it can arise except between the principal and the factor; and the law is the same in reference to the rights of the common carrier. The same principle has been adopted in this State in relation to a statute lien.

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

This was an action of TROVER for a cask and twenty gallons of rum, taken from on board a vessel. Plea, general issue and a justification.

The defendants, to justify the taking, offered a complaint made by said Palmer, defendant, and others, and a warrant and judgment of Woodbury Davis, a justice of the peace, which were objected to.

Defendants contended that plaintiff was bound to show that the freight on the property from Boston, due to the owners of schooner Comet, which brought it, had been paid, and the lien on it discharged.

Plaintiff asked the Court to instruct the jury that "where goods are wrongfully taken from a bailee, that it is not necessary, in order for the owner to maintain trover for their value against the wrongdoer, that said owner should tender or pay to the bailee any freight for which said bailee might have a lien on the goods; nor could such wrongdoer set up any such lien except under the express authority of such bailee.

"2d. That no proof of ownership being made, the burden of proof would be on him, who asserted the existence of any unsatisfied lien, to prove it affirmatively."

The Court instructed the jury that it was incumbent upon the plaintiff to satisfy them by proof that the plaintiff had both the property, and the right of immediate possession; and that, if they were satisfied from the evidence in the case, that the carrier had a lien for the freight, which had not been paid or waived, then the action could not be maintained.

The jury found for the defendants; and, being inquired of, stated, that they found for defendants on ground that the freight had not been paid, and the claim of the carrier had not been waived.

To the foregoing rulings the plaintiff excepted.

White & Palmer, for plaintiff.

1. It is not disputed that, in order to maintain the action of trover, the general rule is, that the plaintiff must have the right of immediate possession at the time of the conversion. But it does not follow that every wrongdoer may set up in

excuse for his wrong, any personal right or privilege, or lien, which a carrier or bailee might have a right to enforce against the general owner, and to avail himself thereof, to defeat the action, without pretence of authority from such carrier or bailee.

A lien in favor of a carrier or bailee, for freight or advancement of expenses, is a personal right or privilege in his behalf, founded in the policy of trade, and is so considered and treated by all the foreign and American writers. Abbot on Shipping, 6 Amer. Ed. c. 2, part 4th, page 363, and notes; Angell on Carriers, c. 9, § 359.

The term signifies a claim annexed or attaching to chattels, without satisfying which, such property cannot be demanded even by its owner.

2. The *possession* of the person asserting such lien must be a *lawful* one. One may not seize the goods even of his debtor, and claim to retain them by virtue of his debt. 2 East, 235; 2 Moor, 730; 8 Price, 567.

3. This lien, or privilege, or personal right, may be waived or lost in various ways; as by permitting the goods to go out of his possession either actually or by construction.

If defendants had paid the freight, having the goods wrongfully in possession, they could not, by reason of such payment, have detained them against the rightful owner; and a tender of freight and charges would not have been necessary previous to bringing an action for their value, against the wrongdoer. *Lempiere* v. *Parley*, 2 Tr. Rep., 485.

4. Actual possession is not necessary to maintain trover. Conversion of the *property* being the gist of the action. *Hunt* v. *Houghton*, 13 Pick. 216; *Foster* v. *Gorton*, 5 Pick. 185.

When a person has delivered goods to a carrier, and the carrier has wrongfully parted with the possession of them to a *stranger*, the owner may maintain trover for the conversion against the stranger; for the owner has still the possession *in law* against the wrongdoer, and the carrier is considered merely as his servant. *Duel* v. *Moxon*, 1 Taunton, 391;

Gordon v. *Harper*, 1 Tr. Rep. 12; 2 Saunders, 47, and note 2; *Bloxam* v. *Saunders*, 4 Barn. & Cres. 941.

"When goods by the tort of a third person are taken from a bailee or commission merchant, the owner has a right to immediate possession of them. And a lien for the merchant's expenses cannot be set up except by himself or by his express authority." Per Judge WOODBURY: "Because such lien is a mere *personal right*, and constitutes no bar to the *possession* of the property, unless set up by the authority of the party holding such lien." *Jones* v. *Sinclair*, 2 N. H. 319; cites 7 East, 7; 5 Dur. & East, 605. This case is directly in point.

5. The taking being unlawful, and against the express forbidding of the owner, no demand is necessary.

Abbott, for defendants.

MAY, J.—In this case the jury were instructed that it was incumbent on the plaintiff to satisfy them, by proof, that he had a right of property in the goods sued for, and the right of immediate possession; and that, if they were satisfied from the evidence in the case, that the carrier had a lien for the freight, which had not been paid or waived, then the action could not be maintained. Upon the rendition of the verdict, the jury being inquired of by the Court, stated that they found for the defendants, upon the ground that the freight had not been paid and the claim of the carrier had not been waived.

That a common carrier has a lien upon the goods transported by him, and a right to retain the possession, as against the general owner, until his reasonable charges are paid; and that the plaintiff, in an action of trover, cannot recover without proof of property in himself, and the right of immediate possession, is not questioned by the learned counsel in defence. Such is the law.

It is, however, contended that the right to retain possession of the goods transported, which, by the common law, attaches to a common carrier, to enforce the payment of his charges, is of such a nature that it does not deprive the general owner

of the right to immediate possession, as against a wrongdoer; and constitutes no bar to the possession of the property, unless set up by the authority of the party holding such lien. Upon examination of the authorities we are of opinion that these positions are well maintained.

It has been repeatedly decided, both in England and in this country, that the lien of a factor is a personal privilege which is not transferable, and that no question upon it can arise except between the principal and factor. *Daubigny & als.* v. *Duval & al.*, 5 D. & E. 604; *McCombie* v. *Davies*, 7 East, 5; *Jones* v. *Sinclair*, 2 N. H., 319; *Holly* v. *Huggeford*, 8 Pick. 73. In this State the same principle has been adopted in relation to a statute lien. *Pearsons* v. *Tinker*, 36 Maine, 384.

In the case of *Holly* v. *Huggeford*, just cited, it was argued in defence, that the lien of the factor *so destroyed* the right of possession in the general owner, that he could not maintain an action of trespass against an officer who had attached the goods as the property of the factor, but the Court decided that such a position was untenable; and PARKER, C. J., says, that "the lien of a factor does not dispossess the owner until the right is exerted by the factor. It is a privilege which he may avail himself of, or not, as he pleases. It continues only while the factor himself has the possession; and, therefore, if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, *or he may sue in trespass if they are forcibly taken;* for his constructive possession continued notwithstanding the lien."

No reason is apparent why the same consequences should not attach to the lien of a common carrier as to that of a factor. In both cases the nature of the lien is the same. Both are common law liens; and such a lien has very properly been defined to be the right of detaining the property, on which it operates, until the claims which are the basis of the lien, are satisfied. *Hammond* v. *Barclay*, 2 East, 235; *Oakes* v. *Moore & al.* 24 Maine, 214. The object of these liens being the same, their effect must be the same. *Ubi eadem ratio ibi idem*

jus. The lien, therefore, of a common carrier, does not deprive the owner of the goods of his right to immediate possession, as against a tort feasor. The Judge presiding at the trial, therefore, erred in instructing the jury, that if they were satisfied that the carrier had a lien for the freight, which had not been paid or waived, the plaintiff could not recover.

Exceptions sustained and new trial granted.

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

JOB LARRABEE *versus* INHABITANTS OF SEARSPORT.

In an action against a town for damages resulting from a defect in the highway, counsel for the defendants admitted "notice," but argued to the jury that he did not admit "*reasonable notice*:" — *Held*, that the admission must be regarded as conclusive upon the party by whom it was made.

Held, also, that *notice* and *reasonable notice* must be taken to mean one and the same thing.

The fact of notice having been admitted, it ceases to be a question in issue before the jury, and instructions submitting it to their determination are erroneous.

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

This was an action on the case to recover damages for an injury occasioned by a defect in a highway in the town of Searsport. At the commencement of the trial, it was stated to the Court by defendants' counsel, in presence of the jury, that "the road and notice are admitted." The proof was, that the injury (if any) was occasioned by an accident which happened to the plaintiff's ox, at eight o'clock in the morning, by reason of a snow drift in the road. There was evidence tending to show that the snow had fallen the evening previous.

The counsel for plaintiff, in his argument, assumed that *reasonable notice* was admitted.

The counsel for the defendants argued to the jury that, although he admitted notice, he did not admit *reasonable notice.*

The Judge, in his charge to the jury, stated to them, that

the liability of the town to keep the road in repair, and *reasonable notice* of the defects, if any, were questions about which they need not inquire, for such liability and notice were admitted.

The counsel for defendants contended that if the drift was occasioned by the snow which he alleged fell the evening before the accident, the town could not have had reasonable notice, and requested the Judge to instruct the jury, that the town would not be liable unless they had *reasonable notice.*

The Judge stated that, that question was not open, for such notice had been admitted.

Defendants' counsel stated that he admitted notice, but not *reasonable notice.*

The Judge observed, that he understood the admission of notice in such case to be an admission of reasonable notice.

The counsel for defendants insisted upon the instructions being given which he requested.

Whereupon the Judge instructed the jury, that the defendants would not be liable unless they had reasonable notice, of which *they must judge from the evidence, unless they were satisfied from what was stated by defendants' counsel at the commencement of the trial, that reasonable notice was admitted.*

The verdict was for defendants.

The plaintiff excepted to the above rulings and instructions.

Abbott & Nickerson, for plaintiff.

J. G. Dickerson, for defendants.

APPLETON, J.—The admission of notice was made in the progress of the cause and must be regarded as conclusive upon the party by whom it was made. Notice, and reasonable notice, meant, and were intended to mean, one and the same thing, else the admission was without meaning. The fact of notice having been admitted, it ceased to be a question in issue before the jury. Under the instructions given, the jury may have found, that the defendants had no notice of the defect by which the injury is alleged to have been occasioned, and, if so, they have found against the admissions of the counsel by

whom the trial of the cause was conducted. The instructions in this respect were erroneous. *Exceptions sustained and New trial granted.*

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

JONAS EMERY *versus* JAMES W. WEBSTER.

Parol evidence is inadmissible to contradict or vary the terms of a valid written instrument.

But the writing may be read in the light of surrounding circumstances to get the intent and meaning of the parties.

The description in a deed contained the following: — "All that part of lot 87, 3d division of lots lying westerly of the centre of the *old channel* of Little river stream:" — *Held*, that parol evidence was admissible to explain the phrase "old channel." Instructions, in such case, limiting the application of the evidence by the jury simply to the question of the *antiquity* of the channel, were erroneous.

The identical monument referred to in a deed may always be shown by parol proof.

Evidence of the language and acts of the parties to a deed at the time of the conveyance, and subsequent thereto, to show how they construed it, and what line they recognized as the boundary, is admissible.

It is competent to prove by parol what was *agreed* on and understood as the boundary by the parties at the time of the conveyance, and how they construed the language of the deed.

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

This was an action of replevin for a quantity of hemlock bark, which grew upon what is called the island in Little river stream, in Belfast. The suit involved the question of title to said island. The plaintiff claimed it by virtue of a deed from Jonathan White and others, to him, whereby was conveyed "all that part of lot 87, 3d division of lots, lying westwardly of the centre of the old channel of Little river stream." If, by the "old channel," was meant the easterly one, then the island belonged to the plaintiff; otherwise, it did not. The verdict was for plaintiff. The points raised in the case appear in the opinion of the Court.

White & Palmer, for defendant, contended: —

1. That the deed is to be construed with the aid of the circumstances existing at its date, as to what the parties intended by its terms. 1 Greenl. Ev. § 282, and note 2; cases cited § 286.

2. The extrinsic evidence raised a *latent ambiguity* in the deed as to the meaning intended by the parties in the use of the descriptive term; and that the evidence of the acts of the parties, in fixing the actual boundary, should have gone to the jury to explain their intent. 1 Greenl. Ev. § 288, and cases cited in note 2.

3. That this did not contradict the deed, but gave a reasonable meaning to the language, inasmuch as the language was susceptible of a reasonable signification *consistent* with the acts of the parties. *Waterman* v. *Johnson*, 13 Pick. 286; *Davenport* v. *Johnson*, 15 Mass. 85; *Ballard* v. *Briggs*, 7 Pick. 533.

4. That parol evidence of the acts of the parties, is admissible to show their intent, even where there is a misdescription of a boundary, wherever the same evidence must be resorted to extrinsically from the deed, as in fixing on the earth a boundary or monument; and, especially, that the parties at the time went on to the ground and fixed the actual boundary; this is but applying the language as the parties applied it. 1 Greenl. Ev. 317; 2 Greenl. Cruise, Title Deed, 395; *King* v. *Landers*, 8 T. R. 379.

5. Misdescription of boundary or monument, may be considered like the misdescription of a note in a mortgage, as by a different date, amount, or time, or payee. 12 Pick. 557; 29 Maine, 302, and 33 Maine, 446.

N. Abbott, for plaintiff.

HATHAWAY, J. — The rights of the parties, in this suit, depended upon the question, whether or not "the island in Little river stream, in Belfast," from which the bark replevied was taken, was conveyed to the plaintiff, by Jonathan White and others, by their deed of December 15, 1828.

The land conveyed by that deed, was described therein as "all that part of lot 87, 3d division of lots, lying westwardly of the centre of the old channel of Little river stream."

The controversy was, whether the channel on the east or the west side of the island, was the channel designated in the deed, as the boundary of the land conveyed.

The defendant introduced evidence of the conversation and conduct of the parties to the deed, at or about, and subsequent to, the time of its execution, tending to show that they agreed upon the western channel, as the "old channel" mentioned in the deed as the boundary; that they understood that to be the old channel, and so called it, and that they intended and fixed upon it as the boundary, and that the grantors and the plaintiff, the grantee named therein, so construed the deed *then*, and for many years after that time.

By the instructions of the presiding Judge, to which exceptions were taken, the jury were limited in their application of the evidence, to the single subject of the antiquity of the channel, and all parol evidence to show what the parties meant by the term "old channel," as used in the deed, was excluded from their consideration.

The rule of law is unquestioned, that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument, but the rule is directed only against the admission of any other evidence of the language employed by the parties in making the contract.

The writing may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties.

The question being, what did the parties mean and understand by the written language used, and to be interpreted?—parol evidence of extraneous facts and circumstances is often indispensable, to aid in obtaining a true answer to the inquiry. 1 Greenl. Ev., 8th ed., § § 277, 282, 295, 295 a.

By reason of the unstable character of the channels of streams or rivers which flow through alluvial lands, it would be often impossible to affix any definite meaning to the term

"old," in a deed, when applied to the channel of such a stream, as a boundary of land, without the aid of such parol evidence of the language or acts of the parties, at the time of, or subsequent to the conveyance.

The phrase "old channel" might have been, and probably was, merely conventional, between the parties to the deed. It was uncertain and indefinite, and therefore subject to explanation. Both channels may have been old. They might, in the lapse of time, have been alternately denominated new and old, according to the number of successive years, during which the action of frequent freshets had permitted either of them to constitute the principal channel.

There is nothing in the meaning of the word "*old*," as used in the deed, so positive as to exclude parol evidence, by which to show what the parties thereto intended by it.

The plaintiff is the original grantee of Jonathan White and others; he must have known, whether or not the island was intended to be included in his deed, and consequently where the true boundary was; hence, evidence of his language and acts, at the time of the conveyance and subsequently, tending to show that he recognized the western channel as the boundary, and so construed his deed, was legally admissible and proper for the consideration of the jury, concerning the questions of the true boundary of the land. *Stone* v. *Clark*, 1 Met. 378.

"Whether parcel or not of the thing demised, is always matter of evidence." Per BULLER, J., in *Doe* v. *Bent*, 1 T. R., 701. The identical monument referred to in the deed, is always a subject of parol proof. *Proprietors of Claremont* v. *Carleton*, 2 N. H., 373; *Linscott* v. *Fernald*, 5 Greenl. 496. *Wing* v. *Burgess*, 13 Maine, 114.

In *Waterman* v. *Johnson*, 13 Pick. 261, (a case similar to this,) it was held competent to prove, by parol evidence, that a certain line was *agreed* on and *understood* at the time of the conveyance, as the boundary of the "pond" which was named in the deed, as one of the boundaries of the land conveyed.

The doctrine which would authorize the admission of parol

evidence, in this case, to prove the establishment of the western channel as the boundary, is not distinguishable, in principle, from that of the uniform decisions of this Court, in which parol evidence has been always received to identify monuments, set up or marked as boundaries of land conveyed.

The error in the instructions was in assuming, that the term "*old channel*," as a boundary, had a known, definite and certain meaning, like "the *town* line," or "the *sea-shore*," which terms would need no explanation as boundaries.

It was as competent to prove, by parol, that the western channel was established as the boundary, as it was to prove, by the same kind of evidence, what was the old channel.

Exceptions sustained.

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

APPLETON, J., non-concurred, and gave the following opinion:

APPLETON, J.— The land conveyed by the deed of Jonathan White and others, to the plaintiff, dated Sept. 15, 1828, is described therein as "all that part of lot 87, 3d division of lots, lying westerly of *the centre of the old channel* of Little river stream.

The language of the deed is clear and unambiguous. It cannot be construed to mean the bank of the channel. Neither can it mean the *new* channel, if one there be. If there be but *one* channel to which it can apply, that channel must control and determine the rights of the parties.

But there may be *two* channels, to both of which the epithet *old* may justly and by common usage be applicable. This would constitute a case of *latent* ambiguity, and parol evidence would be properly received to determine which of two *old* channels was the one intended by the parties. "Suppose," says SHAW, C. J., in *Waterman* v. *Johnson*, 13 Pick. 261, "the deed describes a line as running to a pine tree marked; and in applying the deed to the land, there are found two pine trees marked, either of which answers the general description, and no course, distance or other particular in the

deed to determine which is intended, parol evidence would be admissible to show which was intended." Now whether the boundary be a channel, a fence, or a tree, is immaterial. If there be two boundaries of the same description to which the language of the deed is applicable, the jury must determine from the whole evidence, to which the parties referred.

According to the case of *Clough* v. *Bowman*, 15 N. H., 504, "if it was still a matter of doubt what log fence was intended, the settled principle is, that when other means of ascertaining the true construction of a deed fail, and a doubt still remains, that construction must prevail which is most favorable to the grantee."

The jury were instructed to ascertain whether there were two old channels, and if so, to which the parties in their conveyance referred. They were further instructed, that the plaintiff would hold to the old channel wherever they should find that to be. These instructions were in strict accordance with the law of the case. If the scrivener erred in using the phrase "the old channel," when the parties intended the *new* channel, it is not for this Court, setting as a court of law, to correct it. If the jury have mistaken the facts, and rendered a verdict at variance with the truth, their mistake cannot be remedied, as this case is presented for our consideration.

TIMOTHY W. ROBINSON *versus* JAMES WHITE.

Evidence tending to show that a certain "stake" is the monument referred to in a deed, is proper for the consideration of the jury; but from the facts thus proved, and in the absence of all proof to the contrary, the Court would not be authorized to instruct the jury that there was any presumption of law that it was such monument.

In an action of trespass, *quare clausum*, the burden of proof is upon the plaintiff to show affirmatively the location of the monuments named in the deed under which he claims, and that they include the place entered upon by the defendant.

Robinson *v.* White.

A party has no cause of exception to an instruction given to a jury by the presiding Judge at his own request.

Nor can a party justly except to instructions as favorable to him as the law will justify, though erroneous in other respects.

A grant of land described in the deed as extending to a monument standing on the bank or margin of a river, goes to the thread of the river, unless its terms clearly denote an intention to stop at the margin.

It seems that land bounded on a natural lake or pond, extends only to the water's edge; otherwise, if the pond is artificial.

A deed described the boundary of certain land as running "to the pond to a stake and stones:" — *Held*, that this restricted the grantee to the "stake and stones," if they, or their original location could be ascertained; if not, then his grant extended "to the pond."

Natural monuments must control both courses and distances.

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

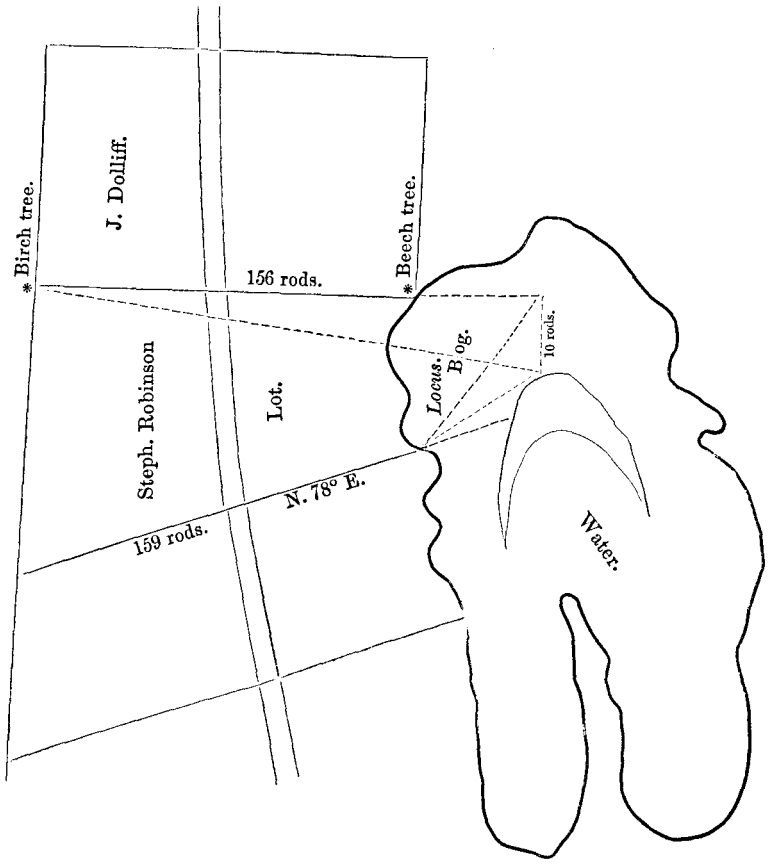
This was an action of trespass *quare clausum*.

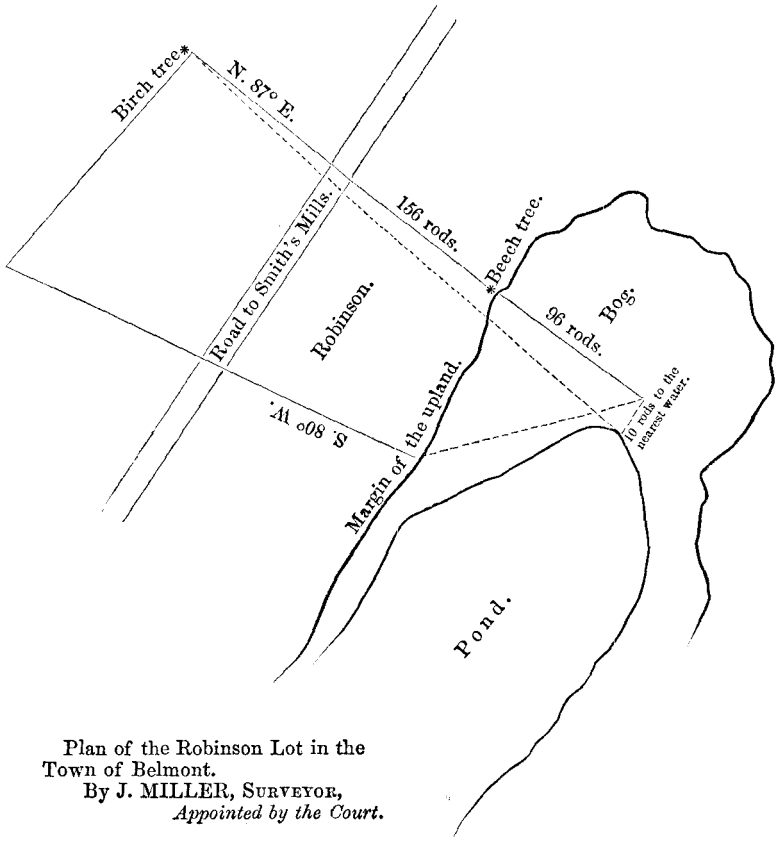
Plaintiff introduced a warranty deed from Benjamin Joy to Stephen Robinson, dated June 27th, 1823, duly acknowledged and recorded.

The description only is material, and was as follows: "A certain parcel of land in Belmont, (now Morrill,) being lot No. 80, according to survey and plan of Noah Prescott, made for Benjamin Joy in 1822 and 1823, and bounded as follows, viz.: Beginning at the southwest corner of Jacob Dolliff's lot at a beach tree; thence south 84 degrees east 156 rods to the pond to a stake and stones; thence southerly on said pond about 80 rods to a stake and stones at the southeast corner of said lot; thence south 80 degrees west 82 rods to the road; thence north 20 degrees west on said road 32 rods to a stake and stones; thence south 80 degrees west 80 rods to a beach tree; thence north 10 degrees east on the west line of lot, 88 rods, to the place of beginning; containing seventy-five acres, more or less, as surveyed by said Prescott."

Mr. Miller, the surveyor appointed by the Court, prepared the plan which bears his signature.

It was admitted that plaintiff had this title. The following plan of Prescott was introduced by plaintiff. The dotted lines are added: —


Birch tree.
J. Dolliff.
Beech tree.
156 rods.
Steph. Robinson
Lot.
Locus. Bog.
10 rods.
N. 78° E.
159 rods.
Water.



Plan of the Robinson Lot in the Town of Belmont.
By J. MILLER, SURVEYOR,
Appointed by the Court.

Plaintiff introduced evidence that defendant entered upon the bog lying within the side lines of said lot 80, (if they are to be extended across the bog as represented in said Miller's survey,) at the time alleged in the writ, and picked cranberries, which was the trespass complained of; nominal damages only were claimed.

Defendant, to show his title to the bog and cranberry patch, introduced deed from Wm. D. Sohier, to himself, dated May 10, 1854, duly acknowledged and recorded, conveying many parcels of land in said Belmont, (now Morrill,) and

among other clauses in the description is the following, which is all that is material in the case: "Also that part or the whole, as the case may be, of the "Cross pond," and bog, meadow and upland adjoining thereof, which is not by express terms, or by implication of law, included in any conveyance or conveyances made by the late Benj. Joy, or any parties interested in his estate, of lots abutting thereat, and to which no other party or parties have any right or title."

It is admitted that the place where the cranberries grew, either passed to Robinson and to plaintiff, under Joy's deed of June 27, 1823, or to defendant, under his deed above recited.

There was evidence from both sides that there was at the margin of the bog and upland, in various places, a natural embankment, which the witnesses called a "sea wall," but which was disconnected and not continuous, but these were merely vacant places where there was no such wall; and at one place there was below this wall or bank a strip of land like intervale extending into the bog, and upon which large trees were still growing; and that for fifty years there had been small growth upon the bog itself and still is.

The defendant introduced evidence tending to prove that thirty years ago the water came up near to the foot of the "sea wall," in the rainy parts of the year, and that the ice in the winter did the same; witnesses stated it to be for seven or eight months in the year, and making up near to the margin of the bog and upland, where the side lines of the lot intersected said margin: — also, that a stake and stones with surveyor's marks upon the stake, had stood about six or eight rods above the sea wall, on the line from the starting point in said deed to Robinson, (which starting point was undisputed by the parties,) near the end of the one hundred and fifty-six rods, which was seen by witness eight or ten years ago; that said stake appeared like a stake of some years standing when seen ten years ago; there was no other proof regarding said stake; and that there had been another stake corresponding, to wit, standing on the other side line at the margin of the

bog and upland, but witness did not remember any marks upon it. Miller, the surveyor, testified, that the stake at the end of the one hundred and fifty-six rods, was a few rods further from the starting point than one hundred and fifty-six rods, but not further than he had found to be the usual overplus in re-measuring Prescott's lines. There was also testimony that this last stake did not stand in the side line of the lot. This was all the evidence tending to show that either were corner stakes.

Several witnesses who had lived near, stated that they never knew of either of the stakes. There was also testimony that a few years ago a dam was built below on the stream a quarter of a mile, that raised the water from one to four feet in the pond, which was maintained part of the year; also, that the bog had made into the pond within thirty years some two or three rods.

Defendant's counsel requested the Court to instruct the jury:—

First, That if they found that there was an old stake standing at the end of the one hundred and fifty-six rods, the distance named in the deed, bearing upon it surveyor's marks, and other indications of the character of the monument named in the deed, in the absence of all proof to the contrary, the presumption would be that it was the stake referred to in the deed.

Second, The burthen of proof to show that this was not the stake named in the deed, was upon the party alleging such to be the fact.

Third, That the stake is the *particular* monument, and that the phrase "at the pond," "or to the pond," is only *indicea* of the place where the stake stood; and if a stake is proved to have existed at the place where the pond was at the time of the deed, even if it only reached that point at the time of freshets, under no legal hypothesis could they go beyond the stakes named in the deed.

Fourth, That if the pond cannot be reached at all, except by abandoning the line named in the deed, then they are controlled by courses and distances.

The Court declined to give the first instruction, and the second, in the terms requested, but instructed the jury, "that plaintiff must make out affirmatively, the burthen of proof being upon him, where the monument named in the deed stood, and that the monument, referred to in the deed, included the place which defendant entered upon."

The third requested instruction was given; and the Judge further instructed them, "that the pond and stake were the monuments named in the deed, that they were identical, and that if they could find them to coincide on the face of the earth, then they would be the true monuments; but if the stake could not be found, then the pond was to be taken as the most certain." But if they should find that a stake was erected by the parties when the deed was made, or immediately thereafter, at the margin of the pond as it then was, and that at the time it was so erected, the pond was enlarged from any cause beyond its natural margin, then such stake or the place where it stood would be the true monument or boundary. Other appropriate instructions were given and not excepted to.

And to the *fourth* request, the jury were instructed that if a slight variation of the course named in the deed from the monument begun at, would reach the pond named in the deed, then the line must be extended to the pond, although in its natural state the distance was greater than that given in the deed, unless they should find the pond was enlarged and a stake inserted as aforesaid.

The verdict was for the plaintiff.

To the foregoing rulings the defendant excepted.

N. Abbot, for plaintiff, cited *Nelson* v. *Butterfield*, 21 Maine, 220.

White & Palmer, for defendant, cited *Bradley* v. *Rice*, 13 Maine, 198, and cases there cited; Angell on Water Courses, p. 37, § 41; *State* v. *Gilmanton*, 9 N. H., 461; *Waterman* v. *Johnson*, 13 Pick. 261; 1 Fairfield, 238.

APPLETON, J.— This is an action of trespass *quare clausum.* The plaintiff claims a parcel of land in the town of Morrill, the boundaries of which are described in his deed as follows: "Beginning at the southwest corner of Jacob Dolliff's lot, at a beech tree; thence south eighty-four degrees east one hundred and fifty-six rods *to the pond to a stake and stones;* thence southerly *on said pond* about eighty rods to a stake and stones, &c., &c., containing seventy-five acres more or less, as surveyed by said Prescott."

As no motion for a new trial as against evidence, appears to have been made, the only questions arise on exceptions to the rulings, or the refusals to rule, of the presiding Judge.

The controversy between the parties is, as to certain bog land lying between where the "stakes and stones" are alleged to have been placed, and the water line of the pond. The stakes and stones are not shown as now standing, but evidence was introduced tending to show their original location to have been at some distance from the pond as it now is.

1. The first requested instruction was, that "if they found that there was an old stake standing at the end of the one hundred and fifty-six rods, the distance named in the deed, bearing upon it surveyor's marks, and *other indications* of the character of the monument named in the deed, in the absence of all proof to the contrary, the presumption would be that it was the stake referred to in the deed." This was refused. What the "other indications of the character of the monument" were, do not appear to have been stated in the request. But there was no presumption of law in the case. The various facts bearing upon the stake, tending to show the same to be the monument, were proper for the consideration of the jury; but the Court could not, as requested, have given the instruction that there was any presumption of law binding on them. The evidence was entirely for the consideration of the jury.

2. The instruction given, so far as applicable to the second request, is unobjectionable.

3. The third request was, that "the stake is the particular monument, and that the phrase "at the pond," or "to the pond," are only *indicia* of the place where the stake stood; and if a stake is proved to have existed at the place where the pond was at the time of the deed, even if it only reached that point at the time of the freshet, under no legal hypothesis would go beyond the stakes," which was given. It is not necessary to determine the accuracy of this instruction, for as it was given in compliance with the request of the defendant, he can have no cause of complaint.

But to this instruction, the further qualifications were added, "that the pond and stake were the monuments named in the deed, that they were identical, and that if they could find them to coincide on the face of the earth, then they would be the true monuments; but if the stake could not be found, then the pond was to be taken as the most certain. But if they should find that a stake was erected by the parties when the deed was made, or immediately thereafter, at the margin of the pond as *it then was*, and that, at the time it was so erected, the pond was enlarged from any cause beyond its natural margin, then such stake, or the place where it stood, would be the true monument or boundary."

It has been held, when land adjoining a river, is described as bounded by a monument standing on the bank of the same, and a course is given as running from it down the river, as it turns to another monument, the grantee takes to the middle of the river. *Luce* v. *Carley*, 24 Wend. 451. So when land is bounded by a line commencing at a stake "by the side of the river or mill-pond," and running by the side of said pond to another stake by the said pond, the grant extends to the thread of the river. *Lowell* v. *Robinson*, 4 Shep. 357. "It is conceded," remarks COWEN, J., in *Starr* v. *Child*, 20 Wend. 149, "that the words *to and along the river* would include the stream. What difference between them and to and along the shore? A difference in words signifying the same. In either case, taken literally or according to common understanding, they carry you to a line immediate the water

and the land, and touching both." If a boundary is described as running to a monument standing on the bank, and from thence running "by the river," or "along the river," it does not restrict the grant to the bank of the stream; for the monument, in such case, is only referred to as giving the directions of the line to the river, and not as restricting the boundary *on the river*. *Child* v. *Starr*, 4 Hill, 369. Although the monuments are described as standing on the margin or bank of the stream, the grant carries the title of the grantee to the centre of the river, unless its terms clearly denote an intention to stop at the margin. *Cold Iron Spring Works* v. *Tolland*, 9 Cush. 495; *Inhab. of Ipswich, pet'rs*, 13 Pick. 431.

Where land is bounded upon a lake or pond, if it is in its natural state, it would seem that the grant extended only to the water's edge. *State* v. *Gilmanton*, 9 N. H., 461. Where the pond is an artificial one, "it would be natural to presume," remarks SHAW, C. J., in *Waterman* v. *Johnson*, 13 Pick. 261, "that a grant of land bounding upon such a pond, would extend to the thread of the stream upon which it is raised, unless the pond had been so long kept up as to become permanent, and to have acquired another well defined boundary."

Now the qualifications of the third requested instruction, cannot be regarded as unfavorable, in any degree, to the defendant. They restrict the plaintiff to the stake and stones, if they can be found, or if their original location can be ascertained, but if neither can be, then "to the pond." To these, defendant cannot justly except.

4. The fourth requested instruction was properly refused, for nothing is better established than that natural monuments must control both course and distance. The instruction given, in lieu of the one requested, is not one of which the defendant can complain. It required the line to be run to the pond, "unless they should find the pond was enlarged, and a stake erected as aforesaid." In all the instructions, the precedence was given to the artificial over the natural boundary.

It is not necessary to determine whether, if the verdict had been for the defendant, the exceptions might not have been

sustained; but it is very certain that he has no just ground of complaint. *Exceptions overruled.*

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

GOODENOW, J., gave the following dissenting opinion: —

This is an action of trespass *quare clausum.* The verdict was for the plaintiff. The case comes before us upon exceptions. It is admitted, that if the plaintiff has no title, the defendant has a title to the *locus in quo.*

The plaintiff claims under a warranty deed from Benj. Joy to Stephen Robinson, dated June 27, 1823.

The description of the premises conveyed, is as follows: "A certain parcel of land in Belmont, being lot No. 80, according to survey and plan of Noah Prescott, made for Benjamin Joy in 1822 and 1823, and bounded as follows, viz: Beginning at the southwest corner of Jacob Dolliff's lot, at a birch tree; thence south eighty-four degrees east one hundred and fifty-six rods *to the pond to a stake and stones;* thence southerly *on said pond* about eighty rods to a stake and stones at the southeast corner of said lot; thence south eighty degrees west eighty-two rods to the road; thence north twenty degrees west on said road thirty-two rods to a stake and stones; thence south eighty degrees west eighty rods to a beech tree; thence north ten degrees east on the west line of lot eighty-eight rods to the place of beginning; containing seventy-five acres, more or less, *as surveyed by said Prescott.*"

The probability is, that all that part of the premises which occasions the present controversy, was formerly a part of the pond, as so denominated in common parlance. It might have been considered worthless.

The stake and stones named as the second monument in Joy's deed, cannot be found. The course and distance from the *birch tree,* at the beginning, indicate the point where that second monument stood; and it was, unquestionably, on the margin of the bog or low land, or *pond,* as it was probably called when the water was high. It cannot be reasonably supposed that Prescott made a mistake of ninety-six rods in

the admeasurement of that line, or that the grantor intended, or that the grantee expected, that it was to be thus extended by implication. There is great precision in the description, which seems to silence implication. The black lines on Prescott's survey, reach to the low lands or bog, and no further. The second course of said deed runs southerly *on said pond* about eighty rods to a stake and stones. The first course extended ninety-six rods beyond the one hundred and fifty-six rods named in the deed, would not touch the present pond. The second course from the point claimed by the plaintiff could not, therefore, run the first ten rods on what the plaintiff claims to be the pond intended. If it aims for the high land southerly and directly, it will not touch the plaintiff's pond; if otherwise, it will run only ten rods to the pond, and then much less than *eighty rods on the pond,* before it hits the other extended dotted line. This position conflicts with other parts of the deed continually. The plaintiff's title does not cover the *locus in quo,* in my opinion. It is limited to the margin of the bog or low land, about one hundred and fifty-six rods from the beginning, or birch tree. It is a question of fact for the jury, from all the evidence in the case, the deed, the plans, the state of the water, &c., &c., to find the place where the first line terminated.

The instructions of the presiding Justice were therefore erroneous, and led the jury to a wrong conclusion, or did not permit them to reach a right conclusion, or to give due effect to all the evidence.

COUNTY OF PISCATAQUIS.

JOHN POLLARD *versus* SOMERSET MUTUAL FIRE INSURANCE CO.

The term *alienation*, as applied to real estate, has a technical signification, and any transfer, short of a conveyance of the title, is not an alienation thereof.

The Act incorporating an insurance company, provided "that when the property insured shall be *alienated*, by sale or otherwise, the policy shall thereupon be void;" — *Held*, that a mortgage of the insured property is not an alienation, within the meaning of that Act.

To avoid a policy by an alienation of the property, the transfer must be complete and entire, unless the contract of insurance otherwise provides.

But where there is a provision that the policy shall be void, if the property insured shall be alienated "in whole or *in part*," a mortgage violates such provision and avoids the policy.

The assignee of a policy of insurance, transferred with the knowledge and assent of the company, may, in case of loss by fire, maintain an action, in the name of the assignor, for the amount insured.

The assignor cannot discharge such action, nor would payment to him by the company, avail against the claim of the assignee.

The company, having assented to the assignment, cannot take advantage of any subsequent acts of the assignor.

By the rules of the common law, the assignee always brings his action in the name of the assignor.

The assured having mortgaged his property and assigned his policy, the assignee must bring his action in the name of the assignor, even if the assignment were made with consent of the insurers, unless they have made an express promise to the assignee.

Courts of law, in all cases, will uphold and protect the equitable interests of assignees.

ON AGREED STATEMENT OF FACTS, from *Nisi Prius*.

This was an action of assumpsit upon a policy of insurance, made by the defendant corporation to the plaintiff, Nov. 15, 1848.

On Dec. 27, 1848, the plaintiff mortgaged the insured property to Oliver Eveleth and likewise assigned his policy. In March, 1850, he conveyed one undivided half part of the same premises, subject to the mortgage, to one B. F. Greeley.

Of these two conveyances, and of the assignment of the plaintiff's policy, the defendants had due notice, and assented thereto.

In February, 1852, one Charles P. Watson and one David Smith, proposed to enter into possession of said premises, and to occupy the same as a hotel, under an agreement to purchase for the sum of thirty-two hundred dollars, provided said Eveleth would give them a bond to convey the same upon certain conditions, to which the owners assented. In accordance with that understanding, on the 28th day of February, A. D. 1852, Pollard and Greeley by deeds of quitclaim conveyed their interest in the premises to Eveleth, and Eveleth, by his bond, agreed to convey said premises to Watson & Smith upon their performing certain conditions precedent.

Eveleth, also, on the same day, in consideration of the deeds of Pollard and Greeley to him, by his bond, agreed to re-convey said premises to them in case Smith & Watson should fail to perform, according to the stipulations of his bond to them, and upon the delivery by them (Pollard and Greeley) to him of their mortgage deed of the same, duly executed, to secure the payment of such sum as should be due to him (Eveleth) upon the original mortgage notes from said Pollard to him. Said bonds were the only consideration which Eveleth gave for the deeds from Pollard and Greeley to him. The deeds were recorded soon after their execution, but the bonds were not recorded.

Smith & Watson entered into possession and occupancy of the property, in March, 1852, and so remained until February 5th, 1853; but they entirely failed to fulfill the conditions of the bond from Eveleth, whereby they had forfeited all claim to a conveyance of the property by virtue thereof, and only remained in as mere tenants of Pollard and Greeley, to whom they paid rent.

Defendants were notified of the occupancy, to which they assented in writing.

On February 5th, 1853, the buildings insured, except the stable and shed, and the furniture, were entirely destroyed by fire, without fault or design on the part of the assured.

On February 28, 1853, Eveleth, in fulfillment of his bonds to Pollard and Greeley, conveyed the premises, with the remaining buildings, to them, taking back a mortgage thereof to secure the payment of the original mortgage notes, upon which there was due more than the amount claimed in this suit. On the same day Pollard consented in writing that the amount due upon the policy might be paid to said Eveleth, to be allowed upon said original mortgage notes, of which defendants had notice.

The Court, in this case, may draw inferences as a jury might do upon such of the foregoing testimony as is legally admissible, and if the action cannot be sustained by reason of the 9th section of the act of incorporation, and article 6th of the rules and regulations of the company relating to the alienation of insured property, and the transactions of February 28, 1852, a nonsuit is to be entered, and defendants are to be allowed their costs. Otherwise, a default is to be entered, or judgment rendered for such sum as the plaintiff may be lawfully entitled to recover, and costs. If the Court shall be of opinion that the action should have been in favor of Oliver Eveleth, the record may be so amended, and judgment rendered for said Eveleth for such damages as he may be entitled to, with interest and costs.

J. H. Rice, for plaintiff.

1. By the facts agreed in this case, there is but a single question presented, upon which the Court is required to adjudicate; and that is whether there was, on the 28th of February, 1852, such an alienation of the insured property, or any part thereof, as by the contract of insurance between the parties, worked a forfeiture of the policy, and justifies and protects the defendants in refusing indemnity to the plaintiff for the loss of the property.

The deeds to Eveleth and his bonds of defeasance back, were but a new mortgage for the security of the same debt, and a debt which the defendants had already consented might be so secured, and that the mortgagee might hold their policy

or a lien upon it, as further security for the same debt. R. S., c. 125, § 1; Statutes of 1844, c. 107.

2. Eveleth was not a stranger to the defendants; for they had already admitted him to an interest in the property and in the policy, to an amount greater than the company could, in any event, be liable to pay; and if he was not a stranger, and had acquired the entire fee, without the consent of the defendants, it ought not to defeat his right to recover for the loss, in the name of Pollard, or in his own name. Angell on Fire and Life Insurance, p. 233, § 197. Even if Eveleth is to be regarded as a stranger, there was not such an alienation of the property, as would defeat a recovery upon the policy by the plaintiff; for if he retained and had, at the time of the loss, but a partial interest — any insurable interest — it should be protected. Angell on Insurance, p. 230, § § 193 and 194, and page 232, § 196, and cases cited.

3. The assignee had a right to mortgage the property without the consent of the company, so long as he remained in possession. 23 Pick. 418; Angell on Ins., p. 243, § § 209 and 210. And the case finds that plaintiff did retain possession and occupancy of the property by Watson & Smith, his tenants, to which defendants gave their assent.

James T. Leavitt, for defendants, contended: —

1. That this was such an alienation of the insured property as, under the Act of incorporation, would defeat the plaintiff's claim. *Abbot* v. *H. M. F. Ins. Co.,* 30 Maine, 414; *Adams* v. *R. M. F. Ins. Co.,* 29 Maine, 292.

2. That the action was wrongly commenced in the name of the assignor of the policy.

Rice, for plaintiff, in reply.

APPLETON, J. — The plaintiff, having on the 15th Nov. 1848, effected insurance on a tavern in Greenville, and the furniture therein, on Dec. 27th, following, mortgaged the same to Oliver Eveleth, and at the same time assigned the policy of insurance thereon to him, of all which, the case finds the defendants had due notice and to which they assented.

The Act of incorporation, under which the defendants claim to exercise corporate rights, provides, in § 9, "that when the property insured *shall be alienated by sale or otherwise, the policy shall thereupon be void*, and be surrendered to the directors of said company, to be cancelled," &c.

It has been held, in a series of cases, that a mortgage is not an alienation of the premises insured, within the meaning of this Act. "The term alienation," says CRIPPEN, J., in *Mastin* v. *Madison Ins. Co.*, 11 Barb. 224, "has a legal technical meaning, and any transfer of real estate, short of a conveyance of the title, is not an alienation of the estate. No matter in what form the sale may be made, unless the title is conveyed to the purchaser, the estate is not alienated." These views have been affirmed in repeated decisions in New York. *Allen* v. *Hudson River Mut. Ins. Co.*, 19. Barb. 445; *Tillou* v. *Kingston M. F. Ins. Co.*, 1 Selden, 405. It has been decided in New Hampshire that the mortgage of property insured by the insurer, is not an alienation within the meaning of the clause in the charter prohibiting alienation. *Rollins* v. *Columbian Ins. Co.* 5 Foster, 204; *Dutton* v. *N. E. Ins. Co.* 9 Foster, 153; *Folsom* v. *Belknap M. F. Ins. Co.* 10 N. H. 231. The same principles were sustained in Massachusetts in *Lazarus* v. *Com. Ins. Co.* 5 Pick. 76; *Jackson* v. *Mass. M. F. Ins. Co.* 23 Pick. 418. In *Adams* v. *Rockingham M. F. Ins. Co.* 29 Maine, 294, it was held that to avoid an insurance, the alienation of the estate insured must be complete and entire.

It is insisted, in defence, that the plaintiff, after his mortgage and the assignment of the policy, has entirely disposed of the equity of redemption, and that there is an alienation, and that consequently the action is not maintainable.

Courts of law, in all cases, uphold and protect the equitable interests of the assignee. The policy, by its terms, is payable to the plaintiff or his assigns. The assignment to Eveleth having been made with the knowledge and assent of the defendants thereto, the assignor ceases to have the power to defeat the rights of the assignee. He cannot discharge

the action commenced in his own name. A payment to him by the insurers, with a knowledge of the assignment, would be of no avail against the claims of the equitable assignee. The nominal plaintiff has no power to defeat the claims of the party in interest; and the defendants, knowing of, and assenting to the assignment, are so far parties to the same that they cannot take advantage of any subsequent acts of the assignor.

In *Traders' Ins. Co.* v. *Robert*, 9 Wend. 404, a policy of insurance was effected by a mortgager, and the policy, with the assent of the assurers, was assigned to the mortgagee, and a loss occurred. It was held, in an action on the policy by the mortgagee, in the name of the mortgager, that it was no bar to a recovery, that subsequently to the assignment, the mortgager effected a second assurance, and neglected to give notice to the first assurers, although there is an express condition that the policy shall be void in case of such second assurance, and neglect of notice by the insured or his assigns. "Had the nominal plaintiff in this case," remarks SAVAGE, C. J., "executed a release to the insurance company, it would have no effect upon the rights of the assignee; and if he could not directly discharge the right of action which he had assigned, surely he cannot do it indirectly." In *Tillou* v. *Kingston M. F. Ins. Co.*, 1 Selden, 405, FOOT, J., in delivering the opinion of the Court, says: "The assignment of a policy of insurance, with the assent of the insurers, creates new and mutual relations and rights between the assignee and the insurers, which, on the plainest principles of law and justice, cannot be changed or impaired by the acts of a third person over whom the injured party has no control." In *Allen* v. *Hudson River M. F. Ins. Co.*, 19 Barb. 445, the insured assigned his policy with the assent of the insurers, and subsequently procured a new insurance, without giving notice, which by the terms of the policy rendered it void. "It is insisted," says HARRIS, J., "by the defendants, that the insurance in the Columbian Insurance Company, and the omission to give notice of such insurance till after the fire, discharged them

from further obligations upon the policy. I am inclined to think this objection would have been well founded had the policy remained in the hands of the party originally insured. But it having been assigned to the plaintiffs before the last insurance was effected, and that too with the knowledge and assent of the defendants, it was no longer in the power of the assignors to do any thing to impair the policy in the hands of their assignees." In *Conover* v. *Ins. Co.* 1 Coms. 290, JOHNSON, J., says: "Nor are we called upon to decide whether the absolute alienation by Conover, after the assignment of the policy, is a good defence, as the point was not raised at the trial. But if we were, I do not see how the interest of Gridley, the assignee, could be affected by it."

As the assignment to Eveleth has been assented to by the defendants, his rights cannot be impaired or defeated by the subsequent proceedings of the nominal plaintiff. It is not necessary, therefore, to inquire whether there has or has not been a subsequent entire alienation of the estate.

In *Abbott* v. *Hampden M. F. Ins. Co.* 30 Maine, 414, it was one of the by-laws of the defendants, that if the assured should alienate in whole or in part that the insurance should be void; and under this special provision, it was held that a mortgage was an alienation in part. But there is no such provision in the Act incorporating the defendants, nor in their by-laws. Nor in that case was there any assent to assignment of the policy as there is in the one under consideration.

By the agreement of the parties, if the action is not properly commenced in the name of Pollard, but is maintainable in that of Eveleth, the assignee, the proceeding may be amended and the cause proceed to judgment in his name.

There is a class of cases where, by special legislation, authority has been given to maintain a suit in the name of the assignee. There is another class in which suits have been upheld upon the ground of a special promise by the defendant to the assignee. But the case before us would seem to fall within neither of these classes.

The action, in all cases, by the rules of the common law, is

maintained by the assignee in cases of assignment, in the name of the assignor, but for his benefit. *Flanagan* v. *Camden M. F. Ins. Co.* 1 Dutcher, 507. A mortgage by the insured, of property covered by the policy, is not "an alienation by sale or otherwise;" and when the insured has executed a mortgage on the insured property, and has assigned his policy to the mortgagee, before the happening of the loss, the suit for the amount insured must be in the name of the party insured in the policy. *Conover* v. *Ins. Co.* 3 Den. 254. Even if the assignment was made with the consent of the assurers, still the action must be in the name of the assignor, unless there be an express promise to the assignee. *Jessel* v. *Williamsburg Ins. Co.* 3 Hill, 88. In the absence of any provision in the charter or by-laws of a mutual fire insurance company, whereby the assignee becomes a member of the company, the action, in case of loss, must be in the name of the assured with whom the contract was made. *Folsom* v. *Belknap Co. M. F. Ins. Co.* 10 Foster, 231. The Supreme Court of Massachusetts, in *Bowdwitch M. F. Ins. Co.* v. *Warren*, 3 Gray, 415, seem to indicate their view of the law to be the same as has been already suggested.

But the agreement of parties in this case, renders the decision of this question unimportant, as the rights of Eveleth are equally entitled to protection, whether the action is in his own name or in that of his assignor, after notice of and assent to the assignment. In either event a default must be entered.

Defendants defaulted.

RICE and GOODENOW, J. J., concurred.

MAY, J., concurred in the result.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1856.

COUNTY OF KENNEBEC.

ANNA W. HEYWOOD *versus* ZIMRI HEYWOOD.

A. agreed to pay B. forty dollars a year, rent, for a farm, the payment to be made in specific articles, at prices and in quantities specified, with the balance in cash, or country produce at cash price: — *Held*, that if A. tender the articles when due, B. must receive them, not at the cash, but at the stipulated price: — *Held*, also, that if A. failed to deliver them as agreed, B. cannot recover them, but must take the forty dollars, which was the agreed measure of damages, in case of default of A. to pay the specified articles.

No word in a contract is to be treated as a redundancy, if any meaning, reasonable and consistent with other facts, can be given it.

When the sum in dollars and cents is expressed in a contract, to be paid by one to the other, it is not to be rejected for a more uncertain standard.

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

This was an action of ASSUMPSIT, in which the plaintiff claimed an amount due on an account annexed; also rent under a lease of a farm occupied by the defendant. The lease is dated December 11th, 1844, writ dated March 15th, 1853. The payment of rent, provided by the lease, is as fol-

lows, viz.:—"And the said Zimri, on his part, agrees to pay annually to the said Anna W., for the use and rent of said premises, the sum of forty dollars, together with two lambs and two good fleeces of wool, per annum, and to pay all the taxes assessed on said premises, for and during the time he shall be in possession of said premises, under this lease; the payment of said sum of forty dollars to be made after the following manner, to wit:—ten bushels of corn at seventy-five cents per bushel, eight bushels of wheat at one dollar per bushel, twenty-five bushels of potatoes at one shilling per bushel, and two tons of hay at five dollars per ton, the balance in cash, or country produce at cash price."

The Judge instructed the jury, that if they found rent due on the lease from Dec. 11, 1851, to Dec. 11, 1852, (as alleged in the writ,) and a failure of the defendant to deliver the hay, corn, wheat, &c., in payment, the measure of damages, so far as the articles were concerned, would be the market value of the articles at the time and place where the rent fell due.

The verdict was for the plaintiff. The defendant excepted to the above instructions.

North & Fales, for defendant.

The promise in this case is not a commercial contract to deliver articles at a stipulated price, but a promise to pay a sum of money in specific articles at an agreed price. In an agreement to pay specific articles, the rule of damages is the value of the articles at the time and place of payment. But when the agreement is to pay a sum of money in specific articles, or a certain sum in specific articles at an agreed price, the price fixed, is the rule of damages. *Brooks* v. *Hubbard*, 3 Conn. 58; *Penney* v. *Gleason*, 5 Wend. 393; *Coucier* v. *Graham*, 1 Ham. 351; *Baily* v. *Clay*, 4 Ran. 346.

When the precise sum is agreed upon by the parties, as in many actions of assumpsit and covenant, the jury are confined to the sum mentioned as the measure of damages. *Leland* v. *Stone*, 10 Mass. 462.

Professor GREENLEAF, in his 2d vol. on Evidence, § 259,

says, "it will be inferred, that the parties intended the sum as liquidated damages, when, from the nature of the case, and the tenor of the agreement, it is apparent that the damages have been the subject of actual and fair calculation and adjustment between the parties;" and, as an illustration of this principle, says, "as to pay a sum of money in goods at an agreed price," which we think is the case at bar.

Drummond, for plaintiff, contended, that but a single question was presented by the case, and that was, what should be the measure of damages. Is the plaintiff entitled to recover the market value of the articles named, at the time and place of delivery, or merely the forty dollars? The contract is absolute to pay the specific articles, and the measure of damages is the price of the articles at the time and place of the breach. 2 Kent's Com. 480, and note; Chit. on Con. 445; *Gleason* v. *Pinney*, 5 Cowen, 411; *Brooks* v. *Hubbard*, 3 Conn. 58; *Smith* v. *Smith*, 2 Johns. 235.

TENNEY, J. — This action is for the recovery of the arrears of rent, claimed to be due under a lease, in which is the following: "And the said Zimri, on his part, agrees to pay annually to the said Anna W., for the use and rent of the premises, the sum of $40, together with two lambs and two good fleeces of wool, per annum, &c., the payment of said sum of $40 to be made after the following manner, to wit: ten bushels of corn at 75 cents per bushel, eight bushels of wheat at $1 per bushel, twenty-five bushels of potatoes at 1 shilling per bushel, and two tons of hay at $5 per ton; the balance in cash, or country produce at cash price."

Among other things, the plaintiff claims the entire rent of the premises for one year, ending Dec. 11, 1852, and insists that she is entitled to the amount of the actual market value at that time, of ten bushels of corn, eight bushels of wheat, twenty-five bushels of potatoes and two tons of hay, in addition to the ten dollars to be paid in cash, or in country produce at cash price, when these articles are shown to have had a value greater than that stated in the lease. On the other

hand, the defendant resists this construction of the contract, and contends that, failing to deliver the specific articles, he is bound to account only for the rent at its agreed value in cash.

The legal question presented in this case, is one which has been before judicial tribunals in other States, and Courts upon it have come to different conclusions. The doctrine, which the plaintiff insists is the true one, has been adopted in *Meason* v. *Phillips*, Addis. Rep. 346, and in *Edgar* v. *Bois*, 11 Serg. & Raw. 445, in Pennsylvania. In New York, also, the same doctrine was held by the Supreme Court, in *Pinney* v. *Gleason*, 5 Cow. 152, 411; in *Clark* v. *Pinney*, 7 Cow. 681; and in the State of Tennessee, as appears by the case of *McDonald* v. *Hodge*, 5 Haywood's Tenn. R. 85. The contrary was maintained in Connecticut, in *Brooks* v. *Hubbard*, 3 Conn. 58, 60; in New York, in *Smith* v. *Smith*, 2 Johns. 243; also, by the Court of Common Pleas, in the case before cited of *Pinney* v. *Gleason*, whose opinion was adopted in the Court of Errors unanimously, and the decision of the Supreme Court was reversed. *Pinney* v. *Gleason*, 5 Wend. 393.

In most of the cases referred to, the market price of the articles at the time stipulated for their delivery, was less than that agreed upon in the contract; and on this point, Chancellor WALWORTH remarks, in referring to the case cited from 7 Cow. 681, upon giving his opinion in *Pinney* v. *Gleason*, 5 Wend. 393: "the particular terms of the contracts are the same in both; and the only difference in the cases is, that in one the salt was worth *more*, and in the other *less*, than the price specified in the note. The same principle, therefore, is applicable to each."

When we apply elementary principles to the question, difficulties, which at first appear formidable, will vanish. Money is the natural standard of value, which theoretically is not supposed to fluctuate from year to year; and when the sum in dollars and cents is expressed in a contract, to be paid by one to the other, it should not be rejected for a more uncertain standard. Hence, a note payable in specific articles, is con-

sidered of less value than a note payable in cash. Chipman on Con. 35.

Pothier holds that the agreements for paying any thing else in the place of what is due, are always presumed to be made in favor of the debtor, and hence he has always the right to pay the particular thing which he has admitted was due, and the creditor cannot demand any thing else; and as an illustration, he puts the case of the lease of a vineyard, at a fixed rent, expressed in the terms of commercial currency, but payable in wine. In such a case, the lessee is not bound to deliver wine, but may pay the rent in money. 2 Ev. Pothier, 347, No. 497. Mr. Chipman supposes a case of a note for $100, payable in wheat at 75 cents a bushel, and concludes that it is within the principle referred to by Pothier, that the debtor may pay the $100 in cash, or in wheat at the price specified. He considers the fair interpretation of the contract to be, *the creditor agreed to receive wheat instead of money, and to avoid disputes about the price, they fixed it in the contract. If, at the time fixed for the payment of wheat, it should be worth 50 cents, when the price fixed in the contract was 75 cents, he may pay his debt at 75 cents. That, if the parties had intended the risk in the rise and fall of the wheat, should be equal with both, the contract would have been simply for the payment of a certain number of bushels.* Chip. on Con. 35.

It is a general principle, that no word in a contract is to be treated as a redundancy, if any meaning, reasonable and consistent with other parts, can be given to it.

In this case, if the principle contended for, in behalf of the plaintiff, should be applied, this contract must be treated the same as a contract to pay the specified quantities of corn, wheat, potatoes, and hay, together with ten dollars in cash, or country produce at cash price, and two lambs, and two fleeces of wool, without the mention of the sum to be paid in the commercial currency. So were the decisions which are favorable to the plaintiff. But this doctrine cannot be admitted. The important agreement, that the sum to be paid was one fixed by the standard of the law, cannot, with propriety, be

disregarded, and the liability be determined by one which is uncertain, changing from year to year, from month to month, and even from day to day; depending, too, upon opinions of men, which may differ essentially according to their places of residence, the business in which they are severally engaged, and their various recollections of facts, which are the basis of their opinion, after they have occurred.

According to written authorities cited, the contract to pay a certain sum in specific articles, at an agreed price, being for the benefit of the debtor, he has the election to pay in that manner, or in cash, at the time agreed upon; and a tender, if made at the exact time of payment, in lawful money, would bar an action on the contract. This is a corollary from the principles of these authorities.

In this case, the value of the rent was fixed at the sum of $40 for each year, payable at its termination. It is manifest, that the parties designed to avoid all uncertainty touching the value of the articles to be paid for the three-fourths of the yearly rent, and fixed the prices themselves. The plaintiff undoubtedly regarded it a less evil to incur the risk of having her rent paid in articles, which she was willing to receive, at a price above the market value at the time of payment, than to ascertain the true value, and perhaps be subjected to litigation, on account of a difference of opinion between herself and the lessee. If he should tender the articles at the day, the rent was paid so far, notwithstanding the real value was much greater or less than that agreed upon; no appeal could lie from their own decision of the value. If the lessee failed to deliver the articles altogether, the standard of the damages to the lessor had been fully agreed upon by them in the contract. If the rent was $40 a year, and corn, wheat, potatoes and hay, to the amount of three-fourths of that sum, were worth a certain and fixed price, by their agreement, it is not perceived, that they designed to seek the uncertain information of the amount to be substituted for these articles, but should be as they had determined, and conforming to the whole value of the rent, as agreed.

It is true, as contended by the plaintiff's counsel, that when the market value of the specific articles, named in the lease, should be below the standard agreed upon, the rent being received therein would fall short of its estimated value; and, in a reversal of this supposed state of the market, the payment in cash could never exceed this sum. It is true, the plaintiff was thus exposed; but the contract cannot, therefore, be changed, if its construction is obvious. Both parties must abide by the contract, according to their intention, as derived from the lease itself. The value of the rent was matter of agreement between the parties, and was not subject to be changed by the omission to deliver the articles, in which it was contemplated payment could have been made.

Exceptions sustained. — New trial granted.

APPLETON, J., concurred.

RICE, J., gave the following dissenting opinion.

This is an action of assumpsit. The principal matter in controversy, is the amount of rent due under a lease of a farm occupied by the defendant. The only question presented by the exceptions, is the true rule of damages applicable to the case.

The plaintiff is the lessor of the farm; the defendant the lessee. The lease contains the following provisions:—"And the said Zimri, on his part, agrees to pay annually to the said Anna W., for the use and rent of said premises, the sum of forty dollars, together with two lambs and two good fleeces of wool, per annum, and to pay all the taxes assessed on said premises, for and during the time he shall be in possession of said premises under this lease; the payment of said sum of forty dollars to be made after the following manner, to wit:— ten bushels of corn at seventy-five cents per bushel, eight bushels of wheat at one dollar per bushel, twenty-five bushels of potatoes at one shilling per bushel, and two tons of hay at five dollars per ton, the balance in cash or country produce at cash prices."

The defendant contends that he is liable to pay, at most,

forty dollars, and that he has his election under the contract, to make that payment in cash, or in the articles specified in the lease, at the prices therein agreed. The plaintiff contends that she is entitled to the specific articles named in the lease, and, in default of delivery, to their fair market value at the time and place of delivery, in cash.

Whether instruments of this kind are to be treated as contracts for the payment of a specific sum of money, but in which a *privilege* is reserved to the payor to pay the same in specific articles, at the price agreed, or whether they shall be treated as contracts for the delivery of specific articles, at an agreed price, and at a specified time and place, the authorities are by no means uniform.

In *Smith* v. *Berry*, 18 Maine, 122, it was held that the measure of damages, on a note for the payment of one hundred and thirty casks of lime, was the value of the lime at the time and place of delivery.

If property be sold at a stipulated price, to be delivered at a future day, and in the meantime the property rise, the purchaser is entitled to the rise of the property; and if the property be not delivered, the value of the property, at the time it was to be delivered, is to be the measure of damages. Chipman on Contracts, 121.

Upon a contract for the delivery of goods, the general rule of damages for non-delivery, is the market value of the goods at the time and place of the promised delivery, if no money has yet been paid by the vendor. *Gainsford* v. *Carroll*, 2 B. & Cress. 624; *Shepard* v. *Hampden*, 3 Wheat. 200; *Stevens* v. *Lyford*, 7 N. H., 360; *Williamson* v. *Dillon*, H. & Gill. 444; *Peterson* v. *Ayre*, 24 Eng. L. & E. Rep. 382; *Shaw* v. *Nudd*, 8 Pick. 9; 2 Greenl. Ev. § 261.

It has also been held, that if the vendee has already paid the price in advance, he may recover the highest price of such goods, in the same place, at any time between the stipulated day of delivery and the time of trial. *West* v. *Wentworth*, 3 Cow. 82; *Clark* v. *Pinney*, 7 Cow. 681; 2 Greenl. Ev. § 261.

The reason given for this distinction is, that when the money has not been paid by the purchaser, he has the means in his hands to go into the market and purchase other goods, at the market price, whereas, when the money has been paid over to the seller, he is deprived of his means of purchasing other goods by the wrong of the seller, and therefore the latter should make good the loss the buyer is subjected to by being deprived of the use of his money. This distinction is not universally recognized as sound. *Sargent* v. *Franklin Ins. Co.*, 8 Pick. 90; *Smothorst* v. *Woolston*, 5 Watts & Serg. 106; *Smith* v. *Dunlap*, 12 Ill. 184; Sedgwick on Damages, 277.

In contracts for the delivery of specific articles, at an agreed price, the preponderance of authority is very decided in favor of the rule which holds the price of the article, at the time and place of delivery according to the contract, to be the measure of damages for a breach of the contract, by a failure to deliver. But in contracts where the price of the article to be delivered is not only specified, but the amount to be paid is also incorporated, as in a note or contract to pay a given sum at a specified time and place, in specific articles, at an agreed price, the rule is not equally uniform.

Thus, in *Brooks* v. *Hubbard*, 3 Con. 58, which was assumpsit on a note for two hundred and fifty dollars, in brown cotton shirting, at 30 cents per yard, the Court held the measure of damages to be the amount specified in the note and interest.

In *Smith* v. *Smith*, 2 Johns. 235, the action was upon a note for forty pounds, silver money, to be paid in land, at nine shillings per acre; *held*, the measure of damage was the amount of the note and interest.

In *Gleason* v. *Phinney*, 5 Cow. 152, on a note for seventy-nine dollars and fifty cents, in salt at fourteen shillings per bushel, in good boating order, the Court held, that in default of delivery of the salt, the sum stipulated in the note was the measure of damage, and not the value of the salt at the time and place of delivery.

In *Perry* v. *Smith*, 22 Vermont, 301, which was assumpsit on the money counts, the following note was offered in evidence:—"For value received of Gates Perry, I promise to him or his order, five hundred dollars, to be paid in half-blood merino wool, &c., at two shillings per pound, &c., with interest."

The principal question discussed was, whether this note could be received in evidence under the money counts. But ROLAND, J., in delivering the opinion of the Court, remarked: "In short, by an uninterrupted series of decisions in this State, notes payable in specific articles of property, after the time of payment has elapsed, seem to stand in much the same condition as notes payable in money, except in their lack of negotiability. After the time of payment mentioned in the note has elapsed, or, to use the common and uniform phrase of the community, after the note has "run into money," it is considered purely as an obligation for the payment of money alone, and a fixed and determined sum; and in no sense is such a note considered as merely evidence of a special contract for the delivery of a certain quantity of specific property; or the holder's right and interest in it as a mere claim or right to recover damages of the maker for not having delivered it agreeably to the contract." In support of this doctrine, the learned Judge cites *Dewey* v. *Washburn*, 12 Vt. 580; *Wainwright* v. *Straw*, 15 Vt. 219; *Dennison* v. *Tyson*, 17 Vt. 549. In neither of these cases, however, was any specific price fixed, at which the articles, in which payment was to be made, should be delivered; but they were to be delivered either at *cash* prices, or at *wholesale* prices. This is a very important distinction, for in such case the amount specified in the note, and the value of the article to be delivered, would necessarily be the same.

Chipman, in his work on Contracts, at page 35, lays down doctrines substantially the same as those already cited from the Vermont Reports.

In *Clark* v. *Pinney*, 7 Cow. 297, the action was upon a note for fifty dollars in good, first quality common salt, at one dol-

lar and fifty cents per barrel. The Supreme Court of New York held that the measure of damages, was the value of the article at the commencement of the suit. But this decision was overruled by the Court of Errors, 5 Wend. 393, and the amount of the note and interest decided to be the true rule.

In *Meason* v. *Philips*, Addison, 346, which was covenant upon a lease of land for four years, at twelve shillings per acre, payable in good merchantable grain; wheat at four shillings, rye at three shillings, and corn at two shillings and sixpence per bushel, it was held that the damages were the price of the grain at the time and place of delivery. The Court say that, "grain, not money, was the object in view of both, and money was only used to ascertain the quantity of grain. The chance of gain or loss must be mutual." In a note to this case, the reporter cites three other cases in Pennsylvania, not reported, which had been decided on the same principle.

Eager v. *Bois*, 11 S. & R. 44, was on an agreement to deliver a quantity of whiskey at stipulated prices. The value of the whiskey at the time and place of delivery was held to be the measure of damages.

In *Matton* v. *Craig*, 2 Bibb, 584, which was on a note for eighty-nine dollars, to be discharged in good merchantable brick, common brick at four dollars per thousand, and sand brick at five dollars per thousand, the Court decided that the note was not for payment of money, but for the payment of brick.

In *Hixon* v. *Hixon*, 7 Humph. 33, on a note for payment of one hundred dollars in Georgia, or Alabama, or Tennessee bank notes, or notes of any good men, the Court held the measure of damages to be the specie value of the notes in which payment might have been made, and in which it would have been most for the interest of the covenantor to have paid.

In *Smith* v. *Dunlap*, 12 Ill. 184, on a note for $131,480,52, in "State of Illinois indebtedness," the Court held that the obligation was in fact but a promise to deliver so many dollars, numerically, of the securities described; and if the

debtor failed to deliver them according to the terms of the contract, he was responsible for their real, not their nominal value, and that their cash value was the true amount of indebtedness to be discharged.

In *Wilson* v. *George*, 10 N. H., 445, which was assumpsit on the money counts, a note for eleven dollars and twenty-two cents, to be paid in wheelwright work, was offered in evidence. PARKER, J., in delivering the opinion of the Court, remarked, "It has been thought that contracts for the payment of a certain sum, in specific articles, at a certain price, give the debtor an election to deliver the articles at the price specified, or to pay the sum in money. If this was the settled exposition of such contracts, although they approach more nearly to the character of promissory notes, a declaration for money had and received, would hardly seem to be applicable. But we cannot regard this as the true construction of such contracts. Such is not the language of the agreements, nor, as we think, the usual understanding of the parties. The payee may generally be willing to take the value of the specific articles in money, because it will be more advantageous; but he has a right to require the property according to the terms of the promise."

In *Cole* v. *Ross*, 9 B. Monroe, 393, which was an action on obligation to pay $3,333,33, payable in good merchantable pig metal, at twenty-nine dollars per ton, it was held, (GRAHON, J., dissenting,) that the measure of damages was the value of the pig metal at the time of the breach of the contract. SIMPSON, J., in delivering the opinion of the Court, said, "the expression, *payable in merchantable pig metal*, clearly points out the thing that is to be paid; it is not of the same import as the expression *may be paid* in pig metal. The latter, if used, would have implied an election to pay in the thing named or not, as it might suit the convenience of the obligors; the former, in direct and positive language, makes the amount payable in the thing specified, and shows that it was really a contract for pig metal and not for money, which might be paid by the delivery of the article named; and that

the sum mentioned was merely the medium by which the quantity of the thing contracted for was to be ascertained, according to its stipulated value per ton."

Mr. PARSONS, in his recent work on Contracts, vol 2, p. 490, in treating of contracts of this character, remarks, "there might be something in the form of the promise, in the *res gestæ*, or in the circumstances of the case, which, by showing the intention of the parties, would decide the general question; but in the absence of such a guide, and supposing the question to be presented merely on the note itself, as above stated, we should say that the more reasonable construction would be, that it was an agreement for the delivery of goods in such a quantity as named, and of such a quality as the price there indicated. And on a breach of this contract, the promisor should be held to pay as damages the value of so much of such goods at their increased or diminished price."

In this apparently conflicting state of the authorities, we are required to resort to general principles of construction to determine the true character of the contract under consideration.

It is a principle universally recognized as sound, that the intention of the parties should control in the construction of contracts. That intention is generally sought in the terms of the contract itself. If these terms are ambiguous, reference may be had to the situation of the parties, and the circumstances surrounding the case.

There is also another principle of general application in the construction of contracts, which is, that force and effect, shall, if practicable, be given to all their provisions and stipulations; that no part shall be discarded which is intelligible in itself, and in harmony with the general provisions of the instrument.

An examination of the case before us will, I think, disclose no uncertainty, no conflict in its terms. All its provisions are in harmony with each other. The amount to be paid — the articles in which payment is to be made — the price at which these articles are to be delivered — the character of the arti-

cles — are all set out in equally distinct, affirmative terms. In these several stipulations there is no conflict, no repugnance. Nor are there any alternative stipulations. The lease does not stipulate that the rent may be paid in the articles stipulated *or* in money. On the contrary, all its provisions are unqualified and certain.

Then, again, the situation of the parties, taken in connection with the subject matter of the contract, harmonizes with this construction. The plaintiff is the lessor of a farm, and receives her rent in those articles of produce which are necessary for her support and personal comfort; corn, wheat, potatoes, fleeces of wool, lambs and hay, in such quantities as would seem to be suitable for her subsistence with her little stock, and which would be required in equal amounts, were the price, in money, high or low. Then, again, the discrimination in the contract. Thus, in making up the forty dollars, the quantity and price of the corn, wheat, potatoes and hay, are all specified. These articles would always be required in given quantities for the lessor's subsistence; then the ten dollars, balance, is to be paid in *cash or country produce at cash price.* This would afford the means for procuring those little luxuries, aside from the staple products of the farm, deemed necessary for comfortable subsistence by persons in the situation of the plaintiff.

Entirely consistent with this is the situation of the defendant. The lessee of a farm, he may be supposed to have been desirous to stipulate for the payment of his rent in articles of produce, and in quantities fixed and determined, and not dependent upon the uncertainties and fluctuation of the general market.

It is said, however, that the payor supposes that such stipulations for payment in specific articles are for his advantage. This is highly probable. But the payee may entertain different views. To him the specific articles may be of more value than money. To compel him, therefore, to receive them when they depreciate below the agreed price, and deprive him of the right to demand them when they advance above that price,

is manifestly inequitable. The chance of gain or loss, unless a different intention is manifested, should be reciprocal.

But it is also contended, that in contracts for payment in specific articles, where the sum to be paid is inserted, as well as the price at which the articles are to be delivered, the sum thus specified should be treated as liquidated damages, in case of failure to perform.

It is difficult to perceive any difference in effect, between an agreement to pay fifty dollars, for instance, in hay at ten dollars per ton, and one in which the stipulation should be to pay five tons of hay at ten dollars per ton. In the first case, the sum to be paid, and the price per ton, would determine the number of tons to be delivered; in the latter, the quantity would be determined in direct terms — the result would be the same in each.

But when a given sum is to be paid in specific articles, and that sum is made up of different articles, in different quantities, but at fixed prices, the very complexity of the contract, and the variety of the articles enumerated, tend to show that the *articles*, are the substantive matter of the contract, rather than the sum stipulated, as money.

This is a contract to pay a certain sum, it is true. But it is also an agreement to pay the sum in a *particular manner*. One is as much a part of the contract as the other. Neither, in my judgment, can be dispensed with by one party without the consent of the other. And to permit the defendant, under such circumstances, to be a gainer by a voluntary violation of his agreement, especially when that agreement was made with a woman, would not, in my opinion, be in conformity with the obvious intention of the parties, nor with sound law, nor conducive to good morals.

MARY HASKELL *versus* CYRUS PUTNAM.

A., for a valuable consideration, agreed to convey to B. certain premises within two years, *provided* B. paid a stipulated sum of money within that time to A., and also all taxes that might be levied on the premises, and an agreed sum annually for rent. B. failed to perform the conditions, allowed the property to be sold for taxes, purchased the tax title, and defended against A. by force of that title: —

Held, that it was the duty of B. to have paid the taxes, and that he cannot set up, as against A., a title which he obtained by a violation of that duty.

ON AGREED STATEMENT OF FACTS.

This was a writ of entry. The nature of the claim and grounds of defence, will appear in the arguments of counsel, and in the opinion of the Court.

W. Emmons, for plaintiff.

1. The certificate of the collector was invalid, because it does not state, that no person appeared within nine months to discharge the taxes. Laws of 1844, c. 123, § 1.

2. The treasurer's advertisement is defective and insufficient, because it does not purport to publish the taxes of only such as were assessed upon land of non-resident owners, who were known, and not of those upon land of non-resident owners unknown. The taxes in question, were assessed upon land the owner of which was unknown. Laws of 1844, c. 123, § 2.

3. The defendant was guilty of a breach of trust, violation of his contract, and of taking advantage of his own wrong. Matthews in Equity, 32 Maine, 305; Matthews in Equity, 28 Maine, 363; Perkins on Conveyancing, 201; Noys' Maxims, § 33, p. 40.

W. B. Glazier, for defendant, contended: —

1. The requirements of law in the sale of the land for non-payment of taxes were strictly complied with.

2. The obligation given by Haskell (the plaintiff) to Putnam (the defendant) can in nowise affect the tax title. It is not signed by Putnam, and no counterpart thereof, or corresponding agreement to pay rent or taxes, was ever given by Putnam to Haskell. This is simply an agreement of *Haskell's*

to convey the premises upon performance of certain conditions. Suppose the conditions were not performed; in that case, Haskell was absolved from conveying, and this could be the only consequence. *Colman* v. *Anderson*, 10 Mass. 105; *Gray* v. *Gardiner*, 3 Mass. 399; *Blossom* v. *Cannon*, 14 Mass. 177.

3. Nor can the transaction be looked upon in the light of a mortgage. No deed was given contemporaneously with Haskell's agreement, *and the obligation is not under seal.* So Putnam cannot be considered as a mortgager. *Jewett* v. *Bailey*, 5 Maine, 87; *French* v. *Sturtevant*, 8 Maine, 246.

RICE, J. — The testator of the demandant, on the 18th of September, 1848, in writing, for a valuable consideration, agreed to convey the demanded premises to the tenant, by deed of quitclaim, within two years, provided the tenant should pay or cause to be paid, within that time, a sum of money therein stipulated, and also pay all taxes which might be levied thereon, and an agreed sum annually for rent.

Under this obligation the tenant held and occupied the demanded premises, paying the rent stipulated, and affirming from time to time to the agents of the demandant that he had also paid the taxes. This condition of things seems to have continued until the year 1853; the time for payment of the principal sum, having been extended from year to year until that time, when the tenant was notified to quit, and this action for possession was commenced. It now seems that the tenant, in violation of the conditions on which he occupied the land, neglected to pay the taxes assessed thereon, and permitted the same to be sold therefor, and now defends under a quitclaim deed, obtained from the person who purchased the tax title.

It was the duty of the tenant to pay the taxes upon the demanded premises. The omission to do so was a violation of good faith and a breach of the condition on which he occupied them. To permit him to set up a title which he has obtained by a violation of his own duty, if it were in other respects

good, would be most manifestly inequitable, and in fraud of the rights of the demandant. Such a defence cannot prevail, either in law or equity, and it requires no small degree of assurance to set it up in a court of justice. The tenant must be defaulted, and the demandant have judgment for possession and for rent as per agreement of parties.

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

LYDIA JEWETT, *Administratrix, in Equity, versus* LAURISTON GUILD, *Administrator, & al.*

It is not for the Court, in a suit in equity, brought to redeem mortgaged premises, to ascertain the amount due, upon the payment of which the plaintiff is entitled to a conveyance; that is a service appropriate to a master.

THIS was a BILL IN EQUITY to redeem certain mortgaged real estate. The right to redeem was not questioned, the only issue being the amounts due to the several respondents, upon which the petitioner prayed the judgment of the Court.

Bradbury & Morrill, for plaintiff.

R. H. Vose, for respondents.

APPLETON, J. — The right of the plaintiff to redeem the mortgaged premises described in the plaintiff's bill, if there is any thing due, or to a release by the defendants, if there has been a compliance with the terms of the bond therein set forth, does not appear to be questioned.

The plaintiff is entitled to a conveyance, upon the payment of such sum, if any, as may be due the defendants.

The cause is to be referred to a master to ascertain what sum, if any, may be due the defendants, or either of them.

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

ABRAHAM JEWELL, (in review,) *versus* SAMUEL C. GAGE.

The jury having by misapprehension found a verdict for $317,46 damages, when by the evidence the plaintiff was entitled to recover no more than $150: — *Held*, that a new trial must be granted, unless the excess and interest thereon from the date of the writ, be remitted by the original plaintiff.

ON MOTION FOR NEW TRIAL from *Nisi Prius*, SHEPLEY, C. J., presiding.

This was a writ of review. The cause was tried at the March term, 1855, and the jury returned a verdict that the plaintiff in review did promise in manner and form as the said Gage in his original writ had declared against him. The plaintiff in review, then filed a motion for a new trial, on the ground that the verdict was against the evidence and the weight of evidence. The facts in the case are sufficiently stated in the opinion of the Court.

Paine, for plaintiff in review.

Bradbury & Morrill, for defendant.

APPLETON, J. — It seems that on February 15th, 1850, Jordan Golder, being indebted to Gage, the defendant in review, but the plaintiff in the original action, mortgaged to him all his "logs now lying in the boom of Abraham Jewell," and further agreed that said Jewell might "saw into boards the aforesaid logs, and sell and dispose of the boards manufactured from said logs, and pay over the proceeds thereof to said Gage." In accordance with this agreement, Jewell manufactured the logs entrusted to his care, and the original action was brought for their proceeds.

Previous to this mortgage, Golder had purchased three several lots of logs, portions of which were then in the boom. When Foster & Spaulding sold their logs, which constituted one of the lots, they reserved a lien thereon for the purchase money, which still remains in part unpaid. For these logs, or their proceeds, Gage can have no claim. His right to recover is for the proceeds of the other lots remaining in the pond at the time of the mortgage.

The case is presented upon a motion for a new trial as against evidence. The verdict was for the sum of $317,46. At the largest estimate of the witnesses called by the original plaintiff, there were not more than ten thousand feet of one and five thousand feet of the other lot, in which he could have any interest. The value of those logs is not estimated at more than ten dollars per thousand feet. Regarding the evidence of the plaintiff as entirely correct, which the jury had a right to do, he was not entitled to recover more than $150.

A new trial is to be granted, unless the original plaintiff will remit the excess above the sum of $150 and interest from the date of the writ.

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

ELLEN M. STINSON, (by *pro. ami,*) *versus* CITY OF GARDINER.

All persons, including children, have a legal right to pass upon the public roads, so long as they do not violate laws for individual protection or the common good.

And, for the purpose of passing and repassing, they may use any part of the highway, provided they conform to all laws and well settled rules connected with such use.

Safety and *convenience* for travelers, and their horses and teams, is the rule by which to judge whether there be any defect, or want of repair, or sufficient railing, upon highways.

The public have no right in a highway, except to pass and repass.

When children use a part of the public road for their sports, the town or city through which the way passes, is not responsible for injuries received by any of the children so engaged, though the injuries may result from a defect in the road.

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

This was an action to recover damages for personal injuries received by the plaintiff, a minor, in consequence of an alleged want of a sufficient railing on the highway.

The plaintiff's evidence tended to prove that she was returning from school, in June, 1854, to her father's house; that she passed on to a side-walk elevated some eleven feet above

the ground, on the outside of the way; that she stopped and leaned against a post to which the railing had been nailed, or against the railing, and that the railing gave way, the same having been loose and swinging for some time, and she was thrown to the ground and severely injured.

It was admitted that the defendants were bound by law to keep the way in repair; that the railing was defective, and that the defendants had reasonable notice thereof.

The evidence on the part of the defendants tended to prove that the plaintiff had got possession of a bottle from a lad by the name of Robbins; that she ran with the bottle; that he pursued her; that she got upon the side-walk and was leaning against the defective railing, when he came up and seized the bottle; that he tried to pull it away from her; that he let go of the bottle, when she sallied back against the railing, and this giving way, she was precipitated to the ground.

There was also evidence on the part of the plaintiff tending to rebut the ground assumed by the defence.

The defendants contended that they were not by law required to prepare their road for a play-ground for children, and that if the plaintiff at the time of the accident was using the highway as a play-ground, and not as a traveler, she could not recover, and requested the Judge so to instruct the jury, which instruction the Judge refused to give.

The Judge instructed the jury, that, by law, the road is to be kept safe and convenient only for the use of travelers; but the law does not define for what purposes it may be traveled, whether for business or pleasure, or work or play, provided the use of it, at the time, is lawful, and the person traveling on it is not using it in a manner prohibited by law, as by traveling on the Sabbath for any purpose other than necessity and charity; that the plaintiff may recover, being otherwise entitled to, notwithstanding that she and others were jointly using the way by passing over it for purposes of sport, provided that in so using it there was no want of ordinary care on her part; that is to say, that if, in passing over the road or side-walk, the plaintiff did no act which a prudent person in

the exercise of ordinary care might not have done, or omitted no act which ordinary care required her to do. But if the injury was not occasioned through the defect in the way alone, or if the want of ordinary care on her part, or any other cause for the existence of which she was in fault, at all contributed to the injury which she received, she cannot recover.

The jury were further instructed, that they would determine from the whole evidence in the case, whether the plaintiff was playing or scuffling at the time of the injury, or not; and also, whether in passing over the side-walk, she stopped to lean against the post or railing, or not; and if they found she did so, in either particular, they would then determine whether it was or was not safe to do so in such a place, and whether she did or not do any thing which a prudent person in the exercise of ordinary care might not have done; and that the mere fact that she did any of these things while passing over the road or side-walk will make no difference in regard to her right to recover, (if she be otherwise entitled,) provided the jury find that in so doing, and in all that she did, there was no fault or want of ordinary care on her part.

The defendants further requested the Judge to instruct the jury that if the injury was wholly or in part the result of playing or scuffling between plaintiff and any other person or persons, she cannot recover. This instruction the Judge declined to give, but did instruct them that if they were satisfied of the existence of the way, that it was defective and unsafe, that the defendants had reasonable notice thereof, and that the defect in the railing was the sole cause of the injury, it would make no difference with the plaintiff's right to recover, even though the plaintiff did play and scuffle with other children in passing over the road, provided that the jury were satisfied that in such playing and scuffling there was no want of ordinary care in passing over the way on her part, which contributed to the injuries she received; and ordinary care was such care as persons of common prudence usually exercise, and the burden of proof was upon the plaintiff to satisfy

them of this fact, as well as all others necessary to entitle her to recover in the case.

The jury returned a verdict for the plaintiff.

To the foregoing instructions and refusals to instruct, the defendants excepted.

Bradbury and *Joseph M. Meserve*, for plaintiff.

In suits of this character, the plaintiff is required, unless the facts are admitted, to show: —

1. That the highway was not safe and convenient; —

2. That the plaintiff exercised ordinary prudence and care; and, —

3. That the injury was occasioned by the defect in the highway alone. *Moore* v. *Abbott*, 32 Maine, 46; 2 Cushing, 604.

In the case at bar, the existence of the way, the liability of the city to repair, the existence of the defect causing the injury, and reasonable notice thereof to the defendants, are admitted.

There is likewise no pretence that the injury would have been sustained, if the city had not so permitted their road to be out of repair.

It remains, then, for the plaintiff to show that at the time of receiving the injury, she was in the use of ordinary care and prudence, and that the injury was occasioned by the *defect alone*.

That the plaintiff was in the use of ordinary care and prudence, must be considered as fully proved, for the Judge instructed the jury that "the burden of proof was upon the plaintiff to satisfy them of this fact," and the whole tenor of the instructions is, that without full and conclusive proof of this fact the plaintiff cannot recover.

The defendants, however, claim to be exempt from liability for such damage in this case, because, as they say, the plaintiff, at the time of the accident, *was at play* in said highway, and not a traveler, and therefore not a person for whose use they were liable under the statute to keep the way in repair. They accordingly requested the Judge to instruct the jury,

"that they were not by law required to prepare their road for a play-ground for children, and that if the plaintiff at the time of the accident was using the highway as a play-ground, and not as a traveler, she could not recover." This instruction, the Judge refused to give, but did instruct them "that, by law, the road is to be kept safe and convenient only for the use of *travelers*." The jury must, therefore, have been satisfied that the plaintiff, at the time of the accident, was a traveler; otherwise, under the instructions, they could not have given her a verdict. There was, therefore, no error in the refusal of the Judge to give the first requested instruction.

The counsel argued that the plaintiff was a "traveler," within the language and intent of the Revised Statutes, c. 25, § § 57 and 89; and cited 36 Maine, 398.

The only limitations or conditions which the law attaches to the right of any person to recover the damages by him received in such a case, are, that the injury must be caused by the defect *alone*, and that such person must be in the use of ordinary care. 32 Maine, 46.

The plaintiff was on her way home from school. No one will deny the liability of the town to keep their streets safe and convenient for scholars traveling over them for such a purpose; and the plaintiff having been proved to be in the use of ordinary care, and the injury being caused by the defect alone, the requested instructions relating to the plaintiff's playing, became unimportant and unnecessary, and were rightfully withheld by the presiding Judge.

C. Danforth, for defendants.

TENNEY, C. J. — The obligation of the defendants to keep in repair, the highway on which the injury to the plaintiff is alleged to have been received, the defective condition of the railing at the time of the injury, and reasonable notice thereof to the city of Gardiner, are admitted.

Evidence was introduced by the plaintiff, tending to prove, that she was returning from school to her father's house; that she passed on to a side-walk, elevated some eleven feet above

the ground, on the outside of the way; that she stopped and leaned against a post to which the railing had been nailed, or against the railing, which gave way, having been loose and swinging for some time, and that she was thrown to the ground and seriously injured.

The defence was, that at the time and near the place of the accident, the plaintiff was at play in the road with another, or that the two were scuffling, and that she run, or was forced with some violence against the railing; and that the accident happened, while she was on the road for a purpose, and doing acts, which exonerate the city from liability to damages for the injury received.

From the exceptions, it is manifest, that the testimony introduced by one party, was in conflict with that introduced by the other in some respects, particularly, in reference to the plaintiff's acts at the time of her fall.

All persons have the right to pass and repass upon public roads, so long as they violate no laws for the common good, or for the protection of individuals. Within these restrictions, they are entitled to the use of the highway for the purposes of travel; whether the object of that travel is business or pleasure; whether they pass on foot, with carriages, or in the various modes, which each individual may choose to adopt. Any part of the highway may be used by the traveler, and in such direction as may suit his convenience or taste, provided he therein conforms to all laws and well settled rules connected with such use. Children are not restricted in passing and repassing upon the streets and roads, more than adults. And the same rules are to be applied equally to all in regulating the use of highways for the objects designed.

Safety and convenience for travelers, and their horses, carts and carriages, are the rule by which it is to be determined, whether or not there be any defect or want of repair, or sufficient railing upon highways. R. S., c. 25, § 57. It being settled in a given case, that the way is defective in some of the particulars, wherein the statute requires that it shall be safe and convenient, a remedy is given to persons referred to,

in the same statute, who shall receive any bodily injury, &c., through such defects. Sect. 89.

It is for travelers, and their horses, carts, teams and carriages, that these highways are to be opened, kept in repair, and amended from time to time. And the statute has not provided that they shall be kept safe and convenient for any others. A street or highway, may be put to a use at a particular time and place, and that use be entirely foreign to the design of passing and repassing thereon, for the purpose of travel, according to the meaning of the statute; and the appropriation may require a much better condition of the ground than would be necessary to make it safe and convenient for travelers. Hence, the rule of safety and convenience for the traveler, might differ essentially from that which would be applied, in a use, not provided for, or contemplated by the statute.

The public have no right in a highway, excepting the right to pass and repass thereon. *Stackpole* v. *Healy*, 16 Mass. 33. "Subject to the right of mere passage, the owner of the road is still absolute master. The horseman cannot stop to graze his steed, without being a trespasser; it is only in case of inevitable, or at least accidental detention, that he can be excused, even in halting for a moment." *Pearsall* v. *Post*, 20 Wend. 111. In *Peck* v. *Ellsworth*, 36 Maine, 393, SHEPLEY, C. J., in delivering the opinion of the Court, says: "Towns are made liable for injuries, by the statute, only to the extent of its provisions." And it is held, in that case, that a party can recover of a town damages for an injury received on the highway, only when the defect or want of repair will prevent the way from being safe and convenient for travel.

If a circus company should appropriate a part of a public highway for the exhibition of their feats in horsemanship, or other acts of agility, entertaining no design to use that part of the way, as travelers, could one of that company have any ground for a claim of damages for bodily injuries, or other losses, on account of any defect therein, against the town or city, in which the way was located? When children appro-

priate a part of the road for their sports, and cease to use it as a way for travel, the town or city through which the way passes, is not responsible for injuries, which may be received by any of the children so engaged, although the injuries may take place through a defect in the road.

The defendants requested the Judge to instruct the jury, that if the plaintiff, at the time of the accident, was using the highway as a play-ground, and not as a traveler, she could not recover. This instruction the Judge refused to give; and it was not given, in substance, in any of the remarks made by the Judge to the jury. The facts assumed in this request, had some support at least in the evidence, as reported in the exceptions; and, therefore, the instructions requested, were not for a case purely hypothetical. If the plaintiff was using the road as a play-ground, and not as a traveler, the use thereof for purposes of travel, must be regarded as entirely suspended, and she was using the ground for an object altogether different from that contemplated by the statute.

We think, according to well settled principles, the instructions should have been given. *Exceptions sustained, verdict set aside, new trial granted.*

RICE and APPLETON, J. J., concurred.

CUTTING, J., did not sit.

GOODENOW, J., gave the following dissenting opinion: —

I cannot concur in the opinion drawn by the Chief Justice. I do not perceive that the point was made in the opening of the defence, that the plaintiff was not a *traveler* upon the road, at the time of her injury. The case states that the evidence on her part "tended to prove that she was *returning from school*, in June, 1854, to her father's house; that she passed on to the side-walk, elevated some eleven feet above the ground, on the outside of the highway." *It is not denied that this side-walk was a part of the highway.* There is no evidence reported on the part of the defence to indicate that she was not there as a *traveler*. The evidence as to her having had some sport or play with Robbins, if uncontradicted,

would be altogether insufficient to found upon it a conclusion that she was there for the purpose of making the highway a "play-ground," and not as a traveler.

We must expect of children, the habits of children, and that they will be mirthful, and joyous, and sportive, while regularly on the way, as *travelers*, to and from school.

It does not appear at *what time*, in the progress of the trial, that the "defendants *contended* that they were not by law required to prepare their road for a play-ground for children." It does not appear to have been *contended* by the plaintiff, that they *were* so required. The Court was not requested to instruct the jury upon that simple proposition, but the request for instructions added, "and that if the plaintiff, at the time of the accident, was using the highway as a play-ground, and not as a traveler, she could not recover." The Judge might well refuse to give this instruction, as calculated to mislead the jury, by assuming that there was evidence to establish a proposition, when no such evidence appears to have been in the case. To my mind, the instruction *given* was much better adapted to lead the jury to a right conclusion, than the instruction *requested*.

It not unfrequently happens, that positions are taken at the close of a trial, while the Judge is charging the jury, or after his charge, that were not taken in season to give the adverse party an opportunity to reply to them by evidence or argument. And mixed propositions, or requests for instructions, are made, some of which are applicable, and some not applicable to the case under consideration. In such cases, it is the duty of the Judge to analyze them, and separate what is relevant and sound from what is irrelevant and unsound. This is what I think the Judge presiding did in this case, and nothing more.

The Judge had already instructed the jury, "that the road must be kept safe and convenient *only for the use of travelers*." The jury must have found that the plaintiff was a traveler. It seems to me like an attempt on the part of the defendants to substitute a new issue, and different from the real one

which had been relied upon and discussed before the jury; and it should be treated like a *departure* in pleading. The real point litigated, was the care or want of care in the plaintiff.

There are no facts in the case to indicate that the plaintiff was at the place where the injury happened, for the purpose of using it as a "play-ground." If she had been a boy with bat and ball, or other implements for play, in company with other boys, such a presumption might have arisen. It seems to me that the evidence, as well as the presumptions, are the other way. A "bottle" is not used for the purpose of playing at any game with which I am acquainted.

The *defect* in the highway, disclosed by the evidence, is one which rendered it unsafe for *travelers*, beyond controversy.

JESSE R. MATHEWS, (*Appellant,*) *versus* JOSEPH W. PATTERSON, *Administrator.*

WM. MATHEWS, (*Appellant,*) *versus* SAME.

By Revised Statutes, c. 105, § 36, it is provided, that "no bond, required by law to be given to the Judge of Probate, or to be filed in the probate office, shall be deemed sufficient, unless it shall have been examined and approved by the Judge, and his approval thereof, under his official signature, written thereon:" — *Held*, that the approval of sureties on a prior bond is not to be taken as approval of the same sureties on a subsequent bond.

Each probate bond must be specifically acted on by the Judge, as required by the statute.

THESE were appeals from a decree of the Judge of Probate, allowing an account of Patterson, administrator *de bonis non.* The case turned upon a single point, which is stated in the opinion of the Court.

Paine & Stinchfield, for appellants.

J. W. North, for respondent.

APPLETON, J. — The appellants, being dissatisfied with the decree of the Judge of Probate, allowing the account of the

appellee, as administrator *de bonis non* on the estate of Edward Mathews, claimed an appeal, and filed their bond to prosecute the same. The condition of the bond was not for the prosecution of their appeal "at the *next* term of the Supreme Court of Probate," as is required by R. S., c. 105, § 26, but at a time subsequent thereto. The bond being defective, upon motion of the appellee, the appeal was dismissed.

The appellants, upon the dismissal of their appeal, claiming that their omission to prosecute the same was the result of "accident or mistake," at the same term petitioned this Court, that they would, in accordance with R. S., c. 105, § 30, "allow an appeal to be entered and prosecuted with the same effect as if it had been done seasonably," which was granted, upon their filing satisfactory bonds.

By § 32, after an appeal is claimed and the bond filed, "all further proceedings in pursuance of the order, sentence, decree, or denial, appealed from, shall cease, until the determination of the Supreme Court of Probate shall be had thereon." This must be regarded as equally applicable to an appeal by virtue of § 26 or § 30.

By the statute, the appellant is to furnish security, in case of appeal, to the adverse party. The proceedings are not to be stayed in the court of probate, to the injury of parties interested, unless they are furnished with a bond for their protection. The security of the bond is equally required, whether the appeal is under § 30 or § 26.

By § 36, "no bond, required by law to be given to the judge of probate, or to be filed in the probate office, shall be deemed sufficient, unless it shall have been *examined* and *approved* by the judge, and his approval thereof, *under his official signature, written thereon.*"

The bond, in the present case, is not approved by the judge of probate, nor by any Justice of the Supreme Judicial Court, sitting as a court of probate. It is true, it has the same sureties as the bond which was filed and approved by the judge of probate when the appeal was taken, which was subsequently dismissed. But it is not enough to say that this bond has

the same sureties as a former one, which has been approved. A bond, with the same sureties, which will be approved at one time, may not be at another. The sureties may become embarrassed or insolvent. But even if their condition remains unchanged, or should be changed for the better, that will not answer the requisitions of the statute. The approval of the bond by the judge, under his official signature written thereon, is required by law. With that requisition, the appellants have not complied, and their appeal cannot be sustained. *Appeal dismissed, and decree of judge of probate affirmed.*

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

RICE, J., concurred in the result.

OLIVER BRAGDON *& ux. versus* APPLETON MUTUAL FIRE INSURANCE COMPANY.

After the plaintiff in a suit has introduced all his evidence, the presiding Judge may order a nonsuit, without a motion to that effect by the defendant.

The refusal of the Court to order a nonsuit, on motion of the defendant, is not subject to exception; but it is otherwise in regard to a ruling of the Court ordering a nonsuit.

If evidence is introduced in defence, the cause must be submitted to the jury, unless the plaintiff consent to a nonsuit.

The rule that a nonsuit cannot be ordered, except by consent, after testimony has been introduced in defence, has been several times recognized by this Court, and it is believed has been generally adhered to in practice in this State.

When a policy of insurance has been executed, and notice thereof given to the assured, its actual delivery is not necessary to complete the contract.

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

This was an action of ASSUMPSIT upon two contracts of insurance alleged to have been made by the defendants. They filed specifications of defence, and pleaded the general issue.

The plaintiffs introduced deeds and other evidence tending to prove that the female plaintiff was the owner in fee of the

property destroyed by fire, at the time the contracts were alleged to have been made, and at the time of the loss. They also introduced evidence for the purpose of showing the manner in which the insurance was effected and through what agents.

The defendants introduced testimony contained in depositions in defence.

After the evidence was in, the Court directed a nonsuit, to which the plaintiffs excepted.

Snell and *H. W. Paine*, for plaintiffs.

A nonsuit cannot be ordered, except by consent, after testimony has been introduced in defence. *Lyon* v. *Sibley*, 32 Maine, 576; *Emerson* v. *Joy*, 34 Maine, 347.

The plaintiffs had made a case proper for the consideration of the jury, and it was for the jury to decide whether plaintiffs have paid the cash premium.

And the jury would have been authorized to find a payment. *Taylor* v. *M. Fire Ins. Co.*, 9 Howard, 390.

L. M. Morrill, for defendants, contended:—

1. That the Court may order a nonsuit when the testimony introduced by the plaintiff will not authorize the jury to find a verdict in his favor. 20 Maine, 317.

2. That the fact of testimony having been introduced by the defendant, will not change the rule of practice, nor take from the Court the power to order the nonsuit, if such evidence would not change the result.

TENNEY, C. J.— The nonsuit, in this action, was directed by the Judge, after the evidence on both sides had been presented to the jury. To this direction, the plaintiffs excepted.

After the plaintiff in an action has adduced the evidence on which he relies for its maintenance, the presiding Judge may order a nonsuit, without being moved by the defendant to do so. But to such order, the plaintiff is entitled to his exceptions. But the refusal to direct a nonsuit, upon motion, is not subject to exceptions.

If evidence is introduced in defence, the truth of this evi-

dence, if favorable to the defendant, cannot be assumed by the Judge, but must be submitted to the jury.

When the plaintiff's evidence, taken in its full strength, has no tendency, in the opinion of the Judge, to maintain the issue for him, it is an useless consumption of time to hear evidence in defence, and after that direct a nonsuit. It may be true, that the evidence of the defendant cannot be regarded as giving any strength to the plaintiff's case, as it stood, when he stopped, but it is proper that there should be some uniform rule of practice in this respect. And such a rule has been recognized in the cases of *Lyon* v. *Sibley*, 32 Maine, 576, and *Emerson* v. *Joy*, 34 Maine, 347; and, it is believed, that this rule has generally been adhered to in practice.

The ground upon which the liability of the company is denied, is, that the policies were not delivered; and that this omission was because the cash premium was not paid, as the by-laws required.

The plaintiffs' evidence, if true, showed that Boyd was the general agent of the company, and that Moody, of the firm of Fellows & Moody, was also an agent; and from the fact, that premiums for insurance were paid when he and Boyd were present, and he was unable to state whether it was paid to one or the other, it *may* be a legitimate inference, that it was a part of Moody's business under his agency to receive money for the company. These agents went to the village of the residence of the plaintiffs on the 7th day of October, 1853; after certain negotiations with Bragdon, the plaintiff, applications were prepared by Boyd, upon the request to be insured from that time, and signed by both plaintiffs, in a manner satisfactory to Boyd, who said the policies should be made without delay. Moody told Bragdon, during the negotiations, that it made no difference whether he paid the cash premium at that time, or when he should take the policies, and he did not pay it. Bragdon also asked Boyd for a copy of the by-laws, and was told by him, that he had none with him, but that he would be furnished with a copy on the policies. It appears further, from the evidence, that it was the

understanding that the policies would be made at once, as the president of the company was in an adjoining town, and should be left with Fellows & Moody, at Waterville, and no time was fixed when Bragdon should take them. The policies were made and signed, and put into the hands of Fellows before the loss; but Fellows was afterwards ordered by the president not to deliver them, and they were subsequently taken back. No evidence introduced by the plaintiffs, tended to show that Bragdon was informed by any agent of the company, or knew, or had reason to suppose, that the by-laws required payment of the cash premium to make the policies effectual. The plaintiffs did not introduce at the trial the by-laws, and it is understood that the specifications of defence did not require the production thereof, or of the policies, to make out a prima facie case for the plaintiffs.

From the foregoing facts, was there nothing for the jury to determine? If there was, and they might have found from the evidence that the right of the company to receive the cash premium before the delivery of the policies, was waived, by the fact, that they were left by the president with Fellows & Moody, they had become effectual from that time, notwithstanding Bragdon had not received them. "When a policy of fire insurance has in fact been executed, and notice of the execution been given to the assured, its actual delivery is not essential to the completion of the contract." Angell on Fire and Life Insurance, 67; *Kahue* v. *Ins. Co. of North America*, 1 Wash. C. C. R. 93.

If the policies had not been withdrawn from the possession of Fellows, or directed not to be delivered to Bragdon, by the president, and no loss had occurred, would not the plaintiffs have been liable for the premium to the company, though the plaintiffs had refused to take the policies? If such liability had existed, it cannot be contended that a corresponding obligation on the part of the company did not attach.

Exceptions sustained, verdict set aside, new trial granted.

RICE, APPLETON, MAY and GOODENOW, J. J., concurred.

CUTTING, J., non-concurred, and gave the following dissenting opinion:—

This action is brought to recover the amounts insured on certain buildings and machinery, included in two policies, dated October 7th, 1853.

The plaintiffs introduced Joseph Fellows, who testified that on Saturday, Oct. 8th, 1853, late in the afternoon, Wm. Pulsifer, (the defendants' president,) delivered to him the policies, and told him to put them into the safe and take care of them, (he was an express agent); again saw Pulsifer, on Sunday, at Kendall's Mills, and was told by him not to deliver the policies. On Monday afternoon Bragdon called on him and demanded the policies; he had them at that time, but did not deliver them. On Tuesday morning he returned them to Pulsifer; he was one of the firm of Moody & Fellows, who were agents of the defendants.

Also, Joseph G. Moody, who testified, that on Oct. 7th, 1853, he, acting as defendants' agent, went with Edward A. Boyd, their general agent, to obtain insurance at Kendall's Mills; examined the premises, and Boyd made out two applications for Bragdon; the understanding was, that the policies should be made at once, as the president was then at Waterville, (the town adjoining,) and left with Moody & Fellows at that place; no time was fixed when Bragdon should take them; Bragdon asked him, if it would make any difference whether the cash premiums were paid then, or when he took the policies; he told him it did not; the cash premiums were not paid; they told Bragdon the policies would be made without delay. The applications were handed to the president on their return to Waterville. At the same time, they took an application for one Ellis, who paid $29,75, the cash premium, for which Boyd gave him a certificate, and told him he was insured from that time; this application was taken away with the others. Bragdon was present when the certificate was given; during that conversation between Boyd and Ellis, Bragdon asked him, (witness,) if it made any difference to him, whether he paid then, or when he took the policies; he

told him that it made no difference to him, (witness.) Bragdon had previously expressed a wish to him to be insured from that time. Bragdon asked Boyd for a copy of the by-laws. Boyd told him, he had none with him, that he would be furnished with such copy on the policy; there were no rules or regulations of the company read by Boyd to Bragdon. On Sunday, Pulsifer told him to tell Fellows, his partner, not to deliver the policies to the parties, but to deliver them to him, (Pulsifer.)

Also, John B. Bradbury, who testified, that, on Oct. 10th, 1853, about one o'clock, P. M., Bragdon called him into the office of Moody & Fellows; inquired of Fellows if he was the agent of the insurance company; he said he was; Bragdon called for his policies; demanded them, and tendered to Fellows $52,50 in American gold; he counted it, as Fellows declined to receive it; at Bragdon's request he took and kept it until the 14th of this month, (December, 1855,) when he deposited it with the clerk of this Court; Fellows said he had the policies, but declined to deliver them.

The foregoing was the substance of all the evidence introduced by the plaintiffs. The pleadings admitted that the buildings were consumed by fire on Saturday night, as alleged in the writ.

The defendants introduced the deposition of Edward A. Boyd, and the affidavit of Pulsifer, to the latter of which, were annexed the two policies, with the charter and by-laws of the company, on the same sheets.

Thereupon the Judge directed a nonsuit; upon which ruling the questions arise. — Was there any fact for the jury to settle? Were the plaintiffs entitled from the evidence to recover as a matter of law?

The nonsuit was ordered solely upon the testimony produced by the plaintiffs, if we except the policies and the charter and by-laws attached, the former of which were the instruments declared on, and consequently their execution could not be, and was not controverted by the plaintiffs; the other documents were made a part of the contracts and referred to

therein in these words, "subject to the provisions, conditions, and limitations of the charter and by-laws of the company." The construction of all these written documents was for the Court and not for the jury. It is not pretended by the counsel for the plaintiffs, in argument, neither do we perceive that, in the affidavit of Pulsifer or the deposition of Boyd, there is one particle of testimony beneficial to the plaintiffs, and as to so much of the same as operated against them, the ruling has afforded them no cause of complaint; for, if the jury would not be authorized to render a verdict in their favor, upon their own showing, they certainly could not when connected with that of the defendants.

What was there for the jury to find from the plaintiff's own testimony? Could they, under proper instructions from the Court, upon the effect of the documentary evidence, determine that the policies had been delivered with an understanding of the parties to take effect previous to the fire?

Moody swears that the policies were to be left with himself and his partner, in the express business, at Waterville; that no time was fixed when Bragdon should receive them; and that they were the agents of the company.

Fellows, the partner, testifies that Pulsifer delivered the policies to him, and requested him to place them in the safe and to take care of them. And it appears that, subsequently, (after the fire,) they were returned to Pulsifer, never having been delivered to, or received by, the plaintiffs.

It may be said, perhaps, which however was not said in the argument, that the custody of the policies by Moody & Fellows, was for the benefit of the plaintiffs, and the possession by the former was for the use of the latter; and that such delivery was unconditional. But when we look into the by-laws, which exhibit the extent of the agent's authority, we perceive, notwithstanding any supposed or assumed authority to the contrary, that no delivery could be effectual, until the cash premiums of $48,50 were advanced.

Art. 8th, reads thus: — "Each person shall pay, upon the

execution of his policy, *and before its delivery*, the premium thereon," &c.

It may again be contended, which was not done in the learned arguments of the counsel, that Bragdon had some assurances, and some reason to expect, that he was insured from the time his applications were perfected and passed over to the agents, since, at the time Ellis paid his money and received the certificate, Bragdon inquired of Moody, whether it would make any difference if he paid the cash premiums then or when he took his policies; and the reply was, that it would not, or would not, to him. Such an agreement, if made, was not only wholly unauthorized, but absolutely prohibited by Art. 6th of the by-laws, which is, that "no insurance shall take effect until the application has been approved by the president, or two of the directors, and until the terms of insurance fixed by the directors, have been accepted by the applicant, and the cash premium been paid," &c. And the last clause in Art. 12th is, "no insurance agent or broker forwarding applications to this office, is authorized to bind the company *in any case whatever*."

The plaintiffs' evidence shows no compliance with the by-laws, but the reverse, as to the payment of the cash premiums, and consequently they have wholly failed to substantiate one of the material allegations in their writ.

But it is contended by the plaintiffs' counsel, and upon this point they seem to rest the case, so far as the merits are concerned, that the jury would have been authorized, from the evidence, to find a payment; or in other words, that a promise to pay is equivalent to a payment; and on this point refer to an able opinion in 9 Howard's U. S. Rep. 390. Such a law undoubtedly would be very acceptable to a large class of debtors, and perhaps even to the defendants in the last resort.

The plaintiffs may have been misled, but it was their duty to have informed themselves upon what terms and conditions they could be insured, agreeably to the company's charter and rules, which by statute are to accompany each policy, and to have known that any contract made in derogation thereof,

would not be binding. *Barrett* v. *Union M. F. Ins. Co.*, 7 Cush. 175; *Real Estate M. F. Ins. Co.* v. *Roessle*, 1 Gray, 336.

The defendants belong to a class of corporations, which, when properly and legitimately conducted, are of great public utility. They are instituted for the mutual benefit of their members, who consist only of such as are insured therein, and whose policies are the only evidence of their membership. Their authority is derived from their charters, and from such rules and regulations as they may deem proper to adopt and promulgate, not inconsistent with the constitution and laws of the State. They must, from necessity, employ agents, whose acts, to be valid and binding, must be within the limits of their delegated powers. And "an act, not performed according to the requisites of the law, cannot be considered as the act of the company." *Head* v. *The Providence Ins. Co.*, 2 Cranch, 127; *Beatty* v. *The Marine Ins. Co.*, 2 Johns. 109.

It being manifest, therefore, that the plaintiffs have offered no evidence sufficient in law to substantiate their claim, but have proved directly the reverse, and that the defendants' evidence has afforded them no aid, I now pass to the consideration of the question, which seems to be relied on as the principal ground for sustaining the exceptions, namely, whether a nonsuit can be ordered, except by consent, after testimony has been introduced in defence.

In *Cole* v. *Bodfish*, 17 Maine, and cases there cited, it has been settled, that "according to our practice, a nonsuit may be ordered by the Court, if, upon the plaintiff's own showing, his action is not sustained, subject however to his right to except to the opinion of the Judge."

It is difficult to perceive upon what principle a nonsuit may not as well be ordered after as before the defendant has introduced his evidence, provided such evidence has not the least tendency to benefit the plaintiff. It can be, at most, but a distinction without a difference, possessing not even the merits of a legal fiction. The plaintiff has, in both instances, to rely solely upon the strength of his own testimony. Suppose,

by way of illustration, that the plaintiff introduces a witness, who swears to nothing favorable to his claim, but adversely to it, and the defendant, instead of moving for a nonsuit, produces a witness who testifies to no fact material to the issue, or if material, unfavorable to the plaintiff, or a release of the plaintiff's cause of action, the execution of which is not disputed, and then moves for a nonsuit; can it be contended that the mere introduction of such evidence presents a question of fact exclusively for the jury, and that the functions of the Court are to be suspended until after solemn arguments of learned counsel, and then to be only exercised by instructing the jury to return their verdict for the defendant? It would seem that such a procedure would render the administration of justice not only tedious in some cases, but ridiculous. And such substantially is the doctrine contended for by the plaintiffs.

If the plaintiff cannot resist a nonsuit after his evidence is closed, how can he occupy any stronger position, when the defence has disclosed nothing in his favor? This question is substantially answered in *Hoyt* v. *Gilmore*, 8 Mass. 336, which was likewise an action on a policy of insurance; testimony had been introduced on both sides, and a nonsuit was ordered without consent. The Court, in delivering their opinion, remark:—"Whether fraud be a question for the Court or jury, yet if, upon the facts in evidence in this case, the jury had given the plaintiff his premium, we should not have hesitated to set aside the verdict." And the nonsuit was confirmed. So in the cases of the *Salem Bank* v. *Gloucester Bank*, 17 Mass. 8, 32; and the *Gloucester Bank* v. *Salem Bank*, 17 Mass. 33, 46.

In *Janson* v. *Acker*, 23 Wend. 480, the plaintiff claimed title to the property under (and introduced,) a bill of sale from one *Anderson*. The defendant, being an officer, read in evidence an execution against *Anderson*, &c.; and, on his motion, a nonsuit was ordered. Justice BRONSON, in pronouncing the opinion, observes, that "the exception is mainly directed against the power of the Judge to nonsuit the plaintiff after

evidence had been given on both sides, a position which cannot be maintained."

The rule is accurately and concisely stated by the Court, in *Pratt* v. *Hull*, 13 Johns. 335, thus; "we must assume that there was no dispute about the facts before the Court, or any weighing of testimony falling within the province of the jury; and, therefore, it was a pure question of law, whether, under a given state of facts, the plaintiff was, in law, entitled to recover. And, unless this was a question for the Court, there is no meaning in what has been considered a salutary rule in our courts of justice, that, to questions of law, the Judges "are to respond, and to questions of fact, the jury." Likewise, in the case now under consideration, there was no dispute about the facts, nor any testimony to be weighed. The plaintiffs had proved that the cash premiums had not been paid, which was made by the by-laws one of the indispensable prerequisites to the delivery of the policies; and they had derived no "aid from the defendants' testimony," either on the direct or cross-examination, and consequently the ruling, the subject matter of these exceptions, was, in the language of this Court, in *Lyon* v. *Sibley*, 32 Maine, 576, cited by defendants' counsel, "based solely upon that principle which secures to the Court and the jury their respective provinces." The ruling did in no particular conflict with the reasons assigned in that case for sustaining the exceptions. There the plaintiff had introduced proof that he was once the owner of a mill log, which subsequently had been used by the defendant. In defence, it was shown that the defendant and one *French* had used the log as a portion of the materials in constructing their boom, which they afterwards sold to one *Ward*. From this testimony, it is difficult to perceive, why the plaintiff, instead of being nonsuited, should not have recovered on one of the money counts. At all events, it is manifest that the province of the jury was invaded. One *dictum*, however, has crept into the language of the Court, in that opinion, which should here be corrected. The Court is made to say, that "after evidence on both sides, the defendant has a right to in-

sist that a verdict be rendered." If such be the rule, it is not made apparent, how the *plaintiff*, the excepting party, should derive benefit, because the *defendant* may have been "aggrieved." Such, however, I conceive not to be the rule of practice, as adopted in this State or in Massachusetts, with certain exceptions created by statute; such, for instance, as where an account is filed in set-off. But, before the cause is committed to the jury, it is discretionary with the presiding Judge to permit the plaintiff to become nonsuit, as is settled in *Means* v. *Wells*, 12 Met. 362, (and by English and American authorities there cited,) in which "it is held by the Court, that where a discontinuance is not a matter of right, it may be granted by the Court on motion and on good cause shown." And provision is made, in contemplation of such results, by R. S., c. 115, § 89, for the payment of the cost in the former, before the party can commence another suit for the same cause of action. This principle is also recognized and enunciated in *Theobald* v. *Colby*, 35 Maine, 179.

The case of *Emerson* v. *Joy*, 34 Maine, 347, is in harmony with the decisions to which I have already referred. The plaintiff had established his claim, and the nonsuit was ordered upon testimony introduced by the defendant, the credibility of which was for the consideration of the jury and not for the Judge; if not believed, the plaintiff was entitled to recover. The subsequent and final remark of the Court could have relation only to the subject matter of the evidence in that suit, and not to evidence irrelevant, or about which there is no dispute. The conclusion to which I have come, therefore, is, that the ruling was correct, and that the exceptions should be overruled.

DAVID L. GUPTILL *versus* NOAH DAMON.

The construction of a written contract is a question of law, to be decided by the Court.

But in an unwritten contract, circumstances in proof may essentially vary the literal import of the language used; and it is not the province of the presiding Judge to give a construction to the language, as an imperative rule of law.

It is for the jury alone to determine from all the evidence, what was said and done by the parties to a verbal contract, and therefrom to find their intention.

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

This was ASSUMPSIT on an alleged contract of warranty of the soundness of a horse sold by the defendant to the plaintiff, and for breach thereof.

There was evidence tending to show on the part of the plaintiff, that the horse was unsound immediately after the sale, and on the part of the defendant, that the horse was sound up to the time of the sale.

The only evidence of the warranty was derived from the admissions of the parties subsequently made.

One witness, on the part of the plaintiff, testified that the plaintiff, in his hearing, asked the defendant "if he did not sell him the horse for a sound horse," and that defendant replied that he did.

A witness called by defendant, testified that he asked the plaintiff if "defendant warranted the horse to him," and that plaintiff replied that "he did not; that he would not warrant any horse."

The Judge, among other things, instructed the jury, that if they found that the defendant did, at the time of the sale, say to the plaintiff, "I sell you the horse for a sound horse, but I will not warrant him," then, as matter of law, there was no warranty.

The jury returned a verdict for the defendant.

To the foregoing ruling and instruction, the plaintiff excepted.

Paine and *Glazier*, for plaintiff.

The plaintiff should not have been required to prove the horse unsound.

Rule 9 of this Court. — "All matters set forth in the writ and declaration which are not specifically denied, shall be regarded as admitted."

The declaration alleges a promise and a breach, and the specification does not deny the breach.

The Judge erred in giving the instruction he did.

Any distinct assertion by the vendor during the negotiation, intended to bring about a sale and having that effect, will be treated as a warranty. *Hastings* v. *Lovering*, 2 Pick. 214; *Hillman* v. *Wilcox*, 30 Maine, 170; *Osgood* v. *Lewis*, Har. & Gil. 495.

In *Wood* v. *Smith*, 4 C. & P. 45, the buyer said, "she is sound, of course." The seller replied "yes, to the best of my knowledge." On being asked if he would warrant, he said, "I never warrant — I would not warrant even myself." Held to be a qualified warranty.

Assumpsit on breach of warranty will lie, when defendant knew what he affirmed to be false. *Hillman* v. *Wilcox*, 30 Maine, 170.

Morrill and *Mills*, for defendant.

TENNEY, C. J. — This action is assumpsit upon the alleged warranty of the soundness of a horse, purchased by the plaintiff of the defendant. At the trial, it was a question whether the allegation was satisfactorily proved or not. The evidence consisted of confessions represented by witnesses to have been made by each party after the sale.

The Judge instructed the jury, that if they found the defendant did, at the time of the sale, say to the plaintiff, "I sell you the horse for a sound horse, but I will not warrant him," then, as matter of law, there was no warranty.

It was for the jury alone to determine, from the evidence, what was said and done by the parties, and therefrom, under

all the circumstances attending the transaction and connected therewith, exhibited in evidence, if any such there were, to find their intention.

The meaning of the parties to a written contract, is a question of law to be decided by the Court. But when the contract alleged is not attempted to be shown by any written instrument, circumstances in proof may essentially vary the literal import of the language employed; and it is not the province of the Judge to give a construction to the language represented to have been used by the parties, as an imperative rule of law. *Homans* v. *Lombard*, 21 Maine, 308; *Copeland* v. *Hall*, 29 Maine, 93; *Houghton* v. *Houghton*, 37 Maine, 72.

The instruction given restricted the jury, in their consideration of the evidence, to limits not fully authorized by law.

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

RICE, APPLETON and MAY, J. J., concurred.

CUTTING, J., dissented, and gave the following opinion: —

This action is attempted to be sustained upon the alleged contract of warranty in the sale of a horse, tried on the general issue, and specifications of defence under the ninth rule of this Court, which requires the party to be confined to the grounds of defence therein set forth. "And all matters and things, set forth in the declaration, which are not specifically denied, shall be regarded as admitted for the purposes of the trial." The specifications filed, deny "all such promises, undertakings or engagements, as are set forth in the plaintiff's declaration." And while the plaintiff admits that the promise is specifically denied, at the same time, he contends that the breach is otherwise. But, that the greater includes the less, is a maxim of law, as well as an axiom in geometry; and after the defendant had denied any warranty, it would seem to have been not only superfluous, but an exhibition of bad taste in pleading, to deny a breach of a non-existing or controverted contract. Such further denial would have assimi-

lated into the inconsistent positions taken in a certain traditional defence, so often recited by *junior* members of the bar.

The question, made at the trial, was principally as to the legal effect of the testimony submitted, which was derived entirely from the *confessions* of the parties as to the terms of the contract; the defendant admitting that he "sold the horse for a sound horse," and the plaintiff, that "the horse was not warranted to him." In order to reconcile this evidence, the jury might very reasonably come to the conclusion, that the admission of both parties referred to the same time, and were made in the same connection. The contract, then, in relation to the warranty, would be this:—"I sell you the horse for a sound horse, but I will not warrant him." As to the fact, whether such words were spoken at the time of the sale, or not, was a question of fact *submitted* to the jury. But if found in the affirmative, the jury could not render a general verdict without instructions as to the legal import of such language; and it was the duty of the Judge thus hypothetically to instruct them; otherwise, their finding must have been special, leaving the conclusions of law to be drawn subsequently by the Court, which is not usual in practice, although either mode might lead to the same result. The one form or the other must be adopted, or questions of law, as well as matters of fact, must, from necessity, be submitted to the jury. The instructions, in this respect, were in exact conformity to the law, as laid down by the Court in *Rice* v. *Dwight Manufacturing Co.*, 2 Cush. 80, where FORBES, J., in delivering the opinion, remarks:—"It was, no doubt, the province of the jury to decide all questions of fact; but it was the duty of the Court to instruct the jury, hypothetically, that if a particular fact or combination of facts was proved, certain legal consequences would follow. The *language* used by the parties while contracting, may be proved, and when proved, it is to be taken in its *usual* and *ordinary* acceptation; and however difficult it may be, and frequently is, to put a just construction upon it, still that duty devolves upon the Court. *The jury*

are to find whether or not the language was used; the Court are to instruct the jury as to its legal effect, if used."

The mode of the instructions, therefore, being in accordance with both usage and authority, the remaining question, and the one principally relied upon, is, were the instructions legally correct as applicable to the contract as found by the jury; or, in other words, if a person sells a thing as sound, but will not warrant it as such, is he notwithstanding a warrantor? And this very proposition shows the correctness of my conclusion upon the former point. For, if eminent counsel disagree as to the force and effect of language, how can it be presumed that the jury, without instructions in matters of law, could come to a correct legal result? Suppose the Judge had said to the jury, "if, from the testimony, gentlemen, you should find a warranty, you may then proceed to consider," &c. Such a charge would have presented to the jury the same question of law that is now presented to us.

This case differs from those cited by the plaintiff's counsel in some important particulars. Here there was *no evidence offered*, that defendant knew at the time of the sale, that the horse was unsound, or that the parties relied upon any representation as a warranty.

In *Hillman* v. *Wilcox*, 30 Maine, 170, the Court say:—"If the defendant represented his oxen to be sound, when he knew they were not, and the parties relied upon the representation as a warranty, he would undoubtedly be liable to an action *ex delicto*, for the deceit. The plaintiff might elect to sue him in assumpsit or case, if the representations were intended as a warranty."

In *Wood* v. *Smith*, 4 C. & P. 45, the allegation was, that the defendant said the mare was sound to the best of his knowledge, and the proof was, that she was not sound, and the defendant knew it.

In *Hastings* v. *Lovering*, 2 Pick. 214, it is decided, that a representation amounts to a warranty, when it is so intended by the parties. Here there could have been no such intention, for the language used wholly negatives such a conclusion. I think, therefore, that the exceptions should be overruled.

JOHN HAYNES *versus* JOHN L. HUNNEWELL.

A principal, whose agent, duly authorized, has completed a purchase of stock for him, cannot repudiate the transaction by reason of any neglect of his agent to inform him of the fact.

The treasurer of a corporation, who purchases stock in its behalf, and by direction of its authorized officers, does not render himself personally liable to pay therefor; but otherwise, if he really acts for himself, or without authority from the corporation, though purporting to act as its agent and in its behalf.

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

ASSUMPSIT to recover for fourteen shares of stock in the North Wayne Scythe Company.

In a suit against that company, it was thought necessary that plaintiff should be a witness. To be so, his stock, consisting of fourteen shares, must be sold. They were transferred to defendant, by L. M. Morrill, who was counsel for the company; and the plaintiff testified. He also stated that his shares were sold to defendant.

The only authority which Morrill had is contained in the following letters:—

"Boston, Oct. 28th, 1852.

"L. M. Morrill, Esq., Augusta, Me.

"I will buy stock of Haynes at seventy dollars per share, company's note, six months' credit. He can buy it back, if within four months. "John L. Hunnewell."

"Augusta, Nov. 5th, 1852.

"Dear Sir:—Haynes thinks he ought to have *more than* 70 *per cent.* for his stock. Thinks he will be content to get 80 cents. Will you authorize me to say that amount for the company and take a transfer?

"I think Haynes' testimony quite important—nearly indispensable, and should be glad to avail ourselves of it.

"Please instruct me by return of mail, or by telegraph on Monday next, as the case is set down for trial for that day.

"Yours, "L. M. Morrill.

"John L. Hunnewell, Esq."

Telegraphic despatch.

"Boston, Nov. 8, 1852.

"L. M. Morrill, Esq.

"Since I wrote last, I have tried to sell stock, and have so far succeeded, as to have an offer of 75, and think I shall get 80, but without doubt 77½. Say to Haynes to transfer the stock to me personally, and I will send him the notes of the company, or what I may receive, and it shall be good. Let him know that if he transfers to me at 70, he can buy back at any time within three months, by giving notice in thirty days from transfer. If above that, it must be an actual sale.

"J. L. Hunnewell, Treas'r."

"Augusta, Dec. 10, 1852.

"Dear Sir:—Agreeably to your despatch, I arranged with Mr. Haynes for his shares at 80 cents, to be paid as you proposed, and he has left the certificates with me to close the matter with you.

"There are 14 shares, and he would like to have two notes; one for $1000, and the other for balance, $120, on the time proposed. "Yours, "L. M. Morrill."

"Boston, Dec. 17th, 1852.

"L. M. Morrill, Esq., Augusta.

"Will you ascertain and let me know if this is a sale of the stock, and not to be re-transferred again at same price, as it will make some difference in my plans, and in my letter we were to know this when transferred.

"The company are disposed to do all they can in this suit, but the property was conveyed by Mr. D. by a warrantee deed against the claims of all persons.

"You know as well as we how far such things go, but we give it attention in order that it shall be prompt, but not that in a pecuniary way we are in the least interested.

"Yours, "John L. Hunnewell, Treas'r."

"Augusta, Dec. 19th, 1852.

"Dear Sir:—I understand the transfer of the stock to you, to be a sale absolute, and not to be re-transferred except at your option. Haynes testified he had sold his stock, and I am not instructed to take from you the right to re-purchase.

"I should, therefore, feel authorized to deliver the stock to you unconditionally, upon receipt of notes.

"I perfectly understand your position in making the defence in this suit, and that you do not intend to waive any rights you may have for indemnity over against your grantor.

"Your ob't serv't, "L. M. Morrill.

"J. L. Hunnewell, Boston."

"Boston, Dec. 20th, 1852.

"L. M. Morrill, Esq.

"Mr. Haynes' stock may be transferred to J. L. Hunnewell, Treasurer, as I spoke to one or two parties about it, and I will send him company notes, or I may send the person's notes who takes it, which I will decide upon when I transfer.

"I will be responsible that he shall receive either the company's or the purchaser's note.

"Yours truly, "J. L. Hunnewell, Treas'r."

The defendant offered in evidence the two certificates of stock, with the plaintiff's transfer thereon, dated Oct. 28, 1852.

He also offered a letter of plaintiff of which this is the copy.

"Kent's Hill, May 22d, 1853.

"Mr. J. L. Hunnewell,—Dear Sir:—I received a very strange letter from you through Mr. J. F. Taylor of North Wayne, this morning.

"I should not perhaps have replied to it had it not contained some certificates of stock which belong to you. As it is, I will merely say, I sold to you last fall, as treasurer of the company, fourteen shares of the stock of the North Wayne Scythe Company.

"Lot M. Morrill, Esq., of Augusta, attorney for said company, showing authority to purchase the same, under the sig-

nature of yourself as treasurer, and promising to pay me therefor in not over six months at eighty dollars per share.

"I accordingly made the transfer of the shares, and, as you requested, to you personally. But I am sorry to add, I have not yet received my pay for them, though the time longest set has some time since expired, and present appearances indicate that I shall be under the necessity of enforcing payment.

"Yours, &c., "John Haynes."

On this evidence the Court were authorized to render a legal judgment.

J. H. Williams, for defendant.

Bradbury, for plaintiff.

TENNEY, J.—In the fall of 1852, a suit in favor of one Underwood against the North Wayne Scythe Company was pending, for the recovery of damages alleged to have been sustained by the flowing of the complainant's land. The parties to this action were interested as stockholders in that company, and it was supposed by both, that the knowledge possessed by the plaintiff would be very material to the defence of the flowage suit, if he could be made a competent witness. A correspondence took place between them in relation to a sale of the plaintiff's stock to the defendant, who offered the sum of $70 a share, company's note, six months' credit, with the privilege of repurchasing in four months, in a letter of October 28, 1852. L. M. Morrill was counsel for the company in the action of Underwood against it; and he wrote the defendant on Nov. 5, that Haynes thought he ought to have more than 70 per cent. for his stock. "Thinks he will be content to get 80 cents." "Will you authorize me to say that amount for the company, and take a transfer?" He writes further, "I think Haynes' testimony quite important, nearly indispensable, and should be glad to avail ourselves of it." He requested that he be instructed by return of mail, or by telegraph, as the case was set down for trial on Monday, then next.

On Nov. 8, the day assigned for the trial of the complaint,

the defendant sent to Morrill by telegraph, saying he thought he should obtain "80" for the plaintiff's stock, and adds, "Say to Haynes to transfer the stock to me personally, and I will send him the notes of the company, or what I receive, and *it shall be good.* Let him know, that if he transfers to me at 70, he can buy back at any time within three months, by giving notice in thirty days from transfer. If above that, it must be an absolute sale."

After the instructions of the defendant to Morrill, of Nov. 8, and before the trial of the suit against the company, Morrill stated to the plaintiff, that the price which the defendant was to give, was $80 a share, and transfers were written on the certificates, in the hand of the plaintiff, were executed by the plaintiff, and delivered to him immediately. Haynes testified in the trial, and, in answer to a question put to him on the stand, touching his interest, stated that he had sold his shares to the defendant.

On Dec. 10, 1852, Morrill informed the defendant, by letter, of the transfer of the shares to him, that he had possession of the certificates, and that he was ready to receive the notes which were to be given in payment. In a letter of Dec. 17, 1852, the defendant inquired of Morrill, whether the sale was absolute, and not to be re-transferred, which was answered on Dec. 19, that the sale was absolute. On Dec. 20, 1852, the defendant wrote to Morrill, saying, that the stock of Haynes might be transferred to J. L. Hunnewell, "Treasurer," as he had spoken to one or two parties about it, and would send him the company notes, or might send the note of the person who should take it, which he would decide upon, when he, [the writer,] should transfer; and said, "I will be responsible, that he shall receive either the company's or the purchaser's note." All the letters written to Morrill, referred to, after that of Oct. 28, 1852, were signed "J. L. Hunnewell, Treasurer."

The authority given to Morrill, to say to the plaintiff, to transfer the shares to him, was in answer to the question, whether he would authorize him to say that the price should

be $80 a share, and take a transfer. To secure one great object of the negotiation in the proposed transfer, it was necessary that the contract should be closed immediately. The transfer was made, so that the plaintiff treated it as effectual, to divest his interest; he did not insist upon the payment, before the transfer was perfect by the delivery of the certificates. Morrill was the agent of the defendant, and received the certificates as such; and thereupon the contract was concluded.

It is objected, that so long a time elapsed after the authority was given by the defendant to purchase the shares, and notice to him of the transfer, that he was excused from a compliance with his offer. The contract being complete between the plaintiff and the defendant, through his agent, immediately after the offer was made, the plaintiff could not have been affected by the delay, for which he was in nowise responsible. But the delay was not injurious to the defendant. The power which he gave to Morrill, to take the transfer at $80 a share, was executed. No advantage was attempted by the plaintiff, because the notes in payment were not met, but he was ready long afterwards to receive the payment in the mode contemplated.

The letters, addressed to Morrill, after the defendant was informed of the transfer, treated the bargain by the defendant, as consummated on the part of the plaintiff, and no objection was made on account of not having been seasonably informed thereof; but the inquiries therein, were based upon the assumption, that nothing had been wanting on the part of the plaintiff and Mr. Morrill.

The defence is also relied upon, that the defendant in the transaction, acted in behalf of the North Wayne Scythe Company, and therefore cannot be personally responsible. If he was merely acting for the company, carrying out the offers which it, through its authorized officers, had directed him to make and accept, the objection is well taken. But if it appears, from the whole evidence, that he was acting in his own behalf, and not by the authority of the company, he will be

personally liable, notwithstanding he signed his name as treasurer, and might have expected that the company would adopt and ratify his doings.

The transfer was made to him, and not to the company, by his express direction. As late as Dec. 20, 1852, it appears, that it was an open question, whether the company or some other party would take the stock; but the language is express, that a transfer from him was contemplated, before he could determine what notes would be sent in payment. And, when he says in the letter of that date, "I will be responsible that the plaintiff shall receive, either the company's or the purchaser's note," and in the letter of November 8, that the notes of the company, or what he may receive, "shall be good," it must be understood, that he acted for himself alone. And it does not appear, that the directors of the company had any action upon the question of the purchase of the shares; nor that the defendant had any agency whatever from the company, or the officers, who had power to confer it.

Defendant defaulted.

RICE and APPLETON, J. J., concurred.

JAMES B. THORNTON *versus* SETH WOOD.

A mortgagee has no attachable interest in the premises so long as the mortgage remains open.

The purchaser of an equity of redemption sold on execution, has no attachable interest in the premises during the year within which it may be redeemed.

A. mortgaged certain premises to B. A.'s equity of redemption was then sold on execution and purchased by B. C. then attached the premises in a suit against B., and levied thereon the execution which issued on the judgment recovered by him in the suit. But A. paid the debt secured by the mortgage before foreclosure; also the sum for which the equity sold, and interest, within one year: — *Held*, that B. had no attachable interest in the premises, and that C. acquired neither legal nor equitable claim thereto by the attachment and levy.

The payment of a debt secured by mortgage may be proved by parol; and so may the payment of the sum to redeem an equity of redemption sold on execution.

On Agreed Statement of Facts, from *Nisi Prius*.

This was a writ of entry, demanding an undivided half of a house and lot in Gardiner.

It was agreed that the original title was in defendant.

The demandant relied for his title upon a deed from Edmund Perkins, conveying the premises to him, dated April 7, 1852.

Also a record of a suit, *Edmund Perkins* v. *Phineas Pratt*, from which it appears that an attachment of all Pratt's real estate was made August 30th, 1849; judgment recovered Sept. 27th, 1851, for $2268,53 debt, and $21,44 cost; and that a levy of the execution, issued thereon, was made on the premises October 12th, 1851.

Also a deed from Seth Wood to Mason Damon and Phineas Pratt, dated Oct. 5th, 1847, conveying the premises in mortgage to indemnify and secure them harmless as indorsers of a note made by Seth Wood, and payable to said Pratt and Damon, or order, in one year from date, for $1500, and by them indorsed to Lucretia Jewett.

Also a record of a suit, *Scudder, Cordis & Co.* v. *Seth Wood*, in which judgment was recovered at the August term, 1848, execution issued thereon August 17th, 1848, in which the right of Seth Wood to redeem the premises was sold by auction to Phineas Pratt and Noah Woods for $800, and a conveyance thereof was made to them by the officer by deed dated Dec. 4th, 1848.

Phineas Pratt, called by defendant, stated that he never was called upon to pay the note described in the mortgage aforesaid, and never did pay it, or any part thereof, but that the same was paid by Noah Woods for Seth Wood, with money received by him as proceeds of certain personal property put into the hands of said Noah Woods, Phineas Pratt, Mason Damon and Richard Clay, by said Seth Wood, by mortgage dated Jan. 19th, 1848, for the purpose of paying this note and other claims against said Seth Wood.

Mr. Pratt further stated, that the said $800, paid for the equity of redemption aforesaid, was wholly paid, with the in-

terest thereon, from the proceeds of property of Seth Wood, put into their hands by said Seth, for the purpose of being converted into money and applied to the payment of said sum and interest. The last payment was made November 28th, 1848.

The Court is to determine the case upon the foregoing statement of facts and evidence, with authority to draw the same inferences that a jury might, and to render such judgment as the law and facts require.

Bradbury & Morrill, for plaintiff.

Whittemore and *Danforth*, for defendant.

Pratt's interest as mortgagee was not attachable, even if he had such an interest at the time of the attachment. *Smith* v. *People's Bank*, 24 Maine, 115; *McLaughlin* v. *Shepard*, 32 Maine, 143; *Coombs* v. *Warren*, 34 Maine, 92.

Neither was his interest, as purchaser of the equity, liable to attachment, for the right of Wood to redeem, not having expired, that interest was similar to that of the mortgagee. Besides, he got no interest as purchaser of the equity, for Wood, having virtually paid the note secured by mortgage, by the mortgage of personal property, Jan. 19th, 1848, before the attachment was made, the mortgage was rendered void. *Randall* v. *Farnham*, 36 Maine, 86.

This right in equity too, whatever it was, was redeemed by Wood long before the levy. So that, at the time of the levy, Pratt had no interest whatever, Wood having released him from his note, and paid his claim as purchaser of the equity, as by law was his right to do. Pratt being authorized to receive the pay, and no other person having that authority, his receiving it must necessarily have divested him of all interest in the premises. Otherwise, Wood must lose his property, although ready and willing to redeem, and in this case having actually redeemed.

But if the levy operated at all, it could only operate so as to give plaintiff the right to redeem under the mortgage. Now Seth Wood was the promisor on the note secured by the mortgage to Pratt and Damon; and having actually paid the

note, as he was bound to do, of course the mortgage could not be made operative as against him. But he being in possession of the premises, the law gives him the rights of an assignee of the mortgage; his possession of the premises, so far as this suit is concerned, is equivalent to an actual assignment, and the plaintiff has no right to the possession, even, until he redeems the mortgage. *Kinnear* v. *Lowell*, 34 Maine, 304; *Barker* v. *Parker*, 4 Pick. 505; *Willard* v. *Hardy*, 5 N. H., 252.

TENNEY, C. J.—The only title of the demandant to the premises, is under a levy of an execution in favor of his grantor against Phineas Pratt, made on October 12, 1851, issued on a judgment rendered September 27, 1851, an attachment having been returned on the original writ, as made on August 30, 1849.

Pratt and Mason Damon held a mortgage of the premises from the tenant, dated Oct. 7, 1847, to secure them against liability as accommodation indorsers for him on a note of $1500, held by Lucretia Jewett. This note was paid from means provided by the mortgager, without any call upon the mortgagees.

The right in equity of redeeming from the mortgage aforesaid was purchased at an officer's sale thereof, upon execution against Wood, in favor of Scudder, Cordis & Co. by said Pratt and Noah Woods, on Sept. 30, 1848, for the sum of $800, which, with the interest thereon, was caused to be paid by the debtor as early as November 28, 1848.

So long as the mortgage to Pratt and Damon was open, the mortgagees had no attachable interest. *Blanchard* v. *Colburn & ux.*, 16 Mass. 345; *Smith* v. *People's Bank*, 24 Maine, 185; *Eaton* v. *Whiting*, 3 Pick. 484. At what time this mortgage was extinguished by payment, does not appear, and is immaterial, as Pratt never had any interest therein, which was subject to attachment.

An undivided moiety of an equity of redemption in the premises was acquired by Pratt at the time of the sale there-

of; but for the space of one year from the time of his purchase, the same reasons, on which the principle rests that the right of the mortgagee cannot be taken on mesne process and execution, apply with equal force to the right of redeeming from a sale of the equity of redemption, made by an officer, upon execution.

When, therefore, the return of the attachment was made upon the writ of the demandant's grantor, against Pratt, the latter had no interest, which could be attached. And, at the time that the levy was made upon the execution obtained in that suit, if the tenant had not redeemed from the sale, and had not paid the mortgage, the legal estate was in Pratt and Damon, and the equitable estate in Pratt and Woods, after the expiration of one year from the time the latter became the purchasers. But before the levy, on the execution against Pratt, the tenant had paid the note, named in the condition of his mortgage, and had paid the sum for which the equity was purchased, and interest thereon, in season for redemption. So that at the time of the extent upon the premises, Pratt was completely divested of all title therein. *Jewett* v. *Felker*, 2 Greenl. 339. The payment of the debt secured by a mortgage may be proved by parol; and the payment of the sum to redeem an equity of redemption, sold on execution, may be shown in the same manner. In this case such proof was admitted without objection, or agreed to exist.

The claim of the demandant has no equitable or legal foundation. *Judgment for the tenant.*

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

STATE OF MAINE *versus* JOSEPH HASTY.

A certificate, under the hand of the governor and the seal of State, attested by the secretary, that a person had been appointed and qualified to solemnize marriages, and that he continues to hold the office, is not legal evidence of the person's authority.

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

INDICTMENT, for adultery with one Phebe Ann Smith, tried at the November term, 1854. Plea, not guilty.

To prove the marriage of defendant, the counsel for the government introduced, subject to objection, an extract from the records of the town of Waterville, made by the town clerk, of such marriage, on July 11, 1850, as solemnized by "Calvin Gardiner, pastor of the First Universalist Society, Waterville;" also, subject to like objection, a paper, signed by the governor, bearing the seal of the State, of the following tenor:—

"State of Maine. WILLIAM G. CROSBY, Governor of the State of Maine. To all who shall see these presents, Greeting.

[L. S.] "Know ye, That Rev. Calvin Gardiner of Waterville, in the county of Kennebec, was on the twenty-first day of October, A. D. 1833, appointed and commissioned, and on the twenty-fifth day of October, A. D. 1833, qualified to solemnize marriages in each and every county through the State; that he still continues to hold said office; and that to his acts and attestations, as such, full faith and credit are and ought to be given in and out of Court.

"In testimony whereof, I have caused the seal of the State to be hereunto affixed.

"Given under my hand, at Augusta, this nineteenth day of September, in the year of our Lord one thousand eight hundred and fifty-four, and in the seventy-ninth year of the independence of the United States of America.

"By the Governor.

"Alden Jackson, Secretary of State."

Upon this point, there was no additional evidence, except

that defendant said to the officer when he was arrested, "that he did not care so much on his own account as he did on account of his wife."

Phebe Ann Smith testified to the effect, that the offence was committed, and against her will.

The counsel for defendant requested the Court to instruct the jury, that if the higher offence was committed, the verdict on this indictment should be for defendant. He declined to give the instruction, and the respondent was convicted. The jury also, in answer to a written question, found that the offence was committed against the will of the female.

Drummond and *Morrill*, for defendant, contended: —

1. The crime charged in the indictment, was *merged* in the one proved, and cited several authorities.

2. There was no sufficient proof of the marriage. The extract from the town record, was not admissible, without proof of identity. *State* v. *Wedgwood*, 8 Maine, 75; *Ham's case*, 2 Fairfield, 391; *Com.* v. *Norcross*, 9 Mass. 492.

3. The paper from the Secretary of State was not admissible. It was not evidence by any statute provision, nor by any known rule of law.

R. H. Vose, for the State.

By the Court. — The paper from the Secretary of State, introduced as evidence, was not the commission giving authority to the clergyman to solemnize marriages, nor was it the copy of any record. It was not legal evidence.

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

COUNTY OF SOMERSET.

INHABITANTS OF MERCER *versus* INHABITANTS OF BINGHAM.

A. offered to be defaulted for a given sum, in the suit brought by B. against him, which offer B. accepted at a subsequent term. A. claimed costs from the date of the record of his offer upon the docket to the time of its acceptance. — *Held*, that A. was not entitled to costs, but that B. was entitled to them up to the date of the default.

In order to give the defendant, who has filed his offer to be defaulted, a right to costs under R. S. of 1841, c. 115, § 22, the plaintiff must, 1st, proceed to an actual trial, and 2d, fail to recover a "greater sum for his debt or damage" than that for which defendant offered to be defaulted.

If there has been no trial in the suit, the defendant is neither entitled to costs by reason of his offer, nor thereby relieved from paying costs to the plaintiff.

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

This was an action of ASSUMPSIT for the recovery of the value of supplies furnished by the plaintiffs to certain poor persons, alleged to have a settlement in the town of Bingham. At an early day after the entry of the action, the defendants filed an offer, in writing, to be defaulted for a certain sum, which offer was entered upon the docket, and the offer, the filing thereof, and the entry upon the docket, were such as the statute requires in R. S., c. 115, § 22. The action was continued, without the acceptance of the offer, from March term, 1855, to the September term, when the action was put upon the trial docket; but, before it was called for trial, the offer of the defendants was accepted, and they were defaulted therefor. The defendants claimed costs from the time the offer was filed and entry thereof made upon the docket, to the time of the default, which the Court disallowed. The plaintiffs moved for costs to the time of the default, which were allowed by the Court. To these rulings the defendants excepted.

Hutchinson, for defendants.

J. S. Abbott, for plaintiffs.

HATHAWAY, J.— The defendants were not entitled to costs, and the plaintiffs must have their costs until the default was entered in the action. See *Pingree* v. *Snell*, (page 53 of this volume,) in which case the subject was fully considered.

Exceptions overruled.

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

RICE, MAY and GOODENOW, J. J., dissented; and Mr. Justice MAY expressed the views of the dissentients in the following opinion:—

The correctness of the ruling in this case, depends upon the proper construction of the Revised Statutes, c. 115, § 22. Until the statute of 1835, c. 165, § 6, the defendant in a suit, "founded on contract, express or implied, bond, or other specialty, or judgment of court," in which more was claimed than was actually due, had no mode, except by a tender, or bringing money into court under the common rule, of permitting the plaintiff to take judgment for the whole amount to which he was justly entitled, and of avoiding the excess of the plaintiff's claim, without subjecting himself to all the costs which might accrue in the avoidance of such excess. The hardship of the rule, which subjected a party to the payment of additional costs, when such party, being unable to pay his debt before judgment, was in fact willing that judgment should go against him for the whole amount which the plaintiff was entitled to recover, attracting the attention of the Legislature, was undoubtedly the reason which induced the enactment of the statute of 1835. The object of its provisions, therefore, was to relieve an honest debtor from accumulating costs occasioned solely by the unjust demands of his creditor.

That in the construction of statutes, it is proper to have regard to all the statutes enacted in *pari materia*, cannot be denied; and, often an existing statute will be much better understood, by examining it, in the light of preceding statutes upon the same subject, although they may have been repealed. We should also keep in view the mischiefs which the statutes were designed to prevent.

The provisions of the statute to which we are now called to give a construction, R. S., c. 115, § 22, before cited, are but a revision of the statute of 1835. The general purpose of both statutes is the same; with slight variations in the phraseology, the two statutes will be found to be substantially, if not identically, alike in their meaning, except in the following provisions of the statute of 1835: "And if, after such offer and consent," referring to the offer to be defaulted, provided for in what precedes, "the plaintiff shall neglect to accept of judgment for the sum so offered *for more than* two days, the defendant shall be entitled to recover costs *afterwards*, until the plaintiff shall accept such offer, or surcease his suit, or shall recover a greater sum, and execution may issue therefor accordingly, or such costs may be off-set, as herein provided in case of trial and recovery of no greater sum than the judgment tendered." These provisions are entirely omitted in the revision.

It is conceded, that "according to the clear and express words" of both statutes, "the defendant is entitled to costs only upon the happening of two events,—first, that after such offer the plaintiff *shall proceed to trial;*" and, secondly, "shall recover no greater sum for his debt or damages up to the time when the offer was made," than the amount specified in the offer. If the statute of 1835 had not contained the provisions which are omitted in the revision, the general purpose of the statute being kept in view, can there be any reasonable doubt as to what was intended by either of the conditions upon which the defendant was to recover his costs? Was not the offer, provided for by the statute, intended to be substituted in some respects for a tender, and until modified in its effects by the statute of 1847, c. 31, § 2, have not this Court held that such effects were similar to those resulting from a tender, or from bringing money into court under the common rule? *Fogg* v. *Hill*, 21 Maine, 529. Indeed, the statute itself speaks of the "offer" and "judgment" thereon, being *tendered.*

By the statute of 1847, just cited, it seems to have been the intention to deprive the offer of all its incidental effects

upon the case, except upon the question of costs. *Wentworth* v. *Lord*, 39 Maine, 71. Regarding the offer upon that question only as in the nature of a tender, what is meant by proceeding to trial after it is made? Does it mean an *actual* trial, or an *expected* trial? Is not the plaintiff to be regarded as proceeding to trial, when he declines for an unreasonable time to accept the offer, and holds himself out to the defendant as insisting upon that part of his claim which the defendant denies? Is that a reasonable construction of the words, "proceed to trial," which will allow the plaintiff to progress with his cause upon the trial docket, term after term, keeping the defendant, who is willing that he shall have judgment for all that is his due, in court, with his counsel and witnesses, and perhaps at great expense, and then, when the cause is reached, before an *actual trial* is had, to accept the offer, and thereby not only to prevent the defendant from recovering his subsequent costs, but actually entitling the plaintiff to recover his own? Is such a construction in harmony with the general purpose of the statute? One definition of the preposition *to*, as laid down by our best lexicographers, is, "towards." Using it in this sense, to proceed *to* trial, simply means proceeding *towards* a trial; *that trial which the proceedings apparently indicate*, and which, from the position assumed by the plaintiff, and held out to the defendant, is naturally to be expected. It is not *a trial*, but *a proceeding to trial*, which the statute has made a condition. *To proceed to trial* is, therefore, in our judgment, necessarily nothing more than going forward with the cause after the offer, in such a manner as to indicate ostensibly that a trial is intended. Such a construction, will be found to be not only more consistent with the general purpose of the statute, than that which requires an actual trial, but more in harmony with the justice of the case, and the analogies of the law in cases of tender or bringing money into court. The first contingency, therefore, upon which a defendant, under the statute, is entitled to his costs, when considered independently of the provision which is

omitted in its revision, does not necessarily imply an actual trial, but may happen, and often does happen, without it.

In relation to the second contingency, the plaintiff may properly be said to have recovered no more than the offer, when the judgment, however made up, whether by a trial or otherwise, shows that the amount recovered, up to the time when the offer was made, is no more than the sum specified in the offer. The word "recover," does not, in itself, of necessity include the idea of a trial. The rendition of a judgment is all that is meant by a recovery under the statute. If, however, the language of either of the statutes, in relation to the contingencies upon which the defendant's right to costs depends, were susceptible of a different construction, in determining which is to prevail, the court are bound, if the language will fairly admit of it, to adopt that which will best effectuate the general design of the statutes, and remedy the mischiefs which they were intended to prevent. Such construction must prevail, even if the strict letter of the statute would lead to a different result. Acting upon this universally admitted rule, we cannot doubt but that either of the two statutes we have been considering, is, if we lay wholly out of view the provisions in the statute of 1835, which were not incorporated into the statute as revised, not only fairly capable of receiving, but actually requires the construction we have adopted.

Before proceeding to consider the effect of the provisions of the statute of 1835, which were not adopted in the revision of 1840, we will remark that the words "time of *trial*," as contained in that part of the revised statute which declares that, upon the happening of the necessary contingencies, "the defendant shall recover his costs of the plaintiff from the time of such offer, up *to the time of trial*," for the reasons before stated, do not mean the time of an actual trial, but the time when the action is disposed of, and the judgment which is required by the second contingency is rendered; the word trial being used to designate what is usually the effect of a trial.

If the foregoing views are sound, then it follows, that unless there be something in the omitted provision of the statute of 1835, before recited, or in the fact of its omission in the statute as revised, which satisfactorily shows that the Legislature intended a different construction from that which we have given, the ruling of the Judge at *Nisi Prius*, is erroneous, and the defendant's exceptions must be sustained. What, then, was the original purpose of this provision? Was it intended to enlarge the rights of the defendant beyond those conferred in the preceding part of the Act, or was it a limitation upon those rights? The peculiar phraseology of the statute evidently indicates that it was drawn by some person unskilled in the drawing of statutes, and, perhaps, unaccustomed to legislation. If we are right in the construction which is given to the first part of the statute, that part confers upon the defendant all the rights which are contained in the part now omitted, except those that relate to the issuing of execution or the off-setting of his costs against whatever the plaintiff may recover. Without the omitted provisions, no time was fixed, except by implication, from which the defendant should be permitted to tax his costs. The principal object of these provisions was to make certain the time from which costs might be taxed, by limiting that time to the expiration of two days after the offer should be made. Without such limitation, costs must have been allowed from the time of the offer. These provisions, therefore, instead of enlarging, actually diminish the rights before conferred.

If this omitted part of the statute, as we have seen, is not a grant but a limitation upon rights before granted, then its omission in the statute, when revised, shows a legislative intention to drop the limitation and thus to leave the previous grant in full force. Hence the statute, as revised, provides for the taxation of the defendant's costs from the time of the offer. That part of the omitted clause which provides that the defendant shall be entitled to recover costs, after the offer, "until the plaintiff shall accept such offer, or surcease his suit, or shall recover a greater sum," seems to be but a re-

capitulation of the contingencies which may happen by reason of the plaintiff's proceeding to trial, all of which are included, although not particularly specified in the preceding part of the Act. The Legislature which revised the statutes, perceiving that such specification was unnecessary, and that it would be more reasonable to allow the defendant his costs from the time of the offer than from the expiration of two days after it, dropped the clause containing such specification and limitation from the statute. This amendment, also, is found to be in furtherance of the present tendency of the public mind, in its legislative action, and in accordance with the general object of these statutes, which was the protection of honest debtors against the burden of such unnecessary costs and expenses as might arise in defence of their rights, whenever a creditor should attempt to enforce an unfounded claim.

From the view which we have taken of the clause which was omitted in the revision of the statute, it appears, that there was nothing in its provisions, or in the fact of its omission, which calls for a construction of the revised statute differing from that which we have arrived at. Such construction can work no injury to the plaintiff, because he has full opportunity, when it is offered, to take a judgment for what is legally his due; and, if he thinks the offer does not embrace so much in amount as he is entitled to receive, he can litigate the question with his debtor; but if he do so, *by proceeding on with his cause apparently for trial*, and it subsequently turns out that he was in error, he must be held subject to such costs as his election to *proceed to trial*, has, under the provisions of the statute, imposed.

It will be seen, by referring to the more recent revision of the statutes in 1857, c. 82, § 21, that such revision is in substantial conformity with the construction now given; and perhaps it may not be too much to suppose, that the late Chief Justice of this Court, to whose learning and industry the last revision of the statutes was most judiciously confided, has embodied in the new statute what he regarded as a correct

judicial interpretation of the Revised Statutes of 1840, in view of the preceding enactment which we have discussed. If so, the opinion we have arrived at finds in his judgment strong confirmation. It is also believed that the almost uniform construction of the statute, at *Nisi Prius*, has been that which we have adopted.

The conclusion to which we have come, is, that, under the Revised Statutes of 1840, c. 115, § 22, if the defendant make an offer in writing, to be defaulted, and the plaintiff neglects to accept it, but proceeds with his action towards a trial, or apparently for that purpose, the defendant will be entitled to recover his costs after the offer, and the plaintiff cannot recover any costs accruing after it was made, notwithstanding it may appear that no actual trial was had; provided that it also appear that a judgment was rendered in the suit, and the amount recovered, up to the time of the offer, was no greater than the sum specified therein. The exceptions should, therefore, be sustained.

HORACE A. MAYHEW *versus* DANIEL PAINE, and ASA H. HANKERSON, *Trustee.*

The wife of A. tendered to B. a sum of money, to redeem real estate, which the latter held by mortgage as security for certain notes given by A., the wife claiming that the money was the fruits of her own earnings. The money not having been taken, it was deposited by her in the hands of C., subject to the order of the mortgagee, or her own order, in which condition it remained at the time of the service on C.: — *Held*, that C. could not be charged as trustee of A.

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

TRUSTEE DISCLOSURE. — The alleged trustee in this case disclosed the following facts: —

"Prior to the service of the plaintiff's trustee writ on me, Mrs. Harriet Paine, of Jackson Plantation, wife of Daniel Paine, of said Jackson Plantation, tendered to Charles Pike three hundred and twenty dollars in specie, and deposited the

same in my hands, to pay certain notes given by said Daniel Paine to said Pike, and to redeem certain land which was mortgaged by said Paine to Pike for security. Said money was in my hands at the time of the service of plaintiff's writ on me. She claimed right to redeem said land by virtue of a quitclaim deed given by Elisha Pettingill to her, bearing date July 9th, 1850, the description in which was as follows, to wit:—"All the right, title and interest in and to a certain lot of land situated in said Jackson Plantation, in the county of Franklin, and is the same I bought at a sheriff's sale, sold on execution in favor of R. Hiscock, and against Daniel Paine, as by sheriff's deed dated July 7th, 1849, and recorded in the Franklin Registry, vol. 16, page 546, will fully appear, reference being had thereto." She said, at the time of making said tender and deposit, that the money was her own earnings and resources; that she had supported herself for the last four years, during which time she had obtained said money as aforesaid. Said three hundred and twenty dollars has remained in my hands ever since said deposit was made, and is now in my hands, subject to Pike's order or to her order. At the time she made the tender to Pike, she exhibited to him the deed aforesaid described."

The Court ordered the trustee to be discharged; to which order the plaintiff excepted.

Webster and *Marshall*, for plaintiff.

TENNEY, C. J.—The money in the hands of the party summoned as trustee, was tendered by the wife of the principal defendant, to Charles Pike, to pay certain notes, given by her husband to Pike, and to redeem real estate, conveyed in mortgage for their security. It does not appear by the disclosure, whether the creditor positively refused to receive the money or not, when it was offered, but it not being taken, it was deposited in the hands of the supposed trustee, subject to Pike's order, or to her order.

The money so tendered and deposited, is claimed by the

plaintiff, as a fund in the hands of the depositary, belonging to the principal defendant, which can be reached by the process of foreign attachment.

If the money had been received by Pike, it would not probably be contended that it would be subject to attachment in his hands as trustee. It being due to him from the husband, whose money it is claimed to have been, by the facts disclosed, it would become his property. It was deposited for him, in payment of her husband's notes, and could be taken at any time, it not having been withdrawn, at the time of the service of the writ. The husband has not denied her authority to make the payment, in discharge of his notes, and it is not in the power of a stranger, to treat the tender and deposit as a nullity, and thereby divert it from the designed direction.

The inducement under which the wife acted, to make her interest in the land mortgaged, available to her, by the payment of her husband's notes, cannot change the principle, which is otherwise applicable. *Exceptions overruled.*

RICE, J., concurred.

APPLETON, J., did not concur in the foregoing opinion, but made the following memorandum:—

Till the tender is accepted, the money may be withdrawn at any time. Whether withdrawn or not, the title to it remains in the person tendering. If lost, it is his loss. It is in no respect the property of the person to whom it is tendered till acceptance.

The evidence does not satisfactorily show that the money tendered belonged to the defendant's wife. If it belonged to the defendant, when tendered, it still remains his.

WILLIAM D. GRAY *versus* FRANKLIN KIMBALL.

Certain articles, which are treated as property, while used for lawful purposes, may be subjected to forfeiture and destruction, if their use be deemed pernicious to the best interests of the community. And when attempts are made to use such articles for unlawful purposes, or in an unlawful manner, and these attempts are so concealed, that ordinary diligence fails to make such discovery as to enable the law to declare their forfeiture, statutes, authorizing searches and seizures, have been held legitimate.

The exercise of this power must be properly guarded, that abuses may be prevented, and that the citizen shall not be deprived of his property, without having an accusation against him, setting out the charge and the nature thereof, and only by the judgment of his peers, or the law of the land.

The citizen is also by the constitution to be secure in his person, houses, papers, and possessions, from unreasonable seizures and searches.

The statute of 1853, c. 48, for the suppression of drinking houses, &c., does not violate any of these constitutional provisions.

There may be cases, in which one may be prosecuted and tried for acts which he never committed, but which were done by another. And laws authorizing proceedings *in rem* may be enforced against the property seized, when the real owner may not in point of fact be informed thereof.

When a process is issued by a court or magistrate having jurisdiction, and is right upon its face, it is a protection to the officer who executes it.

Actions, indictments, and processes pending, at the time of the passage of the Act of 1855, c. 166, are clearly saved from the operation of the repeal of former acts therein specified.

An officer is not liable for his official acts under a sufficient warrant, because the prosecution fails by reason of the repeal of the law by virtue of which the warrant was issued.

What form of complaint is sufficient to authorize subsequent proceedings under the statute of 1853, c. 48.

Where the parties agree that the case shall be decided upon the declaration and the defendant's pleadings, the Court must determine it upon those pleadings as they appear in the case, though the plaintiff might, by a replication and re-assignment, have presented a different issue.

The appointment of the plaintiff, as agent of the town to sell liquors, gave him no rights in the maintenance of his action against the defendant, so long as he, being an officer, was bound to execute the warrant and was protected therein.

ON FACTS AGREED.

This was an action of TRESPASS to recover the value of certain liquors seized by virtue of a warrant which alleged them to be in the possession of a person other than this plaintiff, the owner, and intended for sale, in violation of law, by said

third person. The case was submitted to the full Court upon the pleadings in the case, in accordance with the following agreement:—

"This case is to be decided upon the declaration and defendant's pleadings, which are to be copied and made a part of the case. The plaintiff was, at the time of the taking, a duly appointed agent of the town of Anson, for the sale of liquor, under the statute of 1853. If the matters set forth in the defendant's special plea, are an answer to the action, judgment is to be rendered for the defendant. If the matters therein alleged are not sufficient to bar the plaintiff's action, judgment is to be rendered for the plaintiff, upon the general issue, reserving the right to the defendant to be heard in damages."

(Signed,) "P. M. Foster, *Pl'ff's Att'y.*

"Josiah H. Drummond, *Def'ts Att'y.*"

The plaintiff's declaration was:—

"In a plea of trespass, for that the said Kimball, on the 9th day of July, at Waterville aforesaid, with force and arms took and carried away the goods and chattels, viz.:—five barrels of New England rum, of the value of one hundred dollars, and one barrel of Holland gin, of the value of sixty-three dollars, all the property of the plaintiff, then and there found and being, against the peace of the State and to the damage of the plaintiff, (as he says,) the sum of three hundred dollars."

To this the general issue was pleaded, with the following special plea:—

"And for further plea in this behalf, by leave of Court first had and obtained, the said defendant says, that as to all the trespasses in the plaintiff's declaration mentioned, except the taking and carrying away of the five barrels of New England rum and one barrel of Holland gin, he is not guilty thereof as the plaintiff above against him complains, and of this he puts himself on the country.

"By Josiah H. Drummond, his Attorney.

"And the plaintiff, likewise,—

"By P. M. Foster, his Attorney."

As to the residue of the trespasses complained of, the defendant pleaded specially, with the usual formalities, in justification and in bar of recovery by the plaintiff, that in taking the liquors, and in all else done by him in the premises, he acted as coroner which he was, under and by virtue of a legal warrant issued by Joshua Nye, jr., a justice of the peace for the county, upon complaint duly made before the said justice, and directed to the defendant,* (the office of sheriff of

* The following is a copy of the complaint and warrant in this case.

"STATE OF MAINE.

"To Joshua Nye, jr., a Justice of the Peace, in and for the County of Kennebec.

"William Brown, Eugene H. Evans and Ephraim Maxham, all of Waterville, in said county, all competent to be witnesses in civil suits, and all resident in said county, on oath, complain and inform said justice, that they have reason to believe, and do believe, that spirituous and intoxicating liquors are kept and deposited in a certain building, a part of which is used as a store, and a part for a dwellinghouse, situated in Belgrade, in said county, at South Belgrade, so called, occupied by Frederic Spencer, it being the building next north of Solomon Leonard's store, on the east side of the road leading from the depot of the Androscoggin & Kennebec Railroad, in South Belgrade, to Belgrade Hill, so called; and that said spirituous and intoxicating liquors are kept and deposited as aforesaid, in said building as aforesaid, by Frederic Spencer of said Belgrade; and that the said Frederic Spencer is not authorized to sell spirituous liquors in said Belgrade, by any statute of this State now in force, and is not the agent appointed by the selectmen of said Belgrade to sell spirituous and intoxicating liquors in said Belgrade; and that said liquors are intended for sale in this State, by said Frederic Spencer, in violation of law; all which is against the peace and contrary to the form of the statute in such case made and provided; whereby said liquors have become forfeited to be destroyed, and said Frederic Spencer to pay a fine of twenty dollars. They, therefore, pray that a warrant may be issued to search the premises aforesaid, for such liquors, and to seize any such liquors so found, and to hold the same until finally disposed of according to law, and that said Frederic Spencer may be apprehended, and held to this complaint, and further dealt with according to law. Dated at Waterville, this first day of July, A. D. 1853."

(Signed.) "Wm. Brown,
"Eugene H. Evans,
"Eph. Maxham."

"Kennebec, ss. — July 1, 1853. Then the above named William Brown, and Eugene H. Evans, and Ephraim Maxham, severally made oath to the truth of the foregoing complaint, by them severally subscribed. Before me,

"Joshua Nye, jr., Justice of the Peace."

Kennebec county being then vacant); and that all his acts and doings complained of were done in obedience to the commands of said precept, and were lawful. The plea concluded with a verification and the usual prayer for judgment and for his costs.

Foster, for plaintiff.

1. The allegations in the declaration are admitted. Do the pleadings set forth any defence? We say they do not.

2. Are the proceedings of the justice and the officer conclusive? We say they are not.

3. These were unknown to the plaintiff. The warrant was issued and the seizure of his property made without the slightest notice to him.

4. No presumption of law arises against the plaintiff.

5. The pleadings do not show that any complaint was made before the justice, to authorize subsequent proceedings.

"STATE OF MAINE.

"Kennebec, ss. To any Coroner of said County of Kennebec, Greeting.

"[L. s.] Forasmuch as the foregoing complaint has been made this day before me, one of the justices of the peace in and for said county of Kennebec, you are hereby commanded, in the name of the State of Maine, with suitable and proper assistants, to enter in the day time, the premises in said complaint described, to wit:—A certain building, a part of which is used as a store, and a part for a dwellinghouse, situated in Belgrade, in said county, at South Belgrade, so called, occupied by Frederic Spencer, it being the building next north of Solomon Leonard's store, on the east side of the road leading from the depot of the Androscoggin & Kennebec Railroad, in said South Belgrade, to Belgrade Hill, so called, and search said premises for spirituous and intoxicating liquors; and if any spirituous or intoxicating liquors are there found, to seize the same, and the vessels in which they are contained, and to carry the same to some proper place of security, to be there kept until final action on said complaint. And if any such liquors are found on said premises, you are alike commanded to apprehend the body of the said Frederic Spencer, and bring him before me forthwith, to answer to said complaint, and show cause, (if any he has,) why said liquors should not be forfeited, and he be examined concerning the subject matter of said complaint, and further dealt with according to law. And you are alike requested to summon the complainants, and also William Brown and George C. Alden, to appear and give evidence relative to the same, when and where you have the said respondent. Given under my hand and seal, at Waterville, this first day of July, A. D. 1853.

"JOSHUA NYE, jr., Justice of the Peace."

6. There is nothing in the pleadings, or officer's return, showing any judgment, or how the property was disposed of.

7. Section 33 of the law of 1855, does not contain any distinct, unambiguous saving clause.

8. Plaintiff was duly licensed. *Preston* v. *Drew*, 33 Maine, 558; *State* v. *Robinson*, 33 Maine, 564.

Drummond, for defendant.

1. It is objected that a coroner has no right to serve the process under which the defendant justifies, even when there is no sheriff. R. S., c. 104, § 61, settles this point. The statute of 1853 contains nothing repugnant to this provision of the Revised Statutes.

2. The pleas show a justification. They are in the usual form. Story, 516. If the liquor law of 1853 is constitutional, they are good in substance.

3. An officer is bound to execute a warrant, and he is not bound to decide whether a statute is constitutional or not. If bound to execute a warrant, he will be protected in so doing. *State* v. *McNally*, 34 Maine, 210; *Smyth* v. *Titcomb*, 31 Maine, 272, 285.

4. But the Act additional to c. 170, of the R. S., approved March 16, 1855, expressly establishes this defence.

5. It is said, that this law is unconstitutional and void. As it affects only the remedy, it is not unconstitutional, though it affects suits pending. This law merely changes or restricts the remedy, and such laws have been decided to be constitutional. *Springfield* v. *Hamden*, 6 Pick. 501; 19 Pick. 48; 22 Pick. 430; *Thayer & al.* v. *Seavey*, 11 Maine, 284; *Oriental Bank* v. *Freize*, 18 Maine, 109; *Read* v. *Frankfort Bank*, 23 Maine, 318.

"A remedy for a party may be changed or wholly taken away by the Legislature, without contravening the constitution of the United States." The same principles are decided in 3 Pick. 508; 11 Pick. 28; 13 Mass. 1; 5 Mass. 409.

6. The Legislature may constitutionally enact laws to make valid and legal the doings of public officers who have exceed-

ed their authority, although by such laws individuals may be deprived of rights previously vested. *Walter* v. *Bacon*, 8 Mass. 468, 472; 9 Mass. 151, 153; 9 Mass. 360, 363. These cases are cited and approved in *Thayer* v. *Seavey*, above cited. The right does not vest until judgment; the commencement of an action does not affect the right either way. See cases above cited.

TENNEY, C. J.— This action is trespass for the alleged taking of five barrels of New England rum, and one barrel of Holland gin, by the defendant. The defendant pleads specially, that he took the articles named in the writ, by virtue of a complaint and warrant, put into his hands as a coroner of the county of Kennebec, he being duly appointed and qualified, as such, to which officer the warrant was directed; that the office of sheriff of that county, at the time the warrant was issued, and the taking of the goods, was vacant; that he made the search, as commanded in the warrant, and having found them, seized the same, and carried them to a proper place of security, there to be kept till final action on the complaint; that he afterwards apprehended Frederic Spencer, and had him before a justice of the peace, according to the command of the warrant, and made return of the same, with his doings thereon. It is agreed, that at the time the property was taken, the plaintiff was the agent of the town of Anson, duly appointed for the sale of liquors under the statute of 1853; and it is also agreed, that the question, whether the defendant is liable in this action, shall be determined by the pleadings filed in the case.

The counsel for the plaintiff raises several objections to the sufficiency of the matters set forth in the defendant's special plea. And the first is, that the proceedings were unknown to the plaintiff.

The plaintiff was not made, or intended to be made, a party to the proceedings. The warrant was against the liquors, in the building described as that of Frederic Spencer;

and it was liquors there deposited, and only such, that the defendant was commanded to search for, and seize, if they should be found; and against Spencer, as the keeper of those liquors, for sale in violation of law. The proceedings were *in rem*, as to the liquors, which were believed, by the complainants, to be intended for unlawful sale in this State, by Frederic Spencer, and were in conformity to the provisions of the statute of 1853, c. 48, § 1.

2. Another answer to the defence is, that the pleadings do not show, that any complaint was made before the justice, to authorize subsequent proceedings. The complaint, fully set out in the special plea, contains the following, to wit:—"And that said spirituous and intoxicating liquors are kept and deposited," &c., "by Frederic Spencer," &c.; "and that the said Frederic Spencer is not authorized to sell spirituous liquors," &c.; "and that said liquors are intended for sale in this State, by said Frederic Spencer, in violation of law, all of which is against the peace," &c., "whereby said liquors have become forfeited to be destroyed," &c., "and the said Frederic Spencer to pay a fine of twenty dollars." Then follows the prayer for the warrant, that search may be made, the liquors, if found, to be seized, to be held, till finally disposed of according to law; and that the said Spencer may be apprehended, and held to answer to this complaint, and further dealt with according to law. The plaintiff's counsel have pointed out no specific defect in the complaint, in reference to subsequent proceedings; and it is not perceived to be wanting in substance or form, so that the magistrate was not fully authorized to take jurisdiction, and proceed to hear the evidence touching the complaint, and to render such judgment, *in rem*, and against the keeper, as the statute and the evidence would authorize.

3. It is further objected, that neither the pleadings, nor the officer's return, show any judgment, or the manner in which the property was disposed of. This objection, from the terms employed, seems to be predicated upon the ground, that the trespass complained of in the writ, was for acts done to the property, after the hearing before the justice upon the com-

plaint, and after it was returned by the defendant. The pleadings will not authorize this position of the plaintiff. The special plea throughout, is clearly intended as a justification for the acts, which are alleged to have been done by authority of the warrant, issued upon the complaint of three individuals, and not for the destruction of the property after the hearing. This is manifest, from the statement in the plea of the search made for the liquors, the seizure of the same, the removal to a place of security, there to be kept until final action on said complaint, mentioned in said warrant; the subsequent apprehension of the keeper of the liquors, who was brought before the magistrate, and the return of the warrant, "which," as it is alleged in the plea, "is the trespass complained of in the plaintiff's declaration as to the taking and carrying away of the rum and the gin, whereof the said plaintiff complains against the said defendant," &c. If the plaintiff commenced his suit for acts done by the defendant, to his property, after the hearing before the justice, upon the return of the warrant, and the apprehension of Spencer, and not those done before, he could have presented this in his replication to the defendant's special plea, and made a re-assignment. Instead of this, he omits to make any replication, so far as the case shows, but enters into the agreement, that the case shall be decided, upon the declaration, and the defendant's pleadings.

4. Again, it is urged against the defence, that if there was any sufficient complaint, it shows that the liquor was forfeited, and Spencer fined, before the seizure of the property, or the arrest of the keeper. If such was the complaint, upon a fair construction, it was not only unauthorized, but absurd. But the language of the complaint is otherwise; after alleging the belief that the liquors were unlawfully kept by Spencer, it proceeds, "whereby said liquors have become forfeited to be destroyed, and said Spencer to pay a fine," &c.

5. The proposition is made by the plaintiff's counsel that the proceedings were in violation of the constitution. But he has omitted to specify the parts of the constitution which

have been violated, or to point out wherein the proceedings were obnoxious to this charge.

Certain articles, which are treated as property, while used for lawful purposes, may be subjects of forfeiture and destruction, under proper statutory provisions, if their use is deemed pernicious to the best interests of the community. And when such articles are attempted to be used for unlawful purposes, or in an unlawful manner, and the attempts are so concealed, that ordinary diligence fails to make such discovery as to enable the law to declare the forfeiture, statutes, authorizing searches and seizures, have been held legitimate. The exercise of this power must be properly guarded, that abuses may be prevented, and that a citizen shall not be deprived of his property, without having an accusation against him, setting out the nature and charge thereof, and but by the judgment of his peers, or the law of the land; and he shall be secure in his person, houses, papers and possessions, from unreasonable searches and seizures. It is not perceived, that the statute, under which the suit in this case is attempted to be defended, violates any of the provisions of the constitution, which have been adverted to; or that the proceedings invoked have not been such as are authorized by the statute.

We are to take the declaration as true, in this case. But this case does not differ from numerous others, in which one man may be prosecuted and tried for the acts which he never committed, but which were done by another. And laws authorizing proceedings *in rem*, may be enforced against the property seized, when the real owner may not be informed thereof. But where the process is issued by a court or magistrate, having jurisdiction, and is right upon its face, it is a protection to the officer who executes it. *Butler* v. *Potter*, 17 Johns. 145; *Horton* v. *Auchmoody*, 7 Wend. 200; *Relgea* v. *Ramsay*, 2 Wend. 604; *Fisher* v. *McGirr & al.*, 1 Gray, 1. The appointment of the plaintiff, as the agent of the town of Anson, to make sale of liquors for certain lawful purposes, gives him no rights, in the maintenance of the present action, so long

as the defendant was bound to execute the warrant, and was protected therein.

It is said, that the saving clause in the statutes of 1855, c. 166, § 33, is indistinct and ambiguous. We think that the actions, indictments and processes pending, are clearly saved from the operation of the repeal of former acts therein specified. But were it otherwise, there is nothing in the case as presented, which would take away the defence set up, if the repeal had no exceptions; and the prosecution against the liquors, and the supposed keeper, had failed by the repeal, or for any other cause.

Plaintiff nonsuit, judgment for defendant.

RICE, J., concurred.

INHABITANTS OF RIPLEY *versus* INHABITANTS OF LEVANT.

To set off a part of one town and annex it to another, has the same effect in regard to the legal settlement of persons residing on the territory annexed, as to incorporate a new town.

The incorporation of a new town from parts of other towns, "with all the persons having a legal settlement therein," includes all who had acquired their settlements on the territory of which the new town is composed, although removed therefrom at the time of incorporation.

By R. S. of 1841, c. 32, a manifest distinction exists between the division of a town and the incorporation of a new town from parts of other towns, in regard to the rights of settlement of the inhabitants, under certain circumstances. The *division* fixes the settlement of persons, absent at the time, in that part in which was their last dwelling place. The *incorporation* places in the new town, the settlement of those who *actually dwelt and had their homes* within its limits at the time of incorporation.

A. had his settlement in the town of B., and removed therefrom after having resided for a few weeks in a portion of the town which was subsequently annexed to other territory and incorporated into a new town: — *Held*, that A. having acquired his settlement in that part which remained the town of B., and having had no dwelling place and home within the bounds of the new town when incorporated, his legal settlement was still in B.

AGREEMENT OF FACTS from *Nisi Prius*.

This was an action of ASSUMPSIT, to recover for supplies

furnished Thomas Raymond and family, as paupers. The proper notice and reply, denying liability, were admitted, the only question being one of settlement; the defendants contending that the paupers' settlement was in Kenduskeag and not in defendant town.

The following facts were agreed:—The paupers' settlement, on and prior to April, 1837, was in Levant, they having lived in that town, in various places, more than five years. In the latter part of April, 1837, they removed from Levant to Ripley, where they have since remained. Soon after they fell into want, and were ever after supplied by the town of Levant, in said town of Ripley, until July, 1854, when defendants withdrew their support, and the town of Ripley then commenced supporting them and furnished them the supplies sued for.

On Feb. 20, 1852, the town of Kenduskeag was incorporated, composed of parts of the two towns of Levant and Glenburn, about equal amounts of territory having been taken from each of said towns.

Defendants allege that the last dwelling place of said paupers in Levant, was in that part of the town which was incorporated into Kenduskeag; and the plaintiffs deny that fact. It is agreed that either party may take such testimony touching that question as they may see fit, in depositions, which testimony shall constitute a part of this case, the same to be submitted to the Court for their decision, with authority to draw such conclusions therefrom as a jury would be authorized to do. It is admitted that, prior to Jan. 30, 1854, said Raymond and his wife had given a mortgage of the land on which they lived in Ripley, to secure certain notes given by them; that, by consent of said Raymond and wife, and at the request of the overseers of the poor of Levant, who claimed the right in behalf of the town of Levant to redeem said mortgage, the mortgagee on that day assigned said mortgage and notes to the town of Levant, and the overseers paid him the amount due on the same; that the amount due and

paid was about $75, and the mortgaged property was worth about $250.

The Court are to render such judgment on default or nonsuit as the law of the case may require. In case of default, defendants are to be heard in damages.

In accordance with the above agreement, evidence was introduced by both parties.

D. D. Stewart, for plaintiffs.

1. Raymond, while *in transitu* from Levant to Ripley, passed through that part of the town since incorporated into Kenduskeag, and remained there a short time; but his residence or stoppage there was merely *transitory and temporary*, and therefore not such a residence as the statute contemplates, upon which the defence is based. *Turner* v. *Buckfield*, 3 Greenl. 229; *Hampden* v. *Fairfield*, 3 Greenl. 436; *Smithfield* v. *Belgrade*, 19 Maine, 390.

2. The defendants claim that the incorporation of Kenduskeag, out of parts of Levant and Glenburn, was a *division* of Levant, within the meaning of the first clause of the fourth mode of gaining a settlement. This proposition, the plaintiffs deny, and assert, upon their part, that the case falls directly and unequivocally within the meaning of the second clause of the fourth mode. R. S., c. 32, § 1, mode 4. And that, as the pauper was not living within the territory at the time of the incorporation, and had not been for fifteen years, he acquired no settlement in Kenduskeag, but retains his settlement in Levant. *Windham v. Portland*, 4 Mass. 384.

What constitutes the division of a town, within the meaning of the statute?

The answer is given by Chief Justice MELLEN in these words:—"Such a division of a town as shall produce two or more towns, composed of the same territory which formed the original town." *Hallowell* v. *Bowdoinham*, 1 Greenl. 132.

The only qualification of this definition, is in *Livermore* v. *Phillips*, 35 Maine, 184; but that case is *sui generis*, and has no application to the question now under consideration. In

the closing sentences of that opinion, SHEPLEY, C. J., recognizes the difference between the *division* of a town and the *incorporation* of a new town.

Whether the annexation of territory to a town, is to be regarded as a division of the town from which it is taken, it is unnecessary to consider. The current of authorities sustains the position that it is not a division within the meaning of the statute. *Groton* v. *Shirley*, 7 Mass. 156; *Fitchburg* v. *Westminster*, 1 Pick. 144; *Hallowell* v. *Bowdoinham*, 1 Greenl. 129; *New Portland* v. *Rumford*, 13 Maine, 299; *New Portland* v. *New Vineyard*, 16 Maine, 69.

Whether the creation of a new town *wholly* out of the territory of *one* old incorporated town, is a *division* of such old town, within the meaning of the statute, may, and perhaps must, depend upon the peculiar language of the Act creating such new town. It *may* be a division within the first clause of the fourth mode, or it *may* be an incorporation of a new town within the meaning of the second clause of that mode. If the Act itself professes to *divide* the old town, and to create a new town out of the part set off, it would, perhaps, be considered as coming within the first clause. If it professed to *incorporate a new town*, out of a part of the old one, it might, and probable would, fall under the *second* clause. See laws of 1842, "*Act to divide*" Minot and incorporate Auburn; also laws of 1845, "*Act to divide*" Anson and incorporate North Anson; also laws of 1850, "Act to incorporate the town of Kennebec." *Winthrop* v. *Auburn*, 31 Maine, 465.

The Act of February 20, 1852, incorporating the town of Kenduskeag out of parts of Levant and Glenburn, does not purport to be a *division* of either of those towns. It professes simply to incorporate a *new town out of parts of two old towns*. It falls, therefore, directly and clearly within the *second* clause of the fourth mode; and persons not living upon the territory at the time of its incorporation, by the provisions of that clause, have no settlement in the new town. *Windham* v. *Portland*, 4 Mass. 384; *Harvard* v. *Boxborough*, 4 Met. 571.

Again. The language of the statute itself seems to be too

clear to require any judicial construction as to its meaning. It says:—"When any new town shall be incorporated, composed of a part of one or more old incorporated towns, every person legally settled in any town of which such new town is wholly or partly so composed, or who has begun to acquire a settlement therein, and *who shall actually dwell and have his home within the bounds of such new town at the time of its incorporation*, shall have the same rights in such new town in regard to settlement, whether incipient or absolute, as he would otherwise have had in the old town where he dwelt." Now the Act creating the town of Kenduskeag, purports, on its face, to incorporate the new town out of parts of two old incorporated towns, thus falling precisely and literally within the language of the statute just cited.

3. The argument, thus far, has been based upon the *general* pauper statutes, in order to meet the argument upon which the defence is grounded. The reasoning is believed to be strictly in accordance with the authorities; but it is supposed to be wholly unnecessary here, for this case must turn upon the *language of the Act itself* incorporating Kenduskeag. Sec. 1 of that Act, Laws of 1852, c. 485, is in these words: "All that part of Levant lying in the northeast part of said town and bounded as follows, &c.; also, all that part of the town of Glenburn included and lying in the following limits, &c., together with all the persons having a legal settlement therein, is hereby incorporated into a separate town by the name of Kenduskeag."

This Court have already given an exposition of the words "*legal* settlement," as used in this Act, and they hold the words to mean all persons *who have acquired their settlements* on the territory incorporated into the new town. *Belgrade* v. *Dearborn*, 21 Maine, 337. The same question is also decided in *Winthrop* v. *Auburn*, 31 Maine, 465, 468.

A. W. Paine, for defendants, cited the following authorities:—*Hallowell* v. *Saco*, 5 Greenl. 143; *Wayne* v. *Greene*, 21 Maine, 357; *Lexington* v. *Burlington*, 19 Pick. 426; *Livermore* v. *Phillips*, 35 Maine, 188; *Windham* v. *Portland*, 4

Mass. 388, 389; *Hallowell* v. *Bowdoinham*, 1 Greenl. 132; *Holden* v. *Brewer*, 38 Maine, 472.

Rowe, for plaintiffs, in reply.

TENNEY, C. J. — This action is to recover for supplies, furnished by the defendants, for the relief of Thomas Raymond and his family, in the year 1854. The question of settlement is the only one presented. The defendants deny the settlement in the town of Levant; but insist, that under the facts agreed, and the evidence in depositions submitted therewith, it is in the town of Kenduskeag, which was incorporated on February 20, 1852, and composed of parts of Levant and Glenburn. Special laws of 1852, c. 485.

It is admitted, that prior to April, 1837, the paupers had a settlement in the town of Levant, having lived in that town in various places for more than five years. It is satisfactorily shown by the evidence, that this residence was in that part of the town which is now Levant. In the latter part of April, they removed from Levant to Ripley, where they have ever since remained. Soon after they went to Ripley, they fell into want, and were supplied by the town of Levant, in the town of Ripley, until July, 1854, when the defendants withdrew their support, and since that time supplies have been furnished by the plaintiffs.

The place where the paupers last lived, for a few weeks before their removal to the town of Ripley, in the beginning of the year 1837, was in that part of the town of Levant which was afterwards a part of the town of Kenduskeag. Whether they lived there as a residence, and as a home, in view of the statutes touching the settlement of paupers, was a question to be determined by the Court, from the evidence in the depositions submitted, in connection with the facts agreed.

In the act incorporating the town of Kenduskeag, after the boundaries mentioned therein, it is added, "with all the persons, having a legal settlement therein, is hereby incorporated into a separate town," &c. This language is similar in its

import, and very nearly identical in its terms, with that used in the "Act to set off certain lands in Dearborn and annex the same to Belgrade." Special laws of 1839, c. 553, § 1. And the setting off of a part of a town, and annexing the same to another, has the same effect, as the incorporation of a new town, so far as regards the legal settlement of the persons resident on the territory thus annexed. *Groton* v. *Shirley*, 7 Mass. 156; *Hallowell* v. *Bowdoinham*, 1 Greenl. 129.

The language referred to, in the act setting off a part of Dearborn and annexing it to Belgrade, has had a construction in the case of *Belgrade* v. *Dearborn*, 21 Maine, 334. It was held to include all who had acquired their settlements in territory annexed to the other towns, although removed therefrom, at the time of the annexation. The same principle has been applied in *West Gardiner* v. *Farmingdale*, 36 Maine, 252; and in *Yarmouth* v. *North Yarmouth*, 34 Maine, 411.

It becomes necesary, then, to determine in what town the paupers in question had a settlement, upon the incorporation of the town of Kenduskeag. Their settlement having been in Levant, before Kenduskeag was incorporated, and it being manifest that they had gained no other, excepting in Kenduskeag, it must continue in Levant, unless by the operation of the laws it was changed therefrom. If they had gone directly to Ripley, from their last residence in that part of Levant which now constitutes a part of that town, in 1837, their settlement would now be in Levant.

If we assume, what is denied by the plaintiffs, that they did reside, and have their home, in the portion of Levant which was embraced within the limits of the new town, in 1837, did that residence and home fix their settlement therein, on its incorporation? If this question is to be answered in the affirmative, it must be by virtue of the fourth mode of acquiring a settlement, in sect. 1, of chap. 32, of Revised Statutes of 1841. And herein a manifest distinction is made between the division of a town, and the formation of a new town, from two or more old incorporated towns. In the former, those having a legal settlement, but absent at the

time of the division, shall have their settlement in the part wherein their last dwelling place shall happen to fall, at the time of the division; in the latter, any person legally settled in any town, of which the new town is wholly or partly so composed, *and shall actually dwell, and have his home, within the bounds of such new town, at the time of the incorporation,* shall have the same rights in such new town, in relation to settlement, as he would otherwise have had in the old town where he dwelt.

These modes of gaining a settlement, provided in the Revised Statutes of 1841, are the re-enactment of those in the statutes of 1821, chap. 122, sect. 2; and the latter are the same as those found in the statutes of 1793, of Massachusetts, chap. 34, sect. 2. These provisions have been considered by the Court of Massachusetts, and by this Court, under all the statutes, and the distinction is maintained and affirmed. *Groton* v. *Shirley,* and *Hallowell* v. *Bowdoinham,* before cited; *Starks* v. *New Sharon,* 39 Maine, 368.

If the home of the paupers for a few weeks, in the early part of the year 1837, was in the part of Levant now Kenduskeag, (their settlement being in Levant, before any part was taken therefrom,) this fact was without effect upon their settlement. In order that the same fact could have produced any effect, fifteen years afterwards, upon their settlement, some statute provision is required. No statute, or any construction of a statute, has gone so far as to do this.

The paupers, in no view of the evidence, in relation to the question, whether they resided and had their home in the portion of Levant, now in the new town, in the winter and spring of 1837, or not, can fall within the provision touching the settlement of persons, in the latter part of the fourth mode, in chap. 32, sect. 1, Revised Statutes. They acquired their settlement in the whole town, by a residence of five years in the part remaining Levant; and when the new town was incorporated, they had not a dwelling place and home within the bounds thereof. Their original settlement in Levant has undergone no change. *Defendants defaulted.*

HATHAWAY, MAY and GOODENOW, J. J., concurred.

APPLETON, J., dissented, and gave the following opinion:—

The town of Kenduskeag, composed of part of Levant and part of Glenburn, was incorporated in 1852.

It is admitted, that Raymond, the pauper, had his legal settlement in Levant, and that before its division he had removed to Ripley, where he has ever since continued to reside.

It is first to be ascertained from the evidence, in what part of Levant was his "last dwelling place." As to this there is much conflicting testimony. Raymond and his wife concur in fixing it in that portion of the defendant town which now constitutes part of Kenduskeag. In a question of this description, reliance may reasonably be placed on the accuracy of their recollection. They would naturally recollect their outgoings and incomings, for to them they were matters of interest—to others of indifference. Their testimony receives corroboration from other witnesses. Upon a comparison of all the evidence, I regard it as satisfactorily established, that the "last dwelling place" of the pauper in Levant, was in that part of the town which subsequently, by incorporation, became a part of Kenduskeag.

The pauper having his "last dwelling place" in that part of Kenduskeag, which was severed from Levant, and being absent therefrom at the time of the incorporation of the new town, and having acquired no legal settlement since, it remains to ascertain whether such settlement was continued in Levant, or by the incorporation of Kenduskeag became fixed therein.

The settlement of the pauper depends upon the question, whether or not a "division" of Levant took place, when a part of its territory was, with a part of that of Glenburn, incorporated into the new town of Kenduskeag. That Levant was thereby shorn of its population, wealth and territory, is unquestioned. Was it thereby divided? Was its unity severed into parts? If so, does not such severance constitute "division?" If it does not, what does? And when is a town divided?

The rights of the parties depend upon the construction to

be given to the fourth mode of gaining a settlement, under R. S., c. 32, § 1, which is in these words:—"Upon the *division* of any town, any person having a legal settlement therein, but being absent at the time of such division, and not having gained a settlement elsewhere, shall have his legal settlement in that town wherein his *last dwelling place* shall happen to fall, upon such division. When any new town shall be incorporated, composed of a *part of one or more old incorporated towns*, every person legally settled in any town of which such *new* town is *wholly* or *partly* so composed, or who has begun to acquire a settlement therein, and who *shall actually dwell and have his home within the bounds of such new town* at the time of its *incorporation*, shall have the same rights in such new town in relation to settlement, whether incipient or absolute, as he would otherwise have had in the old town where he dwelt."

It is as obvious as it can be made to appear by the force of language, that "division" and "incorporation" are indissolubly connected together as part of one and the same transaction.

Towns are not divided by one act, and the parts thus obtained incorporated by another. Whenever a new town is formed from a "part of one or more old incorporated towns," there must necessarily be a division as well as incorporation. The severance by which the part or parts are obtained constitutes a division. The incorporation of the new town from the parts thus obtained, includes the idea of a division, without which there would be no parts to be incorporated.

If, "upon the division of any town," a new town "should be incorporated composed of a part of one" old incorporated town, this would be regarded as a division. It would be a division and incorporation together. If a new town should be "incorporated composed of a part of one or more old incorporated towns," it is difficult to perceive how the parts of old incorporated towns, thus fused by a new incorporation, can have been severed from the old towns, except by division. The parts of old towns formed into a new one, are not annexed, for there is no existent corporation to which they are added by annexation.

It was held in *Barnstead* v. *Alton*, 32 N. H., 245, upon a careful examination of all the authorities, that a town was divided, whenever any portion of it was separated from the rest, whether the severed portion was incorporated in a new town or annexed to an old one.

The fourth mode in its very terms is but one mode. It embraces those absent from the parts of the town divided and those resident in the new town incorporated. It thus makes provisions for all contingencies which may arise. It imposes upon each part of the town the burthen of those, who, having a settlement, may be absent at the division, as well as those who may be residents at the incorporation. The liabilities of the old and new town are to be determined upon the same principles. The last dwelling place of the individual absent, and the actual residence of the individual dwelling and having his home, govern and control.

On any other construction, every town, a part of which may have been incorporated with a part of some other into a new town, will be compelled to bear the burthen of those, who, having a settlement, may be absent from its remaining territory as well as those absent from the part incorporated in the new town. In other words, the town would lose its territory and wealth, and retain all the paupers, who, being absent, would have acquired a settlement upon its lost territory. This would be manifestly unjust.

It has been settled by a series of decisions that the annexation of a part of one town to another, is not to be regarded as a division of the former town, within the meaning of the fourth mode of gaining a settlement, to which reference has been had. To this extent the authorities go and no further. *Hallowell* v. *Bowdoinham*, 1 Greenl. 129; *New Portland* v. *Rumford*, 13 Maine, 299; *New Portland* v. *New Vineyard*, 16 Maine, 375. 69

The incorporation of a *new* town from a "part of one or more old incorporated towns," is not a case of annexation, nor is it to be regarded as such. When parts of two old incorporated towns are formed into a *new* corporation, the old towns are divided within the meaning of the statute. Levant

having been divided, the legal consequences of a division must follow. *Lexington* v. *Burlington*, 19 Pick. 426.

The parts of Levant and Glenburn, "together with all the persons having a legal settlement therein," are incorporated in the new town. In reference to similar language, WHITMAN, C. J., in *Belgrade* v. *Dearborn*, 21 Maine, 337, uses the following language:—"The meaning of the words might, perhaps, be satisfied by restricting them to such persons as had a legal settlement in Dearborn, and were, at the time of the annexation, resident on the parts annexed. But it must be regarded as more consonant to the intention of the Legislature, indicated by prior enactments, *in pari materia*, to suppose they intended to include here, by the words used, all who had acquired their settlement in the territory annexed to the other towns, although removed therefrom at the time of annexation. And moreover it is provided in the Act concerning paupers, that upon the division of towns, those having a legal settlement therein, and who were absent therefrom at the time of such division, shall have their settlements in such town as the part they dwelt upon shall have fallen into." According to principles upon which the decision in Belgrade *v.* Dearborn rests, the town of Levant cannot be held to support the pauper Raymond.

In *Livermore* v. *Phillips*, 35 Maine, 184, SHEPLEY, C. J., says, "it is doubtful whether the definition of the phrase used in the statute, 'upon the division of any town,' intimated in the case of Hallowell *v.* Bowdoinham, will prove to be entirely satisfactory." In Hallowell *v.* Bowdoinham, it was held that a division must produce two or more towns composed of the original territory. But the effect of an incorporation of a *new* town "composed of a part of one or more old incorporated towns," was not before the Court in that, nor in the other cases which determined the effect of annexation.

The construction here given must be regarded as the determination of a question now first argued and presented distinctly for consideration.

It is insisted, that the clause in the Act incorporating Ken-

duskeag, Stat. 1852, c. 485, § 5, which provides that it "shall not be holden for any liabilities of said town of Levant," exempts the former from the support of the pauper and imposes the burden upon the latter. But such is not its meaning. The section in which these words are found, relates to the funds and personal property of the towns, and to other debts and liabilities. It contains no allusion to the subject of settlement, or to the future support of paupers. Though Raymond was then a pauper, he might not so continue. The language refers equally to present debts and personal liabilities; not to debts which at some future time might be contracted, or to liabilities which might thereafter arise. It imposed upon Levant its then existing debts and liabilities. The claim sought to be recovered, was not a liability then existing, nor one that it could be foreknown would ever exist. It was neither within the letter nor the spirit of the Act.

The settlement of the pauper not being in Levant, the action is not, in my opinion, maintainable.

MAY, J., gave the following explanation of his views and the reasons for his concurrence in the opinion of the Court:

The defendants having admitted that the settlement of the paupers was once in their town, must show that it has been changed; the burden is on them.

If the language of the Act of incorporation, which declares that certain described parts of the territory of Levant and Glenburn, "together with all the persons having a legal settlement, is hereby incorporated into a separate town by the name of Kenduskeag," overrides the provisions of the R. S., c. 32, § 1, in regard to the fourth mode of gaining settlements, so as to fix upon the town of Kenduskeag the settlement of such persons only as had actually gained their settlements upon the territory embraced in such town, whether they had their homes upon the territory at the time of the passage of such Act or not; then, as the facts contained in the report do not show that these paupers gained their settlement upon such territory as was included in the new town, the defendants have failed to make out a defence.

If similar language in the Act incorporating the town of West Gardiner, was held to determine whose settlements were transferred to the new town, and whose remained in the city of Gardiner, no reason is perceived why it should not have the same effect here.

Such language may properly be regarded as changing the provision of the Revised Statutes, so far as it is inconsistent with the provisions thereof; and it would seem to be clearly inconsistent with that provision, which makes the settlement of the pauper depend either upon an actual home, or absence of the pauper, at the time of the passage of the Act; by substituting instead of these provisions, a provision that all settlements should be determined by the *place* where they were actually gained, and fixing them in the territory where they had been thus acquired.

If this is not so, then the question arises, where, upon the facts in this case, was the settlement of these paupers? in Levant or Kenduskeag?

I think the testimony satisfactorily shows that their last dwelling place was in that part now Kenduskeag. Their testimony is direct, and somewhat corroborated. On the other hand, there is testimony to impeach them, and some tending to show that their residence in Kenduskeag was merely temporary. But considering the character of the paupers, and that it was not necessary that they should have a right to occupy the house they were in, in order to have a domicil there, and then that much of the testimony as to their intentions is only of an impeaching character, and so is not affirmative proof, I think the weight of evidence is in favor of the position that their last dwelling place was in Kenduskeag.

If so, and the Act of incorporation is not to be regarded as a division, then the settlement of the paupers would still remain in Levant, they having removed before the passage of the Act. I think this is not a case of division but of incorporation.

If I did not regard this question as settled by the authorities — if it were a new question — I certainly should concur

with Judge APPLETON in his construction of the statute; but for the reasons given by SHEPLEY, C. J., in *Starks* v. *New Sharon*, I think the Court are bound to regard *stare decisis* as a sound maxim for their guidance in this case.

EBEN. H. NEIL, *in Equity, versus* JOHN S. TENNEY.

A. having become the assignee of a mortgage, and, by foreclosure thereof, the sole owner of the premises therein described, agreed, by contract under seal, to relinquish to B. all his title thereto, upon payment by B. of a certain sum. No actual consideration was paid for the agreement, and it was afterwards voluntarily surrendered to A. by B. for the reason that he was not able to pay the amount required by the contract. — *Held*, that, being under seal, the contract imported a sufficient consideration to uphold it.

Under this contract, the interest of B. was the same as if he had acquired a right to the conveyance by any other mode. He had an attachable interest in the premises, which might be seized and sold for the payment of his debts.

He might sell or assign his interest by virtue of the contract, before any attachment or seizure of it.

The question, whether such sale or assignment be fraudulent as against creditors, may, in certain cases, be tried and determined by a jury.

He might, also, make a gratuitous gift of his interest under the contract; but it would be void as against creditors.

Such contract might also be rescinded or cancelled by the parties thereto, before the rights of third persons have intervened.

The voluntary surrender of this contract by B. to A. was void as against creditors, B. being at the time insolvent; and C., by the seizure and sale of B.'s interest in the premises after such surrender, acquired a right to the conveyance from A.

A right, acquired in any legal mode, to the conveyance of real estate, though resting entirely in contract, is attachable property, and may be taken and sold on execution.

BILL IN EQUITY.

This bill in equity is accompanied by an agreed statement of facts, which are fully presented in the opinion of the Court.

Abbott, Coburn & Wyman, for plaintiff.

MAY, J. — This case, which is a bill in equity, is submitted to the Court upon an agreed statement of facts. From that statement it appears, that one Thomas C. Jones, on May 2d,

1840, by his deed of warranty, conveyed the farm in controversy to one Alfred Stackpole, and at the same time took back a mortgage of the same to secure certain promissory notes amounting to $1250, which the said Stackpole then gave in payment for said farm. The said Alfred Stackpole having paid a part of said notes, on Sept. 2, 1844, by his deed of warranty, conveyed one half of said farm to his father, James Stackpole, in severalty, and subject to the mortgage of said Jones. Subsequently, the condition of the mortgage having been broken, the said Jones took the necessary steps by an advertisement and record thereof, made in pursuance of the statute, to foreclose the same; and afterwards, before said foreclosure had become perfected, Alfred Stackpole, who had been in possession of the premises, with his father, from the date of Jones' deed to him, left said farm, having abandoned the intention of redeeming, and verbally, or otherwise, acquitted or released to his father all his rights in said farm. It further appears, that at some time the said James and Alfred Stackpole gave an absolute deed of said premises to one John W. Sawtelle, which the said Sawtelle took as security for about $100, being a claim which he held against the said James. This deed, whenever given, could have passed nothing except the rights which the grantors then held, viz., the same rights of redeeming the premises which the Stackpoles then had.

On the first day of January, 1855, just before the foreclosure became absolute, the defendant paid the said Jones the amount then due upon said mortgage, being about $850, and the said Jones indorsed the notes secured thereby, and then in existence, to him, without recourse, and at the same time assigned the mortgage to the defendant, in whose hands the same was afterwards foreclosed. Said assignment was made at the suggestion of said James Stackpole, long before expressed, but was without any consideration or agreement between him and the defendant. By these proceedings the defendant became the assignee of the mortgage and the sole owner of the whole estate. All parties before interested in

the right and equity of redemption, had negligently or intentionally suffered the said mortgage to become legally foreclosed in the hands of the defendant, and thus had lost all their equitable rights. In this condition of things the defendant, by contract, under his hand and seal, dated Jan. 6, 1855, agreed with said James Stackpole, upon the payment by him, within one year from that date, of the sum of eight hundred fifty-six dollars and ninety-eight cents, with interest thereon, to relinquish, by a quitclaim deed, all his claim and title to said farm. This contract was executed and delivered to said James Stackpole, without any previous agreement, verbal or written, and without any actual consideration; and, it is agreed by the parties, that this fact is not to take away the legal effect of the written contract, but the want of consideration and the contract are both to be treated as the law requires.

On the 28th of Nov. 1855, and before any seizure and sale of said Stackpole's right under the contract, by which the plaintiff claims title, and before any such attachment, the said Stackpole, being then insolvent, voluntarily delivered to the defendant the said contract, saying he should be unable to pay the sum therein specified; and he surrendered the paper, which was received by the defendant, no agreement or understanding having taken place before, at that time, or afterwards, touching said surrender.

That James Stackpole had no attachable interest in the estate, after the foreclosure of the mortgage was complete, and before the giving of said contract, we think is perfectly clear; and that said contract, *being under the hand and seal of the defendant*, imports a sufficient consideration to uphold it, is equally so. The contract, by its terms, entitled the said Stackpole to a deed of the premises, upon performance of the specified condition which it contained. The right to such a conveyance, when legally acquired in any mode, though resting in contract, and relating to real estate, is made attachable property, and may be seized and sold in conformity to law, for the payment of the debts of any person who is enti-

tled to a conveyance of such estate by virtue of any bond or contract. It may be attached on mesne process, R. S., c. 114, § 73; and by the Act of amendment, c. 1, § 10, it is further provided, that "all the right and title to a conveyance of real estate, by virtue of a bond or contract, which any debtor may have, may be taken and sold on execution, in the manner prescribed in the thirty-sixth and four following sections," of c. 94, in the Revised Statutes.

The agreed statement of facts, further shows, that the right of said James Stackpole, under said contract, for a deed of conveyance of said farm, was duly seized and sold on executions to the plaintiff, in conformity to law, on the 31st day of December, 1855, for the sum of $273,40; and that the creditors in said executions, were such, at the time of the aforesaid surrender of said contract, and had been for a long time before. It becomes necessary, therefore, in order to decide what are the plaintiff's rights under said sale, to determine whether it was competent, in equity, for said Stackpole to surrender, without any consideration, the right which he had acquired under the contract of January 6th, 1855, to the prejudice of his existing creditors. That such surrender was made voluntarily, and without any solicitation or desire on the part of the defendant, and that the defendant accepted it, without any knowledge of any design on the part of said Stackpole to defraud his creditors, if any such design existed, the case fully shows. The question then arises, whether said surrender was effectual, so as to pass or extinguish the right of said Stackpole to a conveyance, as against his then existing creditors. The bill alleges that the premises were at that time of much greater value than the sum to be paid therefor, as mentioned in the condition of the contract, upon payment of which the conveyance was agreed to be made; and the amount paid by the plaintiff at the officer's sale, December 31, 1855, seems to indicate that there is truth in the allegation. Does the fact, that the right or property in this contract, was acquired by said Stackpole, without the payment of any consideration to the defendant therefor, other than what

such a contract, under seal, legally imports, put said Stackpole in any different posture than he would be in, if he had acquired his right to such conveyance in any other mode? We think not.

No legal or equitable reason is perceived, why such property, when once vested in the debtor, is not held, subject to the same principles, so far as relates to the rights of creditors, as any other property held by such debtor. Like one's interest in other contracts, it may be sold and assigned; and when such assignment is before the attachment on mesne process, the question, "whether such assignment be good and valid, or fraudulent and void, on legal principles," may, by the statute of 1847, c. 21, § 3, in certain cases, be tried and determined by a jury. Undoubtedly, such property may also be the subject of gift; but "gratuitous gifts," says Chief Justice WHITMAN, in the case of *Emery* v. *Vinal*, 26 Maine, 305, "in which no benefit was expected to accrue, or intended thereafter to be derived therefrom, by the grantor or donor, have, in numerous cases in the books, been adjudged void, when found to be interfering with the rights of creditors." Such contract, for a conveyance of real estate, may also be rescinded or cancelled by the parties thereto, *before* the rights of other persons have in some way attached; but we know of no equitable or just principle, by which the mere surrender of the contract to the obligor, after the debtor's rights in it have become fully vested, for the simple reason, that the holder regarded himself as unable to pay the sum therein specified, without any agreement or understanding having taken place, before, at the time, or afterwards, touching the surrender, can properly be regarded as having the effect to deprive the then existing creditors of such debtor of the right to attach such debtor's property therein, and to sell the same, if of value, in conformity to law, for the payment of their debts. Inasmuch, therefore, as the facts agreed in this case, show no such assignment, gift, or rescission of the contract, prior to the seizure and sale of the right of James Stackpole to a deed of conveyance under the same, as to render such sale inoperative

and void, we are brought to the conclusion, that such sale was lawful and valid, and transferred to the plaintiff all the right which passed to said Stackpole by virtue of said contract, when the same was executed and delivered to him; and it appearing that the plaintiff tendered to the defendant on January 15, 1856, $908,42, which is found to be sufficient in amount, if the same had been tendered on the sixth day of January preceding; and the defendant having, in writing, agreed that said tender, though not made in season, should, in the decision of this case, be regarded as made on said last mentioned day, no reason is perceived why the plaintiff is not entitled to a decree for a specific performance of said contract with him, upon the payment of said sum of $908,42, with interest thereon, as agreed, from the said sixth day of January, until the payment thereof. This bill, having been instituted in a friendly manner, to settle the rights of all parties interested, such decree is to be entered by the agreement of the parties, without costs.

TENNEY, C. J., did not sit.

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

JOHN LANE *versus* JOSIAH CROSBY.

A justice of the peace took a recognizance on appeal, in a suit pending before him, the condition of which was that the "appellant shall *appear* at the Court aforesaid, and shall prosecute his said appeal with effect, and shall pay all *intervening damages* and costs," &c.: — *Held*, that by R. S. of 1841, c. 116, § 10, justices of the peace have no authority to require the personal appearance of an appellant at the appellate Court, nor the payment of intervening damages and costs.

There are no presumptions in favor of the jurisdiction of an inferior magistrate.

ON DEMURRER from *Nisi Prius*.

This was an action of *scire facias*, against the surety in a recognizance, on appeal from a justice of the peace. The de-

fendant demurred to the declaration. The question in issue is stated in the opinion of the Court.

McClellan & Hutchinson, for plaintiff.

Josiah Crosby, pro se.

APPLETON, J.— This is an action of *scire facias*, on a recognizance taken before a magistrate, in a suit pending before him on appeal, the condition of which, as set forth in the declaration, is, that the appellant "shall *appear* at the court aforesaid, and shall prosecute his said appeal with effect, and shall pay all *intervening damages* and costs," &c. To this declaration, the defendant, who was a surety in the recognizance, has demurred, and the question presented is, whether the contract, into which the defendant is alleged to have entered, is obligatory upon him.

There are no presumptions in favor of the jurisdiction of an inferior magistrate. The provision of R. S., c. 116, § 10, on this subject, is, that the appellant shall recognize, with sufficient surety or sureties, to the adverse party, if required by him, in a reasonable sum, with condition to *prosecute his appeal with effect*, and pay all costs arising after the appeal. It has been settled, that a magistrate has no authority to require the personal appearance of the appellant, at the appellate court, nor the payment of intervening damages and costs. *French* v. *Snell*, 37 Maine, 100. The recognizance is not in conformity with the requirements of the statute. The declaration sets forth no sufficient cause of action, and must be adjudged bad.

Declaration bad.—Judgment for defendant for costs.

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

COUNTY OF SAGADAHOC.

CHARLES CROOKER *& als. versus* HENRY TALLMAN.

Several persons paid for a mercantile adventure, by a draft on time, to which draft all were parties. Subsequently, by written contract, each of the whole number agreed to pay his proportion of the draft at maturity, in consideration of being entitled to an equal share of the profits. The adventure was not successful; the draft was not paid at maturity, and suit was brought by the indorsers, who had been obliged to take it up, against the acceptors. Both plaintiffs and defendants were parties to the adventure: — *Held*, that the contract was neither payment of the draft nor a discharge of the parties to it, and that the action could be maintained; also, that an action could be maintained upon the contract.

The contract is evidence of what each agreed to pay in the adventure, and may be regarded as equivalent to a receipt from the plaintiffs for their proportion of the draft, and reduces by so much the amount to be recovered by them upon it.

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

This was an action on a draft. The facts in the case are stated in the opinion of the Court.

After the evidence was in, a default *pro forma*, by consent, was entered.

If, upon the evidence, the action is maintainable, the default is to stand, and judgment is to be rendered for such sum as the plaintiffs may, upon legal principles, be entitled to recover. If not maintainable, the default is to be taken off, and judgment rendered for the defendant.

Gilbert, for plaintiffs.

Randall & Tallman, for defendant.

APPLETON, J. — This suit is upon a draft dated March 28, 1848, drawn by B. F. Sawyer upon, and accepted by, the defendant and James C. Tallman, since deceased, for the sum of nine thousand five hundred and two dollars and forty-nine

cents, on eight months, in favor of the plaintiffs, and by them indorsed. The plaintiffs having been compelled, as indorsers, to pay the draft upon its dishonor, claim to recover the amount thus paid of the defendant as acceptor.

In a few days after the date of the draft, the plaintiffs entered into the following agreement:—

"Bath, April 5, 1848.

"Whereas B. F. Sawyer, Esq. on the 28th March, 1848, drew a draft favoring Charles & W. D. Crooker and S. Swanton, 2d, on James C. Tallman and Henry Tallman for the sum of nine thousand five hundred and two dollars and forty-nine cents, on eight months, which said draft is accepted by J. C. and H. Tallman, for the purchase of two hundred and fifty bales of sheeting; now the aforesaid parties agree to equally divide the loss and gain on the said purchase, and each of them to pay one-sixth part of said draft at maturity; the said Tallmans and B. F. Sawyer being responsible, jointly and severally, for one-half part thereof."

(Signed,) "Charles & W. D. Crooker,
"Samuel Swanton, 2d."

A similar contract was signed by James C. Tallman, Henry Tallman and B. F. Sawyer, at the same time.

Had the parties to the contract of April 5th performed their agreement, no question, such as is here presented, could have arisen. The defendant neglected or refused to pay what, by the contract, to which he had become a party, he had agreed to pay. It is not questioned that an action might have been maintained upon this contract. The inquiry here presented is whether it can likewise be maintained upon the draft to which this contract relates.

The contract of April 5 is neither a payment nor a discharge of the parties to the draft. It is a new and subsequent agreement between different parties as to the payment of the draft. The parties to a draft are the payee, the drawer and acceptor. The contract, between the payee and the drawer, and between the payee and the acceptor, are several and distinct. The contract of April 5 is between the

payees on the one and the drawer and acceptors on the other side. It is, substantially, a joint and several promise on the part of the payees to pay, at its maturity, one half of the draft, in consideration of receiving one-half of the expected profits of the sheeting venture. It is evidence which shows that the plaintiffs have no claim upon the defendants for one-half of the amount they have paid. It may be considered as a receipt of half of the funds to meet the draft. To avoid circuity of action, this amount is to be allowed in reduction of the plaintiff's claim, instead of compelling the defendant to resort to a suit upon this contract to enforce from the plaintiffs the payment of their half. *Carr* v. *Stephens*, 9 Barn. & Cress. 491.

But the plaintiffs have received funds to a very considerable amount, which are first to be applied in reduction of the amount due upon the draft. They received from the sales of the sheetings, which came into their hands and were disposed of by them, about one thousand dollars. There was likewise received the further sum of four hundred dollars, or thereabouts, from the sale of the equity of the Malden farm. The precise sums are not definitely stated, but, when ascertained, they must be appropriated in discharge of the draft.

A portion of the sheetings, for which the draft was given, was exchanged for a house on Cherry street, the title of which was conveyed to the plaintiffs as security for their liability. The plaintiffs, however, subsequently wishing to raise money on the house, re-conveyed the same to B. F. Sawyer and J. C. Tallman, who gave their note for $2250, and mortgage to secure the same, to one Perkins, the agent of the plaintiffs, by whom the same was negotiated. It seems probable, that from this negotiation the plaintiffs derived no benefit. But Perkins was their agent and not the agent of the defendant, and they must therefore suffer for his negligence or misconduct. The plaintiffs, from the evidence, seem fully to have recognized the justice of this liability, and to have promised to account for the same. This sum is to be allowed

upon the draft. After these deductions are made, the plaintiffs are entitled to recover one-half of the balance remaining.

The equity of redemption of the Cherry street house is in the plaintiffs, which they hold in trust. But they were under no obligation to appropriate their own funds to its redemption, without aid from their associates. There is no reason why they should account for more than they have received, or might, in the exercise of due diligence, have received from the property.

The defendant is to be defaulted and to be heard in damages. *Defendant defaulted.*

TENNEY, C. J., concurred.—RICE, J., dissented.

ISAAC COOMBS *& ux. versus* FRANCIS T. PURRINGTON.

The public, as foot passengers, have the right to use the carriage way as well as the sidewalk.

Walking in the carriage way is not of itself *prima facie* evidence of want of ordinary care; nor from that fact *alone* will the law infer negligence.

When an injury is the result of negligence on both sides, no action can be maintained.

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

This was an action of trespass, for alleged negligence of defendant's minor son and servant, in driving against the female plaintiff, in Main street, Topsham.

The testimony was to the effect, that the accident happened while the female plaintiff was walking along in the carriage path, in the same direction in which the defendant's horse and sleigh, driven by his minor son, were moving. It further appeared, that for some distance each side of the place where the accident happened, there was a plank sidewalk on one side of the street.

The evidence as to the precise manner in which the collision occurred was conflicting.

The defendant's counsel requested the Court to instruct

the jury, that if they found there was a safe and convenient sidewalk for foot passengers at the place where the accident happened, and the female plaintiff chose to walk in the carriage path, not for the purpose of merely crossing the street, but using the carriage path instead of the sidewalk, and the accident occurred in consequence, there would be such a want of care as would preclude the plaintiff from recovering.

This instruction was refused, and the jury were instructed that the plaintiff and defendant had an equal right to be in the street, and that they would determine whether there was a want of ordinary care on the part of the plaintiff; and if there was, that she would not be entitled to recover.

He further instructed, that the burthen of proof was on the plaintiffs to satisfy the jury that the accident happened by the negligence of the driver, without any want of ordinary care on the part of the plaintiff; that, if there was no negligence on the part of either party, and it was a pure accident, the plaintiffs were not entitled to recover; or, if both parties were in fault, the plaintiffs were not entitled to recover.

The plaintiffs' counsel requested the Court to instruct the jury, that a person had a right to be in the street, whether there is a sidewalk or not, and that such fact is not evidence from which the jury can legally infer negligence; and the instruction was given.

To this instruction, and the refusal to give the instruction requested by the defendant, the verdict being against him, the defendant excepted.

W. G. Barrows, for defendant.

1. It is a want of ordinary care in a woman to use the carriage path, instead of the sidewalk, in a populous place, where carriages are frequently passing. Where suitable sidewalks are provided, indicating an appropriation by common consent of the community, of that portion of the way for the convenience of foot passengers, and to ensure their safety, it is their duty to yield the carriage-path to carriages, except when necessarily in it, as for the purpose of crossing and the like. They should present no unnecessary obstruction to the

free and convenient passage of vehicles; and ordinary care requires of them to avoid the danger of collision, by keeping off the carriage track, and upon that portion of the way especially assigned to them for their security when equally convenient. The ruling requested by the defendant would afford sufficient protection to all who were necessarily in the carriage path. *Washburn* v. *Tracey*, 2 Chip. 136; Starkie on Ev. part 4, title trespass, page 1458; *Palmer* v. *Barker*, 11 Maine, 339; *Hall* v. *Bramley*, 43 E. C. L. R., 1037; *Rathburn* v. *Payne*, 19 Wend. 399; *Hartfield* v. *Roper*, 21 Wend. 615; *Cottrill* v. *Starkey*, 34 E. C. L. R., 587; 55 C. & P. 379.

2. The instruction given, at the request of the plaintiffs' counsel, withdrew from the consideration of the jury a circumstance which was properly in evidence before them, and had a direct bearing upon the question, whether the female plaintiff was in the exercise of ordinary care at the time the accident occurred.

J. D. Simmons, for plaintiffs.

The plaintiffs contend that in this action the Court rightly refused to instruct the jury as requested by defendant's counsel; for the law does not designate any particular portion of the road where the people may pass on foot and where not. Further, want of ordinary care is a question of fact for the jury, under the particular circumstances of the case. *Crampton & al.* v. *Inhabitants of Solon*, 11 Maine, 335.

The jury were instructed to determine whether there was want of ordinary care on the part of the plaintiffs, and if there was, she could not recover. The jury found that she was in the use of ordinary care. As to what constitutes ordinary care, the law is silent; for no precise and distinct rule could be laid down so as to be applicable to all cases. Much must be left to the good sense, experience and discretion of the jury. 6 Cush. 530; 8 C. & P., 691; 5 C. & P., 407, 379.

APPLETON, J.—The requested instructions amount to this; that being in the streets where there is a sidewalk, "would

be such a want of care as would preclude the plaintiff from recovering." This request was properly refused. Whether there is negligence or not, must, in each case, be determined by the peculiar and attendant circumstances. Whether there was any negligence on the part of the plaintiff, was a fact for the consideration of the jury, and was submitted to the jury under proper instructions. *Bigelow* v. *Rutland*, 4 Cush. 247; *Garmon* v. *Bangor*, 38 Maine, 443.

The Court further instructed the jury, "that a person had a right to be in the street, whether there is a sidewalk or not, and that such fact is not evidence from which the jury can legally infer negligence." This instruction was given at the instance of the counsel for the plaintiff, and rests upon the isolated fact, of being in the street where there is likewise a sidewalk. But from that fact *alone* negligence could not be legally inferred. If such were the legal inference, then being in the streets must be regarded as a fact *per se* proving negligence. Now the public street is a place in which all have a right to be, for streets are for the purposes of public travel. It was held in *Boss* v. *Litton*, 5 C. & P., 379, that a foot passenger, though he may be infirm from disease, has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it. "A man," says DENMAN, C. J., "in that case, has a right to walk in the road, if he pleases. But he had better not, especially at night, when carriages are passing." The general right of foot passengers, in reference to carriages, to use the carriage-way, was fully recognized in *Raymond* v. *Lowell*, 6 Cush. 530. It would be a novel doctrine to hold that foot passengers have no right to walk in the street, or, that walking therein, was *prima facie* evidence of want of ordinary care, or that from that fact *alone* negligence might be inferred.

The jury were instructed, "that the plaintiff and the defendant had an equal right to be in the street, and they would determine whether there was want of ordinary care on the part of the plaintiff; and if there was, she would not be en-

titled to recover." The question of ordinary care was thus submitted to the jury, and it was for them to determine, from all the circumstances in the case, whether or not the female plaintiff was chargable with negligence in having left the sidewalk as she did; if not so chargable, whether the injury arose from the negligence of the defendant. The verdict has determined those facts, and they are not examinable here.

It is well settled, that when the injury is in consequence of negligence on both sides, that no action can be maintained. *Simpson* v. *Hand*, 6 Whar. 320; *Williams* v. *Holland*, 6 C. & P., 23; *Parker* v. *Adams*, 12 Met. 415.

Exceptions overruled.—Judgment on the verdict.

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

CUTTING, J., dissented, and gave the following opinion:—

I cannot concur in the opinion, which sustains the doctrine advanced at the trial, and overrules these exceptions. I am fearful, that, by one of the rulings, injustice may have been done by the verdict, which "*is* examinable here," so far as the genuineness of its legal elements are involved.

"The plaintiff's counsel requested the Court to instruct the jury, that a person had a right to be in the street, whether there is a sidewalk or not, and that such fact is not evidence from which the jury can legally infer negligence, and the instruction was given."

Whether the female plaintiff had the right to be in the street, under the circumstances, was one of the principal questions of fact to be settled by the jury; but that fact was wholly withdrawn from their consideration, and decided in the affirmative by the Court; consequently, after this instruction, the plaintiff stood *recta in curia*, protected by the judicial mantle from any imputation of not having been in the exercise of ordinary care.

The burden of proof was on the plaintiff, who requested this instruction, to show, that she was in the exercise of ordinary care. The evidence discloses, that she was walking along in the carriage-path, in the same direction in which the

defendant's horse and sleigh were passing; and, in so walking, was she exercising ordinary care? The answer to this question, would seem to depend upon the attendant circumstances disclosed at the trial, which were a plank sidewalk, her walking *along* and not *across* the street, and the defendant's horse and sleigh approaching in the rear. Now, under such circumstances, to stand still, and suffer one's self to be run over, without any attempt to avoid a collision, cannot be said to be an exercise of ordinary care; yet, under such a state of facts, from aught that appears, (for upon this point the case finds the evidence to be conflicting,) the plaintiff invoked the ruling which was given, to the effect, that from a certain fact simultaneous with other facts, the jury could not legally infer negligence.

The Judge in this particular having encroached upon the province of the jury, the *former* instruction, that they must find that the plaintiff was in the exercise of ordinary care, was either overruled, contradicted, or wholly withdrawn from the jury; whereas the requested instruction should have been refused, and the jury permitted, under the former instruction, to infer negligence, or otherwise, from all the facts disclosed, bearing upon that point.

If it be contended, that the ruling embraced only the abstract proposition, that "a person had a right to be in the street whether there is a sidewalk or not," my answer is, that even an abstract proposition, if it be calculated to mislead the jury, should never be enunciated by the presiding Judge. *Hopkins* v. *Fowler*, 39 Maine, 568.

But, as an abstract proposition, the ruling was not correct, for no "person" has legal right to be in the street, regardless of the laws of the road, as defined and regulated by statute; whereas the instruction implies that he has such right, independent of others' rights, or the attendant circumstances.

It has been also contended, that a foot passenger has a right to substitute the carriage path for the sidewalk, and from that fact *alone* negligence cannot be inferred. Assuming such a proposition to be correct, still it is not this case,

for here that fact was not *alone*. But the question naturally arises, what authority has a Judge to take one "isolated fact," by himself isolated and severed from all other facts in the case, and to instruct the jury that from such fact *alone* no inference can be drawn? If such is to be the established rule of law, then a party would have the right to have a separate ruling upon every distinct fact disclosed by the evidence, when neither, standing alone, might be the subject matter for an inference, but, when taken and considered together, would carry instant conviction. For instance, in the case at bar, the fact that there was a sidewalk, and the plaintiff's walking along the street, were circumstances, which, when considered and weighed with other facts, about which there was conflicting testimony, might have authorized the jury to find negligence, but this chain of facts and circumstances was broken by the presiding Judge.

The cases cited from 6 Cush. 530, *citing* 5 Carr & Paine, 379, to my apprehension, have but little or no bearing upon this question; if any, more in favor than against sustaining these exceptions. The first authority merely settles that foot passengers are not confined to particular crossings; and the verdict was set aside for want of ordinary care on the part of the plaintiff in crossing from the sidewalk into the street.

In the latter, the foot path had been shown to have been "in a bad state;" and the defence set up was ruled to be inadmissible under the defendant's plea. But the *dictum* of the Judge, was only to the effect, that the footman under the circumstances, having a right to walk in the carriage-way, "was entitled to the exercise of reasonable care on the part of persons driving carriages along it." And notwithstanding the defendant was not permitted, under his plea, to show the plaintiff's conduct, *as a full defence*, he was so permitted in mitigation of damages.

WILLIAM KENDALL *versus* GEORGE IRVING *& ux.*

An officer made return of an attachment of real estate as follows: — "By virtue of this precept, I have attached all the right, title, interest, estate, claim and demand of every name and nature that the within named defendant has to any and all real estate in the county of Lincoln; and within five days I put into the post-office at Bath, directed to the register of deeds, at Wiscasset, an attested copy of so much of this return as relates to said attachment, with the names of the parties in the writ, the sum sued for, the date of the writ and the court to which the same is returnable," &c. — *Held*, that the return was in its *form* sufficient to answer the requirements of law.

It is not necessary for the officer personally to carry the copy of his return to the register's office; but it must be "lodged" there, or the attachment is not perfected and the lien created.

The certificate of the register of deeds, in these words, — "Writ — Samuel Kendall *v.* Richard Look, dated Nov. 21, 1850. Attachment dated Nov. 30th, 1850. Recorded Dec. 30th, 1850," — is not sufficient proof that the copy of the return of an attachment of real estate was *lodged* in the register's office.

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

This was a writ of entry. Plea, general issue.

The land in controversy was formerly, with lands adjoining, the estate of Richard Look, who conveyed said estate to E. J. Oliver by deed, March 12, 1850. It lies in Georgetown. The plaintiff's ancestor, Samuel Kendall, deceased, under whom he claimed by inheritance, attempted to make an attachment of the land Dec. 2d, 1850. The officer's return set forth that on that day he "attached all the right, title, &c., that the said Look had at that time to any and all real estate in the county of Lincoln;" "and, within five days, I put into the post-office at Bath, directed to the register of deeds at Wiscasset, an attested copy of so much of this return as relates to said attachment," &c.; but the return does not show that the copy was actually filed in the register's office.

The plaintiff put into the case a copy of the register's certificate in these words: —

"Writ. *Samuel Kendall* v. *Richard Look*, dated Nov. 21st, 1850. Attachment dated Nov. 30th, 1850. Recorded Dec. 30th, 1850. "Asa F. Hall, Register."

This was objected to and admitted. In the suit of *Samuel*

Kendall v. *Look*, the plaintiff recovered judgment, and on the 6th of Feb., 1852, seasonably made his levy on the land demanded, it being all appraised and set off in one body.

It was contended on the part of the plaintiff, that E. J. Oliver, after the conveyance to him by Look, had, before the date of the attachment, conveyed to Look that part of the land, as to which the jury found for the plaintiff; and evidence was introduced to show that such a conveyance had been made by a deed lost or destroyed, unregistered.

The respondents claimed to hold that part recovered by the verdict, under a deed from Oliver to the defendant's wife, dated April 12th, 1852. Mrs. Irving also held a deed from Look, dated Oct. 11th, 1851, conveying the same premises. But neither of the defendants had any title to the residue of the land embraced in the levy and named in the declaration. Neither had Look any title to that remaining portion on the day of the attachment, or at any time afterwards.

The presiding Judge ruled that the attachment was good, and instructed the jury that they might consider that the levy was good, and would take effect from the date of the attachment; so that if they found that Oliver had conveyed a portion of the land levied on by Samuel Kendall, before the attachment was made, he would thus have a title to that portion paramount to the title of Mrs. Irving. The jury found for demandant. To these rulings and instructions the respondents excepted.

Tallman, for plaintiff.

W. Gilbert, for defendants.

TENNEY, C. J.—It was a disputed question at the trial, whether any lien upon the premises was created by an attachment upon the original writ, in the action of Samuel Kendall, the demandant's ancestor, against Richard Look. That writ was dated Nov. 21, 1850, and the return of attachment of all real estate in the county, is under date of Dec. 2, 1850. If the affirmative of this question is established, the demandant obtained a title, by the levy of the execution, issued upon

the judgment in that action, and the death of his ancestor; if otherwise, the title of the female tenant, under the deed from Richard Look to her of Oct. 10, 1851, must prevail.

It is provided in R. S., c. 114, § 32, that "no attachment of real estate on mesne process, shall be deemed and considered, as creating any lien on such estate, unless the officer making such attachment, within five days thereafter, shall file in the office of the register of deeds in the county or district in which all or any part of said lands are situated, an attested copy of so much of the return, made by him on the writ, as relates to the attachment, together with the names of the parties, the sums sued for, the date of the writ, and the court to which it is returnable, except as mentioned in the 34th section of this chapter." Sect. 34, of c. 114, is as follows: — "But if the attested copy of the return, on the writ made, shall be lodged in the office of the register of deeds, as mentioned in the thirty-second section of this chapter, then the attachment shall take effect from the time it was made; otherwise, it shall take effect from the time when such copy of the return is so deposited in the registry of deeds, notwithstanding it may be after the summons or copy was served on the defendant."

The copy of the return, which the officer certifies that he put into the office at Bath, directed to the register of deeds at Wiscasset, is, in its form, sufficient to answer the requirement of the law; but the return upon the writ fails to show, what is equally essential to create a lien on the property, that this was filed in the office of the register of deeds. Unless it appears, that the attested copy of the return, referred to by the officer, was seasonably lodged in the register's office, the attachment cannot be regarded as perfected, and the lien created.

From the language of sect. 34, it is not made necessary that the officer should personally carry the copy to the register's office; but it must be lodged there, or the property, returned upon the writ, if real estate, is not holden by the attachment.

The paper, purporting to be signed by Asa F. Hall as reg-

ister, does not conclusively prove that the copy of the return, as certified by the officer as having been put into the post-office at Bath, was ever lodged in the register's office at Wiscasset; or that any such copy was lodged there. It does not upon its face purport to be a copy of such a copy as that described by the officer in his return; neither is it to be treated as a certificate, that such copy had been lodged in his office. It is not a statement, by the person who signed it, that the copy so described, or any paper, was in the register's office. If the words, "attachment dated Nov. 30, 1850," were intended to refer to the copy of the return on the "writ, *Samuel Kendall* v. *Richard Look*, dated Nov. 21, 1850," it is contradictory to the certificate of the officer in his return, which is dated Dec. 2, 1850.

The words appearing upon the paper, bearing the name of the register, are not that clear and conclusive proof, that the copy of the return required to be filed, lodged or deposited in the register's office, in order to perfect a lien on real estate, which the Court can pronounce, as matter of law, sufficient to render the attachment good.

If the copy, attested by the officer, reached the register's office, it is the evidence, with proof of the time when it was lodged there, from which the Court is to judge whether a lien upon the property returned as attached was created. And if the copy, which the officer certifies that he put into the post-office, was filed in the register's office, it is there at this time; and if it is the one which the officer refers to and describes, it is sufficient to create a lien upon the premises. But when this question can be determined with absolute certainty, it is not wise that the Court, which is to decide the matter as a question of law, should settle the rights of the parties, by proof, defective in itself, and which may lead to erroneous results.

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

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

THOMAS WARREN *versus* JOHN H. DAVIS *& al.*

The certificate of two justices of the peace, discharging a poor debtor from arrest on execution, upon his disclosure, stated erroneously the date of the judgment; but in every other particular conformed to the facts. — *Held*, that the (record) evidence preponderated in favor of the identity of the judgment, and that an action could not be maintained for the penalty in the bond. — *Held, also*, that the debtor not having performed the condition of the bond, the defendants were not entitled to costs as his sureties.

Case of *Hathaway* v. *Stone*, 33 Maine, 500, affirmed.

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

This was an action on a poor debtor's bond, signed by Davis as principal and the other defendants as sureties, dated Feb. 20, 1855, and given in accordance with the provisions of the Revised Statutes, to procure the release of Davis from arrest on execution.

The plaintiff offered in evidence the bond and the execution, and claimed that damages should be awarded by the Court, in accordance with the provisions of the Revised Statutes, c. 148, § 39.

The defendants offered a certificate of two justices of the peace and quorum, dated Aug. 15, 1855; and also offered to prove that said Davis was then, and is now, entirely destitute of means of payment; which evidence was objected to.

The defendants also offered to prove, by the justices, that the bond taken on arrest on said execution named in the bond, was the one that the defendant Davis did disclose on, which was objected to by the plaintiff, as the record was the only proper and legal testimony on this point. They also offered to prove that said plaintiff never had any judgment against the defendant, except the one referred to in the certificate.

The certificate described the judgment as having been rendered in 1855, when in fact it was rendered in 1853.

J. H. Rogers, for the plaintiff.

1. The citation and certificate offered by defendants, do not prove a compliance with the condition of the bond in suit. *Fales* v. *Dow*, 24 Maine, 211; *Slasson* v. *Brown*, 20 Pick.

431; *Reid* v. *Cox*, 5 Blackf. 312, (U. S. Dig. Sup. Ev. 1657); *Hathaway* v. *Stone*, 33 Maine, 500.

2. The record of the justices is the only legal evidence of the papers and proceedings before them. 1 Greenl. Ev. § § 82, 86, 538; *Boody* v. *York*, 8 Greenl. 272; *Tibbetts* v. *Merrill*, 12 Maine, 122; *Moody* v. *Moody*, 11 Maine, 247; *Ellis* v. *Madison*, 13 Maine, 312; *Carey* v. *Osgood*, 18 Maine, 152; *Titcomb* v. *Keene*, 20 Maine, 381; *Burnham* v. *Howe*, 23 Maine, 489; *Blaisdell* v. *Briggs*, 23 Maine, 123; *Wing* v. *Abbot*, 28 Maine, 367; *Bowker* v. *Porter*, 39 Maine, 504; *Mordecai* v. *Beal*, 8 Port. 529, (U. S. Dig. Sup. Ev. xi. 869); *Milan* v. *Pemberton*, 12 Mis. 598, (U. S. Dig. 1851, Ev. 267.)

H. Tallman, for defendants.

The defendants contend that one of the conditions of the bond has been performed, by the disclosure of Davis, in compliance with law.

It appears in the case, that Davis, within the time limited by said bond, submitted himself to examination before two justices of the peace and quorum, who administered to him the oath, and gave him the legal certificate thereof.

If this examination and discharge was on the bond in suit, it of course discharges this action.

The certificate corresponds in every particular with the bond in suit, except that it states the judgment to have been recovered in 1855 instead of 1853. The amount, the term of the court, &c., are the same. The date of the execution is stated to be Jan. 3d, 1855, while the judgment is stated to have been recovered the "*third Tuesday of January*, 1855," simply an impossibility. It is a mistake made by writing 1855 instead of 1853. The case shows this, and the justices will so testify.

The bond could not have been a bond upon a judgment obtained in the third Tuesday of January, 1855; because the execution was issued before that time. We contend that the record discloses a compliance with the conditions of the bond, and that judgment must be rendered for the defendants in

this case. *Hathaway* v. *Stone & al.*, 33 Maine, 500; *Mathews* v. *Houghton*, 11 Maine, 379; *Rand* v. *Tobie*, 32 Maine, 450.

If, however, the record does not show a compliance with the statute, still the plaintiff cannot recover, as there are no damages sustained by him.

The case shows that the principal defendant was, at the time of the disclosure, as well as at the commencement of this suit, entirely destitute of property; in a moral point of view, therefore, it would not only be inequitable, but absolutely unjust to compel the other defendants to pay the debt of the principal defendant.

The statute of 1848, c. 85, § 2, provides that in all actions upon such bonds, &c., "the amounts assessed shall be the real and actual damage and no more." No damages have been sustained in this case, and the action cannot be maintained.

CUTTING, J.—The bond, execution, citation and certificate referred to, and made a part of the case, have not been furnished, and we can ascertain the facts intended to be submitted only from what we can gather from admissions made in the arguments of counsel; from which it would appear that both the citation and certificate corresponded with all the essential *data* in the bond, except that the judgment described in the former was stated to have been rendered on the third Tuesday of January, 1855, instead of 1853, as disclosed in the latter, and which was the correct date.

The certificate of the justices, who administered the oath, is not in accordance with the requirements of the R. S., c. 148, § 31, which makes it necessary for them, among other things, to certify "the date of the judgment." But the certificate, in every other particular, being in accordance with the facts, "we think, that on the whole, the (record) evidence preponderates in favor of the identity of the judgment," as was decided in *Hathaway* v. *Stone*, 33 Maine, 500, where a very similar state of facts was disclosed, both as to the error in the certificate and the poverty of the debtor. And, as the Court remarked in that, so we decide in this case, "for the forego-

ing reasons, the plaintiff is not entitled to recover, and the debtor, not having performed the condition of the bond, can have no judgment for costs." R. S., c. 85, § 3; *Call* v. *Barker*, 28 Maine, 317; *Bard* v. *Wood*, 30 Maine, 155.

Plaintiff nonsuit.—No costs for defendants.

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

SILAS ANDERSON *versus* CITY OF BATH.

It is incumbent on the Judge presiding in a trial, to give to the jury, at the request of a party, any instruction which is in accordance with law and is based on evidence in the case tending to show the state of facts which it supposes; but he is not bound to give it in the language of the request, nor as a "requested" instruction.

When an injury is occasioned by a defect in the highway *and some other cause* for which the town is not responsible, the town is not liable in damages for the injury.

In order to render the town liable, the injury must be occasioned *solely* by its neglect.

A defect in the highway cannot be held to have occasioned an injury when some other cause combined to produce it.

If the jury find, in an action against a town for an injury alleged to have been occasioned by a defect in the highway, that there was a defect in the plaintiff's harness which did in fact contribute to produce the injury, he cannot recover.

If such defect in the harness was unknown to the plaintiff, and the exercise of ordinary care and prudence would not have enabled him to discover it, the result will still be the same; he cannot recover for the injury.

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

This was an action to recover damages for an injury alleged to have been received by the plaintiff, in consequence of an obstruction in a public street.

The points involved in the case are stated in the opinion of the Court.

The verdict was for the plaintiff, and the defendants filed exceptions to certain rulings of the presiding Judge.

They also moved that the verdict be set aside and a new

trial granted for the reasons, (1,) that the verdict was against law; (2,) against the evidence and the weight of the evidence; and (3,) because the damages were excessive.

Gilbert and *Bronson*, for plaintiff.

Tallman and *Paine*, for defendants.

TENNEY, C. J.—The counsel for the defence requested the presiding Judge, among other things, to instruct the jury, "that if the injury was occasioned by inevitable accident arising from defect in the harness, as by which defect, contributing in combination with defects in the street or streets, the plaintiff cannot recover; that this would be so, although the plaintiff had no knowledge of such deficiency of harness, and was in no fault for the want of such knowledge."

If there was evidence, tending to show such a state of facts, as the request supposes, and they would in law prevent a recovery by the plaintiff, it was incumbent on the Judge to have given the instruction in some form; but he was at liberty to state it in different language, from that used in the request, and was not bound to present it as a requested instruction.

John Weeks is reported in the case to have testified, that after the plaintiff received the injury, for which he claimed damages in the action, he told him, in reference to the accident, that "his rein gave way, before he upset, or he should have done a little better than he did;" that he did not state what started his horse; he said that, "when his rein broke, something fell and started his horse, so that he sheered to the south."

Sewall B. Ham testified, that just before the injury was received by the plaintiff, he saw him as he went down Broad street; that the oars, which were in his wagon, appeared to make a noise, and the horse became restive; that the plaintiff spoke to him, and checked him, so that he nearly stopped at Jackson's shop; and as he started again, he saw that one of his reins had either parted or dropped down, and the horse then started faster; witness was unable to say whether the rein was broken; he had but one rein, and that was the right

one, which he had in his right hand; he saw the end of the rein hanging down; the near one was next to him.

By the general instructions given to the jury, they were to inquire, whether the harness and the wagon were defective; and whether such defect, if any, contributed to produce the injury; also, whether the defect was by reason of the want of ordinary care in the plaintiff; or whether it was unknown to him; and if so, whether he was in fault on account of a lack of knowledge thereof. Upon such findings, the jury were instructed as to the legal results which would follow, to all which there can be no objection.

If the jury had found the fact that there was a defect in the harness, and the existence of that defect was unknown to the plaintiff, and the exercise of common and ordinary care and prudence would not enable him to have discovered it, and it did in fact contribute to produce the injury complained of, the case would fall within the principle of *Moore* v. *Abbott*, 32 Maine, 46. This was the instruction which was substantially requested by the counsel employed in the defence of the action before us.

The instruction requested, not having been given in the terms employed by counsel, and the doctrine maintained in defence, embraced in the request, not being found in the general instructions, on the authority of the case cited, the

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

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

COUNTY OF LINCOLN.

LIME ROCK BANK *versus* JOHN L. MALLETT.

A bank received interest in advance for a further period upon a note which it had discounted, and which was about to mature, and caused the word "renewed" to be written thereon: — *Held*, that the advance interest thus received was a valuable consideration, and that the time of payment of the note was enlarged.

The liability of a surety upon a note is terminated by a valid agreement to enlarge the time of payment without his knowledge or consent.

A person whose name appears as maker upon a note, but who is in fact a surety only, and is well known to be such to the payee, may, in a suit upon the note, avail himself of the defence that the time of payment has been enlarged without his knowledge or consent and his liability thereby terminated.

Nor would it be otherwise, where the rule and usage of the bank, well known to the surety, were to take no accommodation notes, so written, but that it required all notes to be joint and several, and regarded all the promisors as principals so far as the bank was concerned. He could still avail himself of the enlargement of the time of payment without his knowledge or consent as a valid defence.

The part payment of a note by the surety, after his liability has thus terminated, with money belonging to his principal, will not revive his liability for the balance, although at the time of such payment he gave no intimation that the money was not his own.

At the trial he may show that the money thus used in part payment belonged to the principal on the note.

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

ASSUMPSIT on a note of the following tenor:—

"East Thomaston, Jan. 28, 1845.

"Value received, we jointly and severally promise to pay the president, directors and company of the Lime Rock Bank, or order, one hundred and seventy-five dollars in sixty days."

(Signed,) "Henry McIntosh,
"John L. Mallett,
"John Spofford."

On the back of the note were the following indorsements:

	"May 28.	Received. —	Renewed.
	"Sept. 28.	"	"
	"Nov. 28.	"	"
1846.	"Jan. 28.	"	"
	"Mar. 28.	"	"
	"May 28.	"	"
	"July 28.	"	"

"1847. Sept. — Received $10,37, and interest till August 28th last, by J. L. Mallett."

This suit was against Mallett only, and commenced April 14, 1849. The general issue was pleaded, and a brief statement filed, alleging that defendant and Spofford were sureties for McIntosh; that the same was known to the bank when the note was discounted; and that the bank had extended to him the times of payment indicated by the said amounts, without the knowledge or consent of defendant, and against his will.

Evidence tending to show that he was surety, and that it was known to the bank, was received, against plaintiffs' objections.

It appeared that the money was first discounted in 1840; and that in January, 1845, the directors instructed the cashier to require new notes of all parties having overdue notes; that he called on Mallett, and he wished the cashier not to call on Spofford, and said he would get a new note with the same signatures; and if the bank would discount such a note, he would father the new note as his own, as between the bank and himself, and provide for it and see that it was paid; requesting his proposition to be communicated to the president, and let him know the result. This was done, and the cashier was authorized to take the new note, which was done.

There was evidence tending to show that the bank had, before January, 1845, established a rule and corresponding usage, or practice, to take no accommodation note, so written, but to require all notes to be joint and several, and all the promisors, so far as the bank was concerned, were dealt with

and treated as principals, and that defendant was a customer at the bank and had notes there.

Evidence tending to show that McIntosh paid the interest at the several times indicated by the indorsements, was given, and some to the contrary.

It was in evidence, that the payment of September, 1847, was made by defendant, and the indorsement made without any intimation that the money was not his own, though proof was given that it was in fact the money of McIntosh, paid by him to be put on to the note.

The plaintiffs contended to the jury, that if they were satisfied of the existence of the rule and usage testified to, and Mallett had knowledge of it when the note was made, and that its discount was procured in conformity with said rule and usage, then defendant, as between the bank and himself, might well be regarded and held as a principal as to the bank, and he would not now be at liberty to assume and claim an exemption from liability as a surety.

And further, if, when this note was discounted, it was upon defendant's proposition; and that the terms of that proposition were, that if the bank would discount the note, defendant would, as between himself and the bank, father the note as his own; and that defendant and bank then so understood that defendant was to be regarded and treated as a principal between them, irrespective of the exemptions which a surety might claim, then it would not be competent for defendant to relieve himself now from liability on the ground that he was merely a surety and the bank knew it.

The plaintiffs' counsel further contended to the jury, that the indorsements made on the back of the note, did not establish a valid agreement on the part of the bank to extend time of payment, or the fact, that it had extended the time of payment.

He also contended, that if the payment and indorsement of September, 1847, made by Mallett, were made without any disclosure that the money was not his own, and without communicating in any way that he was surety and not a principal promisor, that would be sufficient evidence to authorize the

jury to find that defendant knew of, assented to, and acquiesced in the payments and extensions thereon indorsed; and that such payment made and indorsement procured by defendant on the note was in law a recognition of his indebtedness and liabilities.

The jury were instructed, that if the defendant held the relation of surety only upon the note in suit, and that fact was known to the plaintiffs, and the time for its payment was extended, for a good and valid consideration, beyond that stated in the note, without the knowledge and consent of the defendant, the defendant would be discharged; that the usage and practice of the bank to take notes signed by the promisors, without any distinction thereon, who was principal and who was surety, would not alone be sufficient to enable them to hold a surety, known by the plaintiffs to be such, after they had extended the time of payment beyond that specified in the note, by an agreement with the principal, without the knowledge and consent of the surety, even if the surety had knowledge of such usage and practice. But the jury were further instructed, that if the defendant, though he was a surety on the note for which the one in suit was given, and known by the plaintiffs to be so, yet, if by an arrangement with McIntosh, the debt, as between the defendant and McIntosh, became that of defendant, the latter would not be discharged by the extension procured by McIntosh, though without his knowlege and consent; that if the defendant was discharged before the indorsement made Sept. 1847, he was not made liable by that indorsement, if the money then paid was the money of McIntosh; that the words on the back of the note, "received, renewed," with the date, imported an extension for consideration.

The jury returned a verdict for defendant, and, in answer to questions proposed by the Court in writing, found that defendant procured none of the indorsements to be made save that of Sept. 1847.

Lowell & Foster, in the opening argument for plaintiffs, contended that the defendant was not a surety in relation to

the bank, that they dealt with him as a principal, and the contract was mutual in that character. Under the rule and usage of the bank, this note was discounted, and the relation of surety cannot exist without the consent of all the parties to the contract. The evidence did not show that the plaintiffs accepted defendant as a surety; nor did it tend to prove this; it only proved the relations between the signers, in which plaintiffs had no interest. The plaintiffs' complaint was, not that the presiding Judge permitted the defendant to show what his *real relation* and liability to them were, but that he permitted him to show what they were to McIntosh and Spofford, in reference to a contract to which they were not parties. This is where the instructions were erroneous. The evidence only showed a contract between defendant and *third* parties. As to the plaintiffs, no such relation existed. 1 Pothier on Contracts, 176; Burge on Suretyship, p. 16, c. 2.

Gould, for defendant.

The testimony admitted as to the suretyship of defendant, was strictly in accordance with the decision in this case in 34 Maine, and of *Carpenter* v. *King*, 9 Met. 511.

So also was it proper for defendant to show that the payment by him, made in September, 1847, was for McIntosh, to rebut any presumption which might otherwise arise, that he thereby assented to the former extensions of the note.

As to several things contended for by plaintiffs' counsel to the jury, they are of no importance—they are no ground of exceptions. No request of such kind was made of the Court, to give instructions, and the correctness of the instructions given is now the only question open.

In regard to the usage, the language of the Judge is definite, guarded and restricted. It does not cover all the ground contended for by plaintiffs' counsel to the jury, nor all that *some* of the testimony tended to exhibit. Nothing was said about the effect of a *custom* or usage to treat and deal with all the promisors as principals. If instructions upon this point had been *desired*, they should have been *asked* for. There can be no doubt of the accuracy of those given.

But the custom or usage of the bank was conformed to by defendant. The note corresponded to it. But nothing in the rule authorized them to disregard the provisions of law and still hold defendant. The bank engrafted a new provision upon the note, and then claim to hold him whom they knew to be only a surety. There is nothing in the rule or usage to authorize the bank to put additional burdens upon defendant.

There is no proof of any usage to extend the time of payment on their notes, and it can have no effect on this case. Upon the plaintiffs' hypothesis, to make this usage of any avail, it should have been proved that they extended the time of payment to one of the promisors without notice to the others. Besides, no usage can be invoked to control a well settled rule of law.

As to the effect of the partial payment by Mallett in September, 1847, of McIntosh's money; would that revive his liability?

The debt was the debt of McIntosh, the defendant had been discharged of his conditional liability, and the statute of frauds would seem to interpose a legal bar.

The act was one of neighborly kindness. *Ulmer* v. *Reed*, 11 Maine, 293.

Thacher, in reply. Although what the plaintiffs' counsel contended for before the jury is no ground of exception, yet it will not be denied that instructions are to be given to the jury in accordance with law, and corresponding with the facts arising in the case. That in relation to the usage we complain of. It was not such as the nature of the case and the rights of plaintiffs demanded.

The usage was to treat all the promisors as *principals;* it did not relate to the form of the notes merely, but extended to all that related to them, after due, as well as before, and so long as they remained unpaid. If they were to be so dealt with, why not also as to a renewal, or an extension of the time of payment? This custom being known to defendant, was incorporated into the contract the defendant made, and

became a part thereof, and the instruction should have been in accordance with it. *Oxford Bank* v. *Haynes,* 8 Pick. 423.

The usage was one that should be upheld, for it was reasonable, convenient, and adapted to the facilities of business, and to promote just dealings between the parties. *May & al.* v. *Wheeling Ins. Co.,* 9 Met. 354.

It may be true that evidence of an usage to set aside a plain principle of law is not admissible; but it was never supposed that parties, therefore, could not legally agree, in accordance with custom and usage, which had been adopted by one of them, that their rights should be different from what the law would make them, had there been no agreement at all. The ground we take is supported by *Strong* v. *Ellis,* 6 Met. 396; *Williams* v. *Gilman,* 3 Greenl. 276; *Adams* v. *Otterback,* 16 How. 539; *Bank of Columbia* v. *Magruder,* 6 How. 180; *Loring* v. *Gurney,* 5 Pick. 15.

There was also the best of reasons, from the evidence, for the bank to suppose that in fact the defendant was the principal in this note.

As to the indorsement of September, 1847, it is contended, that if defendant had been previously discharged, nothing but an express promise could make him liable, and he relies on the statute of frauds. Is this so? Might he not *waive* his privilege, and become bound again, by paying a part? Having made no explanation at the time he paid it, we contend the instruction as to the *effect* of it was wrong. The mere fact that it was McIntosh's money, without making it known, should not shield him from the effect legally deducible from a part payment.

TENNEY, C. J.—The decision of the questions presented to the Court, when this case was before it upon exceptions, at a previous time, is conclusive upon the point, that the time of payment was enlarged by the receipt of the interest in advance, as a valuable consideration, and the word "renewed" written upon the note. This was the construction put upon

what appeared upon the note itself, and evidence is not admissible to control or vary its legal import.

The defence on the last, as on the former trial, was, that the defendant was surety only upon the note, one McIntosh being the principal, and that the same was well known to the bank at the time the note was discounted; and that, by an agreement with McIntosh, it extended the time of payment, beyond that stipulated in the note, without the knowledge or consent of the defendant.

The attempt to prove, that the defendant was surety only upon the note, was resisted by the plaintiffs, but was allowed. This ruling was in conformity with what may now be regarded as a settled principle, which is recognized in this case, reported between these parties referred to.

The doctrine in law is too well established to require the citation of authorities, that if the holder of a promissory note, knowing that one of the makers is a surety for another on the same note, enters into a valid contract with the principal, without the knowledge of the surety, to enlarge the time of payment, the surety's liability to the holder is terminated. This is affirmed in this case before cited. The reasons for the doctrine, as given by Chancellor KENT, in *King* v. *Baldwin*, 2 Johns. Ch. 560, are entirely satisfactory.

The jury found, under the instructions, the facts relied upon to sustain the defence.

But the plaintiffs invoked a rule of the bank, and an usage corresponding therewith, before the date of the note, "to take no accommodation note so written; but to require all notes to be joint and several, and all the promisors, so far as the bank was concerned, were dealt with and treated as principals;" and they introduced evidence tending to prove such rule and usage, and also that the defendant was a customer of the bank, having notes there.

Upon this branch of the case, the jury were instructed, that the usage and practice of the bank, to take notes, signed by the promisors, without any distinction thereon indicating who

was principal and who was surety, would not alone be sufficient to enable it to hold the surety, known by it to be such, after it had extended the time of payment beyond that specified in the note, by an agreement with the principal, without the knowledge and consent of the surety, even if the surety had knowledge of such usage and practice.

This instruction, as an abstract principle of law, is entirely in accordance with well settled legal rules; for the relation of surety in one maker to another, on the same note, which is not necessary to appear upon the note, but as we have seen may be proved *aliunde*, the instruction was a simple application of the rule, that a surety will be discharged, by the enlargement of the time of credit, as supposed in the instruction.

If the instructions were not sufficiently full and specific, in the opinion of the plaintiffs' counsel, to meet the particular aspects of their case, he could have requested such instructions as he thought appropriate. Not having done this, they cannot be treated as aggrieved for want of further instructions, unless, from the evidence of the case, those given, it is apparent, must have been understood by the jury, as having a meaning different from that imparted, simply by the terms used. And it is insisted, that the rule and usage of the bank authorized the enlargement of the time of payment, under an agreement between the principal and holder, the surety having no knowledge thereof, without impairing the liability of the latter; and that the instruction was regarded by the jury as a denial of this construction of the rule. Upon the hypothesis, that the presiding Judge was so understood by the jury, which is not admitted, we propose to consider the rule and its meaning.

The rule is in one part a prohibition; and in another a requirement. The former is, that no accommodation note, so written, can be taken; the latter, that all notes shall be joint and several. So far, it has reference to the form of the notes, and the character of the contract made by those whose names may be upon them. And where the whole is considered together, it is manifest, that the design was, that the notes

should be so made and executed, that one person taking a liability thereon, should not be holden as a maker, and another as indorser or guarantor, but all should be original promisors. This mode would effectually relieve the bank from the trouble and expense of the steps necessary to be taken to fix the liability of indorsers, and prevent an exposure to loss by the omission of any of those steps, or the want of proof thereof, by making those who were signers on the notes absolutely, instead of some of them being conditionally holden. This was obviously one design at least of the rule. And, in this respect, the note in question conformed thereto.

The rule does not forbid the designation of one as principal, and another as surety, on the notes, but provides, in the notes to be taken, so far as the bank was to be concerned, that all the promisors shall be dealt with and treated as principals.

The general rule of law allows the holder of a promissory note to treat the maker as principal, who signs it as surety, and to deal with him as such. He is not required to give him any notice of non-payment by the maker, who holds the relation of principal to him, or to make demand of payment of the former, to hold the latter. As long as the holder is passive, all his remedies remain. *English* v. *Darley*, 2 B. & P. 62. Under the contract in the note, his rights against the surety are as ample against him as the principal. But as this rule of law gives no power to the holder to alter the note, by putting off the time of its maturity, thereby making it a new and a different contract, the rule of the bank has precisely the same meaning in this respect, and can confer no greater power upon the bank. It is simply an affirmance of the common law principle as applicable to such notes as the bank, under it, designed to discount.

The plaintiffs' construction will make the words, "so far as the bank is concerned," purely redundant. This cannot be admitted. This language implies a restriction, that so far as others than the bank should be concerned, the rule should not apply to the prejudice of the latter. The law regards it

for the benefit of a surety, that he may pay the note at maturity, and immediately look to his principal for reimbursement. He consents, that he may be treated by the holder of a note signed by him as surety, as a joint promisor, and a principal in that contract; but he is concerned, that the contract shall not be changed, so that he shall be precluded from this mode of seeking indemnity, and the rule, by the terms themselves, excludes the interpretation contended for. Allowing the bank to deal with sureties on the note, as principals, and to treat them accordingly, confers the power to do so in that contract to the fullest extent; but gives no right to make them parties to another contract, which increases their liability. Such construction would admit the bank to hold sureties perpetually liable, and at the same time deprive them of the right to pay the debt, and resort to their principal.

Was the defendant's liability revived by the indorsement upon the note, "1847, Sept.—Received $10,37, and interest till August 28th last, by J. L. Mallett?" Under the instruction, that if the indorsement was for money furnished by McIntosh, the defendant was not made liable by the payment thereof, and the general verdict for the defendant, the jury found that this money was furnished by the principal on the note.

The bank was not injured by this payment through the agency of the defendant, when no longer holden on the note. The bank received this sum from its debtor, as a portion of the amount due from him; it was beneficial to the creditors, and effected no change in their rights to call for the balance. If the defendant omitted to inform the officer of the bank, at the time of its payment, that he acted therein as the servant of the principal, this could not operate to the prejudice of the plaintiffs so as to confer additional rights.

The evidence, that the indorsement made in September, 1847, was on account of a payment made by the principal, was properly allowed, as tending to prevent the jury from inferring that if the defendant paid his own money upon the note upon which he was once holden, he admitted that the

previous payments and renewals might have been made by his consent. *Exceptions overruled.*

RICE, APPLETON and MAY, J. J., concurred.

JOHN PHILLIPS *versus* RUFUS RUSSELL.

By the first section of the U. S. Bankrupt Act of 1841, persons owing debts not created in consequence of a defalcation as public officer, executor, administrator, guardian or trustee, or while acting in any other *fiduciary capacity*, should, on complying with the requirements of the act, be entitled to a discharge from them.

A. entrusted B. with his money to take to a distant place to pay the note of A. which money B. appropriated to his own use. B. afterwards obtained his discharge under the bankrupt Act: — *Held*, that B. did not act in the *fiduciary capacity* contemplated by the law, but merely as an express agent or other bailee, and that his discharge was a bar to an action for the money.

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

This was an action of DEBT on a judgment.

The defendant pleaded a discharge in bankruptcy and produced the evidence.

The plaintiff produced the original writ on which the judgment was rendered, and a copy of the receipt of defendant, as follows:—

"$436,50. "Portland, Nov. 9, 1835.

"Received of Capt. John Phillips, four hundred and thirty-six dollars and fifty cents, which I am to pay over to Simon Cripps, and take up his note, and deliver the same to Samuel Chase of Portland. "Robert Russell."

The plaintiff also introduced a deposition setting forth the arrangement between plaintiff and defendant in regard to this receipt, against the objections of defendant.

The case was submitted to the Court upon so much of the evidence as was legally admissible.

Gould and *Wills*, for defendant.

Bullfinch, for plaintiff.

APPLETON, J. — The defendant received a sum of money from the plaintiff, to carry to New Brunswick, and there pay upon a note due to one Simon Cripps. It does not appear that he was to receive any compensation therefor, nor is it material whether he was a gratuitous bailee of the plaintiff or not. Upon this contract, a suit was brought, and judgment obtained for the amount thus received. To the present action, which is upon that judgment, the defendant interposes, by plea, his discharge in bankruptcy. The plaintiff, to avoid the effect of this, insists that the indebtedness, upon which the judgment was rendered, was fiduciary in its character, and that consequently it is unaffected by the proceedings in bankruptcy.

The first section of the bankrupt law provides, that "all persons whatsoever, residing in any State, territory or district of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other *fiduciary capacity*," shall, on a compliance with the requisites of the bankrupt law, be entitled to a discharge under it.

In *Chapman* v. *Forsyth*, 2 How. 202, Mr. Justice MCLEAN says: — "The cases enumerated, the defalcation of a public officer, guardian or trustee, are not cases of implied but special trusts; and the other *fiduciary capacity* mentioned, must mean the same class of trusts. The Act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the Act." The same construction was given to this section in *Hayman* v. *Pond*, 7 Met. 328.

The defendant stands in the same position as an express agent or common carrier, who, though entrusted to carry property from place to place, is no more to be regarded as acting in a "fiduciary capacity" than a commission merchant, or any other bailee of property for certain definite and specified purposes. It was held in *Fowles* v. *Treadwell*, 24 Maine, 377, that a receiptor of personal property, attached on mesne process, might avail himself of his discharge in bankruptcy as a bar to a suit upon his receipt. But the particular char-

acter or condition of the bailment cannot affect the rights of the bailee to the full benefits of his discharge. Whether the bailment was of money or of goods is immaterial. It is equally unimportant whether the article bailed was to be carried to some other place, or to be surrendered on demand at the place of its bailment. The plea must be adjudged sufficient. *Judgment for defendant.*

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

JAMES H. BEAL *& al. versus* THOMAS CUNNINGHAM.

A verdict will not be set aside as being against evidence, unless the evidence so strongly preponderates in favor of the party against whom the verdict was rendered as to justify the conclusion that the jury were influenced by improper considerations.

Nor will a verdict be set aside because the jury, having, by consent of parties, sealed up their verdict and separated for the night, were allowed, after the same was read by the clerk on the following morning, to amend it so as to conform to the real finding; although, by so doing, the verdict became one *against* instead of *in favor* of the plaintiff.

ON REPORT from *Nisi Prius.*

This was an action of TRESPASS for taking what were alleged to be plaintiffs' goods.

The defendant was sheriff, and justified under an attachment against one Barker.

A verdict was returned for defendant, and the plaintiffs moved to set the same aside, as being against the evidence in the case, the weight of evidence, and the law. Another cause assigned was, (and the facts were certified to be correct,) that the said cause was committed to the jury, and that, by consent of parties, they were informed that they might, when agreed, seal up their verdict and separate and return it to Court the next morning. They did separate, and the next morning, on being called upon, a sealed verdict was handed by the foreman to the clerk who read the same; it being a verdict for the

plaintiffs without any assessment of damages. On being informed that their verdict was informal, they, by their foreman, asked to retire, but were informed by the Court that it was not authorized to allow them to consider the case over anew after they had separated; that if the defect in the verdict was matter of form only, it might be amended by the foreman without leaving their seats. The foreman then stated that it was matter of form only, and he, by leave of Court, inserted the word "not" before the word "guilty," when the verdict, thus amended, was read to the jury and affirmed.

Tallman, for plaintiffs.

Hubbard, for defendant.

RICE, J.—The plaintiffs are merchants doing business in Boston. The goods in controversy had been delivered by them to one Ezekiel W. Barker of Newcastle, and were taken on an execution against said Barker, by a deputy of the defendant, who was sheriff of the county of Lincoln. To prove property in themselves, in the goods, the plaintiffs introduced Henry C. Leach, one of their clerks, who testified, among other things, that he was in the counting room, at the desk, when the agreement was made for the goods sued for; thinks in June, 1852, but not certain. Barker wanted the goods sent. Plaintiffs told him they would send them to him, but the goods should remain the plaintiffs' property, as before they were sent, until used or disposed of by him. Barker said nothing—don't recollect as Barker said any thing. He further testified that he did not pretend that he heard all the conversation in the counting room, or recollect all that was there said.

Plaintiffs also called Ezekiel W. Barker, who testified that he had bills of the goods, but not at Court; that plaintiffs always sent bills; he was to pay all debts, and was to pay plaintiffs as fast as the goods were sold.

There was other testimony showing that Barker had, before these goods came into his hands, purchased other goods of plaintiffs, and paid for them. There was also much testi-

mony showing the manner in which Barker had treated the goods after they came into his possession, and the declarations he had made with reference to them, while in his possession. These acts and declarations were inconsistent with any admission, by Barker, of title in the plaintiffs. The books of the plaintiffs were not introduced, nor were any bills introduced showing how the goods were charged when delivered to Barker. The dominion which Barker exercised over the goods, as far as appeared from the evidence, while they were in his possession, was absolute.

There was evidence on both sides; and we do not think it so clearly and strongly preponderates in favor of the plaintiffs as to lead to the conclusion that the jury were influenced by improper considerations, but on the contrary that their verdict was authorized by legitimate inferences deduced from the facts in the case.

The jury returned a sealed verdict in the morning, having retired to consider the case the evening previous. On suggestion from the foreman, that there was an error in the verdict, as read by the clerk, he was permitted by the Court to amend the same, by inserting therein the word *not* before the word *guilty*, after which amendment by the foreman, the verdict was affirmed and recorded. The permission given to the jury, thus to amend their verdict, is assigned as one of the causes for setting aside the same, and granting a new trial. There is no suggestion that the verdict, as amended, is not in conformity with the finding of the jury, or that the amendment was induced by any improper influence, or wrong practice from any source. It was, then, merely a correction of a verbal error, thereby reducing the verdict to form, and making it indicate truly the result to which the jury had, on deliberation, arrived. No impropriety in the course adopted is perceived. *Motion overruled, and judgment on the verdict.*

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

ABNER PLUMMER *versus* OAKES RUNDLETT, and RICHARD H. TUCKER, *Trustee.*

A., summoned as trustee of B., disclosed that he had, prior to the service on him, sent B., (his son in law,) a check for five hundred dollars, and had afterwards taken a note therefor; but that he intended it as a *gift* to his daughter, and had never designed to call for the payment of the note: — *Held*, that being intended as a gift, and being so regarded by the parties at the time, they could not afterwards change the nature of the transaction so as to affect the rights of third parties.

A supposed trustee is not chargable for real estate in his possession, the property of the principal debtor.

The disclosure of a trustee is to be taken as true by the Court; and the affirmative statements therein contained are to receive full credit, unless other facts or circumstances disclosed, are inconsistent therewith.

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

TRUSTEE'S DISCLOSURE. — Richard H. Tucker having been summoned as trustee of Oakes Rundlett, who married the daughter of Mr. Tucker, made a full disclosure, and annexed a statement of the accounts between himself and the principal defendant. By this disclosure, the trustee claimed that a balance of $2758,71 was due him from Rundlett at the date of the service. He stated, among other things in his disclosure, that he received from Rundlett on the 5th of January, 1848, a bill of sale of articles of furniture valued at $805. The trustee did not charge himself for this furniture in the account stated. In the same bill of sale was also included certain horses, carriages, harnesses, &c., valued at $380, which Rundlett retained possession of, and afterwards disposed of with the consent of Tucker, and applied the proceeds to his own use. This item the trustee did not charge himself with in the account. Another matter of dispute in the case, arose in reference to a check for $500, which it appeared he sent to Rundlett on the first anniversary of the marriage of his daughter with Rundlett, which he intended at the time as a gift to his daughter. He, however, requested Rundlett to give him his note for the amount, and at a subsequent period the note was given. This $500 the trustee charged to Rundlett in his

account. He also disclosed, that Rundlett had conveyed to him certain real estate, consisting of a store and some lots of land, which was in the possession of the trustee at the date of the service on him in this action. He charged Rundlett with the amount of certain notes of Rundlett which he had purchased in Boston, after Rundlett had failed, but which he stated in his disclosure he did not purchase at the suggestion of Rundlett but on his own account. The presiding Judge ruled that the trustee was not chargable on his disclosure, and the plaintiff excepted.

W. Hubbard, for plaintiff.

H. Ingalls, for trustee.

RICE, J.—There are errors in the account as rendered by the trustee, and referred to as a part of his disclosure. He should charge himself with the bill of furniture amounting to $805. He is not entitled to credit for the $500 check of June 20, 1844. From all the statements in the disclosure, we think it appears, that at the time the check was forwarded to the principal defendant, it was intended as a gift by the trustee to his daughter and son-in-law, and was so understood by the parties. It was not competent for the parties afterwards to change the nature of the transaction so as to affect the rights of third parties. The trustee is not chargable, as contended by plaintiff's counsel, with the supposed value of the store and lots of land conveyed therewith. They are real estate, and not "goods, effects or credits," in the hands of the trustee. If he holds them by a conveyance which is fraudulent, the property may be reached in another manner and by a different process; nor is he chargable with the value of the horses, carriages, harnesses, &c., amounting to $380. The disclosure shows that neither these articles, nor the value thereof, were in his hands at the date of the service of the writ upon him. The disclosure is to be deemed to be true by the Court; and the affirmative statements therein are to receive full credit, unless there are other facts or circumstances disclosed, inconsistent therewith, to overcome such direct and

affirmative statements. The trustee distinctly affirms that the notes purchased by him in Boston against the principal defendant, were purchased on his own account, and not at the suggestion of the defendant or his attorney, and that he still holds the same. There is nothing in this disclosure which contradicts this statement. Under § 70, of c. 119, R. S., he is entitled to charge those notes in his account. Making the above corrections, there is still a large balance in favor of the trustee, and he must be discharged. *Exceptions overruled.*

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

JOSHUA PATTERSON *versus* DAVID CREIGHTON *& al.*

An oath, taken by assessors, that they will "faithfully and impartially perform the duties assigned them," answers the requirement of statute, directing them to be "duly sworn."

The highway tax must be deemed to be assessed by the assessors of the then current year.

The assessors are required by statute to ascertain from the lists of the highway surveyors of the preceding year, who had not discharged their highway taxes for that year, and to place the amounts found due from such persons in a separate column of the money tax assessed by themselves.

All warrants issued by the proper authorities, are, at common law, to be executed and returned by the officer to whom they are directed, with his doings thereon; and his return, as to other parties, is conclusive.

"A list of the persons, and the sums" required by statute to be delivered by assessors to highway surveyors, may not properly be denominated a warrant.

The list of delinquent persons, with the amounts of the deficiency of each, which it is the duty of highway surveyors to render to assessors, cannot be legally rendered, unless the surveyor has given the notice and made the demand for services required by statute.

The statute requires no return other than those lists, and it may be regarded that the persons whose names are borne on these lists are delinquent for the sums respectively specified.

A return of such list, without previous compliance with the requirements of statute, would render the surveyor liable in damages to the aggrieved party.

A list, not bearing the official signature of the surveyor, is in legal contemplation no list. It will not render the surveyor responsible nor authorize the ulterior proceedings of the assessors.

Patterson *v.* Creighton.

A surveyor will not be allowed to perfect his list, if his own evidence shows that his preliminary proceedings would not justify it.

The records in the offices of the clerk and assessors should show that the surveyors' duties have been properly discharged.

A highway surveyor returned a list of the persons who had not discharged their highway tax, and the sum for which each was delinquent, but did not affix to it his official signature. The assessors of the following year treated it as a legal list and assessed the respective sums in the money tax of that year. By virtue of the warrant from those assessors, the collector seized and sold certain property to discharge a tax, and the owner brought his action of trespass against the assessors : — *Held*, that, although the assessors erred in supposing they had before them legal evidence of the deficiency, and in transferring the sum to the omitted list, yet, as there appeared to be no want of "personal faithfulness or integrity," they were not liable.

The subject matter of complaint in such case might properly be presented to the assessors, with a right of appeal to the county commissioners, in the event of an unsatisfactory result.

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

This was an action of trespass. Plea, general issue. The writ was dated Jan. 29, 1855, and alleged that defendants took the plaintiff's four-wheeled pleasure wagon, with force and arms, on the 29th of August, 1854, and converted the same to their own use, at Warren, in Lincoln county.

The plaintiff introduced in evidence an original warrant of commitment, with the list of taxes, dated June 25th, 1853, signed by the defendants and Lewis Vaughan, jr., the other assessor, also a second warrant, with a supplemental list of taxes, without date. They are both addressed to Robert Spear. By the list of names, accompanying the first warrant, the plaintiff's tax was $24,69.

Robert Spear, the collector of taxes, was called as a witness by the plaintiff, and Seth O'Brien and George Kirk testified for the defendants. The important facts in their testimony appear in the opinion of the Court.

The case was withdrawn from the jury and submitted upon the evidence to the decision of the full Court. If the action could not be maintained a nonsuit was to be entered, otherwise, a default.

A. P. Gould, for plaintiff.

The tax was illegally assessed; and the defendants directed

Spear to distrain the goods of the plaintiff without lawful authority, and were therefore trespassers.

It will be seen hereafter, that the circumstances are such, that it is exceedingly doubtful whether the 88th § of c. 14, R. S., will apply, so that plaintiff's only remedy is against the assessors.

Sect. 56, c. 14, R. S., affords no protection to the defendants, because, (1st,) they were not the assessors of the town of Warren when they issued their warrant of distress, with directions to collect the tax of $35,62, which they had put into the supplemental tax, nor when they assessed that tax. And, (2d,) because they were not "required by law" to assess that tax.

First.—By vote of the town the board of assessors consisted of three persons. Only two of them acted in assessing the supplemental tax, and I submit that but one of them at least was legally qualified. The oath administered to Creighton, was not such as the law required. The immunity of the statute is to assessors, not to persons assuming to be such, without legal right.

R. S., c. 5, § 9, requires assessors, as well as other town officers, to be "duly sworn." The oath in use when the Revised Statutes were framed, was the one prescribed by the statute of 1821, c. 116, § 1, and was in the following words: "You solemnly swear, that you will proceed equally and impartially, according to your best skill and judgment, in assessing and apportioning all such rates and taxes as you may, according to law, be directed to assess and apportion, during your term of office."

Such is the oath in use ever since the organization of the State, and long before. In this case, we have the language of the oath administered, and in Creighton's case it certainly does not conform to the above oath.

Second.—The statute affords immunity to assessors only in assessing and committing such taxes as "they are required by law to assess." But the defendants were not "required,"

nor even authorized by law to assess this tax, and direct Spear to distrain the goods of the plaintiff to pay it.

R. S., c. 25, § 70, provides that "the surveyor, at the end of his term, shall render to the assessors a list of such persons, (if any,) as shall have been deficient, on due notice, in working out or otherwise paying their highway tax; which deficient sums, shall be placed by the assessors in a distinct column, in the next assessment of a town tax upon such delinquent, and collected like other town taxes."

No return whatever was made by O'Brien, the highway surveyor, "at the expiration of his term of office," nor until after "the next assessment of a town tax had been made." O'Brien says, in his testimony, that he returned his list of names in June, 1853. The assessors had no information which would authorize them to assess plaintiff's road tax of 1852 in the "first money tax" of 1853. There was a memorandum on the back of his warrant, unsigned, from which it might be inferred that a portion of the tax was unpaid, but there was nothing from which it could be inferred even that plaintiff had been notified to work it out, or that the state of facts existed which would authorize the defendants to assess it upon him as a money tax.

The statute, c. 25, § 67, provides that the surveyor shall give reasonable notice to plaintiff, in writing, if desired, of the sum plaintiff is assessed; and also "forty-eight hours notice of the time and place he shall appoint to work," &c.

O'Brien, in his testimony, says nothing about notifying the plaintiff but once, the first day which he fixed upon; and then he is not able to say he gave him forty-eight hours notice, while the plaintiff testifies that he gave him none.

In *Fossett* v. *Bearse*, 29 Maine, 523, other testimony than the officer's return was rejected; and this Court held the ruling to be correct. And it is also there held, that even under the statute of 1848, authorizing a constable to amend his return, before the amendment can be allowed, it must be made to appear that the fact is according to the proposed amendment. I know of no authority for a highway surveyor to

amend his return, after he has gone out of office, so as to affect the rights of parties as to past transactions.

The statute authorizes a delinquent highway tax to be "put into the next assessment of a town tax," and no other.

They had no authority by statute, nor from any other source, to put a deficient highway tax into a supplemental tax. The authority to make a supplemental tax is limited to certain cases.

R. S., c. 14, § 53, provides that "when the assessors discover that, by mistake, they have omitted any polls or estates, they may, by a supplement to the invoice and valuation, assess such polls or estate."

They have no authority to add, by supplemental tax, to polls and estates already taxed.

Sect. 53, c. 14, provides for omissions by mistake, of polls and estates wholly omitted, to be supplied by supplement to the invoice and valuation.

But § 70, of c. 25, provides for a different case; adding nothing to the "polls or estates," or to the "invoice or valuation," making no assessment, but simply adding the deficient highway tax "in a separate column," to the tax of the delinquent person, already assessed.

The defendants acted under § 53, of c. 14, rather than § 70, of c. 25; and in this they were wholly wrong.

A large money tax was assessed against plaintiff in the spring of 1853, which had been paid before the supplement. The assessors add nothing, so far as he was concerned, to the "polls or estate," to the "invoice or valuation," in the supplement; but simply put his tax in with the money tax, against other estates than his, assessed in the supplement.

The immunity of assessors from liability for error of judgment, does not apply to such a case. *Withington* v. *Eveleth*, 7 Pick. 106; *Little* v. *Merrill*, 10 Pick. 543, 546.

Our statute, exempting assessors from liability, was enacted in 1826. In 1834, the case of *Mosher* v. *Robie & al.*, 11 Maine, 135, was decided, giving a construction to the statute. The Court say:—"In order to understand the object of the

framers of the statute, it should be kept in mind, that previous thereto assessors were not only answerable for their own neglects, but also for the omissions and the illegal acts of others. 13 Mass. 272. If they assessed a tax, void by reason of irregularity in the proceedings of the town or parish, or its officers, the assessors were held responsible to the individual assessed, provided the assessment was enforced. The object of the statute of 1826 was, no doubt, to relieve them from this hazardous accountability for the omissions of others, permitting them to remain answerable only for their own misdoings. If they assess * * what they are not required or authorized to assess, the protecting statute does not reach them. It could not have been intended, that in such case, the individual aggrieved should be without redress. The tax is void by reason of the proceedings of the assessors. The property of a citizen has been taken by their order, contained in their warrant to the collector to satisfy this void tax, and can it be that the law affords no remedy?" And again they say, p. 138:—"We think the true construction of the statute of 1826, c. 337, § 1, is to leave the assessors answerable for their own misdoings, and relieve them from all liability for the misdoings of others." See 12 Maine, 254.

This opinion is re-affirmed in *Trafton* v. *Alfred*, 15 Maine, 258, 260.

Thus the law stood upon the adoption of our Revised Statutes, when the Legislature re-enacted the statute of 1826 in its identical language.

In *Tucker* v. *Wentworth*, 35 Maine, 394, 397, SHEPLEY, C. J., says, the assessors of towns are relieved from liability for making assessments by the provisions of stat. c. 14, § 56, as amended, *only when "they are required by law to assess any tax,"* &c. That was for assessing a tax on a school district.

In *Powers* v. *Sanford*, 39 Maine, 183, the Judge, on p. 187, says:—"By the provisions of stat. c. 14, § 56, *as amended*, the assessors of a town, who are required to assess a tax upon a school district, are exempted from any personal liability when they act with faithfulness and integrity, and any further

liability is to rest solely on the district. But this does not exempt the town from liability, incurred by its own acts," &c. That was an action against a town for raising money by an illegal vote of the town. No "misdoing" was imputed to the assessors, but it was the illegal act of the town itself of which complaint was made. No question was before the Court involving the liability of assessors, and the remark of the Chief Justice cannot be regarded as intending any restriction upon the established construction of the statute.

And it is of the "misdoings" of the assessors that we complain:—

1. Because they assessed the plaintiff's road tax at all against him, as a money tax, when he had not been guilty of any such neglect as authorized them to do so: and—

2. Because they had no legal authority for putting it into the supplemental tax: and—

3. Because in assessing it as a money tax, if authorized to do so, they did not do it in the manner required by law.

Henry Ingalls, for defendants.

The statute provides no *form* of oath to be administered; and if great strictness should be required, there are probably comparatively few towns in the State in which the oaths to municipal officers would not be found imperfect. The fact that the statutes prescribe no *form* of oath, is evidence that no particular form was required. The oaths, in this case, were much more formal than in *Welles & al.* v. *Battelle & als.*, 11 Mass. 477, in which case they were held sufficient.

The portion of the highway tax apportioned to District No. 1, was duly committed to the surveyor, and a copy of the commitment makes a part of the case. At the expiration of his term he returned to the assessors a "*list*" of those who were deficient in working out their highway tax. This return, or list, is not signed by the surveyor, but he offered to sign it, and should have been permitted by the Court to do so, defendants having moved that he have leave to do so, if any signature was necessary. It is contended, however, that it was not necessary that the surveyor should sign the list or re-

turn. He testifies that he *returned* the warrant with the list of those deficient, and this is a compliance with the law.

It is alleged by the plaintiff that due notice was not given him to work out his tax. In the view I take of this case, whether such notice, or any notice, was given or had, is perfectly immaterial.

The deficiency in the highway tax of the plaintiff, returned by O'Brien, was $35,62.

The defendants also contend that, by the report, agreed statement and copies, it very clearly appears that Lewis Vaughan, jr., (now deceased,) David Creighton and Joseph Starrett, (the last two being defendants in this action,) on the 7th day of March, 1853, were legally chosen assessors of Warren for the then ensuing year, and that Robert Spear on the same day was legally chosen collector of taxes for the same year; and that said assessors and collector were duly qualified, for the reasons and by the authority before mentioned; and that on said 7th day of March a money tax of $2000 was legally raised by said town, and that the same was subsequently legally assessed and committed to said collector.

Subsequent to the general and ordinary assessment, there was a supplemental tax assessed, a copy of the record of which, and of the warrant of commitment of the same to the collector, make a part of the case.

It is upon this supplemental assessment that the principal, if not the only question in this case, arises.

Highway surveyors are required, at the expiration of their term, to render to the assessors a list of such persons, if any, as shall have been deficient, on due notice, in working out their highway tax; and such assessors are required to put such deficient sums in the next assessment, upon said delinquents, that they may be collected as other town taxes. R. S., c. 25, § 70.

The deficiency of the plaintiff was not put into the next assessment of town tax.

R. S., c. 14, § 53, provides that "when any assessors, after having completed the assessment of any tax, shall discover

that by mistake they have omitted any polls or estate liable to be assessed, they may, for the term during which they were elected, by a supplement to the invoice and valuation and the list of assessments, assess such polls and estate their proportion of such tax, according to the principles upon which such assessments were made, certifying that they were omitted by mistake."

It is objected, that a deficiency of highway tax is not embraced by this statute. It is not mentioned in direct terms, it is true; but the manifest intention and meaning of the statute is, that *all omissions in the first assessment, all items which should be included in such assessment, may be included in the supplemental tax.*

The statute requires that the assessors should certify that the omissions were by mistake; and both defendants, both being now assessors of Warren, asked leave to amend their record to conform to the statute, and by inserting December 3d, 1853, as a date, that being the time of the supplemental assessment. That amendment should have been allowed. A town clerk being still in the office, though under a new election, may amend his record made by him while clerk under a former election. *Welles & al.* v. *Battelle & als.*, 11 Mass. 471.

The warrant of commitment of the supplemental tax to the collector certifies that the omission was by mistake.

The statute also requires that the deficient highway taxes should be placed in a distinct column; but this is also amendable; but at most it is but a slight irregularity. Neither this, nor the other matters of form before spoken of, in any manner affect the rights or liabilities of the plaintiff, and afford no right of action in trespass against the assessors. *Welles & al.* v. *Battelle & als.*

But if there was such error or irregularity as to create a liability, the right of action is against the town and not against the assessors, provided they acted with faithfulness and integrity. R. S., c. 14, § 56; *Ingraham* v. *Daggett*, 5 Pick. 451.

This deficient highway tax was rightly included in the

supplement. It was not the intention of the Legislature, nor is it to be fairly deduced from the statutes, that if the assessors omit by mistake to put a deficient highway tax into the next assessment, that the omission cannot be supplied, and that the delinquent is to be thus released from the payment of his highway taxes.

It is hardly necessary to observe, that whether the highway surveyor or the collector proceeded regularly, is a matter of no consequence. The assessors are in no manner liable for any illegal acts or omissions of other persons.

No wrong was done by the assessors to the plaintiff.

CUTTING, J. — Robert Spear, as collector of taxes for the town of Warren, by virtue of a warrant from the defendants, two of the assessors of that town, seized and sold thereon the property described in the writ, for which act the defendants are now sought to be charged as trespassers, for conferring upon the officer unauthorized powers.

The assessment, for the non-payment of which the plaintiff's property was sold, is said to be an unsatisfied balance of the highway tax of 1852, transferred into the money tax of 1853, in a supplemental and omitted list.

The annual meeting for the choice of town officers for the year 1853, appears to have been legally called, and the defendants to have been duly chosen assessors. But it is contended that they were not properly qualified by taking the oath required by law. R. S., c. 5, § 9, requires such officers to be "duly sworn." The oath which they severally took was, in substance, "faithfully and impartially to perform the duties assigned them;" and the law, as embraced in the Act on the construction of statutes, was literally complied with. Ch. 1, § 3, rule 21.

Again: it is urged that the road tax was not legally transferable; that the assessors, for various reasons advanced by counsel, transcended their authority, and thereby imposed upon the plaintiff an unjust and onerous burden, and that the present action is his only remedy. If all these things be so,

then it would seem that he ought to prevail in this suit, although the *gravamen* of the complaint appears to be the difference between the payment of a tax in labor and in money.

It is provided by R. S., c. 25, § 67, that "the surveyor shall give reasonable notice, in writing, if desired, to each person on his list, resident in the town, of the sum he is assessed to the highways and townways, and also forty-eight hours notice, extraordinary casualties excepted, of the times and places he shall appoint, for providing materials and laboring on the same; to the end that each person may have an opportunity to work thereon," &c. And by § 70, that "the surveyor, at the expiration of his term, shall render to the assessors a list of such persons, if any, as shall have been deficient, on due notice, in working out or otherwise paying their highway tax; which deficient sums shall be placed by the assessors in a distinct column in the next assessment of a town tax upon such delinquent, and collected like other town taxes and paid into the town treasury."

Although the law requires, that each taxable inhabitant shall bear his just proportion of the public burdens, yet it is difficult in all cases, owing perhaps to the predominant organ of secretiveness, to ascertain with exactness what that proportion should be. For the ascertainment of that fact, the statute has prescribed various modes of procedure, and invested the assessors, if they be possessed of sufficient moral courage, with the means of a full disclosure. They can require of each individual, resident in their town, a true list of his estates, real and personal, under oath, which, if false, would subject the offender to the pains and penalties of perjury; or if such list should not be duly presented, then all such delinquents are liable to be doomed for such property, or sums, as the assessors, in their judgment, may determine them to be possessed of; from which judgment, under such circumstances, the statute takes away all right of appeal. But such officers, owing to their small remuneration to be received—their hostile attitude imposed, and their fallibility implied, are protected from liabilities for certain mistakes and

errors of judgment, in the honest discharge of their official duties, when in the exercise of their jurisdictional powers. With such views of the law, we will now proceed to the next subject of inquiry, which is, as to the defendants' authority to insert the highway in the cash tax of 1853.

A highway tax must be deemed to be assessed by the assessors of the then current year, who receive the lists, ascertain and record the inventories, adjudge and record the valuations, and thereupon apportion the assessments. It is incumbent on the assessors to discover from the lists of the surveyors of the preceding year, such persons as were delinquent in discharging their highway taxes by labor or otherwise, and to place all sums thus ascertained in a distinct column in the money tax of their own assessing.

At common law, all warrants, issuing from the proper authorities, are to be executed and returned by the officer to whom they are directed and received, with his doings thereon, and his return, as to other parties, is conclusive. But "a list of the persons and the sums," delivered by the assessors to the surveyors, may not properly be denominated a warrant; still, the list of deficient persons, and the amount of their deficiency, which the surveyors are to render to the assessors, cannot be legally so rendered, unless the surveyor has first given the required notice, and made the requisite demand for the services; and, inasmuch as the statute requires no other return than such lists, it may be inferred, when such lists have been returned, that the surveyor has discharged all his duties, and that the names borne thereon have been delinquent in the sums specified, after due notice, and a surveyor might become legally liable to respond in damages to the party aggrieved, who should return such list without a previous compliance with the requirements of the statute. But in order to render the surveyor responsible, such list, by him handed in, should bear his official signature, which was omitted in the present instance; and, consequently, the list so returned, was, in legal contemplation, no list, and therefore

the assessors had no sufficient authority to justify themselves in their ulterior proceedings.

But it is contended, that the surveyor ought now to be permitted to come into Court and subscribe his list. Such liberty should not be granted, if the Court be satisfied from the evidence of the officer himself, introduced by the defendants, that his preliminary proceedings would not justify such an act. And, besides, we are of the opinion, that the records and documents, as kept in the clerk's or assessors' office, should be the defendants' only justification; otherwise, they would be no protection to the persons assessed, if they were liable to be controlled by parol testimony and subsequent amendments. The defendants then have erred, to say the least, in the regular discharge of their duty. Are they liable in this action, or can they justify or excuse themselves under the statute, c. 14, § 56? That section provides, that "the assessors shall not be made responsible for the assessment of any tax which they are, by law, required to assess." We have already seen that the highway tax of 1852 was assessed by the defendants' predecessors; and it is argued that a deficient highway tax, which the surveyor is required to return at the expiration of his office, cannot be said to have been omitted by mistake; and there is much force in the argument. But still the question returns, were not the doings of the defendants within the spirit of the statute?

In the first place, they had jurisdiction over the subject matter. The plaintiff was an inhabitant, and subject to taxation in their town, and had legally been assessed therein; he had paid his money tax, and a portion of the highway tax, without complaint or objection. Under such circumstances, it comes to the knowledge of the defendants for the first time, when about to make their supplemental list, that the plaintiff has been remiss in working out his highway tax. We are satisfied that they erred, both as to matters of fact and law, but with no want of "personal faithfulness or integrity;" they were mistaken in supposing that they had the legal evi-

dence before them of any deficiency; they erred in transferring that deficiency to the omitted list.

But the assessment of a highway tax, is one thing, and the assessment of a money tax, another; the former may be only an incipient stage towards the latter. To assess a money tax, is to ascertain from certain *data*, previously obtained, each individual's just proportion, which he is to contribute to the joint fund for the protection of his property, liberty, and even life. The *data* so obtained, as the basis of taxation, is, first, the inventory and valuation; and, secondly, the delinquent highway taxes of the preceding year; and the requirement of a separate column for the insertion of the latter in the tax bills, was designed only to show the basis of such assessment. It was as much the duty of the assessors to ascertain and reassess for such delinquencies, as it was to make an original tax, and any error or mistake must refer as well to the one as to the other. Under the circumstances, as disclosed, the subject matter of complaint might have been presented to the assessors themselves, with the right of an appeal to the county commissioners, in the event of an unsatisfactory result. But however that may be, we think that the error of the defendants is of such a character as to exempt them from personal liability. And, according to the agreement of the parties, the plaintiff must become *Nonsuit.*

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

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT,

1856.

COUNTY OF CUMBERLAND.

EDWARD T. HARDY *& al. versus* AMBROSE COLBY & SARAH COVELL, *Adm'x, Trustee, &* HARRIS C. BARNES, *Alleged Assignee.*

A. and B. gave a joint and several promissory note, which A. paid at maturity, B. having deceased: — *Held*, that the note, having been paid by A., and being in his possession, was evidence of his claim against the estate of his co-promisor, for contribution.

A., being indebted to C., thereafter delivered the note to him, and took a receipt, whereby C. promised to account for it, when called for, or to return it: — *Held*, that the transaction was a valid assignment between the parties, and, being *bona fide*, could not be defeated by the process of foreign attachment.

Such delivery was a sale both of the evidence of the debt and of the debt itself, and the claim against B.'s estate thereby became the property of C. as perfectly as if it had been a note, not negotiable, against B. and payable to A.

The instrument given by C., furnished a valuable consideration, and it consequently constituted an essential element of the assignment.

An instruction, although erroneous, if it be not material and injurious to the excepting party, will not furnish ground for setting aside a verdict.

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

This was an action of ASSUMPSIT. The plaintiffs sought to secure their debt against Colby by attachment of a claim which he was supposed to have against the estate of Hiram Covell; the same being evidenced by the joint and several note of Colby and Covell, which was paid by the former at maturity, the latter having deceased. After the action was entered in Court, Harris C. Barnes, who alleged that the claim of Colby against Covell's estate had been previously assigned to him, became a party to the suit in pursuance of the provisions of statute. The question, whether there had been a valid assignment of the claim to Barnes, prior to the service on the trustee, was submitted to the jury upon the evidence introduced by both parties, and the verdict was that there had been a prior valid transfer of the claim to Barnes.

The plaintiffs excepted to certain rulings and instructions of the presiding Judge, and also filed a motion for a new trial.

The other material facts in the case will appear in the opinion of the Court.

Shepley & Dana, for plaintiffs.

Anderson & Harmon, for alleged assignee.

HATHAWAY, J.—The defendant Colby, and Hiram Covell, owed Frances E. Stevens a joint and several note for four hundred dollars, which was paid and taken up by Colby. Hiram Covell died intestate, and Sarah Covell was appointed administratrix of his estate; and, as such, was summoned as trustee in this suit, and disclosed. Colby, having paid the whole of the note for which he and Covell were jointly liable, had a just claim against Covell's estate for contribution.

The administratrix, in her disclosure, stated that she was notified by Harris C. Barnes, before the service of the trustee process on her, that Colby had assigned said note to him.

Barnes, to maintain his claim as assignee, in pursuance of the provisions of the statute, became a party to the suit.

The question submitted to the jury, by the pleadings, was, whether or not, "prior to the service of the plaintiffs' writ in this case, the said fund had been, for a valuable consideration, assigned to the said Barnes?"

Colby, who was a competent witness, (R. S., c. 119, § 39,) testified, substantially, that he owed Barnes a note for five hundred and nineteen dollars and sixty-eight cents; that it was understood and talked over between them; that the Covell note was evidence of the indebtedness of Covell's estate to him; that he assigned his claim upon the estate to Barnes; and the note, as the evidence of it, in part satisfaction of his indebtedness to Barnes, who gave him for the same the written instrument of January 20, 1855, by which he acknowledged the receipt of the note, and promised to return it, or account for it, when called for; and that there was no other writing passed between them.

It is obvious, from the whole testimony of the witness, and from the manner in which the business was done, that both he and Barnes meant and understood the same thing, by the assignment of the *note*, (which had been paid by Colby,) and the assignment of Colby's *claim* against Covell's estate.

The note having been paid by Colby, and being in his possession, was evidence of his claim.

The delivery to Barnes, of the evidence of the debt, for a valuable consideration, was sufficient to render the assignment valid between the parties to it; and if valid between them, and *bona fide*, it cannot be defeated by the process of foreign attachment. *Littlefield* v. *Smith*, 17 Maine, 327; *Porter* v. *Bullard*, 26 Maine, 448.

The delivery of the note to Barnes, and his receipt for it, coupled with his promise to return it, or account for it when called for, was a sale to Barnes of the *evidence* of the debt, and of the debt also, which thereby became his property; and as perfectly so, as if the claim had been a note, not negotiable, against Covell, and payable to Colby. *Holbrook* v. *Armstrong*, 1 Fairf. 31; *Dearborn* v. *Turner*, 16 Maine,

17; *Buswell* v. *Bicknell*, 17 Maine, 344; *Perkins* v. *Douglass*, 20 Maine, 317.

The instrument which the witness called the receipt, furnished a valuable consideration, and therefore constituted an essential element of the assignment. Hence, the instruction of the Judge that the receipt constituted no part of the assignment, was erroneous; but it was immaterial, the plaintiffs were not injured by it, nor is any error perceived in the rulings or instructions of the Judge by which the plaintiffs could have been aggrieved.

The verdict of the jury sustained the assignment; and if they believed the evidence, there appears no reason why they should have come to a different conclusion.

Exceptions and motion overruled.

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

STATE *versus* STEPHEN PHINNEY.

A. was arraigned upon an indictment containing four counts; the first two charged an assault, in different forms, with intent to *murder;* the last two charged an assault with intent to *kill:* — *Held*, that all the counts charged but one substantive offence, and that it was competent for the jury to find him guilty of an assault simply, or of an assault with intent to kill, or of an assault with intent to murder.

The accused is entitled to a verdict upon each and every substantive charge in an indictment; and it is the duty of the Court to require the jury to respond distinctly to the several counts contained therein.

When there are several counts, and the jury find the defendant guilty on one count, and are silent as to the rest, the legal effect of the verdict is, an acquittal as to the others.

An officer, when making an arrest, is bound, on demand, to make known his authority.

But his omission to do so, only deprives him of the protection which the law would otherwise throw around him in the rightful discharge of his official duty.

If a person, having been arrested, escapes, without questioning the authority of the officer, he is not to the same extent entitled to demand his authority, upon a re-arrest, as he was before.

State *v.* Phinney.

If there is any thing peculiar in the situation of a party, requiring the modification of an instruction given by the Court to the jury, it is the duty of the party to call the attention of the presiding Judge thereto.

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

This was an indictment, containing four counts, for assault, with intent, &c. The prisoner was found guilty upon the last count. A motion was made by his counsel in arrest of judgment; also that the verdict might be set aside, and a new trial granted. Various causes were assigned; but those which had a bearing upon the decision are stated in the opinion of the Court. Exceptions were also filed to certain instructions given by the presiding Judge, and to his rulings in refusing to give instructions.

Wells and *Gerry*, for defendant.

1. The jury should have rendered a verdict upon all the counts, or stated their inability to agree. *State* v. *Creighton*, 1 Nott & M'Cord, 256; 1 Chit. Crim. Law, (Perkins' ed.) 638, in note.

2. The verdict is against the weight of evidence.

3. The officer is bound, upon request of the person arrested, to show the precept by which the arrest is made, and his aid is bound to make known, upon request, the authority by which he acts. The instructions in relation to these subjects were erroneous. 1 Russ. on Crimes, 518; 9 Coke, 69, note; *McKalley's case*, Frazer's ed.; *Countess of Rutland's case*, 6 Coke, 54; 1 Hale's Pleas of the Crown, 458; *Hall* v. *Roche*, 8 T. R. 187; *Frost* v. *Thomas*, 24 Wend. 418; *Bellows* v. *Shannon*, 2 Hill, 86.

RICE, J.—This case comes before us on a motion in arrest of judgment; on a motion for a new trial, on the ground that the verdict was against the evidence, &c.; and also on exceptions to the rulings of the presiding Judge.

The causes assigned for arresting judgment are numerous. The first two causes assigned, contain, it is believed, the substantive matter relied upon, under this motion.

The first cause is thus set out; "because there was a mis-

trial of this cause, inasmuch as there are four counts in the indictment, and the jury rendered a verdict on one only—to wit, the fourth and last count in the indictment." The second will be considered with the first.

The authorites do not concur as to the effect of an omission on the part of the jury to respond, in their verdict, to all the counts in an indictment. Thus, in *King* v. *Hays*, 2 Ld. Raymond, 1527, it was held to be well settled, upon authority, that if a jury find but a part of the matters put in issue, and say nothing as to the rest, it is ill; and in 1 Chit. Cr. Law, 641, it is said, "with respect to the form in which the verdict should be given which thus partially convicts and acquits, it has been holden, that it ought to find specifically not guilty of the higher, and guilty of the inferior charge; and if it merely find the defendant guilty of the inferior offence it will be of no avail." *State* v. *Sutton*, 4 Gill. 494.

In *Kirk* v. *Com.*, 9 Leigh, 627, it was held that when a verdict finds a prisoner guilty upon some of the counts in an indictment, saying nothing of others, judgment of acquittal should be entered upon those counts of which the verdict is silent. The same rule was adopted in *Com.* v. *Bennet*, 2 Va. Cases, 235.

In *Stoltz* v. *The People*, 4 Scam. (Ill.) 111, the defendant was indicted in two counts. The first count charged the accused with keeping a gaming house, and the second, with keeping open a tippling house on Sunday. The verdict was guilty on the first count, but no finding on the second. The Court said, "the general rule is, that the verdict must be as broad as the issue submitted; and it was formerly held with much strictness, that a failure to find on all the issues, vitiated the verdict. The tendency of modern decisions, however, has been to relax the severity of the rule, and sustain the verdict, when the intention of the jury can be ascertained. What is the reasonable view to be drawn from this verdict? The people prefer two charges of criminal offences against the defendant. He is arraigned on them, and the question of his guilt submitted to the jury for their determination. They

hear the testimony adduced to substantiate both charges, and find affirmatively that he is guilty of one. Is not the inference inevitable that the prosecution failed to establish his guilt on the other charge, and therefore the jury find negatively on it? We are of the opinion that the verdict should be regarded as an acquittal of the defendant on the second count. If such be the effect of the verdict, he certainly has no right to complain. He can never again be put on his trial for the same offence."

Other Courts have held that the proper course to be pursued, was to disregard those counts on which the jury were silent, and proceed to judgment on those upon which a verdict was rendered. *State* v. *Coleman*, 3 Ala. 14; *Aubens* v. *State*, 6 Ala. 20; *Swinney* v. *State*, 8 G. & M. 576.

Other authorities, still, hold that the proper mode of disposing of the counts on which the jury omitted to return a verdict, is by entering a *nolle pros.* by the prosecuting officer, under the direction of the Court. *Com.* v. *Steadman*, 12 Met. 444; *U. States* v. *Keene*, 1 McLean, 429; Bishop's Criminal Law, § 677.

The indictment in the case at bar contains four counts. The first two charge an assault, in different forms, with intent to *murder;* the last two charge an assault with intent to *kill.* They all refer to one transaction, charging but one substantive offence, with different degrees of aggravation. If the evidence would have authorized, it was competent for the jury to have found the defendant, under this indictment, guilty of an assault simply, or of an assault with intent to kill, or of an assault with intent to murder, as the two former are elements of, and necessarily included in the latter, or higher and more aggravated offence.

The defendant was entitled to a verdict upon each and all the substantive charges in the indictment, and it was the duty of the Court to have required the jury to respond distinctly to the several counts contained therein.

The intention of the jury cannot, however, be misunderstood. They manifestly intended to find the defendant guilty

on the fourth count, and not guilty on the first three; and such, we think, is the legal effect of the verdict, whether a *nolle pros.* be entered or not. *Weinzorpflien* v. *State*, 7 Blackf. 186. The case is analagous to an indictment for murder where the jury return a verdict for manslaughter. The motion in arrest cannot prevail.

There are many causes assigned for setting aside the verdict, and granting a new trial. The fourth cause assigned is, because "said verdict was rendered against the evidence and the weight of the evidence." A full report of the evidence, certified by the presiding Judge, accompanies the case. An examination of this report has satisfied us that the verdict was authorized by the evidence, if believed by the jury, and therefore, that it should not be disturbed for the cause assigned, if we have the power to do so, which is not wholly free from doubt. There are no facts before us, from which we can determine whether the other causes assigned for a new trial are well assigned, or otherwise. This motion must therefore be overruled.

There remains for consideration the legal questions raised by the exceptions.

The defendants' counsel, among other things, desired the presiding Judge to instruct the jury, "that an officer's aid, when he has made an arrest, if called upon by the person arrested, is bound to state, in some intelligent manner, the authority by which he assumes to act, and if he neglects or refuses, the party arrested may lawfully resist."

Upon this request, after referring to previous instructions, the Judge instructed the jury, "that the aid's duties in this respect, were the same as those of the officer." He had previously instructed them, "that the officer, after the arrest of a person, if called upon by the person arrested to state his authority or show his precept, is bound to give reasonable information; but that he would not be bound, under all circumstances, to show his precept. Yet the person arrested has a reasonable right to know by what authority he was arrested."

It is contended that the requested instruction should have been given without qualification, and that the instructions given were erroneous.

In the *Countess of Rutland's case*, 6 Coke, 54, it was held that the officer is bound to give the substance of the warrant or process, to the end that the party may know for what cause he is arrested, and take proper legal measures to discharge himself.

In *Hall* v. *Roche*, 8 T. R. 187, Lord KENYON thought it a most dangerous doctrine, that the officer was not bound to show the warrant of the arrest when the party demands to see it, because it may affect the party criminally in case of resistance. He added: — "I do not think that a person is to take it for granted, that another who says he has a warrant against him, without producing it, speaks the truth."

In *McKalley's case*, 5 Coke, 11, it was resolved that the officer is bound to state his authority or show his warrant, where the party submits to the arrest; and where the party (as in that case,) makes resistance and interrupts him, and before he could speak all his words, he was mortally wounded and murdered, in which case the prisoner shall take no advantage of his own wrong. It was also resolved in that case, that if one knows that the sheriff has a process to arrest him, and coming to arrest him, the defendant, to prevent the sheriff's arresting him, kills him with a gun or other engine or weapon, before any arrest made, it is murder. In a note to this case, it is said the party must have some notification of the officer's business, or killing will not be murder. If he be a known officer, the law will imply notice. If he be a special bailiff, named in the process, he must declare his business and authority, as by using words of arrest or the like; and if such declaration be true and the process legal, and afterwards he be killed, it will be murder.

In no case, however, is the officer required to part with the warrant out of his own possession, for that is his justification. But it is very important in all cases where an arrest has been

made by virtue of a warrant, that the warrant, if demanded, should be produced. 1 East, P. C. 519; 1 Hale, 458; Fost. 311.

In *Bellows* v. *Shannon*, 2 Hill, 86, it was said by BRONSON, J., that "although the officer is not bound to exhibit the warrant, especially where there may be reason to apprehend that it will be lost or destroyed, yet I cannot doubt that it is his duty to inform the party, when such is the fact, that he has a warrant, or to make known in some other way, that he comes in his character as an officer to execute process, and not leave the party to suppose that he is a wrongdoer. The contrary doctrine would lead to violence and bloodshed. I do not say the officer is bound to declare the particulars of his authority before he makes the arrest, or that it may not sometimes be proper to lay hands on the party before a word is spoken; but either before, or at the moment of the arrest, the officer ought to say enough to show the party that he is not dealing with a trespasser, but with a minister of justice."

All the authorities concur in the doctrine, that where an arrest has been made by a party not known to be an officer, and who refuses, on demand, to exhibit his precept, or declare his authority, and resistance is made to such officer, and death ensue to the officer from such resistance, such killing will not be murder, but manslaughter only; but it is nowhere held that the assailant, under such circumstances, could be wholly free from guilt.

It by no means follows, therefore, that, because it is the duty of an officer to exhibit his precept, or declare his authority on demand, if he omits or refuses to do so, a person legally arrested, may, with impunity, kill such officer, or assault him with intent to kill. Such a doctrine would place an officer, with a legal precept in his hand, in a worse position than an ordinary private citizen. For, in the latter case, the party assailed would be permitted by law to use so much force only, as was reasonably necessary to protect his own person from violence. The omission of an officer to exhibit or declare

his authority, can do no more than deprive him of the protection, which the law throws around its ministers, when in the rightful discharge of their official duty.

This distinction does not appear to have been noticed at the trial.

The evidence, which is made part of the case, shows that the defendant had, on a day previous to the alleged assault, been arrested on a warrant, by one Brown, a deputy sheriff, from whom he had made an escape. Brown had employed Plummer, the party assaulted, as an aid, to assist in retaking the defendant. At the time of the assault, Brown remained in concealment, and sent Plummer, with other assistance, to capture the defendant. Bearing upon this state of facts, the jury were instructed by the Court, "that if the prisoner had been previously arrested on the same warrant, by the officer Brown, and had escaped without questioning his authority, he was not entitled to the right to the same extent, to demand the authority, after his escape, that he would have had if he had not escaped from the arrest." This instruction, it is suggested, would have been strictly correct, had the re-arrest been made by Brown, or by an aid acting under his immediate direction and in his presence, but when applied to Plummer, who does not appear to have been an officer, or in any way connected with the original arrest, the instruction is erroneous.

As an abstract proposition, the instruction is clearly right. If there was any thing in the peculiar situation of the parties or their relations to each other, which would require a modification of the general rule, and which had escaped the attention of the presiding Judge, it was the duty of the defendant to call his attention thereto.

The Judge, after having fully instructed the jury as to the rights of the defendant and the duty of the officer as to giving notice, remarked, "that the aid's duties in this respect were the same as those of the officer." Taking the whole instructions together, we are of the opinion that the jury

could have been under no misapprehension as to the duty of the officer, nor his aids, nor as to the rights of the defendant.

The motions and exceptions are overruled, and there must be judgment on the verdict.

TENNEY, C. J., concurred in the result, and APPLETON, J., concurred.

STATE *versus* MCKENZIE.

The allegations of an indictment, framed on a penal statute, must charge all the elements of the offence, so as to bring the case of the accused precisely within that described in the statute.

An indictment under the R. S. of 1840, c. 157, § 5, charged the defendant with having "in his custody and possession, at the same time, ten *similar* false, forged and counterfeit bank bills," &c. — *Held*, that the allegation was insufficient.

The word "similar," so used in the indictment, is not equivalent to the language of the statute, "in the similitude of," and cannot be substituted for it.

The word "similitude" was designed to be used in the statute as synonymous with "forged" or "counterfeit."

Counterfeit bills upon a bank, alleged in an indictment to be "in the similitude of the bank bills" of a certain bank, must have the external appearance of those issued by the bank named, in order to come within the statute.

A paper containing all the words and figures upon a genuine bank bill, but having no other resemblance or likeness to it, cannot be said to be in the similitude of the latter, within the meaning of the statute.

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

INDICTMENT, under R. S., c. 157, § 5. The verdict was guilty. The prisoner, by his counsel, after verdict and before sentence, moved for arrest of judgment, for various alleged insufficiencies of the indictment. The motion of the defendant was overruled by the presiding Judge, and he excepted. The indictment charged the defendant with having in his "custody and possession at the same time, ten *similar* false, forged and counterfeit bank bills," &c. The defendant, among other objections, excepted to the sufficiency of that allegation,

contending that the language of the statute, "in the similitude of," should have been employed, and that the words of the indictment were not equivalent thereto.

H. P. Deane, for State.

E. Gerry, for defendant.

There should have been an averment in the indictment, that the bills described therein "were in the similitude of the bank bills or notes." R. S., c. 157, § 5; 1 Chitty's Crim. Law, 281, 282, 283; *State* v. *Brown*, 4 Porter, 410; *Hamilton* v. *Commonwealth*, 3 Pa. 142; *State* v. *Cassidas*, 1 Nott & McCord, 91.

The averment should be in the language of the statute creating the offence. *State* v. *Bangbee*, 3 Blackf. 308; *U. S.* v. *Lancaster*, 2 McLean, 431; *Whiting* v. *State*, 14 Conn. 437.

TENNEY, J. — It was the design of the grand jury, to charge the defendant with an offence described in R. S., c. 157, § 5, which provides, "If any person shall have in his possession at one time, ten or more bank bills or notes, in the similitude of the bank bills or notes, payable to the bearer or to the order of any person, issued or purporting to have been issued by any bank or banking company, &c., with intent to utter and pass, &c., such bank bills or notes, as true or false, knowing the same to be forged or counterfeit, he shall be punished by imprisonment in the state prison for life, or any term of years."

This indictment charges the defendant with having in his custody and possession, at the same time, ten *similar* false, forged and counterfeit bank bills, purporting to be ten bank bills, each payable to the bearer thereof, and to be signed by the president and cashier of the Merchants' Bank, &c.; and the words and figures of each purport to be copied in the indictment; but it is not alleged that they are in the similitude of the bank bills or notes, issued or purporting to have been issued, by the bank named.

It is a general rule, that all indictments upon statutes, especially the most penal, must state all the circumstances

which constitute the definition of the offence in the Act, so as to bring the defendant precisely within it. 1 Chitty's Criminal Law, 281.

The word "similitude" is derived from the Latin *similitudo*, which is translated, "similitude, likeness, resemblance." It is manifest from the same section in the statute, that the word "similitude" was designed to be used as synonymous with the words "forged" or "counterfeit." The meaning given to the word "to forge," is "to make in the likeness of something else;" and "to counterfeit" is "to make in imitation of something else, with a view to defraud, by passing the false copy for genuine or original." Webs. Dict.

The bills should have the external appearance of those issued by the bank named, in order to come within the meaning of the statute. *Commonwealth* v. *Smith*, 7 Pick. 137. We cannot believe, that a paper containing all the words and figures upon a genuine bank bill, issued by a bank having a legal existence, with no other resemblance or likeness, in form or in the handwriting of the president and cashier, to the genuine bills, can be said to be in the similitude of the latter, so as to come within the meaning of the statute. These words cannot be disregarded, and their omission supplied by the word *similar*, as used in the indictment before us. On no construction can we treat the indictment as containing the allegation, that the bills described therein, are even *similar* to the genuine bills of the Merchants' Bank, much less are they represented as being in their *similitude*.

Exceptions sustained.

RICE, APPLETON, and GOODENOW, J. J., concurred.

WM. SMITH *& al., Pet'rs, versus* COMMISSIONERS OF CUMBERLAND COUNTY.

The statute of 1852, c. 221, required that the return of County Commissioners should, pending proceedings, remain on file for the inspection of interested parties.

Where the records of Commissioners fail to show a compliance with a provision of statute, the fact that it has been complied with, may be established, *aliunde*.

The omission to state such fact in the records, is not a defect sufficient to authorize the issuing of a writ of *certiorari*.

Proceedings, commenced and carried forward in accordance with the provisions of a statute which is changed by an amendatory Act during their pendency, cannot be deemed irregular.

The Act of 1853, c. 26, amending that of 1852, c. 221, was prospective in its operation.

When an appeal is taken from a decision of Commissioners in reference to the location, alteration or discontinuance of a highway, all further proceedings by the Commissioners are suspended. If the judgment of the appellate court be wholly against the doings of the Commissioners, it ends them; if it wholly affirm them, they are not obliged to commence again *de novo*, but will proceed from the point which they had reached when the appeal was taken; if it affirm them in part only, the Commissioners will proceed and complete their work in conformity with the judgment of the appellate court.

Where the record omits to state, that a committee appointed by the Supreme Judicial Court to report upon the doings of County Commissioners, were disinterested men, the technical defect may be corrected by amendment. It would not authorize the Court to quash the record.

Under the provisions of the Revised Statutes of 1841, County Commissioners may lay out a highway wholly within the limits of one town.

The Court will not, in the exercise of its discretion, grant a writ of *certiorari* for informalities in a record, which are merely technical, which do not affect injuriously the rights of any citizen, and which are not prejudicial to the public interests.

PETITION for WRIT OF CERTIORARI.

The inhabitants of the town of Windham appealed from the decision of the County Commissioners of the county of Cumberland, in locating a highway in that town. The Supreme Judicial Court thereupon appointed a committee to view the route and other routes connected therewith, who subsequently reported, affirming the doings of the Commis-

sioners, which report was accepted by the Court, and the appellants were ordered to pay costs.

The appellants thereafter petitioned that a writ of *certiorari* might be issued to the said County Commissioners and to the said Supreme Judicial Court, directing them to certify to this Court the record of their proceedings and doings, that the same might be quashed; and the petition assigned the following grounds therefor:—

"1st. Because the doings of said Commissioners, in locating said road, were not returned to the next regular session of said Commissioners' Court after the same had been had and finished.

"2d. Because the doings of said Commissioners were not put on file in the clerk's office, at the next regular session of said Commissioners' Court after they had located said road.

"3d. Because the doings of said Commissioners were not recorded at the next regular session after they had located said road.

"4th. Because there is no legal record of the location of said road.

"5th. Because the committee appointed by the Supreme Judicial Court, viz., Charles Hannaford, Nahum Morrill, and Sewall Milliken, were not three disinterested persons, as the statute requires, it not so appearing by the record.

"6th. Because there was no judgment passed in the Supreme Judicial Court upon the report of the committee appointed by said Court.

"7th. Because said road, being wholly within the limits of the town of Windham, the County Commissioners had no legal authority to locate the same.

"8th. Because the County Commissioners did not record their doings and proceedings until their regular session, holden at Portland, in said county, on the first Tuesday of June, A. D., 1854."

J. Eveleth, for petitioners, argued at length in support of the objections to the doings of the Commissioners, assigned in the petition, and cited, among others, the following author-

ities:—R. S. of 1841, c. 25, § 3; Act of 1852, c. 221, § 2; Act of 1847, c. 28, § 4; Act of 1853, c. 26, § 2; *Wayne and Fayette* v. *County Commissioners*, 37 Maine, 559; *Plantation No.* 9 v. *Bean*, 36 Maine, 361; *Madison* v. *County Commissioners*, 34 Maine, 592; *Macnawhoc Plantation* v. *Thompson*, 36 Maine, 365; *Detroit* v. *County Commissioners*, 35 Maine, 373; *Commonwealth* v. *Getchell*, 16 Pick. 452; *Cushing* v. *Gay*, 23 Maine, 11; *Commonwealth* v. *Stockbridge*, 11 Mass. 279; *Commonwealth* v. *Metcalf*, 2 Mass. 118; *Pierce* v. *Strickland*, 26 Maine, 277; *Ellis* v. *Page*, 1 Pick. 43; *Rutland* v. *Mendon*, 1 Pick. 154; *Blackburn* v. *Walpole*, 9 Pick. 97; *Commonwealth* v. *Cambridge*, 7 Mass. 158; *New Vineyard* v. *Somerset*, 15 Maine, 21.

Howard & Strout, for respondents.

1. To the first objection in the petition, we answer, that it is negatived by the record. The record shows the report and return to have been made at the regular session of the County Commissioners in December, 1852. The location of the road was in September preceding, and the proceedings of the Commissioners, so far as the hearing of parties and the location of the road were concerned, took place at that time. The next regular session of the Commissioners was in December, 1852.

2. The second objection is, that the doings of the Commissioners were not placed on file, according to law. But there is no proof in the case that such is the fact. The presumption is, that the Commissioners observed the law, till the contrary appears. The statute of 1852, c. 221, is only directory, and the fact is not required to appear of record. *Detroit* v. *County Commissioners*, 35 Maine, 379. But in this case, it substantially appears of record, that the law was complied with.

3. The third objection is, that the doings of the Commissioners were not recorded at the December term, 1852. The record shows them to have been recorded. It, however, is not required by law. Chapter 221, of Laws of 1852; *Detroit* v. *County Commissioners*, 35 Maine, 378.

4. The fourth objection is, that there is no legal record,

and in the argument of counsel it is suggested that the record is not signed by the clerk of the County Commissioners for the time being. The record is signed by Robert A. Bird, who was the clerk at the time the record was made up, in June, 1854. And according to the statute of 1852, c. 221, before cited, it was not necessary that the return should have been recorded, until the proceedings were finally closed, after the determination of the appeal.

But it is further insisted, that the Commissioners should have located the way *anew*, after the report of the committee affirming the location, had been certified to the Commissioners, and that this is required by c. 28 of laws of 1847.

Section 4, of c. 28, above cited, seems to proceed upon the idea that the appeal is taken from the decision of the Commissioners to locate, and before the actual location, and, with this view, the latter part of the section provides, that after the report of the committee is certified to the Commissioners, they shall proceed to lay out, &c., "in the manner and according to the regulations and limitations provided by law, where no appeal is taken." The meaning would seem to be, that after the appeal is taken, the proceedings in the County Commissioners' Court are suspended until the determination of the appeal, and then the Commissioners are to furnish that part of the proper proceedings which were not had when the appeal was interposed.

It could not have been intended by the Legislature, that the Commissioners should begin *de novo*, and issue a new notice upon the petition, grant a new hearing to the parties, and view and locate the route anew.

5. The fifth objection is, that the committee appointed by the Supreme Judicial Court were not disinterested, because the record does not so state. We reply, that the Court appointed the committee, acting judicially. The Court could appoint none but disinterested persons.

6. The sixth objection is, that no sufficient judgment was rendered in the appellate court. This objection is not insisted upon in the opening argument by counsel for petitioners.

The record shows a judgment at the April term, 1853, such, we apprehend, as is required by c. 28, § 4, of laws of 1847. But if not formally entered, the fault may be chargable to the clerk, and therefore amendable. *Sumner* v. *County Commissioners*, 37 Maine, 123.

The Court has power to correct its records according to the fact. *Limerick, pet.*, 18 Maine, 187.

7. To the seventh objection, we have the simple answer, that this Court has recently decided, upon the statute now in force, that the Commissioners have authority to locate a highway wholly within the limits of one town. *Harkness* v. *County Commissioners*, 26 Maine, 353.

8. The proceedings under the petition were not finished till June term, 1853. No record was required to have been made until the proceedings were closed. R. S., c. 25, § 3, as amended by c. 221, of laws of 1852. By § 5, of c. 25, above cited, it is provided that the petition shall be continued two terms, after the proceedings by the Commissioners were had and finished, before they are finally closed. This contemplates that the record shall not be made up and completed until the proceedings are finally closed.

The June term, 1854, was the second regular term after the proceedings were finished.

But if the record was not extended or the proceedings closed, so soon as might legally have been done, it does not take away the jurisdiction of the Commissioners, and render all their acts under the petition void; and the writ will be denied, when claimed for this cause. *Orono* v. *County Commissioners*, 30 Maine, 303.

Where substantial justice has been done by the Commissioners, although their record may not show an exact compliance with the statutes, the writ will be denied. *Inhabitants of West Bath, pet.*, 36 Maine, 74.

Eveleth, for petitioners, in reply.

RICE, J.—The statute of 1852, c. 221, requires that the return of the Commissioners, pending proceedings, shall re-

main upon the Commissioners' files, in the custody of their clerk, for the inspection of interested parties. It is contended that the record in this case does not show that this provision of the statute has been complied with.

The record does not, in terms, state that fact. But that the return of the Commissioners was really, as matter of fact, on file, as required by law, is not asserted, and, from what appears, we think the inference is legitimate that such was the case. Facts may be established *aliunde* the record. *West Bath* v. *County Commissioners*, 36 Maine, 74. The same objection was taken under a state of facts almost precisely similar in *Detroit* v. *County Commissioners*, 35 Maine, 373, and held to be insufficient to authorize the issuing of a writ of *certiorari*.

Section 3, of c. 25, R. S., was amended by Act of 1852, c. 221, so as not to require the proceedings of the Commissioners to be recorded until they are completed. The proceedings in this case were commenced while the Act of 1852 was in operation. Proceedings had, in conformity with the provisions of this Act, while it was in force, cannot be deemed irregular. The operation of the Act of 1853, c. 26, by which c. 221 of laws of 1852, was amended, was prospective. *Detroit* v. *County Commissioners*, 35 Maine, 373.

The committee appointed by the Supreme Judicial Court, affirmed the doings of the County Commissioners, in locating the highway in controversy, in every particular.

It is now contended that after the report of the committee, was accepted by the Supreme Court, it was the duty of the County Commissioners to locate the highway *de novo*, conforming in all respects to the requirements of the statute in locating highways upon an original petition.

By § 2, of c. 28, laws of 1847, it is provided that when an appeal is taken, "all proceedings shall be stayed in said Court of County Commissioners, until a decision shall be had in said District Court, from which there shall be no appeal." By § 4, of the same chapter, it is further provided, "if such judgment, (of the District Court,) shall be wholly against the lo-

cation, alteration or discontinuance in question, no further proceedings shall be had thereon by the County Commissioners; but if otherwise, then the County Commissioners shall proceed to lay out, alter, or discontinue such highway, in whole or in part, as the judgment may be; and in the manner and according to the regulations and limitations provided by law, where no appeal is taken."

The first provision suspends, during the pendency of the appeal, all proceedings of the County Commissioners, at the point reached by them when the appeal is taken. And if the decision of the appellate court is wholly against the location, alteration, or discontinuance, no further proceedings can be had by the County Commissioners in the premises; but if, on the other hand, the proceedings of the Commissioners are affirmed, in whole or in part, then it becomes their duty to *proceed* in conformity with such decision, and lay out, alter, or discontinue such highway, in whole or in part, as such judgment may be. That is to say, the Commissioners are to *proceed* from the point which they had reached, when their proceedings were *suspended* by the interposition of the appeal, and complete the laying out, alteration, or discontinuance of such highway, in accordance with the decision of the appellate court. This, we think, is the reasonable construction of this statute, when taken as a whole. The construction contended for, by the counsel for the petitioners, would require of the Commissioners a work of supererogation.

It is also contended that the record does not show that the committee appointed by the Supreme Judicial Court, were *disinterested* men. There is no suggestion that the men who composed that committee were in fact interested in the subject matter upon which they were called upon to act. The defect, if any exists, is in the record of this Court, and is probably simply a misprision of the clerk, which may be corrected by amendment. At most, it appears to be only a technical defect for which we should not feel authorized to quash this record.

It is further objected, that the road lying wholly within the

town of Windham, the County Commissioners have no jurisdiction. This objection has been ably and ingeniously presented by the petitioners' counsel. The same question was before this Court in the case of *Harkness* v. *Waldo County Commissioners*, 26 Maine, 353. It then received a careful examination by the Court, in an opinion drawn by Mr. Justice SHEPLEY, in which the history of our legislation upon that subject is critically examined. On a revision of that opinion, and the grounds upon which it is based, we perceive no reason to change or modify it. That it is satisfactory to our people, is evinced by the fact that it has now stood upon the judicial records of our State for a period of nearly ten years without modification or complaint.

That there are some technical informalities in the record cannot be controverted, but they do not appear to be of such a character as to affect injuriously the rights of any citizen or to be prejudicial to the public interest. Under such circumstances we do not deem it expedient, in the exercise of a discretionary power, to disturb proceedings which have received the concurrence of the County Commissioners and of an intelligent committee appointed by this Court, as well as the approval of this Court itself. For these reasons the writ must be denied in any contingency. We have expressed these views for the purpose of affording a practical rule for proceeding in like cases. But this case is irregularly before this Court, and, for that reason, must be dismissed from the docket.

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

INHABITANTS OF PORTLAND *versus* INHABITANTS OF BANGOR.

The overseers of the poor of the city of Portland committed certain persons to the work-house, by a warrant which described them as persons who, being "able of body to work, and not having estate or means otherwise to maintain themselves, refuse or neglect so to do, live a dissolute, vagrant life, and exercise no ordinary calling or lawful business, sufficient to gain an honest livelihood." — *Held*, that the causes alleged in their warrant were sufficient to give the overseers jurisdiction and authorize the commitment.

The proceeding was rather correctional than penal in its nature.

Overseers, being under oath, are presumed to act with integrity until the contrary be shown.

The town where persons, so committed, have their legal settlement, is liable for their support as paupers.

AGREED STATEMENT OF FACTS, from *Nisi Prius*, HOWARD, J., presiding.

This was an action brought to recover for supplies furnished by the plaintiffs to Betsey Brown and her daughter, Almedia Brown, as paupers, alleged to have had their legal settlement in Bangor, at the time the supplies were furnished. The general issue was pleaded and joined. Legal notice and answer were admitted.

It was also admitted that Betsey Brown was once the wife of Timothy Brown, and that he had a settlement in some town other than Bangor, in this State; that, in 1842, a divorce between them was decreed, on her application; that, in 1838, the family were residing in Oldtown, and that they removed to Bangor and there resided till about 1842; that, when the libel for divorce was filed, the husband was in Thomaston; that, after the divorce, the said Betsey returned to Bangor, where she resided more than five years together, without receiving, during that time, any supplies or support as a pauper, from any town. In 1850, or 1851, she came to Portland and remained until the bill charged was incurred. Almedia, her daughter, remained and lived with her mother from the time of her divorce until the bill claimed was incurred. She died in 1854, aged 22 years.

On May 23, 1853, the mother and daughter were arrested

on a warrant, a copy of which appears in the case. Either party may refer to the original warrant and return. Objections to the introduction of the warrant as evidence was seasonably made.

On the day of the arrest the said Betsey and Almedia were committed to the work-house in Portland, as appears by the return of the officer.

It appeared in evidence, that Mrs. Brown hired a house on Green street, in Portland, and occupied it, with her daughter; that, while they resided there, it was reputed to be a house of ill-fame; that it was known to the marshal, police and overseers of the poor, and of the work-house, in the city of Portland, to have that reputation notoriously; and, that, upon information to that effect, it had been visited by the officers before mentioned, several times, to ascertain its character and condition, and there was evidence to show that persons were found there, by them, of both sexes, who made it a resort for prostitution. It was not proved to be a disorderly house otherwise than as stated and indicated by the evidence before mentioned.

On the night of the 23d of May, 1853, before mentioned, the persons named in the warrant, a copy of which follows, were found at the house and were arrested, for the reasons stated in the warrant, on complaint made to the overseers aforesaid; similar complaints having been made to them before the night of the arrest. Evidence of the reputation of the house was seasonably objected to.

The defendants contended that the supposed paupers were in a condition to support themselves, and were not in distress and standing in need of immediate relief, before they were committed to the work-house, and offered evidence tending to establish these facts.

Upon the foregoing evidence, or so much of it as was legally admissible, though objected to, the Court was to render such judgment as the legal rights of the parties required, with power to draw such inferences as a jury might properly draw.

The overseers' warrant of commitment in this case was as follows:—

"To either of the constables of the city of Portland,—Greeting:—

"Whereas, it appears to us, the subscribers, overseers of the poor, and of the work-house, in the city of Portland, that Elizabeth Smith, Jane Davis, Mrs. Brown and daughter, and Peter Allen, now resident in said Portland, are persons able of body to work, and not having estate or means otherwise to maintain themselves, refuse or neglect so to do; live a dissolute, vagrant life, and exercise no ordinary calling or lawful business sufficient to gain an honest livelihood:—

"You are therefore required, in the name of the State of Maine, to take the said Elizabeth Smith, Jane Davis, Mrs. Brown and daughter, and Peter Allen, and them commit unto the work-house in said Portland; and the master thereof is hereby required to receive them into said house and there employ and govern them according to the rules and orders of the same, until they shall be discharged by order of law.

"Given under our hands, this twenty-third day of May, A. D., one thousand eight hundred and fifty-three.

(Signed,) "George Pearson,
"Benj. Larrabee."

Officer's return:— "City of Portland, May 23, 1853.

"By virtue of the within warrant, I have arrested the within named persons, and them committed to the work-house, as within directed.

(Signed,) "Seth C. Mason, *Constable of Portland.*

"Fees. Service, $3,75."

Notice to Bangor:— "Portland, May 27, 1853.

"Gentlemen,—Betsey Brown, wife of Timothy Brown, and Almedia Brown, their daughter, inhabitants of your town, have now become chargable in this city as paupers. We conceive it necessary to give you this information that you may order their removal, or otherwise provide for them as you may judge expedient. We have charged the expense of their

support, which has already arisen, to your town, and shall continue so to do, so long as we are obliged to furnish them with supplies in our almshouse, at an expense of —— dollars per week.

"We are, gentlemen, with much respect, your most obedient and humble servants.

(Signed,) "Per order, "E. Trowbridge, *Secretary of the Board of Overseers of the Poor.*"

"The Gentlemen, Selectmen or Overseers of the Poor of the town of Bangor."

Reply:— "Bangor, Aug. 23, 1853.

"To the Overseers of the Poor of the city of Portland.

"Gentlemen,—We acknowledge the receipt of your communication.

"The overseers of the poor of Bangor have not been able to discover any law by which the overseers of the poor of any town or city are authorized, by their own warrant, to commit to the work-house, for an indefinite period, any persons only at the expense of the town or city where such persons make the commitment. Hence, I am directed by the board of overseers of the poor of the city of Bangor, to say, most respectfully, to the overseers of the poor of Portland, that, as Mrs. Betsey Brown and her daughter Almedia were committed to the work-house by their warrant, the expenses of such proceedings are not legally chargable to any other town or city; and, therefore, we have no directions or orders to give respecting them whatever.

"We remain, Gentlemen, respectfully, your obedient servants. (Signed,) "Charles Hayward, *Per order of Overseers of the Poor of Bangor.*"

Samuel Fessenden, for plaintiffs.

1. The overseers of the poor for committing persons to the work-house, under the statute of 1841, c. 28, § 13, in such commitment act as judicial officers, and not as executive, whose judgment is conclusive upon the subject matter.

2. The persons so committed by virtue of such judgment

and under a warrant of commitment, are to be regarded as paupers, and their support provided for in the same way as that of other persons standing in need of immediate relief.

3. The statute of 1841, c. 28, § 13, providing for the erection and maintenance of houses of correction, and for the confinement therein of the class of idle and disorderly persons enumerated in the first section of the Act, contemplates that they are to be regarded as idle and vicious paupers who are to be brought into habits of regularity, sobriety and industry, by forced labor, and not as convicts to be punished for crimes.

It follows, from the above positions, if correct, that the city of Portland, in the first instance, were bound to furnish the immediate relief and support, and that the city of Bangor, the place of lawful settlement of said paupers, were liable over to the city of Portland for all such expenses, and support. Vol. 1 Mass. Laws, stat. of 1787, c. 54, p. 436; Opinion of S. J. Court of Mass., 1 Met. 572.

From this case it will fully appear, that persons committed as these were, to the house of correction, form a distinct class from those sentenced to the house of correction, instead of the State's prison or county jail, upon conviction of other offences, who are regarded as criminals, and whose support is first to be paid for out of the county treasury, and ultimately, by the laws of Massachusetts, by the Commonwealth, as State paupers, and, in our State, paid out of the county treasury.

The warrant does set out a sufficient cause for the commitment of Mrs. Brown and her daughter, they falling under the class of persons who did not exercise any ordinary calling or lawful business, sufficient to gain an honest livelihood, but, on the contrary, were pursuing a dishonest and criminal course of life.

Wakefield, for defendants.

The liability of towns to support paupers, is created by statute; and one town, in order to compel another to pay it for the support of paupers, must avail itself of the provisions, and be limited by the conditions, created and required by statute.

One of the required conditions is, that the person for whose support recovery is sought, should have fallen into distress, and stand in need of immediate relief. R. S., c. 32, § 29.

Mrs. Brown and daughter were not of that class of persons described in the warrant, and liable to be seized and committed. The most that can be said, is, that they kept a house of ill-fame. But the overseers have no authority to arrest and commit persons for keeping houses of ill-fame. If the overseers suspected them of keeping a house of ill-fame, it was their duty to prosecute them. R. S., c. 32, § 28.

But it is said that the act of the overseers in making the commitment, was judicial, and, therefore, not liable to be inquired into.

If this act be a judicial act, it is difficult to say what act is not; because,—

1. The overseers are ministerial, and not judicial officers;—
2. There was no hearing of the parties;—
3. There was no adjudication.

This act is very much like that of a justice issuing a warrant to remove a pauper from the State, which has been held to be ministerial. *Knowles & al.'s case*, 7 Maine, 71.

But, assuming that the supposed paupers were rightfully committed, and were in distress when the supplies were furnished, then the defendants are not liable.

Sec. 20, c. 28, R. S., provides that no town shall be liable for the expenses of any person to said work-house, who may not be sent thither by overseers belonging to such town.

It may be possibly said, that this clause refers to commitments to work-houses erected by two or more towns.

I think it obvious that both sections, 20 and 21, and also section 22, refer to and embrace work-houses belonging to one and to several towns.

If the supposed paupers were rightfully committed, and section 20 does not prohibit the recovery for supplies furnished, still the plaintiffs cannot recover.

Chapter 178, § § 24, 25 and 26, of R. S., authorize towns to erect houses of correction, or appropriate work-houses for

that purpose. Sec. 29 makes the parties liable for charges of supporting paupers, when committed to the county house of correction, also liable to pay for their support when committed to the town house of correction.

Section 10 authorizes a justice of the peace to commit certain persons, which includes those described in the warrant of the overseers.

Section 20, under certain contingencies, makes the town, where the person committed had his settlement, liable for his support.

Hence, had Mrs. Brown and daughter been committed agreeably to the provisions in chapter 178, Bangor would have been liable to pay for their support.

But the overseers not pursuing the provisions of this chapter, the plaintiffs cannot recover, because the statute does not make any provision for such class of cases.

GOODENOW, J.—This is an action brought to recover for supplies furnished by the plaintiffs to one Betsey Brown and her daughter, Almedia Brown, as paupers, alleged to have had their legal settlement in Bangor at the time the supplies were furnished. Legal notice and answer were admitted. The amount and value of the supplies are not controverted.

It was admitted that Betsey Brown was once the wife of Timothy Brown, and that he had a settlement in some town in this State other than Bangor; that in 1842, a divorce between them was decreed, on her application; that in 1838, the family were residing in Oldtown, and that they removed to Bangor, and there resided till about 1842; that when the libel for divorce was filed, the husband was at Thomaston; that after the divorce, the said Betsey returned to Bangor, where she resided more than five successive years, without receiving during that time any supplies or support as a pauper, from any town.

In 1850 or 1851, she came to Portland, and remained until the expenses charged in the bill were incurred. Almedia,

her daughter, remained and lived with her mother, until said expenses were incurred. She died in 1854, aged 22 years.

On May 23, 1853, the mother and daughter were arrested on a warrant, and committed to the work-house in Portland, charged by the overseers of the poor, and of the work-house in said city of Portland, with their being residents in said city of Portland, and being able of body to work, and not having estate or means otherwise to maintain themselves, and of refusing and neglecting to do so, and with living a dissolute, vagrant life, and exercising no ordinary calling or lawful business, sufficient to gain an honest livelihood.

The answer does not deny that the legal settlement of the alleged paupers was, and is, in Bangor. But it, in effect, denies the right of the overseers of the poor of the city of Portland to commit any persons, by their own warrant, to their work-house, for an indefinite period, otherwise than at their own expense.

The overseers, who ordered these alleged paupers committed to the workhouse in Portland, were under oath. It is to be presumed they acted with integrity, until the contrary is shown. The causes alleged in their warrant or order of commitment are such as to give them jurisdiction. R. S., c. 28, § 1. "It was rather a correctional than a penal proceeding." If the alleged paupers were in need, it was a proper mode of furnishing them with the necessary supplies, and undoubtedly the most economical.

The evidence offered by the defendants tends to confirm, rather than confute the statement of the overseers of the work-house of Portland, that Mrs. Brown and her daughter were at the time of their commitment living "a dissolute, vagrant life," exercising "no ordinary calling or lawful business, sufficient to gain an honest livelihood."

We are unable to find any good reason why the defendants should not be defaulted. 1 Met. 572.

Defendants defaulted.

TENNEY, C. J., and HATHAWAY and MAY, J. J., concurred.
APPLETON, J., did not sit.

RICE, J., gave the following dissenting opinion:—

By § 13, of c. 28, stat. of 1840, it is provided, that any two or more overseers in a town having a work-house, may, by order under their hands, commit to such house the persons described in the first section of the same chapter, to wit:—

1st. All poor and indigent persons that are maintained by or receive alms from the town.

2d. All persons who, being able of body, and not having estate or means otherwise to maintain themselves, refuse or neglect to work.

3d. All persons who live a dissolute and vagrant life, and exercise no ordinary calling, or lawful business, sufficient to gain an honest livelihood.

4th. All such persons as spend their time and property in public houses, to the neglect of their business, or by otherwise mis-spending what they earn, to the impoverishment of themselves, and their families are likely to come to want.

Pauperism works most important changes in the condition of the citizen. Through its influence, he is deprived of the elective franchise, and of the control of his own person. The pauper may be transported from town to town, and place to place, against his will; he loses the control of his family, his children may be taken from him without his consent; he may himself be sent to the work-house, or made the subject of a five years contract, without being personally consulted. In short, the adjudged pauper is subordinated to the will of others, and reduced to a condition but little removed from that of chattel slavery, and until recently, by statute of 1847, c. 12, like the slave, was liable to be sold upon the block of the auctioneer, for service or support.

A condition in life so undesirable, not to say revolting, to all that is manly and ennobling in human character, should not be *established* unnecessarily, nor by doubtful nor precipitate action.

The situation of the pauper, or of such as are, in the words of the statute, "likely to become paupers," is more dependent and unprotected than the decidedly vicious and criminal.

Thus, while rogues, vagabonds and beggars; night-walkers, brawlers, pilferers, common drunkards, fortune-tellers, common pipers, fiddlers and the like, may not be sent to the house of correction, except upon trial before a magistrate and on complaint on oath with a right of appeal, or before the Supreme Judicial Court, and then restrained only for a limited period of time; the persons described in the first section of the 28th chapter may be sent to the work-house, by the overseers thereof, for an indefinite period, without any complaint, trial, or right of appeal. And this unrestrained power is exercised over a class of persons not paupers, nor even *quasi* paupers, but who, it is supposed, are likely to become such.

Without stopping at this time to inquire into the expediency of conferring such powers upon any class of citizens, or whether the statute is not in violation of constitutional provisions, and the rights of the citizen, it is obvious that such anomalous powers can only be exercised in that class of cases which are specially pointed out by the statute. Such an irresponsible tribunal, or body, cannot be permitted to extend its jurisdiction by implication, nor assumption; it must walk within the very letter of the law.

Applying these rules to the case as presented before us, had the overseers of the work-house in Portland any jurisdiction over the persons of Mrs. Brown and her daughter when they issued their warrant for their arrest, and sent them to that work-house? They were committed, as their warrant recites, as being "persons able of body to work, and not having estate or means otherwise to maintain themselves, refuse or neglect to do so; live a dissolute and vagrant life, and exercise no ordinary calling or lawful business sufficient to gain an honest livelihood."

The evidence reported, supports no one of these allegations, but tends to show that these persons kept a house of ill-fame, and, perhaps, satisfactorily establishes that fact. If so, they might have been properly proceeded against on complaint or indictment, for that offence, but not in this manner.

But it is contended that the warrant, and officer's return

thereon, is conclusive in the case. Nothing may be presumed in favor of the jurisdiction of an inferior tribunal. Nothing, surely, can be presumed in favor of a body, assuming to control the persons of citizens, and incarcerate them, who hardly present the form or semblance even of an inferior tribunal. No; such a body must show that it has jurisdiction, before its acts and decrees can be respected.

It may, however, be contended, that whether the acts of the overseers were lawful or not, is immaterial; because the alleged paupers were in distress, and stood in need of immediate relief, at the time they were supplied, and the defendant town was notified.

Section 29, c. 32, R. S. of 1840, provides that "the overseers, in their respective towns, shall also provide for the immediate comfort and relief of all persons residing or found therein, not belonging thereto, but having lawful settlements in other towns, when they shall fall into distress and stand in need of immediate relief, and until they shall be removed to the places of their lawful settlements."

To authorize towns to interpose under this provision of the statute, and furnish supplies, with which to charge another town, the alleged pauper must have fallen into distress, and stood in need of immediate relief, and the supplies must have been furnished them, as paupers, in good faith. The law will not permit towns, by their unauthorized acts, to force persons, residing therein, into situations of distress, and then relieve them, as paupers, at the expense of some other town. Such a practice would introduce a new mode for preventing settlement of persons in a town, unknown to the law. It is only that class of persons who fall into distress, in the ordinary course of events, or under the ordinary operation of the law, that this statute contemplates.

There is no evidence in this case that Mrs. Brown or her daughter were in distress, or stood in need of relief, at the time of their arrest, under the warrant of the overseers, or that they would have been in that condition had they not been

thus molested, or in case they had been subjected to the ordinary course of legal proceedings.

If it should be suggested, that the plaintiffs are not responsible for the unauthorized acts of the overseers, and that the alleged paupers were in distress, without fault on the part of the plaintiffs when the supplies were furnished, the answer is, that the acts of the overseers have been adopted and ratified by the city, and they are now clearly bound thereby. The authority cited from 1 Met. 495, does not apply.

WILLIAM B. BENSON, *in Equity, versus* FRANCIS O. J. SMITH.

Every thing essential to a statute title must appear of record.

The power of sheriffs and their deputies to serve and execute all writs and precepts to them committed, is conferred by statute, and does not otherwise exist.

The modes in which they are to be served and executed is regulated by statute; and the doings of the officer, unless substantially conformable thereto, are invalid.

The seizure of property upon execution, is necessary to make the sale valid.

Subsequent proceedings, to vest in the purchaser the title of real estate sold on execution, relate to the *time* of the seizure, and depend upon the state of the title as it *then* was.

Prior to the passage of the Act of Jan. 28, 1852, entitled "An Act to amend the ninety-fourth chapter of the Revised Statutes," sheriffs and their deputies had no authority to seize and sell mortgaged property as a whole, when a part of it was in a county to which their authority did not extend.

A deputy sheriff, assuming to act under the Revised Statutes of 1841, seized, as a whole, the property of a railroad corporation, which extended into an adjoining county, in which he was not commissioned to act. After notice of sale had been given, and within ten days of the legal expiration of the notice, the Act of Jan. 28, 1852, was passed, giving officers authority to seize and sell, as a whole, property so situated, but it did not change the requirement in regard to notice. — *Held*, that the notice of sale having been given under a statute which did not authorize the seizure, it was, in contemplation of law, no notice, and the sale void.

A notice, to be effectual, under the statute of 1852, must be given thirty days at least previous to sale, and one, which is ineffectual till ten days only before the sale, is insufficient.

Benson *v.* Smith.

The Act of Jan. 28, 1852, amending the thirty-fourth chapter of the Revised Statutes, does not dispense with any proceedings previously necessary to make a valid sale on execution.

BILL IN EQUITY.

The plaintiff claimed to be the owner of the right to redeem the franchise of the Buckfield Branch Railroad Company, together with all the personal and real estate which had been conveyed by said company to the respondent by a deed of mortgage; and he brought this suit to obtain a judgment of the Court that he might be permitted to redeem the same, on paying the sum which should be found to be due as principal and interest on said mortgage. He claimed to derive title to the right of redemtion by virtue of a sale, on execution, of the same, by Jesse Drew, a deputy sheriff, to David Stanley, who conveyed it to F. O. Libby, from whom the plaintiff held a conveyance.

The officer who made the sale, was commissioned for Oxford county, and a part of the property was in that county, and a part in the county of Cumberland.

The points in issue in the case fully appear in the arguments of counsel and the opinion of the Court.

Shepley & Dana, for plaintiff.

1. *Title of plaintiff.*—By the act of incorporation, July 22d, 1847, c. 54, the road was to extend "from some point or place near Buckfield village, through the towns of Buckfield, Hebron and Minot, at such place at or near Mechanic Falls, on the Little Androscoggin river, as will best connect with the Atlantic and St. Lawrence Railroad, now located to that place."

The legal existence of the corporation, and of the road, thus described in its charter, "with all personal and real property of said corporation, * * * as the same exists by virtue of said Act of incorporation," is admitted by the conveyance in mortgage to the defendant, on October 29, 1849.

The plaintiff and Rufus Porter, on November 8, 1851, recovered a judgment against the corporation. Execution issued thereon November 24, 1851.

The right in equity of the corporation, with its franchise, was seized, advertised, and sold at auction, by virtue of that execution, to David Stanley, on February 7, 1852, by Jesse Drew, a deputy sheriff, who on that day conveyed the same by deed to Stanley.

The officer advertised and proceeded in conformity to the provisions of statutes, c. 76, § 17; c. 94, § § 36–39; c. 117, § 20; and the purchaser became the legal owner of the equity.

June 4, 1853, David Stanley, by a deed of release, conveyed the equity to Francis O. Libby, who, on October 28, 1853, conveyed it to the plaintiff.

Thus plaintiff had acquired a title to authorize him to redeem.

2. *His bill is maintainable without a tender of the amount due on the mortgage.*—The defendant entered into possession of the road on January 11, 1851.

No tender was necessary, if defendant, on demand, had unreasonably neglected to render a true account of the amount due. Chap. 125, § 16. He had done so.

Demand was made by David Stanley for an account on March 12, 1853. By F. O. Libby on June 18, 1853; and by plaintiff on November 2, 1853. This is admitted by the answer.

The grantee of a right in equity acquires with it a right to the benefit of all acts of his grantor respecting the estate mortgaged. *Cutts* v. *York Manuf. Co.*, 18 Maine, 190.

3. *The estate mortgaged is subject to redemption. It is real estate.*—The answer denies that any real estate was mortgaged. For this assertion, (and it amounts to no more,) the defendant relies upon the proviso contained in the first section of the Act of April 7, 1845, c. 165.

The section, in substance, declares that the real estate of any railroad company shall be taxable to it by the cities or towns in which such real estate may lie, provided that the track of the railroad, and the land on which it is constructed, shall not be deemed real estate. That is, it shall not, for such purpose, be deemed real estate. The subject matter of

the enactment, discloses the intention, and determines the true construction of the language. The purpose of the Act is plainly and clearly expressed. It was to authorize cities and towns to tax the real estate of railroads, not to include as such real estate to be taxed, the railroad bed. There was no intention to declare that the road bed, or track, for other purposes, should not remain as real estate. If it were possible to make a different construction, it could not be applied to this corporation.

Its charter, granted subsequently, recognizes the land obtained for the track, and other purposes, to be real estate. By the first section, it is authorized "to purchase, or to take and hold, so much of the land and other real estate," as may be necessary. By the fourth section, it is authorized to purchase and hold land; and the thirteenth section declares that "all real estate purchased by said corporation, for the use of the same, under the fourth section of this Act, shall be taxable to said corporation, by the several towns and plantations in which said lands lie." So that the very lands purchased by this corporation for its road-bed and other uses, are recognized to be real estate, and taxable as such, contrary to the provisions of the Act of 1845.

Some of the effects of a different construction, would be, that land, purchased for a railroad, may be purchased and sold as a horse, or bale of goods; and that the title to it may be conveyed without any deed or other evidence of it. And there could be no other means of ascertaining or proving the title than is common for all personal property; there could be no security of title by record; for a record of title to personal property, made in the registry of deeds, is unauthorized and void. If the railroad, to vary the course or shorten the distance, should, in any place, be discontinued, the land on which it was constructed must become again real estate; and yet the title of the then owner may have been acquired without any written evidence of it, and proof of such title must be received in courts of law.

4. *The equity of redemption has not been foreclosed or for-*

feited.—The defendant does not appear to have entered for condition broken, according to any of the modes provided by statute, c. 125, § 3.

His answer states that he notified the corporation on January 11, 1851, of the non-payment of the sums that had become due, &c.; and that he would accept the mortgaged premises in full satisfaction of said debt, and allow the corporation three years to redeem; "that upon said notice and proposal said road and premises were delivered to this respondent by said company; that more than three years have elapsed, and no payment has been made.

There is no proof presented that the corporation, by any vote or legal act of its officers, agreed to that proposal.

A mere delivery of the possession of the road would not make the corporation a legal party to such an agreement.

If such an agreement had been actually made it could not operate to create a forfeiture. *Ireland* v. *Abbott,* 25 Maine, 155.

F. O. J. Smith, pro se.

1. The complainant claims a right to redeem, as of mortgage, the property of the Buckfield Branch Railroad Company, as conveyed to the respondent by deed, a copy of which makes part of the case.

This alleged right of redemption is claimed to have been derived to the complainant from the purchaser of the same at a sheriff's sale, conducted in conformity to the provisions of the 76th chap. of the Revised Statutes, § 17; and of the 94th chap. § § 36–39; and c. 117, § 20.

But the sale so made was wholly insufficient to pass any valid title. The officer's return of his proceedings of sale, and his deed to Stanley, represent expressly, as well as by reference to the deed of defendant's title from the railroad company, the situation of the mortgaged premises to have been, at the time of seizure and sale, in towns of two different counties, viz.: in Buckfield and Hebron, which were in Oxford County, and in Minot, which was in Cumberland county. The same return and deed of sale, represent the

notices of sale to have been posted up in the towns of Sumner, Paris, Oxford and Turner, which were in Oxford county, and in Auburn and Poland, which were in Cumberland county. The deputy sheriff, in his seizure and return upon the execution, claims to act only by his authority as an officer limited to the county of Oxford. In no other capacity did he assume to act. In his deed to Stanley, he expressly recites his authority as "a deputy sheriff under Samuel Gibson, sheriff of the county of Oxford." This officer of Oxford county had no authority to execute the commands of the writ of execution without the limits of his county, and within the limits of another county, for which he had not been commissioned. His proceedings, therefore, in making seizure and sale of the judgment debtor's estate, either real or personal, without the limits of Oxford county, and within the limits of Cumberland county, were wholly void. The seizure was made, as by the officer's return, on the "first day of December, 1851." "The subsequent proceedings, necessary to make a levy available, have reference to that day, and depend upon the state of the title, as it then existed." *Bagley* v. *Bailey*, 16 Maine, 153.

The R. S., c. 94, § 40, provides, that "the seizure of the right on the execution, shall be considered as made on the day when the notice of the intended sale was given, whether to the debtor, or by posting up notice," &c. The officer's return fixes that day as the 5th of December, 1851. Of course, the subsequent proceedings necessary to make the levy available, referred only and exclusively to the authority with which the officer was vested, and under which he acted, on that day.

"Every thing essential to a title under the statute, ought to appear of record." *Wellington* v. *Gale*, 13 Mass. 488.

A sheriff's sale operates a statute transfer of the interest; and it is essential to the title of the purchaser, that the requisites of the statute should be complied with." As "if a tract of land mortgaged is situated in more towns than one, it is necessary that the sheriff, in making sale of the mortga-

ger's right in equity of redemption, under the statute of 1821, c. 6, [R. S. 1840, c. 94, § 37,] should post up two notifications in every town where any part of the land is situated." *Grosvenor* v. *Little*, 7 Maine, 377.

The Court say, in this last case, "a part of the land mortgaged was situated in the town of Poland. The officer posted up a notification in but one place in that town. The omission to do it in two places there, we are satisfied, is fatal to the title of the purchaser. Nor is it, in our opinion, the less so, because the mortgage also embraced land lying in another town."

The equity of redemption being an entirety in lands of two counties, and the seizure and sale assuming to cover that entirety, they could not be good for the redemption of a part, and bad for the remainder—good for so much as lies in one county and bad for so much as lies in the other county. For the grantee of a part of mortgaged premises cannot redeem, except by payment of the whole mortgage. *Smith* v. *Kelly*, 27 Maine, 237. And to make valid the sale of a right to redeem a part, upon terms that would operate as an obligation to redeem other property than the purchased redemption fails to cover, although represented as covering, is wholly unwarranted by any statute authority. Hence, in the above case, the sale of the equity of redemption, being to lands in two distinct towns, and insufficient in reference to the portion situated in one of those towns, because both portions were designed to be covered by the sale, vitiated the whole sale. And the case of *Franklin Bank* v. *Blossom*, 23 Maine, 546, confirms this position.

2. The plaintiff's claim, that this bill is maintainable without a tender, for reasons set forth in his argument, was traversed and denied, and the following authorities were cited: *Battle* v. *Griffin*, 4 Pick. 16; *Fay* v. *Valentine*, 2 Pick. 546; *Willard* v. *Fiske*, 2 Pick. 540; *Putnam* v. *Putnam*, 13 Pick. 130; *Willard* v. *Fiske*, 2 Pick. 543; *Whitwood* v. *Kellogg*, 6 Pick. 430; *Roby* v. *Sherman*, 34 Maine, 272.

3. The estate mortgaged was not real estate.

The charter, § 1, expressly provides, "and the land so taken by said corporation, shall be held as lands taken and appropriated for public highways."

Unless the ownership of an easement confined to the use, and never descending into the fee of lands, acquired by the public in highways, constitutes real estate, then railroad beds and tracks are not real estate, but are expressly made a less estate—a mere easement—not subject to the operation of the rights of redemption like real estate. It is but a chattel interest.

Again; the charter itself discriminates between what is real estate, belonging to the corporation, and what is not real estate, in the lands they use. Sect. 13 provides, that "all real estate purchased by said corporation, for the use of the same, under the fourth section of this Act, shall be taxed to said corporation, by the several towns and plantations in which said lands lie, in the same manner as lands owned by private persons; and shall, in the valuation list, be estimated the same as the other real estate of the same quality in such towns or plantations, and not otherwise."

Turning to the fourth section, it is found, that the "president and directors" have authority "to purchase and hold land, materials, engines, and cars," &c. In section 1, also, the language is "to purchase or to take," the two modes being alternatives, and contradistinguished. In each section, the title thus contemplated by purchase in respect to land, is as absolute as the title contemplated in respect to "materials, engines and cars." The process is one of absolute purchase. The plaintiff has not exhibited a title covered by the mortgage, to one square inch of real estate so purchased by the mortgager, or so held by purchase. On the contrary, the whole estate held, is that which has been "taken" under the provisions of the first section of the charter, and for the use of which, not for the title, damages have been assessed. To say, that taking by purchase, and taking by virtue of the authority derived from the power of eminent domain, still reserved to the State and delegated in the charter, are one

and the same in meaning, or in effect, finds no support in judicial precedent, or in reason. When taken in the former way, the fee passes to and remains in the corporation, without reversion, whether the road be continued in operation, or not. In the latter case, the fee never passes to, and is never vested in, the corporation, but reverts, disencumbered, on the instant the road ceases to be continued in operation and upheld under the charter.

These different operations of the titles held by the corporation, illustrate, beyond disputation, it would seem, the different natures of those titles.

Hence, it has been adjudged, in *Fryeburg Canal* v. *Frye*, 5 Greenl. 42, where the damages for land taken to build a canal, are in question, it does not involve any title to real estate. See *Harrington* v. *County Com. Berkshire*, 22 Pick. 266.

In *Weston & als.* v. *Foster & als.*, 7 Met. 299, "the Court are of opinion, that the Eastern Railroad Company, by having laid their road over the premises, acquired only an easement therein, and no title to the estate."

So where, in the charter of the Vermont Central Railroad Company, it is provided that the company may take land for the use of their road, and "shall be seized and possessed of the land," it is adjudged that they are not made owners of the fee, but it gives them a right of way merely." *Quimby* v. *V. C. R. R. Co.*, 23 Verm. 387; *Ib.*, 1 Am. Railway Cases, 251.

So, in *Trus. of Pres. Cong. in Waterloo* v. *Auburn and R. R. Co.*, 3 Hill, (N. Y.) 568, the Court say, "But the plaintiffs were not divested of the fee of the land by the laying out of the highway; nor did the public thus acquire any greater interest therein than a right of way, with the powers and privileges incident to that right; such as digging the soil and using the timber and other materials found within the limits of the road, in a reasonable manner, for the purpose of making and repairing the same. Subject to this easement, and this only, the rights and interest of the owner of the fee

remained unimpaired." And among numerous authorities cited by the Court to this doctrine, is *Perley* v. *Chandler*, 6 Mass. 454, wherein Chief Justice PARSONS says, "Every use to which the land may be applied, and all the profits which may be derived from it, consistently with the continuance of the easement, the owner can lawfully claim. He may maintain ejectment for the land, thus encumbered; and if the way be discontinued, he shall hold the land free from the incumbrance."

Pursuing the principle of this Massachusetts doctrine, the Court, in 3 Hill, above cited, further adjudged, "the Legislature have no power to authorize the construction of a railroad across a highway, without providing for a compensation to the owner of the land over which it passes."

The right to use the land of others, for a precise and definite purpose, not inconsistent with the right of property in the owner, is, in legal contemplation, an easement, or franchise, and not a right of property in the soil, even though the easement be of such a nature as to deprive the owner of all useful or available beneficial interest in the land. *Boston Water Power Co.* v. *B. & W. R. Road*, 16 Pick. 512 to 522.

So where a bathing house, built upon flats below low water mark, upon piles, was mortgaged, and the right of redemption sold according to the mode of levying upon a right in equity to redeem real estate, and the bill to redeem was demurred to, the Court adjudged the demurrer good, and the interest not such as could be taken and sold in the manner set up. *Marcy* v. *Darling*, 8 Pick. 283.

A turnpike corporation has no right of herbage within the limits of the road, but it is the exclusive property of the owner of the fee, who may maintain trespass for any injury done to the soil. *Adams* v. *Emerson*, 6 Pick. 56.

Hence, when the Legislature of this State, by Act of 1845, c. 165, § 1, in providing that "all the real estate of said railroad company," &c., "shall be taxable" "in the same manner as the lands" of private persons, cautiously negatived a conversion of the mere easements of such corporations into

real estate, in these words:—"*Provided, however,* that the track of any railroad belonging to any railroad company incorporated by this State, and the land on which any railroad track is, or may be constructed, shall not be deemed real estate."

This would seem to be conclusive. At the same time, it does not conflict with the idea, that such a corporation may become the owner of real estate, not located for the track; although in the case of *Bangor & Piscataquis R. R. Co.* v. *Harris,* 21 Maine, 533, the Court held, that the provision of the plaintiff's charter, by which "the capital stock of said company" should "be holden and considered as personal estate," converted the property of the road "into personal estate." "The interest in this railroad, being personal estate," is the language of the Court.

Shepley & Dana, in reply.

TENNEY, C. J.—The plaintiff claims to be the owner of the right of redeeming the franchise of the Buckfield Branch Railroad Company, with all the privileges and immunities, together with all personal property and real estate of said corporation, however situated and bounded, within the counties of Oxford and Cumberland, together with all the buildings situate on said premises, including all iron rails, the same having been mortgaged by said corporation to the defendant, by its deed, dated October 29, 1849, under a sale of the same right, claimed by the plaintiff, made to David Stanley, on February 7, 1852, and which passed through mesne conveyances to the plaintiff. The sale purports to have been made by Jesse Drew, as a deputy sheriff of the county of Oxford.

The plaintiff seeks a decree under his bill, that he may be permitted to redeem the premises, by paying, which he offers in his bill to do, what, if any thing, shall appear to remain due, in respect to the principal and interest on said mortgage. The defendant filed his answer to the bill, and, among other things relied upon in defence, he insists that said Stanley acquired no right of redeeming the premises un-

der the attempted sale, the proceedings of the officer being ineffectual to vest any interest in him.

Every thing essential to a title under the statute ought to appear of record. *Wellington* v. *Gale*, 13 Mass. 183. And we are to look at the return of Jesse Drew, the deputy sheriff, who returned his doings upon the execution, by authority of which he professed to act, and compare it with the provisions of the statute, touching the sale of such property.

The corporate property of any company, in this State, and the franchise of any corporation, having the right to receive toll, &c., shall be liable to attachment on mesne process, and to be levied upon by execution for the debts of the corporation, as provided in chapters 94, 114, and 117, of the Revised Statutes. R. S., c. 76, § 17.

By c. 94, § § 36 and 37, the right of redeeming real estate may be taken and sold on execution; in which case the officer shall give written notice of the time and place of sale, to the debtor, &c., and shall cause notifications thereof to be posted in some public place, where the land lies, and in two adjoining towns, all of which shall be done thirty days, at least, before the day of sale; and shall also cause an advertisement of the time and place of sale, to be published three weeks successively before the sale, in some public newspaper, printed in the county where the land lies, &c.

By c. 117, § 20, R. S., whenever judgment has been recovered against any company, incorporated with power to receive toll, the franchise of such corporation may be sold on execution at public auction; the officer giving notice of the time and place of sale, by posting a notification in any town or plantation, in which the treasurer, clerk or any officer of the company, if there be any officer, and, if not, where any stockholder may reside, thirty days, at least, before the day of sale, and by causing an advertisement, &c., to be inserted three weeks successively in some public newspaper, &c., four days before the day of sale.

It is objected by the defendant, that the officer, who returned upon the execution that he had made sale of the interest,

alleged to have previously belonged to the corporation, the debtor in said execution, being a deputy sheriff of the county of Oxford only, according to his return, could not seize and make sale of the mortgagers' right, when the right, attempted to be sold, existed in the county of Cumberland, as well as in the county of Oxford; there being no distinction between the part lying in one county and that in the other, in the sale, or in the price received, but the entire right being exposed for sale and sold together.

By R. S., c. 104, § 19, "every sheriff and each of his deputies shall serve and execute, within his county, all writs and precepts, to him directed and committed, and issued by lawful authority."

The statutes confer the power upon sheriffs and their deputies; and unless the power is thereby conferred expressly, or by fair implication, it does not exist.

The mode in which writs and precepts shall be served and executed is regulated by statute; and unless substantially conformable thereto, the doings of the officer are invalid.

The seizure of property upon execution, with the view to make sale thereof, is regarded as an important and necessary act in making a legal sale.

Subsequent proceedings, in order to vest the title in the purchaser, have reference to the time of the seizure, and depend upon the state of the title, as it then was. *Bagley* v. *Bailey*, 16 Maine, 153.

Again; the statute provides, that the seizure on execution, of a debtor's right to redeem estate mortgaged, shall be considered as made on the day when the notice of the intended sale was given, whether to the debtor, or by posting up notices, or by advertising in the newspaper. R. S., c. 94, § 40. A seizure, therefore, of property, is contemplated as essential to a valid sale.

It cannot be contended, that a sheriff or his deputy, can seize or sell property in a county, in which he is not commissioned to act; consequently, all notices of such sale, must be utterly nugatory. Nor can he seize and sell property with

any greater legal propriety, as a whole, when a part of that property was in a county to which his authority therein did not extend.

When Jesse Drew, the deputy sheriff, who undertook to make sale of the right in equity to redeem the premises, mortgaged by the Buckfield Branch Railroad Company to the defendant, posted the notices of sale, &c., we are not aware of any power in him, to expose by sale, any right existing beyond the limits of his precinct. If he had no right to sell, he certainly had none to seize, and the notices were then a nullity.

But the plaintiff relies upon the statute of January 28, 1852, which went into operation on that day, ten days only before the sale. It is not perceived, that the notices and advertisements, would not have been conformable to law, if this statute had been in force at the time of the seizure, and the causing of the notices to be given, and the advertisements to be published. Nor do we see any defects in the sale, upon this hypothesis, if the property treated as real estate was legally of that character.

This statute provides, that when the mortgaged lands are situated in two or more counties, the sheriff, or a deputy sheriff of either of the counties, may sell the whole right of redemption; and if it appears that he gave the notices, "as above prescribed," the sale shall be in all respects as effectual as if the land had been wholly in a town situated in his own county." This provision, by its terms, is an addition to section 37, of chap. 94, of the Revised Statutes of 1841. The object of this enactment, seems to have been, merely, to allow the entire right which may exist in two counties, to be sold by a sheriff or his deputy in one of the counties, provided the notices shall be such as were previously required when the land lay in one county exclusively.

This statute is general, and designed to give a power to a sheriff, or his deputy, after its passage, which did not exist before. It does not, in the slightest degree, dispense with any act previously necessary, to make valid a sale of an equity

of redemption in real estate. The former requirement, that notices should be given thirty days at least before the sale, remained unimpaired. The notices, "as above prescribed," must refer, not only to notices which the statutes, existing when they were made, provided to be given upon a seizure of an equity of redemption, legally made, but also to those which, under the same laws, would be required as parts of the proceedings, which would constitute a valid transfer of the interest attempted to be sold. It could not refer to notices upon a seizure, which the officer had no power to make, and which, if made, would be without legal effect.

A paper, exposed in a public place, purporting to be a notice that a sale would be made, which the law at the time did not authorize, was no notice whatever. And so long as a notice to be legal, is required to be given thirty days at least previous to the time of sale, one which is ineffectual till ten days only before the sale, cannot be sufficient.

The steps essential to render the sale of the equity of redemption effectual, not having all been taken, the purchaser thereof acquired no interest, and consequently could confer none upon others.

The preceding views are based upon the assumption, that the defendant had the rights which the plaintiff supposes, before the attempted transfer thereof, and that the statutes provided a mode by which those rights could be transferred under an officer's sale. Whether such rights existed, and were the subject of sale upon execution, are questions upon which we give no opinion. *Bill dismissed with costs.*

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

RICE, J., concurred in the result.

COUNTY OF YORK.

RUFUS M. LORD *versus* ISRAEL CHADBOURNE.

The common law will afford no aid to a party whose claims can be successfully enforced only by a violation of its principles, or in direct contravention of a statute; and this principle is equally applicable to actions sounding in *tort*.

It is upon this principle, that courts have held that no action can be maintained on a bond or contract executed on the Sabbath; for deceit in the exchange of horses on the Sabbath; for damages occasioned by a defective highway while traveling on the Sabbath, or for injury to a horse knowingly let to be used on the Sabbath, not from necessity or for charity; on a note given for goods purchased to be peddled out contrary to law; and for compensation for services in trade with an enemy in time of war.

In an action of trespass, to recover the value of certain liquors, which had been seized upon a warrant, and for which a writ of restitution had issued, the defendant offered to prove that at the time of the seizure, and for a considerable time previous, intoxicating liquors had been kept for sale by the plaintiff, and that he had been in the habit of selling them in violation of law; which evidence was excluded by the presiding Judge: — *Held*, that as the value of the liquors must depend upon their *status* at the time of seizure, the evidence offered was admissible to enable the jury to determine what that *status* was.

The Legislature has power to pass laws altering, modifying, or even taking away remedies for the recovery of debts, without incurring a violation of the provisions of the constitution, which forbid the passage of *ex post facto* laws.

A judicial tribunal cannot declare void a law passed by the Legislature and clearly within the general scope of its constitutional power, because the law is, in the opinion of the Court, contrary to the principles of natural justice.

The Act of 1851, c. 211, § 16, which provides 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," &c., nor "any action of any kind" "for the recovery or possession of intoxicating or spirituous liquors, or the value thereof," is to be limited in its application to liquors held in violation of law, and thereby liable to forfeiture.

The Act applies equally to actions of replevin, trespass, trover and assumpsit.

The rights of a plaintiff in an action of trespass are not enlarged by the fact that the defendant seized the property sued for under an illegal warrant, if, at the time of the seizure, the plaintiff held the property in disregard of law.

Judgments are conclusive upon the parties to them, in reference only to such matters as were directly in issue in the case.

When the proceedings are *in rem*, the decree of the Court is an adjudication upon the *status* of some particular subject, and is binding upon all parties.

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

This was an action of trespass on the case.

The plaintiff introduced in evidence, a warrant dated December 29, 1851, issued by Frederic Green, Esq., Judge of the Municipal Court of Saco, on complaint of Cotton Bradbury, Charles Hill, and Seth Scammon, for a search of the shop occupied by the said Rufus M. Lord, with the return thereon of M. D. Kimball, deputy sheriff. Also, a copy of a judgment of the Supreme Judicial Court, at the September term, 1852, in the case, *State of Maine* v. *Spirituous Liquors and Rufus M. Lord.* Also, a writ of restitution issued from said Court upon the judgment aforesaid, dated October 19, 1852, with the return thereon of Thomas P. Tufts, coroner.

The plaintiff then called Thomas M. Hayes, who testified that Chadbourne, the defendant, directed Kimball in the seizure of the property, and in all his proceedings, and to sign the return; that Chadbourne said he would take the control of the property and would be responsible for it, and return it, if so ordered, or pay for it.

On cross-examination, he testified; "I suppose Abraham Haley had the control of the liquors when they were taken; he attached them on a writ against Lord in favor of Mr. Keag. I don't know where Mr. Keag is; he was clerk of Mr. Lord. The store was on the corner of Free street and Maine street. I think Mr. Keag carried on business for himself; he said he had a note for $400 or $500, on which the suit was brought. My impression is, that Haley had attached the liquor in the part occupied by Lord, and that Haley had the key of the store."

The plaintiff then called Isaac Sands, who testified that he was present, about the first of November, 1852, when Lord made a demand on Chadbourne, for the spirit that was taken from him; and Chadbourne said "yes, I wish I had it for you, but I suppose it has been destroyed."

The plaintiff also introduced evidence as to the value of the liquors.

The defendant then offered evidence to prove that at the time of the seizure of the liquors, by Kimball, under the warrant, and for a considerable time previous, they were kept for sale by Lord, he not being licensed to sell; that during the time said liquors were pretended to be under attachment by Haley, as testified by Hayes, Lord had a key of the front door of the store where they were kept, and also a way of access to said store, by a back door, through the store occupied by Keag, and an apparatus for privately closing the same; that during that time Lord had conveyed several additional casks of liquors into said store, and had frequently opened and entered said store, when Haley was not present, and had been in the habit of selling said liquors in violation of law.

But the presiding Judge ruled, that this testimony was inadmissible, and excluded the same. Thereupon the cause was submitted to the jury for the purpose of settling the amount of damages, and a verdict was rendered for the plaintiff.

The parties agree, that the case shall be reported for the determination of the full Court, as to the correctness of the rulings aforesaid. And if the full Court shall be of opinion, that the rulings aforesaid, of the presiding Judge, were correct, then the verdict is to stand; if otherwise, then the verdict may be modified, or set aside, and such judgment rendered in the case as the Court shall determine.

John H. Goodenow and *Shepley & Hayes*, for plaintiff.

1. Mark D. Kimball, the deputy of Chadbourne, was ordered to restore the liquors. The coroner, Tufts, demanded them, Nov. 15, 1852, and they were not delivered.

It does not appear by the record that they were intended for sale.

It does not appear that they were illegally taken and held under that process.

They could not be condemned without an adjudication.

By art. 1, § 1, (Con.) all men have the right of acquiring, possessing and protecting property.

2. It was property valuable for the plaintiff's own use. 2. For exportation. 3. For sale under a license. Legislatures have power to make and establish all reasonable laws and regulations for the defence and benefit of the people of this State, not repugnant to the constitution of the State, nor to that of the United States.

3. This is not an action for the recovery or possession of intoxicating liquors, or the value thereof, but for damages for official *non-feasance.*

4. The statute, March 31, 1853, § 1, provides:—"And the liquors so seized, with the vessels in which they are contained, shall be declared forfeited, and such adjudication shall be a bar to any claim for the recovery of the same or the value thereof." If the owner is unknown, the liquors are to be advertised for two weeks before they are condemned and destroyed. If owned for a legal purpose, the Court shall order them restored. The common law would require the same to be done, analagous to taking property by replevin.

5. They were the plaintiff's property in fact. A refusal to deliver them was a conversion.

6. They were not a nuisance, if intended for sale. *Preston* v. *Drew*, 34 Maine, 558. Not so declared by the statute. Not within the common law definition. 4 Black. Com. 166.

They were not a nuisance, until condemned, if at all. They were not indictable as a common nuisance, but sufficiently punished, in a particular way, by statute.

Liquors are not in the same category with obscene prints and counterfeit money. Obscene prints and counterfeit money are immoral in and of themselves. It is a crime to make, issue, or retain possession of counterfeit money, knowing it to be counterfeit; or to keep for an instant immoral publications. The moral sense of the community, no less than the law itself, declares their outlawry at once. It cannot be right, or lawful, to make, issue, or retain them, even for an

instant, except for the purpose of bringing offenders to justice. But it is not so in regard to the liquors in question. They are a lawful article of commerce. They can be applied to valuable uses. They are entitled to protection, until some unlawful act, or intent, on the part of the owner, is proved. An unlawful intent cannot be inferred, without some act done.

There are hundreds of uses to which liquor may be lawfully applied. It may never be intended for drinking, or for sale, in any drinking house or tippling shop. The possession of such property, under proper regulations, is no evidence of an unlawful intent.

If used for cleansing houses, purifying vaults, or for conversion into burning fluid, its use would be perfectly lawful in this State. If used for any other purpose than for tippling, no wrong would be done thereby.

6. If a nuisance, it should be abated according to law. The peace and order of the State require that it should be by the proper officers of the law.

Irresponsible men might take the law into their own hands, and punish a man, and then try him afterwards.

7. No worse thing could happen to the law, or the cause of temperance, than to have a decision countenancing such violence.

Eastman & Leland, for defendant.

1. In this case, the defendant offered evidence that the liquors were kept for sale by Lord, and that he had been in the habit of selling them in violation of law. This testimony was excluded by the presiding Judge.

The defendant contends, that this testimony should have been received, and that it was wrongfully excluded. He should have been allowed to prove that Lord, the present plaintiff, was guilty of a violation of law in keeping the liquors; and in that case, he could not, according to the principles of the common law, nor by the provisions of the statute as restricted by the constitution, according to the decision of this Court, recover in this action.

The plaintiff should come into Court with clean hands. In

regard to contracts, no principle of law is better settled, than that the law will not lend its aid to enforce an illegal contract, or one founded on an illegal consideration. *In pari delicto, potior est conditio defendentis.*

In *Worcester* v. *Eaton*, 11 Mass. 368, (378,) PARKER, C. J., says:—"If one hold the obligation or promise of another, founded on illegal consideration, the party defendant may expose the nature of the transaction to the Court, and the law will say, 'our forms and rules are established to protect the innocent and to vindicate the injured, not to aid offenders in the execution of their unjust projects;' and you must not have the aid of law to rid you of an inconvenience which is a suitable punishment of your offence."

In *Holman* v. *Johnson*, Cowper, 341, Lord MANSFIELD says: "The principle of public policy is this: *Ex dolo malo non oritur actio.* No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or a transgression of a positive law of this country, there, the Court says, he has no right to be assisted. It is upon this ground that the Court goes; not for the sake of the defendant; but because they will not lend their aid to such a plaintiff."

In *Morck* v. *Abel*, 3 Bos. & Pul. 35, Lord ALVANLEY says: "No man can come into a British court of justice to seek the assistance of the law, who founds his claim upon a contravention of the British laws."

In *Booth* v. *Hodgson*, 6 T. R. 405, where A. and B. became partners in insuring ships, contrary to the statute, but it was agreed that the policies should be underwritten in the name of A. only, several policies were effected, and the premiums received by B. as a broker: *held*, that A. could not recover any part of these premiums from B.

Lord KENYON, C. J., says:—"The plaintiffs say to the Court, 'suffer us to garble the case, to suppress such facts of the transaction as we please, and to impose that mutilated state of it on the Court, as the true and genuine transaction, and

then we can disclose such a case, as will enable our clients to recover in a court of law.' It is a maxim in our law, that a plaintiff must show that he stands on a fair ground, when he calls on a court of justice to administer relief to him."

So, a vender, selling goods to be smuggled, and knowingly packing them for that purpose, cannot recover payment for them, though the sale and delivery be complete in a foreign country. *Clugar* v. *Panaluna*, 4 T. R. 466; *Wamell* v. *Reed & al.*, 5 T. R. 599.

A promissory note, made on the Lord's day, given and received as the consideration for articles purchased on that day, is void. *Towle* v. *Larrabee*, 26 Maine, 464. So in New Hampshire. *Clough* v. *Davis*, 9 N. H., 500. So, in Massachusetts, an action cannot be maintained on a bond which is executed neither from necessity nor charity on the Lord's day. In that case, SHAW, C. J., says:—"The general principle, that an action will not lie on a contract made in contravention of a statute, or of a principle of the common law, is well established, and has been repeatedly recognized and enforced in the courts of this commonwealth." *Pattee* v. *Greeley*, 13 Met. 284, (286.)

In *Wheeler* v. *Russell*, 17 Mass. 258, (281,) PARKER, C. J., says:—"No principle of law is better settled, than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law."

In *Dixie* v. *Abbott*, 7 Cush. 610, it was decided that an action could not be maintained to recover the price of spirituous liquors sold to the defendant contrary to law.

In *Robinson* v. *Howard*, 7 Cush. 611, *n*, it was decided, that an action could not be maintained on a note given for goods, bought to be carried about and peddled contrary to the provisions of law.

A written contract for the sale of an apothecary's stock of goods, cannot be enforced at law, if a part of the stock consists of spirituous liquors. *Ladd* v. *Dillingham*, 34 Maine, 316.

2. In regard to torts, the same principle prevails, and, as we believe, is equally well settled.

It is on this principle, that a woman cannot maintain an action for seduction, she being *particeps criminis*. *Paul* v. *Frazier*, 3 Mass. 71.

The fraudulent purchaser of the goods of a judgment debtor has no right to contest the regularity of the doings of an officer, who has seized them on an execution, against the debtor. *Daggett* v. *Adams*, 1 Greenl. 198; *Smith* v. *Hobbs*, 10 Maine, 71.

A person guilty of maintenance, in purchasing a dormant title, can maintain no action against his grantor for fraud, in interfering to prevent his recovery. In this case, PARKER, C. J., says, "No principle is more clear, or more reasonable than that a man cannot build up a right in a court of justice, upon an illegal or an immoral act of his own." *Swett & al.* v. *Poor & al.*, 11 Mass. 549.

Money fraudulently won at gaming cannot be recovered back. *Babcock* v. *Thompson*, 3 Pick. 446.

An action cannot be maintained for deceit practiced in the exchange of horses, on the Lord's day. In this case, WILDE, J., says, "In all cases, it is a well established principle, that a court will not lend its aid to a party, who founds his action on an illegal transaction." *Robeson* v. *French*, 12 Met. 24, (25.)

A person who travels on the Lord's day, neither from necessity nor charity, cannot maintain an action against a town for an injury received by him, while so traveling, by reason of a defect in a highway, which the town is by law obliged to keep in repair. *Bosworth* v. *Inhabitants of Swanzey*, 10 Met. 363.

If the owner of a horse knowingly lets him on the Lord's day, to be driven to a particular place, but not for any purpose of necessity or charity, and the hirer injures the horse by immoderate driving, in consequence of which he afterwards dies, the owner cannot maintain an action against the hirer for such injury, although it is occasioned in going to a different place, and beyond the limits specified in the contract. *Gregg* v. *Wyman & al.* 4 Cush. 322. In this case, FLETCHER, J., says, "The plaintiff acted unlawfully in letting the horse,

and he let him knowingly, for an unlawful purpose. No person can maintain an action founded on such an unlawful proceeding. The authorities on this point are numerous and conclusive. It is also a well settled principle of law, that if the plaintiff cannot make out his claim, without showing an illegal act on his own part, he cannot maintain his action. If the plaintiff's own illegal act forms one link in his chain of title, that is a defective link, which cannot hold the chain together, and the whole must fall. A party cannot be heard to allege his own unlawful act; and if such act be one of a series of facts, necessary to support the plaintiff's claim, then that claim must fail. The party who seeks redress in a court of justice, must come with clean hands; an action which requires for its support the aid of an illegal act, cannot be maintained."

3. But the Act, entitled "an Act for the suppression of drinking houses and tippling shops," of 1851, c. 211, § 16, contains the following provision; "and 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 provision of the statute was very fully examined and discussed in the very able opinion drawn by the Chief Justice, in the case *Preston* v. *Drew*, 33 Maine, 558. He there says, "The State, by its legislative enactments operating prospectively, may determine that articles, injurious to the public health or morals, shall not constitute property within its jurisdiction. It may come to the conclusion that spirituous liquors, when used as a beverage, are productive of a great variety of ills and evils to the people, both in their individual and their associate relations. * * * Such conclusions would be justified by the experience and history of man. If a Legislature should declare that no person should acquire any property in

them for such a purpose, there would be no occasion for complaint, that it had violated any provision of the constitution."

4. But it will be said, the Court has already adjudicated upon these questions, and ordered the liquors to be restored, and issued a writ of restitution. Such was the ground taken at the trial, and sustained by his honor the Chief Justice, who was pleased to say, as a reason for excluding the testimony offered, to prove that the liquors were kept for sale in violation of law, "I do not consider that as any justification of a sheriff for not obeying an order of the Court to return them."

In *Pierce* v. *Strickland*, 26 Maine, 277, (294,) WHITMAN, C. J., in delivering the opinion of the Court, says:—"Where a judgment is introduced collaterally, as a muniment of title, which was rendered *inter alios*, it is not conclusive upon the one not a party to it. It will be competent for him to show that it was unduly or irregularly obtained."

The same doctrine is supported in *Downes* v. *Fuller*, 2 Met. 135, and in other cases there cited.

In replevin, if the plaintiff fails to recover, the statute expressly authorizes the Court to enter judgment for a return, and to issue a writ of return and restitution. R. S., c. 130, § 11.

So in case of personal property libeled for forfeiture. R. S., c. 132, § 8.

So in regard to property stolen. R. S., c. 156, § 14.

If there be any other case in which the Court has exercised this power, it is not now within our recollection; if so, we presume the authority is conferred by express provision of some statute in each case. And here we apply the maxim. *Expressio unius est exclusio alterius.*

In *Commonwealth* v. *Lottery tickets*, 5 Cush. 369, where a search warrant was improperly issued for lottery tickets, and they were found and seized, it was decided that the Court had no authority to order them to be destroyed; but the Court did not order them to be restored, nor claim the power

to do so; nor intimate that an action could be maintained by the owner to recover them back. The Court says, "Courts have no authority to regulate the disposition of them besides that which is conferred by statute."

APPLETON, J.—It is well settled, that the common law will afford no aid to a party whose claims can be successfully enforced only by a violation of its principles, or in direct contravention of a statutory enactment. It has, accordingly, been held, that no action could be maintained upon a bond or contract executed upon the Sabbath. *Pattee* v. *Greeley*, 13 Met. 284; *Lyon* v. *Strong*, 6 Verm. 219. So, the price of spirituous liquors, sold contrary to law, cannot be recovered. *Dixie* v. *Abbott*, 7 Cush. 610; *Ladd* v. *Dillingham*, 34 Maine, 316. Nor is an action maintainable upon a note given for goods bought to be carried about and peddled, contrary to law. *Robinson* v. *Howard*, 7 Cush. 611. Trade with the enemy in time of war, is illegal, and one who knowingly aids another in such trade, cannot recover compensation therefor. *Beach* v. *Kezar*, 1 N. H. 184.

The same principle has been regarded as applicable to actions sounding in *tort*. No action on the case, for deceit in the exchange of horses, made on the Sabbath, can be maintained. *Robinson* v. *French*, 12 Met. 24. So, a person traveling on the Lord's day, neither from necessity nor charity, is not entitled to recover against a town for an injury received by him while so traveling, in consequence of a defective highway, which the town was by law obliged to keep in repair. *Bosworth* v. *Swanzey*, 10 Met. 363. If the owner of a horse knowingly lets him on the Lord's day, to be driven to a particular place, but not from any purpose of necessity or charity, and the hirer injures the horse by immoderate driving, an action cannot be maintained against him for such injury, although it is occasioned in going to a different place and beyond the limits specified in the contract. *Gregg* v. *Wyman*, 4 Cush. 322. "Courts of justice," remarks REDFIELD, J., in *Spaulding* v. *Preston*, 21 Vermont, 9, "will not sustain

actions in regard to contracts or property, which has for its object the violation of law. If a gang of counterfeiters had quarreled about the division of their stock or tools, a court of justice could hardly be expected to sit as a divider between them. If one had taken the whole in violation of the laws by which such associations subsist, a court of law could not interfere, because it is not presumed to be expert in such questions. And if it were, it is considered to be a scandal that such matters should be discussed or adjusted. Such property is, so to speak, *outlawed*, and is common plunder. One who sits himself deliberately at work to contravene the fundamental laws of civil government—that is, the security of life, liberty or property, forfeits his own right to protection in those respects wherein he was studying to infringe the rights of others." "So, too, if a member of the body politic, instead of putting his property to honest uses, converts it into an engine to injure the life, liberty, health, morals, peace or property of others, he thereby forfeits all right to the protection of his *bona fide* interest in such property before it was put to such use."

The general principle involved in the cases cited, and the almost innumerable decisions made in entire accordance therewith, is, that the law distinguishes between rights acquired in conformity with, and arising under its provisions, and claims originating in their clear and palpable violation; that it will not enforce claims made in contravention of its mandates, nor protect property held against, and being used for the deliberate purpose of disobeying its enactments. A different course would be suicidal. The law cannot lend its aid to the destruction of its own authority and to the disobedience of its own commands.

The defendant, on the trial at *Nisi Prius*, offered to prove, at the time of the seizure of the liquors in dispute, by Kimball, under the warrant referred to in the report of the case, and for a considerable time previous, that they were kept for sale by the plaintiff, he not being licensed to sell, &c., and that he had been in the habit of selling said liquors

habit of selling said liquors in violation of law, but the presiding Judge ruled that this testimony was inadmissible, and excluded the same.

However the common law may be on this subject, the statute of 1851, c. 211, § 16, in clear and distinct terms denies the general right to maintain any action, of which spirituous liquors may in any mode be regarded as the subject matter. It provides, that "no action of *any* kind shall be maintained in any court in this State, either in *whole* or in *part* for intoxcating 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 the State for the *recovery* or possession of intoxicating or spirituous liquors, or the *value* thereof." The Legislature may pass laws altering or modifying or even taking away remedies for the recovery of debts, without incurring a violation of the provisions of the constitution, which forbid the passage of *ex post facto* laws. *Evans* v. *Montgomery*, 4 W. & S., 218.

"If the Legislature," says ROGERS, J., in *Commonwealth* v. *M'Cluskey*, 2 Rawle, 514, "should pass a law in plain, unquestioned and explicit terms, within the general scope of their constitutional power, I know of nò authority in this Court to pronounce such an Act void, merely because, in the opinion of the judicial tribunal, it was contrary to the principles of natural justice." The right to take away the remedy for the recovery of debts, and for the recovery of compensation in damages for *torts*, rests upon similar grounds. For a long time usury was a valid defence to a loan of money, made against the provisions of the statute on this subject. So the right to recover has been denied, because regulations as to the survey, or the inspection of articles sold, have been disregarded; though, in all such cases, the articles sold were none the less valuable and the seller was none the less, in equity, entitled to compensation for the thing sold. Much more, then, may the aid of the law be denied when the plaintiff seeks compensation for what was held in defiance of its mandates and with the intent to disregard its clearest prohibitions.

The language of the statute is most general. But in *Preston* v. *Drew*, 33 Maine, 562, it was held, and, on the most satisfactory reasoning, and after a comparison of one part of the statute with another, that this generality of language should be limited and restrained to liquors held in violation of law, and which were liable to forfeiture. "The general intent and declared purpose of the Act," remarks SHEPLEY, C. J., "would in no degree be infringed, by regarding the general language to be so limited as to forbid the maintenance of any action for the recovery or possession of such liquors, or their value, which were liable to seizure and forfeiture, or intended for sale in violation of the provisions of the Act." The correctness of the construction there given cannot be a matter of question. Were it not so, the protection of the law would be withheld from liquors held in accordance with its express provisions. The town could not enforce their rights to liquors taken from the possession of their agent, nor could the mechanic recover damages for the destruction of liquors purchased for mechanical purposes.

The language of the Act prohibits the maintenance "of any action of any kind." It includes all modes of vindicating the possession, if withheld, or of enforcing compensation in damages, if destroyed, subject to the limitation just considered. It equally embraces replevin, trespass, or trover, as assumpsit.

It is not necessary to examine the constitutionality of the search and seizure clause; for if trover or trespass cannot be maintained for the conversion or destruction of property held in violation of law, against the person thus converting or destroying, it is immaterial whether he be an officer or not, or how, or in what way, or for what purposes, such conversion or destruction took place. If the defendant were acting under a warrant ever so illegal or unconstitutional, that would not place him in any worse condition than if acting without any process whatever; that would not enlarge the rights of a plaintiff who was holding his property in palpable disregard of law, or enable him to recover in avowed disobedience to

the provisions of the statute. This was the conclusion to which the Court, upon mature consideration, arrived in *Black* v. *McGilvery*, 38 Maine, 288; *Nichols* v. *Valentine*, 36 Maine, 327.

Upon the express words of the statute, as well as upon adjudged cases, no action can be maintained for the conversion or for the value of liquors held in, and for, the purposes of the violation of law, and consequently liable to forfeiture and destruction.

Has there been, then, any judicial decision by which the defendant is precluded from setting up, in reduction of damages, facts, which otherwise would be open to him, and which, without such judicial decision, would have been available?

"The judgment of a Court of concurrent jurisdiction," says GIBSON, C. J., in 4 Watts, 191, "directly upon the point, is a plea in bar, and is evidence, conclusive between the same parties on the same matter, directly in question, in another Court. But neither the judgment of a Court of concurrent or exclusive jurisdiction, is evidence of a matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." Judgments are held conclusive upon the parties only as to that which is directly in issue. "It is only when the point in issue has been determined, that the judgment is a bar." Greenl. Ev. § 529. "So, also, in order to constitute the former judgment a complete bar, it must appear to have been a decision *upon the merits*," &c. Greenl. Ev. § 530. If the suit is discontinued, or the plaintiff becomes nonsuit, or there is no judgment upon the matter in issue, the proceedings are not conclusive.

When the proceedings are *in rem*, the decree of a Court of peculiar and exclusive jurisdiction, whether of condemnation or acquittal, is binding upon all parties. *Gilston* v. *Hoyt*, 13 Johns. 561. A judgment *in rem* is an adjudication upon the *status* of some particular subject matter, by a tribunal having competent authority for that purpose. Such adjudication concludes all persons from saying the thing adjudicated upon was

not such as is declared by such adjudication. 2 Smith's Leading Cases, 430.

In the case at bar the judgment was, "that the complaint be hence dismissed, and that the said Rufus M. Lord have a return of his liquors so as aforesaid seized, returned upon said warrant and in the keeping of said Kimball," &c.

Whether the officer would or would not be in contempt for disobedience of the order of Court, is not a question presented for consideration.

It is apparent, from the record, that there has been no trial of the guilt or innocence of Lord, nor any adjudication as to the *status* of the liquors seized. If the proceedings be regarded as *in rem*, there has been no judgment of condemnation or acquittal.

If, as may be regarded as probable, the complaint was dismissed for want of form, or if, indeed, for want of jurisdiction, there remained no mode by which the *status* of the liquors could be judicially determined. They were equally liable to seizure again, upon a new complaint, as is a respondent, who may have been discharged upon a *nol. pros.* The *status* of the liquors was neither tried nor determined. Nor does it appear by the judgment that they have been acquitted. It seems rather to resemble a *nol. pros.* or nonsuit, in which the judgment is not conclusive.

But even if these proceedings were to be regarded as conclusive upon the general question of the right of the plaintiff to restitution, yet, as the *status* of the liquors has never been judicially settled, they can, in no event, be binding as to the *value* of the liquors in dispute. That question still remains open to the parties. If they were held by the plaintiff to be used in open violation of law, that fact was most material in reference to the question of value. As the question, whether these liquors were held in violation of law, has never been determined, and as their *status* is a matter essential in determining their value, it must be regarded as still open to the defendant, to show these facts; otherwise his rights will be concluded by a judgment to which he was not a party and in

which the *status* of the liquors neither was nor could be considered.

It was held in *Moulton* v. *Smith*, 32 Maine, 406, that in replevin a verdict of *non cepit*, and a judgment for a return, are not conclusive upon the question of property. They only show, that for some cause, the defendant was not entitled to possession. Still less would it bind a party as to the question of value. In the present case, the order for a return gives no indication of the *status* of the goods, nor of their value. There is no judgment, which would be a bar to a new complaint; and, if so, there has been no fact determined inconsistent with the evidence offered and rejected. The complaint may have been properly dismissed and yet the liquors may have been kept for sale in violation of law. If they were so kept, that fact is material in determining the damages to which the plaintiff would be entitled. Whether they were so kept was an issuable fact, which has never been judicially determined and which is important in the assessment of damages. The evidence offered and rejected should have been received. *Exceptions sustained.*

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

GOODENOW, J., having been of counsel, did not sit.

GILBERT BERRY *versus* THOMAS CUTTS *& Trustees.*

The object of the Act of 1844, c. 112, relating to assignments, was to secure the *equal distribution* of the effects of insolvent debtors not exempt from attachment, among all their creditors, who, after notice, should become parties to the assignment, in proportion to their respective claims.

Preferences, given by an assignment, or by the transaction to effect such distribution of which an assignment is a part, render the assignment void.

If preferences be given, and they do not appear in the assignment itself, the fact may be shown by proof *aliunde*.

If it appear that it was the purpose of the debtor to give preference to one class of creditors over another, and the different instruments to effect that design were not of the same date nor executed at the same time, they will still be deemed, in law, one transaction.

Berry *v.* Cutts.

An insolvent debtor, contemplating the assignment of all his property, for the benefit of his creditors, in accordance with the statute of 1844, c. 112, transferred portions of his estate to secure certain honorary liabilities, and shortly thereafter executed an assignment of his remaining property: — *Held*, that the transfers and the assignment were to be regarded as parts of one transaction, and that, inasmuch as the assignment did not provide for the *equal* distribution of the debtor's estate, in accordance with the statute, it was fraudulent and void; and that the assignee was chargable as trustee of the debtor.

An assignment must in *fact*, as well as in form, provide for the equal distribution of the debtor's estate, not exempt from attachment, or it will not answer the requirements of the statute.

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

TRUSTEE'S DISCLOSURE.

Thomas Cutts, the principal defendant in this suit, being embarrassed in his business affairs, made transfers of portions of his estate to secure his confidential creditors, and, soon afterwards executed an assignment of the balance of his property, not exempt from attachment, for the benefit of his creditors. Messrs. Hayes and Nye, the persons summoned as trustees in this suit, were the assignees of Mr. Cutts. Mr. Hayes made his disclosure, and, after it was placed on file, the plaintiff filed specifications alleging fraud on the part of the principal defendant Cutts, in the distribution of his estate, and put into the case the deposition of the said Cutts in relation to the transaction. Upon a hearing of the case, the presiding Judge discharged the trustees and the plaintiff excepted.

The case was elaborately argued, by counsel, upon the facts.

David Fales and *S. W. Luques*, for plaintiff, cited Act of 1844, c. 112; *Perry* v. *Holden*, 22 Pick. 277.

T. M. Hayes, for trustees, cited Act of 1844, c. 112; Act of 1849, c. 113, § 5; *Page* v. *Smith*, 25 Maine, 256.

Fales, in reply.

RICE, J.—It is provided, by c. 112, of laws of 1844, 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 credi-

tors as, after notice, become parties to said assignment, in proportion to the amount of their respective claims; excepting such property of said debtor as may be by law exempt from attachment.

The obvious intention of the statute is, to secure the equal distribution of the effects of insolvent debtors, not exempt from attachment, among all their creditors, in proportion to their claims. The object to be attained is clearly equitable and should be pursued in good faith, by those who desire to avail themselves of its provisions. Any arrangement, by which an assigning debtor should so dispose of his property as that the assignment should not provide for the equal distribution of his estate, not exempt from attachment, among all his creditors, in proportion to their claims, would manifestly be in opposition to the letter and spirit of the statute. Preferences in the act of assignment cannot be given. And it is equally in violation of the statute, if preferences are given in the transaction by which such distribution is effected, if the assignment constitutes a part of that transaction, though those preferences may not appear in the assignment itself. They may be shown by proof *aliunde*. The assignment must, in fact, as well as in form, provide for the equal distribution of the debtor's estate, not exempted from attachment, or there will not be a compliance with the requirements of the statute.

When, therefore, a debtor, in contemplation of an assignment under this Act, shall determine upon a distribution of his estate among his creditors, and, in execution of such contemplated assignment and determination, and for the purpose of giving a preference to one class of creditors over another class, shall transfer to such preferred class distinct portions of his estate, and then assign the residue thereof to his general creditors, though the different instruments may not bear the same date, or be executed at the same point of time; if they are executed in pursuance of an original design, contemplated and determined upon in the beginning, they will be deemed in law one transaction; a transaction consisting of a series of acts, intended to produce one result, to wit, the distribution of

the debtor's estate among his creditors. If, therefore, the transaction when fully executed, as originally contemplated and determined upon, does not make an *equal* distribution of such estate among all the creditors, in proportion to their claims, it is not in conformity with the statute, and must be deemed in fraud of its provisions, and void as to creditors; at least so far as the assignment is concerned.

The case of *Perry* v. *Holden*, 22 Pick. 269, cited in the arguments, in principle sustains this rule. It even goes further, by holding that the deed as well as the assignment was void, in a case not differing very materially from the case at bar.

Such being the rule of law by which the case is to be determined, it becomes important to ascertain the facts in the case.

Mr. Hayes, one of the assignees, and also one of the trustees in this case, drew the assignment and also most of the deeds, mortgages, and mortgage bills of sale, executed by the principal defendant, by which his property was transferred and assigned.

In the original disclosure, Mr. Hayes says:—"He, (the defendant,) first spoke to me about the situation of his affairs on Wednesday before the date of his assignment. After consultation, I advised him to secure his confidential creditors and make an assignment for the benefit of the rest."

In answer to the question, "Were these deeds and the assignment made in pursuance of that advice?" he says:—"I have no doubt they were. Mr. Cutts, a day or two afterwards, requested me to be his assignee, and I consented, on condition that Mr. Tucker, or some one else, should be associated with me."

He further states:—"I think Mr. Cutts requested me to be assignee before the deeds were made, and I expressed an unwillingness, but after the deeds were executed, I consented to become assignee, on condition that some other gentleman should be associated with me."

After this disclosure was put on file, the plaintiff filed spe-

cifications, alleging fraud on the part of the principal defendant in the distribution of his estate.

In an additional disclosure made by leave of Court, at a subsequent term, this trustee, among other things, declares, that "Mr. Cutts had conversed with Mr. Nye and myself concerning the propriety and expediency of an assignment for the benefit of his creditors, but he had not determined to execute such assignment. Upon Sunday evening, May 27, 1855, about nine o'clock, Mr. Cutts called at my house, and, after some conversation, then, for the first time, expressed his determination to execute an assignment for the benefit of his creditors, and requested me to act as one of his assignees, which I consented to do if Mr. Tucker, or some other gentleman, should be associated with me." He also states, that "said assignment was made by all parties thereto, in good faith, and for the honest purpose of distributing the property of said Cutts among his creditors, pursuant to the statute; and the mortgages were also made in good faith, by said Cutts, to secure creditors and sureties, and indorsers, who sustained to him a relation which he considered peculiarly confidential. The assignment was not contemporaneous with the mortgages, &c., nor was it in pursuance of any plan formed previous to the execution of said mortgages, &c., but in pursuance of a determination of said Cutts, formed after the execution of said mortgages, and after the grantees in the same had assented thereto."

It appeared, on the examination of said Hayes, that many of the statements above quoted, made by him in his second disclosure, were derived from information of others, and not from his own personal knowledge.

The deposition of the principal defendant is in the case. He therein states:—

"I have never delivered mortgage bills of sale to any person since the 25th of May last, (1855.) I did not myself deliver any of the mortgage deeds that were made to secure my creditors, at the time of my failure. I carried them myself to Alfred. I suppose the assignment, the mortgage deeds,

and mortgage bills of sale were all made about the same time; the mortgage deeds and bills of sale were made in contemplation of the assignment. The various mortgage deeds, the assignment, and the mortgage bills of sale, and deeds, were the means made use of by me to transfer my property, at the time, to my creditors. Other parties, beside myself, first proposed to me this plan of making these deeds, mortgage and assignment."

In view of all the facts disclosed by the trustees, and in the deposition of the principal defendant, we are satisfied that the deeds, mortgage deeds and mortgage bills of sale, executed by the defendant, on the 26th and 28th of May, 1855, were executed in contemplation of making an assignment, and after the defendant had determined to assign; that the execution of the various instruments by the defendant, referred to, and the assignment, were parts of one transaction, entered upon for the purpose of distributing his estate among his creditors. And that, inasmuch as the assignment did not provide for an equal distribution of his estate, real and personal, among such of his creditors as should, within the terms of the statute, become parties thereto, it must be treated as fraudulent and void.

Exceptions sustained and trustee charged.

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

CALVIN MOORE *versus* JOHN FALL.

A recovery may be had on a destroyed or lost note, which is not negotiable; or which, being negotiable, has not been negotiated; or which, having been negotiated, has been specially indorsed to the plaintiff, to whom it is exclusively payable.

In England, if a note, being negotiable and negotiated, has been lost, a court of equity has jurisdiction to enforce its payment, upon sufficient indemnity being furnished.

The owner of a lost note may maintain an action, without furnishing indemnity, if it appear at the trial that the statute of limitations may be interposed to prevent a recovery by a *bona fide* holder.

Moore *v.* Fall.

When an action is legally commenced and properly pending, the Court has no authority to dismiss it, on motion, because the plaintiff has not tendered a bond of indemnity.

If the proof of the loss or destruction of the note be insufficient, the defendant may be entitled to a verdict in his favor, but not to a dismissal of the action.

It seems, that courts may continue an action upon a note alleged to be lost or destroyed, until it shall become barred by the statute of limitations.

If a note be destroyed, the plaintiff, upon proof thereof, may recover in a suit at law.

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

This was an action on a note, dated March 21, 1850, for $200, on demand and interest; said note purported to be signed by T. M. Hobson and said Fall, as surety, payable to Luther S. Moore, and by him, before, or about the time of the suing out of the writ, indorsed to the plaintiff. After the commencement of the suit, and before the trial, there was proof tending to show, that said note was burned or lost.

After the evidence for the plaintiff was in, and before the defendant opened, a motion was made by defendant's counsel for a nonsuit, on the ground, that an action at law could not be sustained, on proof of the loss of said note, or that it was destroyed, which motion the Court overruled.

After the testimony was all in, both for plaintiff and defendant, a motion was made by defendant's counsel to dismiss the action, on the ground that the action could not be sustained on the proof offered, as to the loss of the note, unless plaintiff tendered a bond of indemnity to save the defendant harmless, in case said note should hereafter be found; which motions were severally overruled.

To the refusal of the Judge to order a nonsuit, and to the refusal to order a bond of indemnity to be filed, the defendant excepted.

N. Clifford and *L. S. Moore*, for plaintiff.

I. There is no question of law raised in the bill of exceptions for the consideration of the Court.

All that is material in the bill of exceptions will be found in the closing paragraph, which is in these words:—"And to the refusal of the Judge to order a nonsuit, and to the refusal

to order a bond of indemnity to be filed, the defendant excepts, and prays that his exceptions may be examined, approved and allowed."

Two errors are alleged, and two only, and these are specifically set out; and to those we desire to direct the attention of the Court.

1. The first is, that the motion for nonsuit was refused. And to that, we answer, that a motion for nonsuit is, in all cases, addressed to the discretion of the presiding Justice; and his refusal to order it does not, and cannot afford the party any ground of exception. *French* v. *Stanley*, 21 Maine, 512; *Morgan* v. *Ide & al.*, 8 Cush. 420.

Not even when both parties request the ruling. *Farnum* v. *Davidson*, 3 Cush. 232; *Bassett* v. *Porter*, 4 Cush. 487; *Girard* v. *Gettig*, 2 Binney, 234; *Gregory* v. *Prescott*, 5 Cush. 67.

In this last case, it was held that even if the motion was not addressed to the discretion of the Court, the party waived it by proceeding to trial.

2. The second complaint is, that the presiding Judge refused to order a bond of indemnity to be filed.

It will be seen that there is an obvious incongruity between the narrative of the bill of exceptions and the excepting clause. According to the former, the request for the bond of indemnity was connected with a motion to dismiss. And yet the exception is directed solely to the refusal to order the bond of indemnity, and no complaint whatever is made that the action was not dismissed. The overruling of the motion to dismiss is not embraced in the exception.

Whether a bond shall be ordered or not in any case, is necessarily a question of discretion, to be exercised by the Court. And the order, when made, cannot be made effectual, unless as a condition to be annexed to the judgment. *Fales* v. *Russell*, 16 Pick. 315.

In that case, the order was made by the full Court, after the trial, to the jury, and at the time of overruling the objection that an action would not lie on a lost note.

Suppose the state of facts disclosed at the trial were such that an order for a bond of indemnity would at some time be proper, (which we deny,) still, the request was obviously premature, as the result of the trial, if favorable to the defendant, would show it to be wholly useless and unnecessary.

Many reasons might be suggested why it would be better to follow the practice adopted by the Court in the case already cited from Massachusetts.

At all events, it is discretionary with the presiding Justice whether he will make the order before or after verdict, and so exceptions will not lie.

3. It is well settled law that exceptions do not lie to the decisions or rulings of a Judge sitting for the trial of jury causes in any matter within his discretion. *Moody* v. *Hinkley*, 34 Maine, 200; *Wright & al. Lessee of Hollingsworth*, 1 Pet. 165.

It is insisted, therefore, that there is no question of law raised in this bill of exceptions, touching the right of the plaintiff to maintain this action, and that the bill of exceptions ought to be overruled.

4. When a cause is before the Court on a bill of exceptions, nothing is to be considered except what is necessarily and clearly presented by the exceptions. *Page* v. *Smith*, 25 Maine, 262; *Wyman* v. *Wood & al.*, 25 Maine, 436.

Exceptions, in order to be available, must be specifically taken. *Kimball* v. *Irish*, 26 Maine, 447; *Stowell* v. *Goodenow*, 31 Maine, 538.

The exceptions on the two points already considered, are specifically taken; and as the other matters that occurred at the trial are only stated as narration, and are entirely omitted in the excepting clause of the bill of exceptions, they must be considered as waived by the defendant, especially as he subsequently proceeded to a trial on the merits. *Expressio unius est exclusio alterius.* Brooms's Legal Maxims, 278.

II. But suppose that the other matters in the bill of exceptions, though stated merely as narrative, are nevertheless to

be considered as duly presented for discussion, we are willing to meet them.

It will be observed that the note in this case bears date March 21, 1850, and that it was made payable on demand, and therefore was overdue when the action was commenced. The facts reported, show that it was in existence at the date of the writ, and that it has since been burned or destroyed without any fault of the plaintiff.

1. Now, on that state of facts, the decisions in this country are uniform, that the action is maintainable, without any bond of indemnity, either before or after verdict.

It is so even in New York, where the English doctrine has been more closely followed than in any other of the American States. *Rowley* v. *Ball*, 3 Cow. 303.

The Court held in that case, that the action was not maintainable merely on proof that the note was lost; it must go further, and show that it was destroyed.

2. No such distinction is acknowledged, either in the courts of Massachusetts, or of this State, or by the Supreme Court of the United States. The doctrine here is, that the action is maintainable, whether the note is lost or destroyed, especially if it was in existence at the time when the suit was commenced. *Jones* v. *Fales*, 5 Mass. 101; *Fales* v. *Russell*, 16 Pick. 315; *Willis* v. *Cressey & al.*, 17 Maine, 9; *Peabody* v. *Denton & al.*, 2 Gall. 351; *Renner* v. *Bank of Columbia*, 9 Wheat. 581; Story on Prom. Notes, § 111, note 3, pp. 244 & 448.

It is said by Greenleaf, "if there is no danger that the defendant will ever again be liable on the note or bill, as if it be proved to have been actually destroyed, the plaintiff is permitted to recover on secondary evidence." 2 Greenl. Ev. § 156, page 153; *Thayer* v. *King*, 15 Ohio, 242; *Viles* v. *Moulton*, 11 Vt. 470; *Swift* v. *Stevens*, 8 Conn. 431.

Eastman & Leland, for defendant.

APPLETON, J.—This is an action brought by the indorsee upon an indorsed note, which there was proof tending to

show had been destroyed by fire since the commencement of the suit.

After the evidence for the plaintiff had been introduced, the counsel for the defendant moved a nonsuit, on the ground that an action at law could not be sustained on proof either of the loss or destruction of the note, which motion was overruled.

The law is well settled, that a recovery may be had on a lost note which is not negotiable, or which, being negotiable, has not been negotiated, or which, being negotiated, has been specially indorsed to a particular individual, to whom it is exclusively payable. *Pintard* v. *Tackington*, 10 Johns. 104; Chitty on Bills, (10th Amer. ed.,) 264.

In England, if a note, being negotiable and negotiated, has been lost, the court of equity has jurisdiction to enforce payment of the amount due, upon a sufficient indemnity. In Massachusetts, a court of law prescribes a reasonable security for the defendant's protection, upon furnishing which the plaintiff is permitted to recover. It seems, too, that the courts of that State will continue the action till the lost note shall have become barred by the statute of limitations.

If the note was destroyed, it is well settled that the plaintiff, upon proof thereof, may recover at law. *Rowley* v. *Ball*, 3 Cow. 303; *Swift* v. *Stevens*, 8 Conn. 431; *Viles* v. *Moulton*, 11 Verm. 470.

No question was made as to the sufficiency of the proof to show the loss or destruction of the note in suit.

The motion for a nonsuit, on the ground that no action could be sustained at law, on proof that the note was destroyed, was properly overruled.

In this State, it was determined, in *Torrey* v. *Foss*, 40 Maine, 74, that the owner of a lost note may maintain an action at law, without furnishing an indemnity, if it appear that the statute of limitations may be interposed to prevent a recovery by a *bona fide* holder. The defendant would be *now* protected by time against a future holder of the note, had it been lost.

The motion to dismiss the action, unless the plaintiff tendered a bond of indemnity, was properly denied. The Court had no authority, for any such cause, to dismiss an action properly commenced and legally pending. If the evidence was insufficient to show the existence and destruction of the note in suit, or its loss, the defendant may have been entitled to a verdict in his favor, but not to the dismissal of the action.

Exceptions overruled.

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

SOLOMON LINCOLN *& als. versus* AUSTIN G. FITCH *& als.*

The person who indorses and puts in circulation a negotiable security, is incompetent as a witness to show that it was void at its inception.

Facts may be so interwoven with each other that a person, who is a competent witness as to some of them, and wholly incompetent as to others, cannot be allowed to testify to those for which he would otherwise be a competent witness.

A defendant cannot offer evidence in support of an issue which he has not presented by his pleadings.

The receivers of a bank, appointed to close its concerns, have no rights superior to those which the bank would have had if its management had remained in the hands of the directors; and the liabilities of third parties to the bank are not increased or otherwise varied by the appointment of receivers.

A draft having come into the possession of a bank fraudulently and without consideration, its exhibition as the property of the bank, to persons who thereafter became creditors of the institution, can have no effect upon the liability of the drawer and acceptor of the draft.

The president of a bank, with the knowledge of the directors, obtained possession of a draft, which had been signed in blank and intrusted to a third party for another purpose, without consideration, and without the knowledge of the drawers, and made use of it to increase the apparent assets of the bank: — *Held*, that the bank could stand in no better condition than the person who had been entrusted with it and had thus misappropriated it.

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

This was an action of ASSUMPSIT upon a draft and bank check. The claim for the check was abandoned at the trial. No evidence in support of that claim was offered.

The draft or acceptance was as follows: —

"Boston, March 14, 1854.

"$10,000. Two months after date, pay to the order of A. F. Smith, at bank in Boston, ten thousand dollars, value received, which place to account of "A. F. Smith & Co.

"To Fitch, Hodgdon & Co., Springvale, Me."

Across the face of the draft was written, "Accepted, Fitch, Hodgdon & Co."; and on the back, "A. F. Smith."

"For value received, we hereby waive demand and notice as drawers and indorsers of the within.

"A. F. Smith & Co.,

"A. F. Smith."

It appeared that the defendants were interested in a factory at Springvale, in York county, and sometimes had occasion to raise sums of money in Boston.

When such occasions occurred, it appeared that they generally transacted the business through said A. F. Smith.

Sometime prior to the date of this acceptance, anticipating that they might wish to raise a few hundred dollars in Boston, to meet the balance of a small liability at the Merchants' Bank, the defendants left with said Smith a draft and a bank check signed by them in blank; it being understood that said acceptance and check might be used to discharge that liability, in case it became necessary by their failure to furnish other funds in season for that purpose. Other funds were seasonably furnished, and said blanks were not used; but remained in the hands of said A. F. Smith.

And it further appeared, that a part of the loan of the Cochituate Bank, consisted of securities discounted for the benefit of the Lyons Iowa Central Railroad Co., and that some of the securities had remained in the bank overdue and unpaid, until it had become the subject of complaint on the part of the bank commissioners.

Stephen M. Allen, whose deposition the defendants introduced, was president of the bank, and transacted nearly all its business. Wishing to substitute some other paper more acceptable to the bank commissioners, and to withdraw so

much of that loan as was overdue, in order to negotiate in New York to better advantage for its payment, the said Allen, acting for the bank, made the arrangement with said A. F. Smith for the acceptance and bank check, the particulars of which were stated by said Smith in his deposition.

Smith knew that the president was acting for the bank, but he knew nothing definite of the purpose for which the acceptance or check was to be used. Allen received the acceptance and check of Smith, and the Cochituate Bank received them of Allen as president. Smith received no value for the acceptance or check, and the bank paid nothing for them to anybody.

This whole arrangement was made without the knowledge or consent of the defendants, who resided in Sanford, in this State, and had no knowledge or intimation of the transaction until after the bank failed. It stopped payment on the 15th of April, 1854, and its assets having passed into the hands of receivers, they, as such, brought this action. The defendants appeared and pleaded the general issue and filed their brief statement of defence.

The case was tried, and the jury returned a verdict for the defendants. The plaintiffs filed a motion to set aside the verdict, as against evidence, and for a new trial. They also excepted to certain rulings of the presiding Judge. The points raised by the exceptions fully appear in the opinion of the Court. The motion for a new trial was not relied upon at the argument of the cause.

N. Clifford and *N. D. Appleton*, for defendants.

1. The defendants offered the deposition of Asa F. Smith, and when it was read to the jury, the counsel of the plaintiffs objected to the answer to the second interrogatory.

It is true that the Judge overruled the objection, and the answer was read; but it is also true that the Judge instructed the jury, at the request of defendants' counsel, made in the course of his argument, that the said answer could only be received for the purpose of showing, so far as it had that tendency, that the draft was accommodation paper; that it

was not admissible as evidence to prove any fraud in the inception of the draft, or that it was fraudulently put in circulation, and that for any such purpose they must disregard it and lay it out of the case.

Having stated the ruling and the instruction, we now give the question and answer.

Interrogatory 2.—"Did Fitch, Hodgdon & Co. receive any thing, to your knowledge, for or on account of said paper?"

Answer.—"They did not to my knowledge."

It is very clear that the answer has no tendency to prove any fraud in the inception of the note; and if it had, when unexplained, it would make no difference, as the jury were seasonably and most explicitly directed, that it was not admissible for that purpose, nor even to prove that the draft was fraudulently put in circulation.

They were instructed by the Judge, at the request of defendants' counsel, that the answer could only be received so far as it had a tendency to show that the draft was accommodation paper.

It was, in effect, saying to the jury, I will allow the answer to be read, and if you think it has any tendency to prove that it was accommodation paper, you may take it into consideration for that purpose only; but it is not admissible, nor can it be received, for any other purpose whatever.

2. Evidence admissible for the purpose of proving any one of the issuable facts in a case, although clearly inadmissible for other purposes, may always be submitted to the jury under proper instructions. *State* v. *Lull*, 37 Maine, 246; *Schillinger* v. *McCann*, 6 Maine, 370; *Bangor* v. *Brunswick*, 30 Maine, 398; *Whitney* v. *Cottle*, 30 Maine, 31.

Smith is not interested; and if he was, that would make no difference, as it could only affect his credibility.

His deposition was taken on the 17th of March, 1855, since the Act for the admission of interested witnesses went into operation. Laws of 1855, c. 181, page 207.

It follows, therefore, that the only remaining question is,

was it competent for the defendants to prove by Smith that nothing was paid for or on account of the draft, as a ground of inference, that it was accommodation paper?

Surely, it is not an impeachment of a bill or note, to show that it was made for the accommodation of one of the parties to the instrument; nor is the instrument any the less obligatory in the hands of third persons after such proof is made.

Assuming that the bank in fact received the draft, as the jury have found, on what principle is it that the testimony should be excluded?

It is not upon the ground that Smith is interested, because that difficulty, if it existed before the Act of 1855, is now removed.

There is no rule of policy in this or any other country which excludes this testimony.

3. The effect of the evidence, is not to prove that the instrument was originally void, nor to permit the witness to invalidate his own act. It is simply to allow the witness to explain the transaction as it took place between the original parties, in exact accordance with the views expressed by WILLES, J., in the leading case of *Walton* v. *Shelley*, 1 Term R. 301.

It was proposed in that case, to prove by the indorser, that the consideration of the note was illegal, and that the note was void at its inception; and it was held by Lord MANSFIELD, that it was against public policy to permit the witness to disclose that fact, as its effect would be to invalidate his own act as indorser.

No such question arises in this case, and we have no desire to touch the great controversy to which that decision has given rise. That doctrine was overruled in England shortly after it was laid down, and has never since received the sanction of the British courts. *Jordaine* v. *Lashbrooke*, 7 Term R. 601.

For the sake of the argument, let it be admitted that the weight of American authority is on the side of the case first named. Assuming that to be so, then it must be admitted

that the indorser of a negotiable security, negotiated before it is due, and in the hands of an innocent party, is not a competent witness to prove that such security was originally void.

But it is a sufficient answer to the supposed admission, to say that nothing of the kind is proposed in this case, nor is any such proposition involved in the ruling of the Court. On the contrary, the ruling of the Judge, as it appears in the bill of exceptions, adopts and affirms the opposite rule. 1 Greenl. Ev. § 384–5–6; 2 Williams on Ex'rs, 670, part 1 of 2d vol.

While the American courts pretty generally adhere to the rule in *Walton* v. *Shelley*, they are not disposed to extend it, and in many cases it has been limited and restrained. *Buck* v. *Appleton & als.*, 14 Maine, 284; *Thayer* v. *Crossman*, 1 Met. 416; *Franklin Bank* v. *Pratt*, 31 Maine, 501.

The defendants insisted at the trial, that Stephen M. Allen was the agent of the bank, and that he received the draft of Smith for and on account of the bank, and the jury have found by their verdict that it was so, and that too under instructions as favorable to the plaintiffs as they can ever expect.

Such being the fact, we think it clear that it was competent for the defendants to prove that no value was paid for the draft. *Bramhall* v. *Becket*, 31 Maine, 205–211; Story on Prom. Notes, §§ 190, 194, and cases cited; 2 Greenl. Ev. §§ 171 & 172, pp. 167, 169; Byles on Bills, 454, (* p. 323;) as to what is accommodation paper, Byles on Bills, 184.

Want of consideration may be set up as a defence between any of the immediate or original parties to a bill or note.

It being established, that Allen was the agent of the bank, it is clear that the defendants may show that the bank paid no value, unless the absurdity can be maintained that the receivers stand in a more favorable position than the corporation which they represent.

Speaking of the original parties to a promissory note, STORY says: — The same rule will apply to any derivative title under them, by any person who acts merely as their agent, and has given no value. Story on Prom. Notes, § 194.

An executor or administrator has no greater rights, in a

suit on a bill or note, payable to the deceased person whom they represent, than such deceased person would have had during his life time; and the same rule is applied to the assignees of a bankrupt's estate; and why should it not be applied in this case?

We see no reason, and think that none exists or can be suggested. Byles on Bills, pp. 40, 360; *Hyde* v. *Skinner*, 2 P. Wms. 196; *Williams* v. *Burritt*, 1 C. B. 402; 2 Williams on Ex'rs, 670, part 1, 2d vol.

4. The instructions requested were properly withheld. There is no evidence in the case tending to prove that Smith agreed that the draft should go into the possession of the bank, or that he had any knowledge whatever of the purpose for which it was to be used; consequently the first request was not called for, and was therefore properly refused, and the same remark applies to the second request.

They assume a state of facts which did not exist, and which there was no testimony to prove.

The doctrine of the requests is erroneous, and therefore they must have been refused, even if the facts were as the requests assumed them to be. *Agricultural Bank* v. *Robinson & als.*, 24 Maine, 274.

This case decides that the doctrine in the requests is wrong.

The requests assume that the above case is not good law, and for the present we are willing to leave that matter to the Court. 2 Smith's Lead. Cases, 562; 3 Hill, 219.

5. The general doctrine is now firmly established in this country, that whenever a corporation is acting within the scope of the legitimate purposes of its creation, all parol contracts made by its authorized agents, and express contracts of the corporation, and all duties imposed upon it by law, and services rendered and benefits conferred at the request of its agents, raise an implied promise, for the enforcement of which an action will lie against the corporation. Story on Ag. § 53, on p. 58, and cases cited; *Bank of Columbia* v. *Patterson*, 7 Cran. 350–6; Angell on Cor. c. 8, § 7, p. 212, note 4, and c. 8, § 8, p. 214, note 6.

An agent for a corporation may be appointed, as in the case of an individual, by a formal written instrument, as by power of attorney; or by an informal instrument, as by letter of instructions or by an unwritten request; or by implication, from his acquiescence in the acts of the agent. Story on Ag. § 54, p. 64; *Frankfort Bank* v. *Johnson*, 24 Maine, 490.

The officers of a bank are held out to the public as having authority to act according to the general usage, practice and course of business of such institutions; and their acts, within the scope of such usage, practice and course of business, bind the bank in favor of third persons having no knowledge to the contrary. Story on Ag. § 114, p. 130; *Franklin Bank* v. *Steward*, 37 Maine, 519; *Minot* v. *Mechanics' Bank*, 1 Pet. on p. 70.

Agency may be inferred from the relative situation of the parties; or, what is more common, from the habit and course of dealing between the parties. *Maine Stage Co.* v. *Longley*, 14 Maine, 484; 2 Greenl. Ev. § 64 & 65, and cases cited, pp. 56 & 57; *Warren* v. *Ocean Ins. Co.*, 16 Maine, 439; *Badger* v. *Bank of Cumberland*, 26 Maine, 428.

In all cases, except where the appointment of the agent is in writing, he is a competent witness to prove his authority. 1 Greenl. Ev. § 416, p. 532; *Lowber* v. *Shaw*, 5 Mason, 242; *Crooker* v. *Appleton*, 25 Maine, 131.

H. W. Paine, for plaintiff.

The Judge erred in permitting Smith to testify to want of consideration for the acceptance. Smith was one of the drawers, and he was also an indorser, and therefore incompetent to testify to any facts which tended to render the acceptance invalid.

Though the rule of exclusion has been generally applied to cases where the instrument is declared void by the statute, it is not limited to those cases.

In *Bank of United States* v. *Dunn*, 6 Peters, 51, the Court say, "it is a well settled principle, that no person who is a party to a negotiable instrument, shall be permitted by his own testimony to invalidate it."

In *Bank of Metropolis* v. *Jones*, 8 Peters, 12, the Court held the maker of the note incompetent to disclose any fact which tended to avoid the note. And the Court say, "if one whose name appears as drawer, indorser or acceptor, shall be competent to prove facts or circumstances which lessen or destroy its value, before or at the time he becomes a party to it, the credit of commercial paper could not be sustained."

To the same point are *Henderson* v. *Anderson*, 3 Howard, 73, and *Knights* v. *Putnam*, 3 Pick. 184.

The payee is not competent to swear to want of consideration between himself and maker, in a suit by indorsee against the maker, even when the note was taken to secure a preëxisting debt. *Rossenberger* v. *Bitling*, 15 Penn. 278.

This case is not within the exception in *Thayer* v. *Crossman*, 1 Met. 416, for the acceptance was indorsed before maturity.

Nor within the exception in *Fox* v. *Whiting*, 16 Mass. 118, for the suit is brought by indorsees.

The second request for instruction should have been complied with.

1. The defendants, by giving the acceptance in blank to Smith, made him their agent to fill the blank and negotiate the paper. They took the risk of his using it for any purpose. They enabled him to perpetrate a fraud and must bear the loss. *Licklanow* v. *Mason*, 2 Term R. 63; *Putnam* v. *Sullivan & al.*, 4 Mass. 45, is much in point.

The maker or indorser of a note for a particular purpose, takes the risk of its being used for a different purpose and in a different manner. *Sweetser* v. *French*, 2 Cush. 309.

"Principals are responsible for the frauds, deceits and torts of their agents, although they did not authorize, justify or participate in them, or even know of such misconduct, or even if they forbade or disapproved." Story on Ag. § 452.

2. Allen's acts and agreements are not the acts or agreements of the bank, nor is his knowledge the knowledge of the bank.

The proof shows that he was acting for himself.

His discount of the acceptance was but provisional. It

was necessary that the board of directors should pass upon all paper offered. *Washington Bank* v. *Lewis*, 22 Pick. 24.

The case is distinguishable from *Agricultural Bank* v. *Robinson*, 24 Maine, 274.

The request for instruction assumes that the jury may find that the bank paid full value for the acceptance, and that the public was induced to give credit to the bank.

TENNEY, C. J.—The suit is upon an instrument purporting by its terms to be an acceptance drawn by A. F. Smith & Co. for the sum of $10,000, to be paid in two months from date, which is March 14, 1854, to the order of A. F. Smith, upon the defendants; accepted by them, and indorsed by A. F. Smith, with the written waiver of demand and notice, as drawers and indorsers, signed A. F. Smith & Co. and A. F. Smith upon the same paper.

In the specifications of defence, filed in the same case, it is alleged, that the promise contained in the acceptance, was without any legal or valuable consideration; that the defendants signed an acceptance in blank, without date, and sent the same to Asa F. Smith, in Boston, to be used if it should be necessary, to raise funds to the amount of about twenty-five hundred dollars, to meet payments to be made by them, and for no other purpose; that it was not used for that purpose, because said Smith was able to provide the amount necessary, without using the acceptance, and it remained in his hands some weeks, when an arrangement was made between him and the Cochituate Bank, through its president, Stephen M. Allen, that said Smith should fill up the blank acceptance, for the sum of $10,000, dated March 14, 1854, and permit said Allen to take it for the benefit of the bank, and without the knowledge or consent of the defendants, and without receiving any consideration therefor; and they deny that they had any knowledge of the transaction until after the failure of the bank, and that these plaintiffs have no other rights than those which the bank had at the time of its failure; and that the bank, by its president, well knew that said

blank acceptance was never placed in the hands of said Smith to be filled up and used for such a purpose as that for which it was used, but for other and different purposes.

The plaintiffs introduced the acceptance declared on in the writ. Also evidence tending to show, that it came into the possession of the bank, by being negotiated in the course of business, and for a good and valuable consideration.

The deposition of said Asa F. Smith, having been introduced by the defendants, and it appearing therefrom that he was the indorser of the acceptance, the plaintiffs objected to the reading of the answer to the second question propounded to him by the defendants; but the Judge overruled the objection, and the answer was read; but in the charge, at the request of the defendants' counsel, made in the argument, the Judge instructed the jury, that the answer to the question could only be received, for the purpose of showing so far as it had that tendency, that the acceptance was accommodation paper; that it was not admissible in evidence, to prove any fraud, in the inception of the draft, or that it was fraudulently put into circulation; and that for any other purpose, they must disregard it, and lay it out of the case. The question was, "Did Fitch, Hodgdon & Co. receive any thing, to your knowledge, for or on account of said draft?" Answer. — "They did not to my knowledge."

If the defence relied upon was, that the draft was made by authority of the defendants, for the accommodation of the bank, no action in its favor could be maintained against them, inasmuch as the bank must have known for what purpose it was received. But this constitutes no part of the defence, under the specifications; and the proofs introduced, cannot be contradictory to the allegations made by the defendants, if objected to. They deny that they were ever parties to the paper, for the accommodation of this bank, or any other, or for any purpose whatever; that it was made, and indorsed, and put into the bank in fraud of their rights, without any consideration, consent or privity, on their part.

The rule of law relied upon by the plaintiffs, to exclude

this answer, is, that an indorser of negotiable paper, who has indorsed it and put it into circulation, with a view to give it currency as negotiable security, is incompetent as a witness, to show that it was void at its inception, when it was indorsed before maturity. This is the principle of the case of *Walton* v. *Shelly*, 1 Term R. 296; and the reason given is, that no man is admitted to allege his own turpitude, when the allegation will tend to encourage and support fraud and illegality. The principle of this case was adopted by the Court in *Churchill* v. *Suter*, 4 Mass. 156, as having been sustained in practice in that commonwealth uniformly for a long series of years. Since that decision, it has been treated as authority in Massachusetts, and this State, notwithstanding it has been explained and restricted by subsequent decisions, to narrower limits, than were erroneously supposed by some to have been designed by the Court which gave it; and, notwithstanding, it has not been treated as the true doctrine in England, and in some of the United States. *Thayer* v. *Crossman*, 1 Met. 416, and note to page 418.

The purpose for which the answer in controversy was allowed to be considered by the jury, not having been indicated as a ground of defence, but substantially denied, touching the paper, as the acceptance of the defendants, evidence having such tendency, was incompetent, if objected to. A defendant cannot offer evidence in support of an issue which he has not presented.

The answer in Smith's deposition, was from the person charged in the specifications with having filled up the blank check, and negotiated, indorsed and delivered the same, to be put into circulation, with a view to give it currency as negotiable security, against the defendants, as acceptors, and without any authority from them. The answer of the deponent, was full in support of the allegation in the specifications, that the defendants received no consideration for the acceptance, notwithstanding the qualification, that they received nothing for or on account thereof, *to his knowledge.*

When the want of consideration might be treated as made

out, if the deponent was believed by the jury, for the purpose for which it was allowed, it might be somewhat difficult for the jury to disregard this fact, if it constituted an element of importance, in proving the fraud alleged to have been practiced in the inception of the acceptance. Its introduction for one purpose, was suited to mislead the jury in their consideration of other matters before them, wherein it was stated by the Judge to be inadmissible.

The want of all consideration for the liability, purporting upon the acceptance to have been assumed by the defendants, was an important fact, in showing a defence on the grounds alleged; it was among the specifications filed. If they had received an equivalent, for their names being upon the paper as acceptors, the transaction might have been that for which they gave Smith authority to use the blank acceptance, although, at the time, they might have been ignorant thereof, and the defence would fail. A disqualification to testify, at the instance of the defendants, existed in the deponent, in making out the ground relied upon to defeat the action. No distinction could be made between one question and another, in this respect, when each and every fact, attempted to be shown thereby, was important in exhibiting the fraud in which he was charged with having participated. All the facts alleged in defence, were deemed important by the defendants, in making out the fraud of the deponent; and they were so interwoven with each other, that he could not be allowed to testify to one, when he was totally incompetent to testify to another.

The Judge was requested by the plaintiffs' counsel, to instruct the jury, that if they believed the acceptance was given to Smith in blank, and he agreed that it should go into the possession of the bank, to be exhibited as the property of the same, and it was so exhibited, the defendants are, through Smith, parties to the fraud on the public; and if any persons became creditors to the bank, after such exhibition, the defendants cannot set up such fraud, as a defence, and the plaintiffs are entitled to recover.

The requested instruction is predicated upon the ground that the bank did not pay from its funds any consideration for the draft; but that it was received for the purpose of exhibiting indirectly to the public, a condition better than that which in truth existed, and that this fraud was perpetrated by the procurement of the defendants' agent, in the use of the blank draft, which he had been authorized to fill for another purpose.

The plaintiffs are not to be treated as holders of the draft, having paid consideration therefor, without any knowledge of the fraud, or reason to suspect it. They represent the bank, for the purpose of closing its concerns, and for no other. They parted with nothing when they entered upon the discharge of their duties, and they have no rights superior to those which the bank would have had if the management of its affairs had continued with its directors; and the liabilities of the defendants are not increased or changed by their appointment.

The fact, that persons became creditors to the bank, after the draft came into its possession, and was exhibited as its property, can have no effect upon the defendants' liability. These creditors had no property in the draft; and even if they had knowledge that it was in the bank, and exhibited as its property, of which there is no suggestion, they are not to be more favored in the mode contemplated in the instruction requested, than they would be in a like transaction, in which an individual was the debtor. The case of the *Agricultural Bank* v. *Robinson*, 24 Maine, 274, is in point, and decisive of this question.

The second instruction requested, is upon the assumption, that the draft was filled in the manner, and for the purpose alleged in the defendants' specifications, they having received no consideration therefor; with the additional fact, that it was discounted, and the money paid therefor, by the bank, coupled with the other fact, assumed in the first instruction requested, that the draft was entered upon the books, and exhibited as a part of the assets of the bank, to the bank commissioners,

and the bank continued after that to pay its bills and to receive deposits. And upon such finding, it was requested, that the jury be told that the plaintiffs could recover. The facts assumed in the request, may all be satisfactorily proved, and the bank have had full knowledge of the manner in which the draft was obtained, in the transaction between the president of the bank and Smith, at the time when the draft came to its possession; and by a well settled principle of law, the bank can stand in no better condition than the one who obtained the draft from Smith. And the plaintiffs cannot, on the facts supposed in the request, be more able to maintain this suit, than they would have been if it had not been assumed, that the draft was in fact discounted, and the money paid therefor by the bank. *Exceptions sustained, verdict set aside, and new trial granted.*

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

COUNTY OF OXFORD.

BENJAMIN PRATT *versus* POLLY CHURCHILL.

A., having an estate for life in certain premises, conveyed them by deed of warranty to B., who continued in possession over twenty years: — *Held*, that at common law the remainder man or reversioner, having no right to immediate possession, cannot lose his title by adverse possession, and that, during the continuance of the particular estate, he is not bound to enter to defeat a wrongful possession: — *Held*, that the statutory provisions are in accordance with the common law in this respect: — *Held*, that the estate of the tenant under the deed is an estate for life, and that he would not, by the common law, be entitled to compensation for any improvements.

To entitle a tenant to betterments under R. S. of 1841, c. 145, § 23, his possession must be open, notorious, exclusive and *adverse* for twenty years, and such as would, by disseizin, give him the fee.

Where the reversioner or remainder man has no right of entry or possession, the seizin of the tenant, while the particular estate continues, is not adverse.

The Act of March 6, 1844, c. 6, § 1, which provides that the tenant for years may recover betterments against the owners of the expectant estate, does not affect any made before the passage of the Act.

ON AGREED STATEMENT OF FACTS from *Nisi Prius*.

This was a writ of entry to recover possession of certain land.

The land declared for, being a part of the north half of lot numbered five, in Livermore, in the county of Oxford, is a part of the same land which was devised by one Othniel Pratt to his son Othniel Pratt, in and by his last will and testament, which was duly proved, approved, and allowed by the Court of Probate, February 27, 1810; and the said testator was seized of the same land and all the lands devised by said will at the time of his decease, which was January 7, 1810. The lands devised to said Othniel Pratt by the testator, consisted of about two hundred acres of land, with the buildings thereon, about one-half of which was cleared, situate in the town of Leeds, and was, at the time of the making

and approval of said will, occupied by said devisee as a farm; and the north half of lot number five, in Livermore, was about one mile distant from said farm, and the Androscoggin river passed between the same and the farm. The said north half of said lot number five, had not been entered upon or improved before the making of said will.

Othniel Pratt, the devisee in said will, died in January, 1851; but before his death, *to wit*, on the 25th day of March, 1812, he conveyed the north half of lot number five to Samuel and James Ames, their heirs and assigns, by deed of general warranty; and the said Ames', and their grantees, one of whom is the defendant, have been in the peaceable and undisturbed possession of the premises declared for, ever since. It is admitted, that the demandant is one of the legitimate children and heirs at law of the said devisee, and that he has purchased the interest of seven of the nine children, who were heirs at law of said devisee, and who had conveyed the same to him by deed duly recorded, before the bringing of the suit.

The tenant, and those under whom he claims, deriving their title from said Othniel Pratt, the devisee, have erected buildings and made other improvements upon the premises, which are now upon the premises.

It is agreed that, from the foregoing facts, the Court are to draw such inferences as the jury might, and are to determine the rights of the parties in the premises; and if, in the opinion of the Court, the plaintiff is entitled to recover, and the defendant is entitled to betterments, the action is to stand for trial that a jury may determine the same; but if the plaintiff is entitled to recover, and the defendant is not entitled to betterments, then the defendant is to be defaulted; and if the plaintiff is not entitled to recover, then he is to become nonsuit.

H. W. Paine, for defendant.

Two questions are raised by the agreed statement.

1. Is the action maintainable? According to the rule of Shelly's case, the words of the devise to Othniel Pratt, would carry a fee.

But this rule was abrogated by the statute of 1791, c. 60, which was in force when the will of Othniel Pratt, senior, was executed, and when it was established. *Bowers* v. *Porter*, 4 Pick. 198.

By force of this statute, Othniel, the devisee, took a life estate only.

A devise of wild lands to one without words of inheritance, has been held to carry a fee, because it will be presumed that the testator intended to give something of value. *Sargent & al.* v. *Towne*, 10 Mass. 303.

But as the statute is express, and as the language of the devise is clearly within the statute, the tenant will not contend that the fact that the land was in a state of nature, can have a controlling influence on the construction.

2. Is the tenant entitled to betterments?

By § 23, c. 145, R. S., it is provided, "that where the demanded premises have been in the actual and undisturbed possession of the tenant, or those under whom he claims, for six successive years or more, before commencement of the action, such tenant shall be allowed a compensation for the value of the buildings and improvements made by him, or those under whom he claims."

By the agreed statement, it appears that Othniel, the devisee, conveyed by deed of general warranty, March 25, 1812, to Samuel Ames and James Ames, to hold in fee simple; that they and their grantees, (one of whom is the tenant,) have been in the peaceable and undisturbed possession from that time to the date of the writ, March 5, 1852; and that the tenant, and those under whom she claims, have erected buildings and made other improvements.

The courts have found it necessary to restrain the general language of the statute, and have held that it was not intended to apply to those who enter under a title which they afterwards attempt to defeat, or under a contract with the owner to purchase. But it was held that a tenant who was in under a title proved to be defective, was entitled to the benefits of the statute. *Bacon* v. *Callendar*, 6 Mass. 303.

This tenant was in under a title which has been proved inferior to the demandants. Her case is, therefore, within the language of this section of the statute; and was such a case as, in the opinion of the Court, was intended to be reached and provided for.

But if it be possible to raise a doubt whether the tenant is entitled to have the benefits of this statute, there can be none, that she is within the sixth chapter of the statutes of 1843.

The action is brought by a remainder man, after the termination of a life estate, against the grantee by deed of and from a tenant for life.

These facts bring the case exactly within the terms of that enactment.

Seth May, for plaintiff.

It being conceded by the learned counsel for the defendant, that the rule in Shelley's case has been abrogated by the statute of Massachusetts, passed in 1791, c. 60, which was in force when the will of Othniel Pratt, senior, was executed, and approved and allowed, and which statute had received a construction in the case of *Bowers* v. *Porter*, 4 Pick. 198, and, as is believed, recently by our own Court, in a case arising in Kennebec county, under this same will; and it being further conceded, that the rule in the case of *Sargent & al.* v. *Towne*, 10 Mass. 303, does not apply in this case by reason of the statute, and the language of the devise being clearly within the statute; I will, after remarking that, by force of the language in the will, it is fully apparent that it was the testator's intention to devise these lands to be improved by the devisee so that he might enter and cut down the forest and cultivate the land without impeachment of waste, proceed directly to the consideration of the question of betterments which is raised in the case.

Is the defendant, then, entitled to betterments?

We contend that he is not. Until the statute of 1843, c. 6, we think there would have been no doubt about it. It seems to have been directly so settled in the case of *Varney* v. *Stevens*, 22 Maine, 331. In the case of *Austin* v. *Stevens*,

it is said by the counsel for demandant, that Stevens, after this decision, procured an Act of the Legislature to give him betterments, and that Act was the statute of 1843, as appears by the case of *Austin* v. *Stevens*, 24 Maine, 520.

In this last case, the purpose and effect of the Act of 1843 is pretty fully discussed.

In the case now before the Court, the will of Othniel Pratt, senior, was executed April 8, 1809, and it was set up and allowed on the 27th day of January, 1810. Othniel Pratt, junior, to whom the lands in controversy were devised, conveyed the same, by deed of warranty, to Samuel Ames and James Ames, to hold in fee simple; and they and their grantees, one of whom is the defendant, had been in possession to the date of the writ, viz., to March 5, 1852. Ames', and their grantees, must be regarded as holding in submission to the title of the remainder man, until the death of Othniel Pratt, junior, which occurred, as the case finds, in January, 1851, when the life estate in the premises was determined. Since that time, the tenant, or those under whom he claims, may be regarded as holding adversely and against the title of the reversioners.

Upon these facts, we contend, that if the tenant is entitled to betterments, it is only for such as have been put upon the premises since the passage of the Act of 1843, and since the death of said Othniel Pratt, junior.

In the case of *Austin* v. *Stevens*, the Court say, or decide, that the rights of the reversioner to improvements, made during the continuance of the life estate, cannot be altered or changed by the Legislature, after they have been fixed and established by the laws existing at the time when the life estate falls.

We contend, in this case, that it was not competent for the Legislature to change the rights and duties of the tenant for life, and the reversioners, nor any of the incidents attaching to the relation subsisting between the tenant for life and the reversioners, as existing by the laws in force at the time when that relation was created and commenced; and certainly the

Act of 1843 could not divest the reversioner of any rights which existed and were vested in him before or at the time of its passage. See *Austin* v. *Stevens*, just cited, and authorities cited by the counsel for plaintiff; also *Given* v. *Marr*, 27 Maine, 212.

If the foregoing proposition be correct, then nothing can be allowed the defendant for any improvements or betterments made before the passage of the Act, nor until the death of Othniel Pratt, junior, in whom was the life estate; but if the improvements made by the tenant for life, and those claiming under him, are not to be considered as attached absolutely to the estate until the death of the tenant for life, and so to belong to the tenant; and that by force of the statute of 1843 he is entitled to recover for them, then we ask the Court to look at the intention of the testator as expressed in his will.

For, again we say, that from the peculiar language of the devise, the right to betterments or compensation, for improvements during the existence of the life estate, is excluded. The language is, "I give and bequeath unto my son Othniel, the land he is now in possession of; also one half of the lot numbered five, on the north side of said lot, lying in Livermore, to him during his natural life, to improve, and then to his heirs after him for their sole right;" and it is upon these terms, and for improvement, that the devise is accepted. The lot being at the time of the devise wild land, the words "to improve," mean not only to cultivate, but include all which is necessary to do so, viz., the right to cut and clear the lot, and to fence the same, and also to erect and maintain such buildings as will protect and secure the fruits of any improvement. The fair construction of the will is, that the devisee is to have the fruits of the improvement during his life; and then the estate, as improved, is to go after the death of the tenant for life to his heirs; and it is upon these terms that the devise is accepted, and this Court cannot change them. But if the tenant for life, or those claiming under him, had held the estate six years after the life estate had fallen adversely, with

or without the aid of the statute of 1843, she would be entitled to betterments made during that time, as against the owner in fee, in the same manner as if there had never been any life estate resting on the premises.

H. W. Paine, in reply.

APPLETON, J.—The estate of Othniel Pratt, under the will of his father, as determined in *Pratt* v. *Leadbetter*, 38 Maine, 10, was for life only. Having then an estate for life, on March 25, 1812, he conveyed the demanded premises, by deed of warranty, to Samuel and James Ames, by whom, and by those claiming through them, they have been occupied to the present time.

The remainder man or reversioner, not having any right to the immediate possession of the land, cannot lose title by adverse possession. They either cannot, or if they can, are not bound to enter during the continuance of the particular estate, to defeat a wrongful possession. *Jackson* v. *Schoonmaker*, 4 Johns. 402; *Stevens* v. *Winship*, 1 Pick. 327. In accordance with common law are the statutory provisions in this respect. R. S., c. 91, § 10.

If the tenants are to be regarded as in under their title, so far as any was conveyed by the deed of Pratt, their estate would be that of tenants for life; and, as such, they would not, by the rules of the common law, be entitled to compensation for any improvements made by them.

To entitle the tenant to betterments under R. S., c. 145, § 23, his possession must be such, that if prolonged for a period of twenty years, it would, by disseizin, give him the fee. It must be open, notorious, exclusive and adverse. But, as the reversioner or remainder man had no right of entry, nor of possession, during the particular estate, the seizin of the tenant while that estate continued was not adverse to them. *Webster* v. *Howard*, 14 How. 489. As the tenant could gain no title to the fee by adverse possession, so neither could he acquire the lesser right of compensation for betterments.

By the Act of March 6, 1844, c. 6, § 1, the tenant for years

is authorized to recover betterments as against the owners of the expectant estate. But as the improvements made by the tenant for life before that time, enured to the benefit of the owner of the fee, and became his the instant they were perfected, the statute cannot affect any made before its passage, for they had become a part of the reversionary estate. *Austin* v. *Cooper*, 24 Maine, 520. If the tenants are to be viewed as disseizors, as they could not disseize those in remainder or reversion, so neither could they acquire by disseizin any claim for betterments. *Webster* v. *Cooper*, 14 How. 489. If they were in under their title as tenants for the life of Othniel Pratt, they were not holding adversely, and they could hold no betterments. *Treat* v. *Strickland*, 23 Maine, 234.

Defendant defaulted.

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

CUTTING, J., did not sit.

MAY, J., having been of counsel, did not sit.

INHABITANTS OF BETHEL, *petitioners, versus* COUNTY COMMISSIONERS OF OXFORD COUNTY.

County Commissioners have no authority to act on a petition, representing that a town has unreasonably refused and delayed to allow and approve a town way legally laid out, and praying that the commissioners accept and approve it, *unless* the petition, or the record of the Court, show that the application was seasonably made to them.

There must be nothing left to inference in such a case.

PETITION FOR CERTIORARI.

The principal facts in this case were as follows: — The selectmen of the town of Bethel, laid out a certain public way, and reported the same to the town at a public meeting of the inhabitants, who, as was alleged, unreasonably refused and delayed to allow and approve said way. Whereupon the following petition was presented to the county commissioners of Oxford county: —

"To the Hon. Court of County Commissioners for the county of Oxford, to be holden at Paris, within and for the county of Oxford, on the 2d Tuesday of May, A. D. 1854.

"Respectfully show your petitioners, that a town way, or a lane, leading to Joseph Holt's, seventy-eight rods from the county road, to land of Edward Covel, in the town of Bethel, would be of great public convenience; that the selectmen of said town, after notice and warning of the parties, have laid out such way and reported the same to the town, at a public meeting of the inhabitants duly notified and warned; yet the town has unreasonably refused and delayed to allow and approve said town way, laid out by the selectmen aforesaid, and to put the same on record. Therefore, your petitioners, considering themselves aggrieved by such delay and refusal, pray that your honors would, agreeably to law in such case made and provided, accept and approve said town way, and direct the same to be recorded in the books of said town.

(Signed,) "Nathaniel Swan, 2d, and six others."

The Commissioners issued their warrant upon the above petition, and examined and approved the town way so laid out.

The inhabitants of Bethel, by O'Neil W. Robinson, their agent, specially appointed for the purpose, and Joseph Holt of Bethel, in his private and individual capacity, then petitioned for a writ of *certiorari*, to cause the records of the aforesaid doings of the Commissioners to be certified to and brought before this Court, that the said proceedings and the records thereof might be quashed.

The petitioners assigned "the following as some of the many errors and irregularities in the acts and doings of the Commissioners and the records thereof:"—

1st. That said original petition of Nathaniel Swan and six others, does not show that their said appeal from the doings of said town, and application to said Court of County Commissioners, was made within one year from the time when it is alleged that said town unreasonably refused and delayed to approve and allow the town way alleged to have been

laid out by the selectmen of said town; nor does it show when any action was taken by said town in the premises, or when the selectmen thereof located the same; and that, therefore, no jurisdiction is given to said County Commissioners to act on said petition and application aforesaid.

2d. That said petition, or records of said Court, does not show that the way prayed for, leads from land under the possession or improvement of any one of the petitioners for said road, to any highway or town way.

3d. That America Bartlett, who, by said record, acted as a County Commissioner for Oxford county, and who, by said record "B" and "C," acted at the view, examination, hearing and location, Sept. 21, 1854, was not at that time a County Commissioner of Oxford county, but was in September, 1854, elected for a term of three years, to commence in January, A. D. 1855. But that the Commissioners of said county for the year 1854, were John H. Spring, John W. Wilson and James Brown.

By agreement of parties this petition was submitted to the Court without argument.

D. R. Hastings, for petitioners.

Sullivan C. Andrews, County Attorney, for respondents.

CUTTING, J.—It does not appear that the County Commissioners had any jurisdiction; there being no allegation in the petition presented to them, nor any thing appearing in their record, that shows the application to have been seasonably made; and nothing is to be inferred. *Writ granted.*

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

ELBRIDGE G. FULLER *versus* SETH LORING.

By the seizure of goods on execution the officer acquires only a special property in them. The general property remains in the debtor until the goods are sold.

If the officer wastes the goods seized, or misappropriates the money derived from the sale of them, or fails to return the execution, the debtor is thereby discharged.

A creditor holding a demand against a principal debtor and surety, may attach the property of either. He is not bound to resort to the debtor's property first, in order to collect the debt.

A. held a note against B. as principal and C. as surety, upon which he brought a suit, and recovered judgment against both. Upon the execution which issued on that judgment an officer, by the direction of A.'s attorney, seized and advertised for sale certain property of B. After such seizure and notice of sale, another officer in another county, by direction of A.'s attorney, seized and sold on the same execution certain property of the surety C. After this the said property of B. was sold as advertised. C. then brought his action of trespass against A., claiming that the seizure and advertisement of B.'s property, followed by its sale on the execution, protected his (C.'s) property from seizure and sale on the execution, B.'s property having been shown to be ample to satisfy the execution: — *Held*, that the property of C. was legally sold and that he could not maintain his action against A.

[But see *Springer* v. *Toothaker*, 43 Maine, 381.]

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

This was an action of trespass. The general issue was pleaded and joined.

It was proved, subject to all legal objections, that the defendant, on the thirtieth day of October, 1849, sued out a writ of attachment against one Charles Higgins and the plaintiff, upon a note of hand given by said Higgins as principal and the plaintiff as surety; the said Higgins residing at Lewiston, then in the county of Lincoln, and the plaintiff at Turner, in Oxford county.

The plaintiff, at the June term of the District Court, 1850, for Oxford county, recovered judgment in that suit for $80,62, debt, and $17,85 cost. The plaintiff's attorney caused a certain building or shop, situate at said Lewiston, to be attached on said writ, at 5 o'clock P. M., by one Benjamin Dunn, a deputy sheriff for said county of Lincoln. The plaintiff took

out execution on his judgment, and within thirty days from the rendition thereof, S. P. McKenney, his attorney, caused the said execution to be placed in the hands of Dunn, or showed it to him, with directions to seize and advertise the building; and told Dunn that he would return the execution in season to have it sold. Before the sale of said building, McKenney placed the said execution in the hands of Philo Clark, a deputy sheriff for the county of Oxford, with directions to seize and sell the property sued for in the plaintiff's writ; and the said Clark did thereupon, on the 15th day of July, 1850, seize said property, and afterwards sold the same, as appears by his return on the back of said execution; said execution having had no return by said Dunn on it at that time.

The execution was then replaced in the hands of said Dunn, who thereafter sold the building aforesaid, as appears by his return on said execution.

It was further proved, that the defendant's attorney, on the same 30th day of October, 1849, sued out a writ of attachment in defendant's favor, against said Charles Higgins, upon a note against Higgins alone, and caused the same building to be attached on said writ, upon the same day. The writ was entered at the next November Term of the W. D. Court for Oxford county, to which the same was returnable, and the action was continued from term to term until the November Term of said Court, 1850, when the plaintiff recovered judgment against Higgins for $31,20 debt, and $12,56 cost.

George A. Mitchell, for the plaintiff, testified, that he was present at the sale of the goods and chattels sued for in this writ. The sale was made by Philo Clark, and he, the witness, purchased the same; that there was at that time, and before, in the possession of the plaintiff Fuller, a lot of boards, bed posts, nails, glass, joist, and other property, of the value of about $200 there; and in a house near there, which Clark did not sell, a part of which, viz., some joist and bass-wood boards, were mentioned in the said Clark's notice or advertisement of the sale, of the value of $25; that at the time of

the sale the plaintiff told Clark he had better not sell; and that if they would sell the building attached at Lewiston, and it did not bring enough to pay the debt and cost, he would pay the balance.

Danville A. Ricker, for the plaintiff, testified, that in the fore part of July, 1850, he was at the store of one Blake, in Turner, and there heard a conversation between the defendant and Blake about this matter. Witness asked defendant if he had attached Fuller's lumber, and he said he had, or Clark had done it. Witness asked him why; and the defendant said he had a note against Higgins of Lewiston, and the plaintiff Fuller, was holden on it as surety. He thought the note was near $100, and he had a lien on a shop or building at Lewiston for it. Witness then asked defendant why he attached plaintiff's lumber if he had a lien on the shop at Lewiston. He then said he wanted his money, as he had worked hard for it; and he had another note against Higgins, but smaller than the other. He knew the shop at Lewiston, and had seen it, and thought the shop without any land worth $300. This conversation was before the sale of the lumber by Clark.

S. P. McKenney, called by defendant, said he was defendant's attorney in the two suits, and that he never had any instructions from the defendant as to attaching the property sued for in this action. On cross examination, he testified, that when defendant left the notes with him for collection, he simply told him to collect them; and that he took said execution, *Loring* v. *Higgins & al.*, and gave it to Mr. Dunn at Lewiston, and told him to advertise said building, and then took it to said Clark and told him to seize and sell the property which is sued for. I received the money on both executions for defendant and paid it over to him.

Philo Clark, for defendant, testified, that he received said execution, *Loring* v. *Higgins & al.*, from Mr. S. P. McKenney, who directed him to attach and sell the property sued for; that he supposed he did sell all the property he attached, but the advertisement produced, which was in his handwrit-

ing, mentioned some joist as attached, which he did not sell; witness thought he should not have advertised any joist if he had not attached them. Did not sell the clapboards attached because Mr. Ludden claimed them; he did not recollect as he had any direction to sell to any particular amount, or to a less amount than the sum due on the execution. He was not aware at the time that the plaintiff Fuller, had other attachable property, and he had no directions from the defendant to attach the property sued for.

The case was taken, by consent, from the jury, and the parties agreed that the Court, upon the whole case, or so much of the testimony and facts stated, as were legally admissible, (the Court being at liberty to draw such inferences from the testimony as a jury might,) may enter a nonsuit, or default, as the law in the case may require; and if plaintiff recovers, the defendant is to be heard in damages.

Seth May, for plaintiff.

The seizure and sale of personal property upon an execution, is a satisfaction of such execution from the time of the seizure. In the case of *Ladd* v. *Blunt*, 4 Mass. 402, C. J. PARSONS says:—"When goods, sufficient to satisfy the judgment, are seized on a *fieri facias*, the debtor is discharged, even if the sheriff waste the goods, or misapply the money accruing from the sale, or does not return his execution; for, by a lawful seizure, the debtor has lost his property in the goods;" *a fortiori*, then, a seizure, and a subsequent sale upon the execution, is a satisfaction. And there is much good sense in the rule; the debtor has parted with sufficient personal property to pay his debt; the officer is the agent of the creditor in collecting it; and if he fails to do his whole duty, the creditor has a full and adequate remedy on the sheriff's bond. By the proceedings in this case, by Dunn, the deputy, at Lewiston, the defendant's execution was satisfied and discharged, though no entry of satisfaction was made thereon. *Hammatt* v. *Wyman*, 9 Mass. 138.

In the case of *Chandler* v. *Furbush*, 8 Greenl. 408, the case of *Ladd* v. *Blunt* is affirmed; and WESTON, Judge, says:—

"In *Ladd* v. *Blunt*, PARSONS, C. J., distinguishes between a seizure of goods on execution and an extent upon land. By the former, the debtor is discharged, although the sheriff misapply or waste the goods, or does not return the execution." See *Hoyt* v. *Hudson*, 12 Johns. 208, where the same doctrine is laid down.

The building or shop which was seized and sold by Dunn, being personal property, according to the authorities cited, (and I find none to the contrary,) would, if sufficient, be a payment and satisfaction of the execution the defendant had against Higgins and the plaintiff. It would be so as it regards Higgins, the principal; and much more so against the plaintiff, who was a mere surety. The law delights in the protection of sureties, and often compels the holder of the debt to dispose of the debtor's property on which he may have a lien in such a way as to relieve the surety. In the case of *Furbush* v. *Willard*, 16 Pick. 42, where personal property and an equity of redemption, were attached, the officer was held to apply the personal property in such a way as to relieve a *bona fide* purchaser of the equity of redemption; and, for the same reasons, a surety should be protected. If the creditor take property from the principal debtor, as a pledge or security for the debt, he is bound to hold it for the benefit of the surety; and if he give it up without his consent, the surety is discharged to the amount given up. *Baker* v. *Briggs*, 8 Pick. 122. The same rule should apply to a lien created by attachment. It is true, the creditor may not be obliged to make an attachment, even at the request of the surety, without an offer of indemnity; but if he does make it he must hold on to it; neither is he obliged to take a pledge or security; but if he does he must hold on to it.

A surety, who pays the debt for his principal, is entitled to be put in the place of the creditor, and to all the means which the creditor possessed to enforce payment against the debtor. *Clason* v. *Morris*, 10 Johns. 524; *Norton* v. *Soule*, 2 Greenl. 341.

But it may be said, that the defendant in this suit caused

the shop or building attached in the suit against Higgins and this plaintiff, to be attached on the same day in another action against Higgins alone. If he did so, it was not until he had caused it to be attached in the suit against Higgins and the plaintiff. In this last case, the attachment was made, as appears by the officer's return, at 5 o'clock P. M. In the other suit it was made on the same day; but no hour is mentioned in the return. It might, therefore, have been made at the last hour of the day. In such case, it is settled by this Court, that the attachment, made at a particular hour specified in the return, takes precedence of the other. *Fairfield & al.* v. *Paine*, 23 Maine, 498.

We say, then, that the attachment of the building at Lewiston, its sale upon the execution, *Loring* v. *Higgins* and the plaintiff, by Dunn, under the direction of McKenney, the attorney of Loring, was a satisfaction of that execution; and all the acts done by Loring, or by direction of his attorney, in the county of Oxford, in regard to the seizure and sale of the property of the present plaintiff, were tortious and wrongful, and this action will lie to repair the injury which he has sustained. The law will not thus permit the rights of a surety to be trampled under foot.

The acts of the attorney in this case, are the acts of the principal himself. "*Qui facit per alium facit per se;*" and especially, when he receives the fruit of those acts.

Defendant told Danville A. Ricker, in July, 1850, that he had attached the plaintiff's lumber, or Clark had for him; and then went on to explain the reasons why, viz., he had worked hard, and had another note against Higgins alone. McKenney said he received the money of Clark for the property sold, and paid it to the defendant Loring; thus ratifying and adopting the acts of McKenney and Clark. He cannot, therefore, now skulk behind his attorney, and protect himself against the consequences of those acts which he has either caused to be done, or ratified after they were done.

If the cases before cited, be good law, it is not perceived how this action can fail to be maintained.

N. Clifford, for defendant.

1. A judgment creditor is not responsible for the irregular execution of his process, unless he commands or expressly ratifies the illegal acts of the officer. *West* v. *Shockeley*, 4 Har. 287.

2. It is competent for a judgment creditor or his attorney, where there are two or more judgment debtors, to collect the whole amount from one, or partly from one and partly from another, at his election. *Rogers* v. *Sumner*, 16 Pick. 387; *Parker* v. *Dennie*, 6 Pick. 227; *Harrington* v. *Ward*, 9 Mass. 251.

3. The irregularity, if any, in this case, was on the part of the officer, Dunn, and not on the part of Clark, who sold the property in dispute.

HOWARD, J. — The doctrine, that the property of the debtor in goods, is changed and lost by a mere seizure on execution, rests, mainly, upon incidental *dicta* of Judges, that may be gathered from books, and not upon settled opinions of courts, where the point has been directly raised and considered. And so are derived the notions that the property is altered from the owner, and given to the party at whose suit it was seized, and that the general property in goods, after seizure on execution, is in *abeyance*. Such *dicta* may be found in *Wilbraham* v. *Snow*, Lev. 282; *Clerk* v. *Withers*, 6 Mod. 293; 1 Salk. 323; 3 Salk. 159; *Ladd* v. *North*, 2 Mass. 517; *Ladd* v. *Blunt*, 4 Mass. 403; *Bailey* v. *French*, 2. Pick. 590.

The law is, manifestly, otherwise. For, by the seizure of goods on execution, the officer acquires a special property in them; but the general property remains in the debtor until they are sold. The seizure is but the inceptive step in the transmutation of the property, which may be abandoned by the officer, before a change is consummated. He may restore the goods to the debtor, or they may be taken from him by the latter, "or by act of God," or the public enemy; and in neither case, would the execution be satisfied, or the debt cancelled, or the debtor be discharged, though the goods were

of sufficient value to satisfy the judgment. But should the officer waste the goods, or misappropriate the money derived from their sale, or fail to return the execution, the debtor would be discharged. *Shelton's case,* Dyer, 676, note; *Thomson* v. *Clark,* Cro. Eliz. 504; *Payne* v. *Drewe,* 4 East, 522; *The King* v. *Allnutt,* 9 East, 282; *Blake* v. *Shaw,* 7 Mass. 506; *Ludden* v. *Leavitt,* 9 Mass. 105; *Rice* v. *Tower,* 1 Gray, 429; *Nichols* v. *Valentine,* 36 Maine, 322; *Churchill* v. *Warren,* 2 N. H., 298; *Folsom* v. *Chesley,* 2 N. H., 432; *Lewis* v. *Richardson,* 6 Rich. 382; *Nelson* v. *Rockwell,* 14 Ill. 375.

The execution was in force when the plaintiff's goods were seized and sold, and the sale was effective to pass the property to the purchaser. The plaintiff, though a surety upon the note, was a joint debtor in the judgment and execution, and was under the same obligation, as the principal, to pay the judgment creditor; and it was competent for the latter to cause the property of either to be taken to effect the payment of the debt. The mere seizure of the goods of the principal, as has been shown, did not discharge the debt, or release the debtors. By abandoning to the owner the property seized, wholly, or in part, the creditor, in the case under consideration, did no wrong to the principal; and there is no proof that it was detrimental to the surety, otherwise than would have been the fulfillment of his contract. The shop, first seized, was not wasted; but the creditor not choosing to risk his whole debt upon it, might well seek payment or satisfaction more readily from other property of either debtor. He was under no obligation to pursue the seizure of the principal's property, for the benefit of the surety, without request or indemnity, and upon his own hazard.

This is not of the class of cases where the creditor takes security from the principal which he is bound to appropriate in payment of the debt. Neither the attachment, nor the seizure of the property of the principal, constituted security in that sense. It was not given by the principal, or received as such by the creditor, but taken by the officer *per invitum.* It might be taken from him by legal process; the title might

be questionable, and it might not then appear to be sufficient on sale, to discharge the debt and costs. Compelling the creditor, therefore, to resort to the debtor's property first seized, in order to collect the debt, would impose an unreasonable restriction upon his rights, which might, in many cases, operate much to his inconvenience and detriment. He was not bound by his general duty to active diligence in collecting the debt, to collect it in a particular manner, or from a particular source. If the surety would compel the creditor to collect the debt of the principal, he should give suitable indemnity against the risk, delay, and expense that might be incurred. *Wright* v. *Simpson*, 6. Ves. 734; *Hayes* v. *Ward*, 4 Johns. Ch. 123; *Page* v. *Webster*, 15 Maine, 249, where it was held, (258,) that an indorser of a note is not discharged, by the holder's releasing property of the maker's attached on a writ, which was afterwards conveyed, when they became insolvent. *Warner* v. *Beardsley*, 8 Wend. 194; 1 Story's Eq. § 327.

Whether the seizure and sale of the plaintiff's goods, was such an abandonment of the prior seizure of the principal debtor's property, as to require a new seizure and proceedings for the sale of it, to satisfy the remainder due upon the execution, it is not necessary to decide. It is sufficient for the defence, that the plaintiff was not injured by the measure adopted by the defendant, in enforcing payment from his debtor, who chose to make no effort to save himself from the legitimate consequences resulting from his contract.

Plaintiff nonsuit.

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

RICE, J., did not sit.

TENNEY, J., non-concurred, and gave the following dissenting opinion: —

A building, which had been treated as personal property, was attached upon a writ, (made to recover payment of a note, given by one Higgins, as principal, and the plaintiff, as his surety,) on Oct. 30, 1849, at 5 o'clock P. M., as the pro-

perty of Higgins. Judgment was recovered against both defendants at the June term, 1850, of the late District Court, in the county of Oxford, and within thirty days thereafter, being July 10, 1850, the building was seized by an officer upon the execution, issued on that judgment, and subsequently sold. Another attachment of the building was made upon a writ in favor of the defendant, on a claim against Higgins alone, on the same day; judgment was rendered in this last suit at the November term, 1850, of the same Court, in the county of Oxford.

By the return of the officer, the attachment against Higgins and the plaintiff was prior to the other. The date of the attachment on the former, is of a particular hour of the day; and the other is on the same day, without any thing to indicate the time of the day. And the attachment on a writ, when the hour on which it was made is stated, will take precedence of another made on the same day, without the statement of the hour. *Fairfield & al.* v. *Paine,* 23 Maine, 498. The attachment on the writ against Higgins and the plaintiff, was treated as being prior to the other, by the seizure of the property attached belonging to Higgins, on the execution obtained in that action, while the other was pending in Court.

After the building was seized on execution and advertised for sale, without any abandonment of the claim created by the attachment and seizure, the property now in dispute was seized and sold on the same execution, by another officer, and in another county. And the question now presented is, whether the seizure of the building as the property of the principal debtor in the execution, and the notice given of the sale of the same, followed by the sale as advertised, without any new seizure, was not a protection of the plaintiff's property in controversy, so far as the latter was sold to satisfy that part of the execution, which would have been satisfied from the avails of the sale of the building.

In *Ladd* v. *Blunt,* 4 Mass. 402, Chief Justice PARSONS says, in delivering the opinion of the Court, "where goods, sufficient to satisfy the judgment, are seized on *fieri facias,* the

debtor is discharged, even if the sheriff waste the goods, or misapply the money arising from the sale, or does not return the execution; for, by a lawful seizure, the debtor has lost his property in the goods."

It is said, by PARKER, Chief Justice, in *Bailey* v. *French*, 2 Pick. 586, "it is true, where goods of a debtor are seized in execution, it is payment *pro tanto* to the value of the goods, whether the officer lawfully dispose of them or not." In *Chandler* v. *Furbish*, 8 Greenl. 408, the Court treat the doctrine referred to in *Ladd* v. *Blunt* as sound, and regard the seizure of personal property upon an execution as a discharge of the execution, so far as it is sufficient. The cases where this principle has been so emphatically expressed, were not those in which the controversy had reference to personal property, and consequently are not the opinions of the Court upon points actually presented. But they are views of highly distinguished Judges, given, not by way of illustration, but as the settled doctrines of the law; and such they are regarded. This appears from the remarks of SHEPLEY, J., in delivering the opinion of the Court in *Tuttle* v. *Gates*, 24 Maine, 395, where he says, "The judgment against the debtor is considered as satisfied, after the sheriff has taken sufficient personal property of the debtor to pay it," and cites *Mounterey* v. *Andrews*, Cro. Eliz. 237; and proceeds, "The sheriff may sell the property after the decease of the debtor. *Clerk* v. *Withers*, 2 L'd Raymond, 1072." This doctrine is also stated by PARSONS, C. J., in the case of *Ladd* v. *Blunt*, 4 Mass. 403, who observes, "Where goods sufficient to satisfy the judgment are seized on a *fieri facias*, the debtor is discharged, even if the sheriff waste the goods, or misapply the money arising from the sale, or does not return the execution. For, by a lawful seizure, the debtor has lost his property in the goods." The opinion in *Tuttle* v. *Gates*, after quoting as above, goes on, "the last remark, that the debtor has lost his property in the goods, by such a seizure of them, may be considered to be incorrect, according to the case of *Giles* v. *Grover*, 6 Bligh, 279, but it will still remain the unimpeached doctrine of the

law, that if the goods are wasted, the debtor will be discharged."

It is a principle of equity, that when a creditor takes property as security from the principal debtor, who has a surety, that he is bound to hold the property, fairly and impartially, for the benefit of the surety, as well as himself; and if he parts with it, without the knowledge of the surety, he shall lose his claim against the surety to the amount of the property given up. *Baker* v. *Briggs*, 8 Pick. 122.

The Master of the Rolls, in *Law* v. *East India Co.*, 4 Vesey, 829, uses this language: "It cannot be contended, on any principle that prevails with regard to principal and surety, that where the principal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can ever be called upon."

In *Cragthorne* v. *Swinborne*, 14 Vesey, 162, Sir SAMUEL ROMILLY said in argument, "a surety will be entitled to every remedy, which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of the contract, but even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there was not any stipulation for that, and to avail himself of all those securities against the debtor." In a note to this case, it is said: "The doctrine of the Court, as to the right of substitution, is said by Lord BROUGHAM to have been luminously expounded in the argument of Sir SAMUEL ROMILLY, in *Cragthorne* v. *Swinborne;* and Lord ELDEN, in giving judgment in that case, sanctioned the exposition by his full approval." *Rushforth, ex parte*, 10 Vesey, 412; *Wright* v. *Morley*, 11 Vesey, 22.

In *Hayes* v. *Ward*, 4 Johns. Ch. 130, it is said by the Chancellor, "It is equally a settled principle in English chancery, that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every se-

curity, and to stand in the place of the creditor, and to have his securities transferred to him, and to avail himself of those securities against the debtor. This right of the surety stands, not upon contract, but upon the same principle of natural justice, upon which a surety is entitled to contribution from another."

Courts of law have held, that whatever would discharge a surety in equity, would be a good defence at law. *Rees* v. *Berrington*, 2 Vesey, jr. 542.

In *People* v. *Jansen*, 7 Johns. 337, it is said by the Court, "that the ancestor of the defendant was a surety only, appears upon the face of the bond, and whatever would exonerate the surety in one court ought also in the other. I am unable to discover any good reason for sending the defendant into a court of chancery." *Boston Hat Man. Co.* v. *Messinger*, 2 Pick. 223.

The Court say, in *Commonwealth* v. *Vanderlin*, 8 Serg. & Rawle, 457, "there is no clearer rule in equity, than that when the creditor has the means of satisfaction in his own hands, but chooses not to retain it, but suffers it to pass into the hands of the principal, the surety can never be called upon." And this doctrine was applied in a suit at law. In *Letchtinthaler* v. *Thompson*, 13 Serg. & Rawle, 157, it is said by the Court, "when the creditor has the means of satisfaction in his own hands, actually or potentially, and does not choose to retain it, the surety is discharged."

It is not claimed that these principles are of such universal application, that when an attachment of property, supposed to be that of the principal, has been made on mesne process against him and his surety, or seized on execution, that the rights of the latter are abridged by an omission to sell the property, and apply the avails in satisfaction of the execution. It may be real estate, and the creditor is not bound, even after the appraisal and the return of the officer, to accept it in satisfaction. *Ladd* v. *Blunt*, 4 Mass. 402. If it be personal property, the creditor is not required to incur the risk of adverse claims and vexatious, and perhaps expensive liti-

gation. *Page* v. *Webster*, 15 Maine, 249; *Bellows* v. *Lovell*, 4 Pick. 153. In these there is no lien by an agreement between the creditor and the principal debtor, but the right of the former is by a claim, to which the latter's consent was not necessary to give it effect, and which he could not have resisted.

The question here, is not, whether the creditor may not *abandon* the property attached on a certain writ or seized on a certain execution, so that it may go back into the hands of the owner, or be holden by an attachment, which was subsequent to that of the one who abandons. But it is, where the property was not abandoned by the first attaching creditor, but was actually sold by virtue of the execution on which it was seized, and while the attachment on mesne process was in force, and on no other, whether measures can be taken by this creditor to withdraw the avails of any part thereof, so that it shall not be applied to the execution by virtue of which the sale was made, and supply the deficiency from property of the surety.

If the building had been sold on the defendant's execution against the plaintiff and Higgins, before the sale of property of the plaintiff, the latter would be invalid, because the execution was actually satisfied, so far as the property would extend in discharging the execution, though not indorsed thereon. It is believed that this case is not essentially different from the one supposed. The building was not restored to the owner after its seizure; it was not abandoned by the creditor; it was not in the power of the principal debtor to reclaim it; nor could it be taken on an execution in a suit, where there had been a subsequent attachment in another suit, so long as it was held by the execution on which it was seized; it was in the custody of the law, under the first attachment and the seizure on execution in the same suit, and so continued till it was sold; it is obvious, that it was intended to be sold on that execution; that intention was carried into full effect, and the property passed into the hands of the purchaser. If there can be any application of the

doctrine, fully recognized by this Court, that the judgment against the debtor is considered as satisfied after the sheriff has taken sufficient personal property to pay it, the present is a case to demand it. The defence is not put upon the ground, that the building was not sold under the seizure upon the execution in the hands of the officer, or that the purchaser did not acquire a property by the purchase. And if the seizure and sale was a satisfaction of the execution on which it was seized and sold, as it regards the owner of the property and the principal debtor, on every principle of justice, the surety should stand in no worse condition.

The final sale of the building related back to the seizure on execution; no seizure was made after that of July 10. It was sold under the notice first given. All the steps taken, from the time of the seizure to the divesting of the property from the owner, were parts of the sale. While the officer was pursuing the course pointed out by the statute, it is not perceived by what authority another officer in another county could seize and sell other property, belonging to the plaintiff, upon the same execution, when it could not be known till the sale of the building, that it would be needed upon the execution in satisfaction thereof.

The proceeds of the sale of the building were to be considered as money received in payment of the execution, and the expenses attending the seizure and sale; it could be applied to no other till the first was satisfied. Before such satisfaction, it could not be retained legally, to be applied afterwards to a judgment not thus recovered.

The plaintiff's property was sold, and appropriated to the execution, when the process of selling the building was going on by authority of the same execution; and the money raised from the building upon that sale, was not appropriated as the law required.

So far as the plaintiff's property was taken, which would have been unnecessary, by the application of the avails of the sale of the building, to the payment of the execution

against him, he has been injured, and is entitled to his remedy in this form of action.

It is however insisted, that the defendant is not responsible, the unlawful sale of the plaintiff's property being the acts of the attorney, without the special direction of the defendant. It was the duty of the attorney, under the general authority of his principal, to take measures to obtain the money upon the debt; and his duty did not terminate with the recovery of the judgment. The directions given by the attorney to the officers, in their attempts to collect the debt, were those which were entrusted by the creditor to him; and they were the directions of the former, for which he is liable. But evidence reported in the case, shows that the creditor was actually conusant of the proceedings, touching the attachment, the seizure and sale of the property; and that these proceedings were approved by him; and also that he received the avails of the sale, in part at least upon his execution against Higgins alone; and the money received upon the execution against the plaintiff was the proceeds of his goods, for taking which this suit was instituted.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1856.

COUNTY OF PENOBSCOT.

SAMUEL LORD *& al. versus* ENOS WOODWARD.

The provision of the R. S. of 1841, c. 67, § 9, that "any person whose timber shall be so intermingled with the logs, &c., of another, that the same cannot conveniently be separated," may drive the whole to the market or place of manufacture, and have a lien upon the logs, &c , of the other owner, for reasonable compensation, is in derogation of the common law, and must be strictly construed.

In order to recover such "reasonable compensation," under the statute, the *entire service* of driving the logs must be performed by the plaintiff, without any assistance from the other owner.

This statute is not applicable to the case of a party who *aids* in driving the common property. It gives no lien for such service.

The exclusive possession of the logs must also continue in the one entitled to the lien in order to effectually secure the object of it.

When the driving is the joint work of two or more owners, each may recover of the other compensation for any excess of service rendered by him beyond his equitable share; but neither has a lien upon the property of the other for such excess.

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

This was an action founded on § 9 of c. 67, of R. S. of 1841. Plea, general issue.

In the spring of 1855, the plaintiffs and defendant were severally engaged in driving logs on the west branch of Union river, each party having a large force of men under them, so employed. Their two drives came together at the mouth of Oxhead stream; and the logs in them became so intermixed that they could not be conveniently separated. From that point the parties drove together, without any contract, the men in the employ of each driving indiscriminately the logs of both parties.

The plaintiffs contended that they had a larger force engaged at work, in proportion to the number of their logs, than the defendant had, and that they had rendered more service in driving defendant's logs than defendant had in driving plaintiffs' logs. The demand was duly proved. The presiding Justice, among other things, instructed the jury, that if they were satisfied that the plaintiffs rendered more service to the defendant, in driving his logs, than the defendant did, in driving theirs, they would find a verdict for the plaintiffs for the value of such excess of work.

The jury returned a verdict for the plaintiffs.

To all which rulings and instructions the defendant excepted.

J. A. Peters, for plaintiffs, contended that the claim was valid by force of the Revised Statutes, c. 67, § 9, and that the statute should be liberally construed. *Winslow* v. *Kimball,* 25 Maine, 493.

Rowe & Bartlett, for defendant.

The facts proved do not make a case within the statute.

The services contemplated by § 7 of the Act of 1831, c. 521, of which § 9 of c. 67, R. S., is a reënactment, are such as give the persons driving actual or constructive possession of the logs; the lien given by those sections is founded on possession.

The provision relied on is in derogation of common law rights; it authorizes one man to take the possession and con-

trol of another's property, and to remove it to a distant place for his own convenience, without the request, and, perhaps, in opposition to the wishes and interest of the owner, and then compels the owner to pay for such removal. It must be construed strictly.

The case is not within the spirit or meaning of the statute. Had it been within the intention of the Legislature, it would have been specially provided for.

"Further, as a rule of exposition, statutes are to be construed in reference to the principles of common law. For it is not to be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the Act did not intend to make any alteration other than what is specified and besides what has been plainly pronounced; for if the parliament had had that design, it is naturally said they would have expressed it." Dwarris on Stats. *695, Law Lib. vol. 9. "So when a statute commences with a particular enumeration, no other thing shall be taken by equity." Ib. *731. It is not within the mischief provided against. If within the mischief, not being embraced within the language of the statute, the rules of construction do not extend the remedy to the case.

In *Brandling* v. *Barrington*, 6 B. & C. 475, (not re-published in full in the American common law,) Lord TENTERDEN said, "But it is said it was within the equity; speaking for myself alone, I cannot forbear observing, that I think there is always danger in giving effect to what is called the equity of a statute; and it is much safer and better to rely on and abide by the plain words; although the Legislature might possibly have provided for other cases, had their attention been directed to them." BAILEY, J., said, "I certainly think, that the present case comes within the mischief intended to be remedied, and I should have been better satisfied if it could have been brought within the fair construction of the words of the enactment. But I think we should be attributing too comprehensive a meaning to the words of the statute." HOLROYD, J., said, "This case does not appear to have been

contemplated by the Legislature, although it may perhaps be within the mischief which they intended to remedy." DWARRIS, J., after citing the above remarks, *711, says, "The result is, that to bring a case within the statute, it should be, not only within the mischief contemplated by the Legislature, but also within the plain intelligible import of the words of the Act of Parliament. A *casus omissus* can in no case be supplied by a court of law; for that would be to make laws. Judges are bound to take the act of Parliament as the Legislature have made it." And, on *721, "The Legislature, as was once well observed by Mr. Justice HEATH, 'is always at hand' to supply deficiencies or correct mistakes."

"Where the language of the Act is not clear, and is of doubtful construction, the Court may well look at every part of the statute; at its title, and the mischief intended to be remedied in carrying it into effect. But it is not for the Court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases not described, because no good reason can be assigned why they were excluded from its provisions." *Dean* v. *Reid*, 10 Peters, 524; 2 Curtis, 231.

TENNEY, C. J.—This action is sought to be maintained under the provision in R. S., c. 67, § 9, that "any person, whose timber shall be so intermingled with the logs, &c., of another, that the same cannot be conveniently separated for the purpose of being floated to the market or place of manufacture, may drive all the logs, &c., with which his own are so intermingled, toward such market or place, &c., and shall be entitled to a reasonable compensation from the owner, to be recovered after demand therefor, &c., in an action of the case; and he shall have a prior lien on the same, until thirty days after the timber shall have arrived at its place of destination, in order to enable him to attach the logs, &c., in such action."

This statute gives to a party a right to enforce a claim for services, supposed to be rendered for the benefit of another, but without his request, and sometimes without his knowledge,

and possibly against his wishes. Such a statute is in derogation of the common law, and must have a strict construction.

To entitle a person to recover under this provision, it contemplates that he shall render the entire service of driving his own logs, and those of another intermingled therewith, without any assistance from the latter. Such is the literal meaning of the language employed. The person in whose favor the statute was made, "may drive all logs, masts and spars, with which his own are so intermingled." The provision is not made applicable to a case where the party owning logs intermingled with those in which he has no interest, *aids* the owner of the latter in a joint operation of driving the whole; and the Legislature do not seem to have had any such common labor in view; or to have provided a mode of compensation for the excess of the labor of one, over that of another, according to the amount of timber driven.

The lien given to the party, who shall drive all the logs so intermingled, is declared to be, that he may attach the same, for the recovery of compensation for his services. Possession of the timber must continue in the one entitled to the lien, to effectually secure the object of it; and must, from its nature, exclude the possession of the owner. When the driving is the joint work of two or more owners, each may claim compensation of the other for an excess of service, beyond his equitable share. The logs in such a case, are supposed to be in the possession of all the owners, who aided in driving them; and it is difficult to see in what manner a lien in favor of each one against the other, or others, can exist, and be made effectual. The lien extends to all logs driven under this provision. And it does not appear to have been intended, that compensation could be enforced thereunder, for services rendered in such a manner, that a lien upon the timber does not attach.

The claim is for services rendered in *aiding* the defendant in driving his logs. From the case, it appears, that no entire portion of the timber belonging to him was driven by the

plaintiffs, and the statute invoked for the recovery of the compensation demanded is inapplicable.

Exceptions sustained; new trial granted.

HATHAWAY, APPLETON, MAY and GOODENOW, J. J., concurred.

ISAAC M. BRAGG, *in Equity, versus* EPHRAIM PAULK *& als.*

A bond for the payment of money, conditioned to be void on the conveyance of land, is treated in equity as an agreement to convey, and will be specifically enforced against the obligor.

When the grantee of such obligor takes a conveyance of the land thus agreed to be conveyed, with notice, he will be regarded as holding the same in trust for such obligee.

It seems that the assignees of an insolvent debtor, receiving a conveyance of his "right, title and interest" in land, of which he had previously given a bond to convey upon the performance of certain conditions therein expressed, will hold the estate conveyed, subject to the prior equities of the obligee in such bond.

The declaration of a trust may be contained in an indenture between parties, in the recitals of a deed, the conditions of a bond or other instrument under seal.

A declaration, in writing, under seal, that A. has purchased a tract of land, subject to mortgage for the joint and equal benefit of himself and B.; that he has advanced the purchase money for and taken a conveyance to himself of the same as security for his advances and interest therein; that he will apply all the profits of the same to the payment of his advances and of the mortgage on the land; and that upon payment of the same he will convey to B. half of the land thus purchased, and equally divide the profits, if any, with him, is a declaration of trust.

These facts appearing in the conditions of a bond between the parties, constitute a declaration of trust, in which the obligor is *trustee* and the obligee the *cestui que trust.*

Such bond is a declaration of trust within the provisions of the R. S. of Maine, c. 91, § 11.

By R. S., c. 91, § 33, it is to be recorded in the registry of deeds of the district where the land is; and the recording of it is made "equal to actual notice thereof to all persons claiming under a conveyance, attachment or execution, made or levied after such recording."

BILL IN EQUITY.

The plaintiff alleged in his bill, that he made a bargain

with one Asa W. Babcock for the purchase of a certain proportion of a valuable township of land; that being unable to make the cash payment required, he applied to the defendant Paulk, and agreed with him to make the payment and take the conveyance in his own name, for the mutual and equal benefit of both, the said defendant giving the plaintiff a bond*

* The bond referred to was as follows: —

"*Know all men by these presents*, That I, Ephraim Paulk of Bangor, am holden and stand firmly bound and obliged unto Isaac M. Bragg of said Bangor, in the full and just sum of five thousand dollars, to be paid unto the said Bragg, his executors, administrators, or assigns: to the which payment, well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents. Sealed with my seal. Dated the eighteenth day of August, in the year of our Lord one thousand eight hundred and fifty-two.

"The condition of this obligation is such, that whereas, I have this day received from A. W. Babcock, a deed of one-fourth part of seven undivided eighth parts of township number one, in the third range, west from the east line of the State, in the county of Aroostook; said seven-eighths being subject to a mortgage from said Babcock, this day given to John Huckins; and I have paid to said Babcock for such conveyance, the sum of eleven hundred and seventy-three dollars; all which has been done by me for the equal benefit of myself and said Bragg. Now if said Bragg shall repay to me one half of said sum so paid by me, with interest from this time, then I am to convey to him one-half part of said undivided fourth of said seven-eighths of said township, subject to the said mortgage, by good quitclaim deed, free from incumbrances under me, to convey as good a title as I have received.

"All the stumpage received on said seven-eighth parts of said township, is to be appropriated to the payment of said mortgage; and after that is paid, to the payment of the money advanced by me as aforesaid, and interest so far as one-quarter part thereof is concerned, and necessary expenses to be paid by me, and the remainder received for such fourth part, to be equally divided between said Bragg or assigns and myself. As soon as I shall, from stumpage or otherwise, receive as aforesaid the sum due to me from said Bragg, for his one-half of said fourth part, then I am to make a conveyance thereof as aforesaid to him or assigns.

"Now if I shall well and truly perform my part of the foregoing agreement, according to its true intent and meaning, upon the previous performance on the part of said Bragg and assigns, of his part thereof, as therein expressed, then this obligation to be null and void, otherwise to remain in full force and virtue. "E. Paulk. [L. s.]

"Signed, sealed, and delivered in presence of Albert W. Paine."

"Penobscot, ss. — September, 1852. — Personally appeared Ephraim Paulk, and acknowledged the foregoing instrument by him signed to be his free act and deed. Before me, "Albert W. Paine, Justice of the Peace."

conditioned to convey one-half the said interest to him, upon the payment of one-half of the money which the defendant had advanced therefor. The plaintiff also alleged that he had performed all that was agreed to be done and performed by him, and therefore prayed for a decree of the Court that his share of the premises be conveyed to him. Several parties, beside Paulk, were made defendants in the bill, in consequence of conveyances, &c., subsequently made by him to those parties, but it is not necessary to the understanding of the case to give a history of those transactions. The material facts are quite fully stated in the opinion of the Court.

The defendant filed a general demurrer to the bill, and, upon the issues thus raised, the cause was heard.

A. W. Paine, for plaintiff.

I. That plaintiff is entitled to a decree in his favor, as against Paulk, the principal defendant, will not be questioned. A perfectly clear case is made out against him. But as he does not hold the title, it becomes a question of first importance whether or not the holders of the title are not equally obliged to grant the relief prayed for.

The case is one not only "of specific performance," but also of "trust." The whole proceedings, as well as the language of the bond "A," very clearly shows this. He acknowledges by his contract that "all has been done for the equal benefit of said Bragg and myself."

The title, then, of the whole estate, is to be regarded as the equal property of the two; Paulk holding the legal title of Bragg's half in trust, to be conveyed to him upon the payment of one-half of the comparatively small sum of $1173.

The tender of that sum, as alleged, perfects his claim under both clauses.

II. Are, or not, Winn and Boynton and Bradley, the other defendants, equally holden to make the conveyance as prayed for?

The facts presented, as bearing upon them, are simply, that after the bond "A" was given, Bragg immediately took charge of the whole property thus owned in common by himself and

Paulk; took the general oversight of it; permitted teams and collected stumpages, and from the avails paid off the incumbrances which they had assumed. He was, therefore, as far as the nature of the estate would admit, in possession of the premises.

He had also caused his bond to be recorded in the proper registry of deeds.

And had also paid out of his own funds his proportion of the necessary funds to meet a payment falling due for the land.

While matters are thus, Paulk fails; and to secure Winn, one of his creditors, he conveys to him, by absolute deed, all his interest in real estate, and, by mortgage, all his personal estate, the deeds being all made for the collateral purpose of securing his said indebtedness. The deeds embraced Bragg's portion of the land in question. Winn then fails.

Boynton & Co., the common creditors of both Winn and Paulk, then take a deed of all the same property to secure them, and give back to Paulk a bond conditioned for re-conveyance of the property to him when all Paulk's indebtedness to them both is paid.

The amount of property thus held by these two creditors, exceeds the indebtedness of Paulk to them, besides the portion claimed by Bragg.

1. By the terms of the bond, Paulk was the trustee of Bragg, holding his half of the premises for him. And in such case, the latter is regarded in equity as the owner, Paulk being merely the mortgagee, holding the land as security for the amount due him. 2 Story's Eq. § 790; *Van Wych* v. *Allyn*, 6 Barb. 507; *Borne* v. *Childs*, 10 Pet. 180.

Our own Court has also recognized this principle, regarding the bond for conveyance, not merely as an executory, but in equity as an executed instrument, and the obligee as the true owner. *Linscott* v. *Buck*, 33 Maine, 530.

Bragg, then, is to be regarded here as the real owner of the land in controversy, holding under a title prior, and con-

sequently superior to that of either of the defendants besides Paulk. *Malin* v. *Malin*, 1 Wend. 625.

The deeds from Paulk to Winn, and from Winn to Boynton & Co., are both of "his right, title and interest, alone." It could have no other effect than to convey that interest, though the legal title in form might pass. 6 Barb. 481.

But a deed of all one's "right, title and interest," does not bar one who has title to any portion of the land previously acquired, from asserting his claim as superior to the claim under such deed. *Adams* v. *Cuddy*, 13 Pick. 460; *Oliver* v. *Platt*, 3 How. 333, 410.

Without proceeding further, the view now taken, and the authorities cited, would entitle the plaintiff to the remedy which he seeks.

In *Oliver* v. *Platt*, 3 How. 333 or 410, the S. C. of U. S. went so far as to decide that "a purchaser by quitclaim, without any covenant of warranty, is not entitled to protection, as a purchaser for valuable consideration, without notice, and he takes only what the vendor could lawfully convey."

2. The conveyance to Winn, and from Winn to Boynton & Co., were both for collateral purposes, to secure them for Paulk's indebtedness. This collateral holding was evidenced by writing, and thus free from any objection on the score of the statute of frauds.

The deeds, then, are both to be regarded in equity as mortgages. Such is the express decision of this Court. *Howe* v. *Russell*, 36 Maine, 115.

And the Court will, in such case, compel both the mortgager and the mortgagee to unite in conveying the title to one who has an interest subordinate only to this title. *Howe* v. *Russell*, 36 Maine, 115.

And in all such cases, if the trustee convey the land to another, who does not pay an adequate consideration therefor, he has no pretension to retain more than is necessary for his own indemnity. *Hanly* v. *Sprague*, 20 Maine, 431.

Here the fact is found, that no part of the premises here claimed by plaintiff, is necessary for defendants' indemnity,

inasmuch as they have a superabundance of property in their hands to satisfy all their claims against Paulk.

The defendants Winn and Boynton & Co., then, are here held to make the conveyance as prayed for.

3. Where a specific performance of a contract respecting land will be decreed between the parties to it, it will also be decreed between all persons claiming under them, unless other controlling equities are interposed. 2 Story's Eq. Jur. § 788.

Regarding, too, the plaintiff as the real owner of the property held in trust by Paulk for him, as the authorities all do regard him, what claim have Winn and Boynton & Co. to hold the estate against plaintiff's claim. This they cannot do, except by reason of a superior equity, arising from the conveyance of Paulk to Winn, and Winn to Boynton & Co.

But in order that a purchaser may hold an estate against the equitable claim of another, it is requisite that he should purchase for a valuable consideration, and without notice of such equity.

This rule is so well illustrated, and the principle so plainly expounded, in the case of *Bassett* v. *Norworthy*, in White and Tudor's Leading Cases in Equity, vol. 2, part 1, page 65, that reference is here made to that case for a full exposition of the subject and collation of the authorities.

As to notice, actual notice is not necessary to be proved, but the purchaser is held to make all reasonable inquiries and searches for the true state of the title; and he is bound by a knowledge of all the facts which such an investigation would necessarily bring to his knowledge. He must believe the title good, and this belief must rest on such facts as a reasonable inquiry into the title would have disclosed. Ibid, p. 96; 7 Pet. 252, 271; *Chapin* v. *Brown*, 6 Johns. Ch. 398, 402–3; 17 Ves. 483, and cases cited.

Here such an examination into the title in the only proper place, the public registry, could have brought to his notice the recorded bond under which plaintiff claims, the same having been recorded on the 11th September, 1852.

Such reasonable inquiry would also have disclosed the fact,

that Bragg was in actual possession of the land, cutting the timber, and exercising all the usual acts of owership over it.

These both would have been such notice to him as would take away all claim to any equity to be acquired from Paulk's deed. *Le Neve* v. *Le Neve*, 2 White and Tudor's Leading Cases, 122.

But not only must the party claiming show himself as having had no notice of plaintiff's equity, but he must also be a purchaser for a valuable consideration.

What is such valuable consideration, and who such purchaser? The case of *Bassett* v. *Norworthy*, already cited, is full of authority.

A purchaser for the consideration of a prior indebtedness is not to be regarded as one who can claim such exemption. Page 107 of that case, and page 104, *Coddington* v. *Bay*, 20 Johns. 637.

Much less is a mortgagee to be regarded as such a purchaser, who has taken a mortgage to secure such prior indebtedness. *Dickerson* v. *Tillinghast*, 4 Paige, 215; *Vattice* v. *Hinde*, 7 Pet. 252.

And the consideration must be actually paid, not merely secured. *Bassett* v. *Norworthy*, pp. 113, 93; *Jackson* v. *Cadwell*, 1 Cow. 622.

And ignorance of the plaintiff's equity must exist, not only at the time of the purchase, but also at the time of payment. If, in the *interim* between the purchase and the payment, such notice comes to him, he is bound by it, and cannot claim protection. *Bassett* v. *Norworthy*, p. 114; *Wormly* v. *Wormly*, 8 Wheat. 421; *Christie* v. *Bishop*, 1 Bar. Ch. 105.

Though such purchaser will be protected for any improvements and payments made in the meantime, before notice is received. *Bassett* v. *Norworthy*, p. 103.

But so far as the contract or conveyance is not executed, the vendee will hold his rights unaffected by any such intermediate conveyance. *Bassett* v. *Norworthy*, 114.

In the case at bar, the sole consideration was the prior indebtedness of Paulk to Winn and Boynton & Co.; and the conveyance was, at most, only a mortgage to secure a debt

for the security of which, the party had other and abundant security.

No act had been done, no money advanced, improvements made, or other change in their condition taken place in reliance upon this security.

Under these circumstances, they have no claim to resist the plain equity which plaintiff has for relief as prayed for. The case of *Buck* v. *Pike*, 2 Far. 1, is much less strong.

III. The claim of the assignees of Paulk, under the general assignment made by him for the benefit of creditors, cannot impose any objection to the allowance of plaintiff's equity here.

The argument and authorities adduced apply with still greater force to them than to the other defendants.

The assignment is of all his, Paulk's, estate, including his interest only, of course, in the real estate in question.

The assignees then took nothing by the deed in the estate in question. A principle directly settled in *McIon* v. *Kyn*, 3 Wheat. 53; *Baker* v. *Vining*, 30 Maine, 121.

J. A. Peters, for defendants.

Complainant does not allege fraud, nor will he urge any, unless it may be against Paulk alone. The land was first conveyed to Winn and by Winn to Boynton and Bradley. It is not alleged, that Winn had any knowledge of the relations of Paulk and Bragg, or that Boynton and Bradley had; Winn and Boynton and Bradley therefore, were strangers to the trust; and if they are not in equity bound, the assignees cannot be bound, I mean the other parties defendant.

These parties, therefore, being strangers to the trust, are not answerable to this bill. They have been guilty of no fraud, and holding the conveyance without notice of the trust, cannot be disturbed. I can find no authority to determine that it makes any difference whether the conveyance was to secure an old debt or a new one. The language of the books is, that a grantee is only bound to convey when at the time of the transfer he had a knowledge of the trust. The kind of transfer does not seem to enter into the considera-

tion at all. *Foss* v. *Haynes,* 31 Maine, 81; 2 Story's Eq. 784; Adams' Equity, 81. In the last named authority the phrase "conveyed" is used. In all cases where a trustee conveys to a person without prior notice the conveyance stands; no qualification is used whether it is a conveyance in mortgage upon condition or absolute.

I take it, that in any case, a person may look only to the record, and if he has no other knowledge, and if the conveyance would have been good upon the records, the conveyance will stand. In this case there was no fraud and no notice. The record shows us rightfully in title. The plaintiff alleges, that Boynton and Bradley and Winn have other security enough. An answer to that is, let him tender us a clearance from all our liability and for him to take all the property. And again, who can tell how many claims may arise similar to this of Mr. Bragg.

Complainant places force upon the fact, that Paulk only conveyed his right, title and interest; his legal right and interest was the whole land. His title certainly was. There is no pretence that Bragg owned any part of the title. That is just what he is now seeking to obtain. If Paulk, by conveying in the mode he did, did not transfer what he held in trust, why this complaint in equity? If it did not pass, we have not got it.

Where a person relies on a bond, he relies on a merely personal obligation, and if in the course of ordinary business Mr. Bragg has only Paulk's obligation, he has as much as he ever had and just what he started with and was willing to rely on.

APPLETON, J.—It is well settled that this Court has power to decree the specific performance of a bond with a penalty. "Agreement to convey land may be enforced in chancery," remarks PARKER, J., in *Newton* v. *Swazey,* 8 N. H., 12, "although it be secured by a penalty, and be contained in the condition of a bond." The same doctrine has been fully affirmed in *Ensign* v. *Kellogg,* 4 Pick. 1. In *Dooley* v. *Wat-*

son, 1 Gray, 414, SHAW, C. J., in delivering the opinion of the Court, says, "courts of equity have long since overruled the doctrine, that a bond for the payment of money, conditioned to be void on the conveyance of land, is to be treated as a mere agreement to pay money; when the penalty appears to be intended merely as security for the performance of the agreement, the principal object of the parties will be carried out." "In applications for the specific performance of agreements," says CATON, J., in *Broadwell* v. *Broadwell*, 1 Gilman, 599, "it is immaterial what the form of the instrument is, whether it be a covenant in a penal bond with a condition to do the thing. The great and leading inquiry is, what did the parties expect would be done? what was the moving motive of the transaction? what is the real substance of the agreement and primary object of the parties? When that is ascertained, the Court will enforce its execution." The form of the instrument by which the agreement of the parties is evidenced is wholly immaterial. "Thus, if a contract only appears in the condition of a bond, secured by a penalty, the Court will act upon it as an agreement, and will not suffer the party to escape from a specific performance by offering to pay the penalty." 2 Story's Eq. § § 715, 750.

In contracts of this description, a trust is held to attach to the land, and to bind every subsequent vendee purchasing with notice of its existence. *Linscott* v. *Buck*, 33 Maine, 530.

When a trust is in writing, the law requires no particular form of words by which it is to be proved. The letters, notes, and memoranda, in writing, of the party to be charged, and his answers to a bill in equity, have been regarded as affording sufficient foundation for the action of the Court. *Buck* v. *Swazey*, 35 Maine, 41; *Pratt* v. *Thornton*, 28 Maine, 360.

The original purchase was made by the plaintiff and Paulk, on joint account, the first payment having been advanced by the latter. But "if a joint purchase is made in the name of one of the purchasers, and the other pays or secures his share of the purchase money, he will be entitled to his share as a resulting trust." 2 Story's Eq. § 1206. So when P. bought

land, and took a deed in the name of H., and H. advanced the purchase money and took the notes of P. for the same, and agreed to convey the land to P. on being paid the money advanced, and interest, it was held that the money advanced by H. might be regarded as a loan to P., and the land, as purchased with the money of P., so as to raise a resulting trust. *Page* v. *Page*, 8 N. H., 187. If real estate is purchased for partnership purposes, and on partnership account, it is immaterial in the view of a court of equity in whose name the conveyance is taken, whether in the name of one partner or in that of all. In all these cases, let the legal title be vested in whom it may, it is in equity deemed partnership property, and the partners are deemed *cestui que trusts* thereof. A purchaser of property thus situated, with notice of the trust, takes it *cum onere* like any other purchaser of a trust estate, and is bound by the trust. 2 Story's Eq. § 1206.

Trusts are either express or resulting by implication of law. The former must be proved by some written instrument, the latter need not be.

It is enacted by R. S., c. 91, § 11, that "there can be no trust concerning lands, except trusts arising or resulting by implication of law, unless *created* or *declared* by some writing signed by the party or his attorney."

The agreement by which the trust is established, may be made before the purchase of the estate to which it attaches, as in *Quackenbush* v. *Leonard*, 9 Paige, 334, where three individuals entered into a written agreement for the purchase of certain lots of land, the purchase money for which was advanced by one of the number to whom the conveyance of the same was made. It was there held, that the conveyance was *in trust* for those beneficially interested in the agreement, and that a court of equity would enforce and protect the rights of the several parties to the original agreement.

But it is entirely immaterial whether the trust is evidenced by a writing made before or after the purchase. The written declaration of a trust, parol in its origin, is as valid as if its creation had been by writing.

In the present case, the existence of the trust, and the price for which the property was purchased, and for whose benefit the purchase was made, are abundantly declared in the bond or contract signed by Paulk, the specific performance of which is sought to be enforced by this bill. The condition of the bond is as follows:—"That whereas I have this day received from A. W. Babcock a deed of one-fourth part of seven undivided eighth parts of township number one, in the third range, west from the east line of the State, in the county of Aroostook, said seven-eighths being subject to a mortgage from said Babcock, this day given to John Huckins, and I have paid said Babcock for such conveyance, the sum of eleven hundred and seventy-three dollars: all which has been done by me *for the equal benefit of myself and said Bragg*. Now if said Bragg shall repay to me one-half of said sum so paid by me, with interest from this time, then I am to convey to him one-half part of said undivided fourth part of said seven-eighths of said township, subject to the said mortgage, by good quitclaim and free from incumbrances under me, to convey as good a title as I have received.

"All the stumpage received on said seven-eighths part of said township is to be appropriated to the payment of said mortgage; and after it is paid, to the payment of the money advanced by me as aforesaid, and interest so far as one-quarter part is concerned, and necessary expenses to be paid by me, and the remainder received for such fourth part to be equally divided between said Bragg or assigns and myself. As soon as I shall from said stumpage, or otherwise, receive as aforesaid the sum due to me from said Bragg for his one-half of said fourth part, then I am to make a conveyance thereof, as aforesaid, to him or assigns."

The bill alleges, and the demurrer admits a performance by said Bragg, of all that was to be done and performed by him to entitle him to a conveyance.

Now there is no ambiguity in the language of the condition above recited. The joint interest of the parties in the original purchase, and that the obligor holds the estate for

their joint and common benefit, are expressly declared. Language more clearly establishing the relation of trustee and *cestui que trust* can hardly be imagined. Here is a clear and manifest recognition in writing, of a previously existing trust, but of one which could not have been enforced without such recognition, because its enforcement would be against the express words of the statute. Every fact necessary to create or establish a trust is precisely stated, the trust estate, for and on whose account, and when purchased, the purchase money of the same, and that it was advanced for the complainant, and that the land is held as security therefor, and the terms upon the performance of which the *cestui que trust* is to be entitled to a conveyance. All this is declared in writing, and, according to the entire weight of authority in England and in this country, establishes a trust.

In *Dale* v. *Hamilton*, 2 Phill. 266, (22 Eng. Ch. Cond. 266,) Hamilton and McAdam having purchased jointly certain real estate, at the instance of the plaintiff, by a memorandum signed by themselves, but to which the plaintiff was not a party, stated therein the purchase to have been made by them jointly, and that the plaintiff was to have one third of the profits arising therefrom, instead of commissions for purchasing, selling, surveying, or laying out the land into lots, but that he was to have no power or authority over the land, and that he should have no compensation till the whole was sold and paid for. The land having risen greatly in value, Hamilton and McAdam refused to recognize the interest of Dale in the speculation. Upon a bill filed by Dale, in which he sought for a sale of the land, and for the protection of his rights, Lord COTTENHAM remarks as follows: "There is this distinction between agreements and declarations of trust: in the one, it is the agreement itself, which is the origin of the interest, that must be in writing; in case of a declaration of trust, which is only the acknowledgment of a pre-existing interest, it is the evidence and recognition, and not the origin of the transaction, that must be in writing. Here the declaration recognizes a past transaction, because

the purchase had been agreed for before Hamilton became entitled to any share in it; and in this agreement between Hamilton and McAdam, they recognized Dale's right to have one-third of the profit to be produced by the sale of the land, after paying the expenses and interest on the purchase money. Now it would be the strangest thing in the world if, the statute being satisfied, which it is by finding this writing signed by the parties, the Court should not give relief to the party whom the document declares entitled to it. It is nothing that the plaintiff is no party to this declaration of trust; that is not required. A declaration of trust may acknowledge a right in another party, if it is signed by the party declaring that he is the trustee of another." So, "if upon an agreement for joint purchase, the conveyance is taken in the names of some but not all of the intended purchasers, the interests of the others may be established by any subsequent writing signed by the fiduciary partners, and which acknowledges or proves the existence of the trust; and this, although the agreement be that one purchaser shall find the money, and the other contribute his skill in purchasing and subsequently allotting and selling the land." Dart. on Vendors and Purchasers, 435.

In New York, by statute, all trusts must be created or declared by deed or conveyance, in writing. This, it will be observed, is a material variation from our statute, which does not seem to require the creation or declaration of the trust to be by deed. In *Wright* v. *Douglass*, 3 Selden, 564, RUGGLES, C. J., in delivering his opinion, says:—"The statute prescribes no particular form by which the trust is to be created or declared. Under our former statute in relation to this subject, it was only necessary that the trust should be manifested in writing; and therefore letters from the trustee, declaring the trust, were sufficient. Such is the law of England. Our present statute requires that the trust should be created or declared by deed or conveyance, in writing, subscribed by the party creating or declaring the trust. But it need not be done in the form of a grant. A declaration of a

trust is not a grant. It may be contained in the reciting part of a conveyance. Such a recital in an indenture is a solemn declaration of the existence of the facts recited; and if the trustee and *cestui que trust* are parties to the conveyance, the trust is as well and effectually declared in that form as in any other."

It is clear, therefore, that here is a written declaration of a trust, equally valid and binding, as though the parties had entered into an agreement before the purchase was made, as in *Quackenbush* v. *Leonard*, 9 Paige, 334. Indeed, where, as in the present case, money is advanced by one on account of another, and the deed taken to the person so advancing as security, it seems that the conveyance is held to be in trust for the person for whose benefit the purchase was made. "Should B. advance the purchase money, but only on account of A., then A. is the owner in equity, and B. stands in the light of a creditor." Lewin on Trusts, 200.

The bond in and by which the trust between Paulk and Bragg is declared, was duly recorded before the conveyance of Paulk to the other defendants was made. "When such a trust is created or declared by an instrument in writing, the recording of it in the registry of the district where the land lies, shall be considered equal to actual notice thereof to all persons claiming under a conveyance, attachment or execution, made or levied after such recording. R. S., c. 91, § 33.

As the other defendants purchased after the bond was recorded, they come in subject to the equities between Paulk and the plaintiff. 2 Story's Eq. § 788.

Even if the bond were not to be regarded as an instrument to be recorded, still, according to the principles which govern courts of equity, the plaintiff would be entitled to a conveyance. That the plaintiff would be entitled, upon the facts set forth in the bill and admitted by the demurrer, to a decree for a conveyance from Paulk, is not to be questioned for a moment. The terms of the bond having been duly performed, the obligor is regarded in equity as the equitable owner

of the land, and the vendor is deemed to stand seized for his benefit.

The conveyance to the defendants Boynton and Bradley and Winn, was by deed of quitclaim, and for their security. In *Oliver* v. *Platt*, 3 How. 333, the Supreme Court of the United States decided "that a purchaser by quitclaim, without any covenants of warranty, is not entitled to protection as a purchaser for a valuable consideration, without notice, and he only takes what the vendor could lawfully convey." *Adams* v. *Cuddy*, 13 Pick. 460. A mortgage to secure prior indebtedness is not a purchase for a valuable consideration in equity. *Dickerson* v. *Tillinghast*, 4 Paige, 215. Still less can the other defendants, who hold the property as assignees, and in trust for such creditors as may become parties to the assignment, be held entitled to protection. Their condition cannot be viewed in a more favorable light than that of their assignor, to whose rights only have they succeeded.

The defendants have paid no money upon the strength of their conveyance, they have parted with no property upon the faith of any apparent interest which Paulk has conveyed them. They received the property either in trust for creditors, or as indemnity against preëxisting liabilities, and they have no equities which should entitle them to a preference over the plaintiff. Their deed gave them the "right, title and interest," of their grantor, and they can only be regarded as purchasers, for a valuable consideration, of such "right, title and interest." *Bassett* v. *Norworthy*, 2 White and Tudor's Leading Cases in Equity, 65. *Demurrer overruled.*

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

JOHN NOBLE *versus* HARRISON STEELE.

Where a seaman ships for a general trading voyage, without any limitation as to time, and without any certain destination or fixed limit for the voyage, the contract may be terminated at any time by either party.

Where the contract is for a general voyage, with no limitation except as to time, it will be construed as a contract for service for the time named in the articles to be employed between such ports as the master may select.

Under such contract, if a seaman, without adequate cause, leaves the vessel before the expiration of the time specified, he will forfeit his wages earned prior to the desertion.

A seaman signed certain shipping articles, which stipulated that the vessel was "bound from the port of Bangor to one or more ports in or out of the United States, on a general trading voyage, for the term of three calendar months":—*Held*, that the master had a right to the services of the seaman for the three months, between such ports as he might choose to trade, and that the seaman having deserted before the expiration of that period, and not having returned to duty nor offered to do so, thereby forfeited his wages earned prior to the desertion.

ON EXCEPTIONS from *Nisi Prius*.

Assumpsit for seaman's wages, fifty-one days, at eighteen dollars per month, on board the schooner Gen. Scott. The defendant introduced the shipping articles of the vessel, in which plaintiff sailed, for the voyage during which the wages sued for were claimed to have been earned. By these articles, plaintiff shipped for "three calendar months on a general trading voyage." Defendant also introduced Thomas Mason, who testified that he was present at a conversation between plaintiff and defendant, in which plaintiff said he was going to leave and wanted his wages. The defendant protested against his leaving, and said he had not fulfilled his time. This was in Bangor, at or near the vessel, after plaintiff had served one month and nineteen days.

Upon the foregoing testimony and papers, the presiding Judge directed judgment to be entered for the defendant, to which the plaintiff excepted.

It was agreed between the parties, that if, in the opinion of the full Court, the foregoing evidence would in law warrant the judgment rendered, said judgment was to stand, if not, the defendant was to be defaulted.

Knowles & Briggs, for plaintiff.

1. The shipping articles are not binding upon the plaintiff, because they were not read to him.

2. The shipping articles are not binding because they are not according to law.

The first section of the Act of Congress, passed July 20th, A. D. 1790, provides that "the master of any vessel of the burthen of fifty tons or upward, bound from a port in one State, to a port in any other than an adjoining State, shall, before he proceed on such voyage, make an agreement, in writing, or in print, with every seaman on board, declaring the voyage or voyages, term or terms of time for which such seaman shall be shipped." These shipping articles declare but one voyage, and that a general trading voyage; and if there was more than one voyage, it should have been declared in the contract, or it is not binding.

3. The articles are not legal for want of definiteness in the description of the voyage. "From the port of Bangor, to one or more ports in or out of the United States, on a general trading voyage, for the term of three calendar months," is language so indefinite, that if the sailor read it, or it was read to him, he could not determine by it when he might quit. The term, "or elsewhere," in shipping articles, is void for indefiniteness or uncertainty, or to be construed as subordinate to the principal voyage. *Brown* v. *Jones & al.*, 2 Gall. 477; Am. Law Jour. 210; Gordon's Dig. 755, (note.)

4. Though there is no proof as to what kind of a voyage this was, other than the course of it, and what was carried, and where it was carried, as shown in the defence of Ellis, it is evident from this testimony, such as it is, that this voyage was a freighting voyage and not a trading voyage. A trading voyage is not a freighting voyage, and does not include it. *Brown* v. *Jones*, before cited.

5. Sect. 5, of Act of 1790, provides that if a seaman shall absent himself more than forty-eight hours, and an entry shall be made in the log book by the mate or other officer having charge of it, of the name of such seaman, on the day on which

he shall so absent himself, such seaman shall forfeit his wages, &c. Now suppose that these articles are legal and binding on the plaintiff, there is no evidence of any entry upon the "log," and hence, by statute, no forfeiture of wages.

But in *Spencer* v. *Eustis*, 21 Maine, 514, the Court make a distinction between a class of cases covered by this statute, and cases of desertion, "*animo non revertendi*," working forfeiture of the seaman's wages under the maritime law. The opinion is not very full, and I have been unable to see why the statute does not control the maritime law, and govern every case that can possibly arise of desertion of more than forty-eight hours.

G. W. Ingersoll, for defendant, contended:—

That the desertion worked a forfeiture of the wages, and cited: *Spencer* v. *Eustice*, 21 Maine, 519; Abbott on Shipping, (Story's Ed.) 463, 2468, notes; *Cloutman* v. *Tennison*, 1 Sumner, 373; Ware's Rep. 309, 447; *Stark* v. *Parker*, 2 Pick. 267; *Webb* v. *Dickinfield*, 13 Johns. 390.

APPLETON, J.—The plaintiff, at Bangor, shipped on board the schooner Gen. Scott, on a general trading voyage, for *the term of three calendar months;* and the vessel having returned to Bangor, he there, without cause, deserted before the expiration of that time.

It was held by WARE, J., in *The Crusade*, Ware's Rep. 449, that where a seaman ships on a general trading voyage, without any limitation of time, and without any certain destination or fixed *terminus* of the voyage, and which may, at the pleasure of the master, be prolonged indefinitely, the legal construction of the agreement is that it is a contract which may be terminated at the will of either party.

In the present case, there is no *terminus* in space to the voyage. It might end at any port in or out of the United States, where the vessel might be at the expiration of the time for which the plaintiff had shipped.

The voyage was a *general trading voyage*, and was indefinite as to the ports in or out of the United States, between

which trading might be carried on. It might as well be exclusively between Portland and Bangor, during the whole period of the plaintiff's shipment, as between ports more distant. There is no limitation imposed, which prevents the master from trading between any two ports, where he could find a profitable commerce.

The contract of shipment disclosing no limit in space to the voyage, the only limitation to its duration is found to be one of time, and that limitation is most clearly expressed.

The true meaning of the contract of shipment is, that the plaintiff shipped for the term of three months, on a general trading voyage; and that the defendant has a right to his services for that time between such ports as he might choose to trade.

In *Spencer* v. *Eustis*, 21 Maine, 519, the shipment was "from the port of Frankfort, Maine, on freighting business, for the term of four months." In the case at bar, the shipment was "from the port of Bangor, on a general trading voyage, for the term of three calendar months." The general scope of the contract was the same in each case, and the same rules of law must be regarded as applicable. As the plaintiff deserted before the expiration of the time for which he shipped, and did not return nor offer to do so, and as he has offered no excuse for his desertion, his wages, earned before such desertion, are, by the maritime law, held to be forfeited.

Nonsuit to stand.

TENNEY, C. J., concurred.

RICE, J., dissented.

ENOCH P. DAVIS *versus* CITY OF BANGOR.

The provisions of the R. S., of 1841, c. 25, § § 57 and 89, relating to highways, apply to obstructions placed upon or over a street or road, as well as to inherent defects in its structure.

The county, town or persons who are obliged by law to repair a highway, are criminally liable for defects in or upon the same, and for neglects in the performance of their statutory duties in reference thereto.

The liability of a town for damages arising from a defective highway, depends upon proof of the same facts that would render it liable to indictment; and in all cases where it may be held for damages it may be indicted.

A defect, or a want of repair, is either inert matter incumbering the highway upon or over it or structural defects, endangering public travel; and, for injuries arising therefrom, the parties obliged by law to keep it in repair are civilly liable.

Nuisances may be committed by the unlawful use of a highway, for which those committing them may be liable civilly to persons who suffer special damage therefrom, and they may be punished criminally therefor by indictment. The carrying of an unusual weight with an unusual number of horses; the driving of a carriage through the crowded street with dangerous speed; the selling by auction in the public thoroughfares; the congregation of carts in the streets and the collecting of crowds by violent and indecent language, &c., have been held to be nuisances of this kind, because annoying to the community and dangerous to the traveling public.

But towns are not responsible for nuisances of this nature, arising from the unlawful use of the highway without their knowledge or assent, the road, *as a road*, being "safe and convenient."

A team temporarily stationary in a street or road, under the charge of the owner or driver, is not a defect or want of repair to be amended, nor an obstruction to be removed, and the town or city is not liable for injuries occasioned thereby.

While A. was driving his horse harnessed to a chaise, over a bridge, the horse took fright at a tree, on a wagon which was standing there temporarily in charge of the driver, ran away, overturned the chaise and injured A.; — *Held*, that the town was not liable therefor either civilly or criminally.

A city is not liable for an injury occasioned by teams standing on a bridge or street for market and waiting for purchasers, under the care of their drivers or owners.

They are not an "obstacle natural or artificial," which the surveyor of highways is authorized by law to remove.

It seems, that the owners of the teams might, under some circumstances, be liable for injuries thus caused.

Municipal officers cannot bind their town or city by their individual assent to the wrongful acts of others.

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

This was an action of the case to recover damages for an injury received by the plaintiff, by the upsetting of his chaise, in consequence of his horse taking fright upon a bridge in Bangor. Much testimony was introduced on both sides. The verdict was for the plaintiff and the defendants excepted. The cause was argued at the law term of the Court held at Bangor, in July, 1856. The facts of the case are fully stated in the opinion of the Court.

After the evidence was in, the presiding Judge was requested by counsel for defendants to give the following instructions to the jury:—

1st. That the city of Bangor is not liable for obstructions in the streets and on the bridges, caused by teams loaded with trees for the market, and under the care of the drivers or owners of the teams.

2d. If the jury are satisfied from the evidence, that the injury complained of, was occasioned by teams standing on the bridge for the market, and awaiting for purchasers, and under the care of the drivers or owners, the city is not liable in this action.

3d. That streets are made as well for the transaction of business on them as for travel, and that the city of Bangor is not liable for any injury received in consequence of obstructions in the streets, in the transaction of business.

4th. That the charter and ordinances of the city do not impose on the city any additional legal liabilities and obligations to make and repair highways.

5th. That if the plaintiff could see whatever obstructions there were on the bridge before he entered upon it, it is evidence of want of ordinary care on his part that he drove among them, and he cannot recover in this action.

6th. That if the plaintiff entered on the bridge to the left of the middle of the traveled part of the bridge, and received the injury in consequence of driving on the left of the middle of said bridge, he cannot recover.

7th. That if the right of the middle of the traveled part of

the bridge was obstructed with teams in the transaction of business, so that he could not pass on that side, it was his duty to have stopped and waited until the obstructions were removed, or have gone round over one of the other bridges; and that if he chose to try his luck, and go over on the left side of the middle of the traveled part of the bridge, he cannot recover in this action.

8th. That if the jury are satisfied that the horse shied at the evergreen tree, standing as testified to by the witnesses, and the injury occurred in consequence of the horse so shying, the plaintiff cannot recover in this action.

9th. That the city must have had reasonable notice of the actual location of these very teams, or the city is not liable.

The Judge presiding, did not give the instructions requested, any further than they are embraced in the following, given by him, to wit:—

He instructed the jury, as requested by defendants' attorney, that the charter and ordinances of the city did not impose on defendants any additional legal liabilities and obligations to make and repair highways; and he also instructed them generally concerning the duties of towns and cities to keep their highways, streets and bridges, in repair, safe and convenient for travelers, &c.; and concerning their liabilities for injuries and damages occasioned by defects therein; and also upon the subject of notice to defendants of such defects; and also concerning the use of ordinary care by plaintiff in driving, &c.; and also concerning what constituted ordinary care. And upon all these subjects the instructions were unexceptionable. And he also instructed them, that towns and cities being required, by law, to keep their highways in repair, so that they might be safe and convenient for travelers, could not, of course, be justified in establishing any permanent or continued obstruction in one of their highways, which would render it unsafe and dangerous for travelers. That the law had not prescribed what imperfections in a road would constitute the defect referred to in the statute. That it was a fact for the jury to settle, what condition of the road

would render it safe and convenient, or otherwise, which must be determined by them from the evidence in the case. That highways and streets are made for passage, and for the transaction of business, such as the circumstances of the place might require. That although a street might be narrow, and only of sufficient width for passage, yet persons in the ordinary transactions of business, had the right to stop at the stores, shops and dwellings thereon, and unload and load their teams and carriages; and although, by so doing, they might occasion a temporary obstruction of the ordinary travel, yet it would not be any such obstruction as would render the city liable as for a defect. But if the city government authorized persons with their teams and wagons to occupy a portion of such street or a bridge, and make it a customary stand, day after day, during the season of their business, for trade with their customers, and it was by them so continuously occupied; or if it was occupied by them without express authority from the city government, but with their knowledge, and without any objection on their part, or interference therein; and the jury believed from the evidence that the city (the defendants,) assented to such use and occupation; that it would be for the jury, from the evidence in the case, to determine whether or not such occupation of the street or bridge was an obstruction, which would render it unsafe for travelers and constitute a defect therein, which would render defendants liable for injuries and damages occasioned thereby.

The verdict was for plaintiff, $500, and the jury also found specially as follows, to wit:—

"We are satisfied from the testimony, that the horse took fright from the standing tree, which might be further increased by being whipped by the bushes on the other loads."

To the preceding rulings, instructions and refusals of the Court, defendants excepted.

Waterhouse, for defendants, cited *Thompson* v. *Bridgwater*, 7 Pick. 188; *Smith* v. *Smith*, 2 Pick. 621; *Howard* v. *North Bridgwater*, 16 Pick. 189, 190; *Adams* v. *Carlisle*, 21 Pick.

146; *Palmer* v. *Barker* 11 Pick. 338; *Kennard* v. *Barton*, 25 Maine, 39.

J. A. Peters, for plaintiff, cited 7 Maine, 442; 11 Maine, 271; 21 Maine, 29; 3 Pick. 269; 26 Maine, 241; 13 Met. 292.

APPLETON, J.—On the morning of the day when the injury occurred, to recover compensation for which this action is brought, a large evergreen was brought to Bangor market. It "was standing erect in the wagon," with the horses attached, and under the care of the driver. The wagon was on the Kenduskeag bridge, but it "had not been there a great while" when the plaintiff's horse in passing over the bridge was frightened by the tree, which fright, "being further increased by the bushes on other loads," he ran, overturning the chaise in which the plaintiff with his wife was riding, who was thereby severely injured.

It is not denied that the plaintiff was in the exercise of ordinary and common care, nor that the injury occurred upon a bridge which the city was bound to keep in good repair, nor that the bridge, so far as regards its structure or its surface, was in good repair, unless the loaded team, standing as before described, is to be regarded as a defect or want of repair. The question presented is, whether a wagon loaded with ornamental or other trees, standing for sale in a street, with the horses attached and under the care of the driver, constitutes a "defect or want of repair" for which the city would be indictable or liable for damages resulting therefrom, the road being in other respects "safe and convenient."

The duties and obligations of the town in reference to the public highway are derived from statute, and are restricted and limited by its express enactments.

By R. S., 1841, c. 25, § 57, all highways, &c., are to be "kept in repair and amended from time to time, that the same may be safe and convenient for travelers," &c.; in default

thereof, the town in which such neglect of duty occurs is made liable to indictment, &c.

By § 89, any person receiving "any bodily injury," or suffering "any damage in his property through any defect or want of repair," &c., "may recover in a special action of the case, of the county, town or persons who are by law obliged to repair the same, the amount of damages sustained thereby, if such county, town or person had reasonable notice of the defect or want of repair."

From these provisions, it is apparent, that the road, as such, should be safe and convenient; that the statute applies as well to obstructions placed upon as to defects inherent in the structure of the road. The stick of timber, in *Springer* v. *Bowdoinham*, 7 Maine, 442; the rope extended across the street, in *French* v. *Brunswick*, 21 Maine, 29; the miry watering place by the road side, in *Cobb* v. *Standish*, 14 Maine, 198; the stones left in the road, in *Bigelow* v. *Weston*, 3 Pick. 267; the awning projecting over, or the aperture in the sidewalk, in *Drake* v. *Lowell*, 13 Met. 292, and *Bacon* v. *Boston*, 3 Cush. 174; drifts of snow suffered to incumber the streets, in *Providence* v. *Clapp*, 17 How. 161; the log by the side of the traveled path, in *Johnson* v. *Whitefield*, 18 Maine, 286, are illustrations of what are to be regarded as defects in a highway, rendering it unsafe and inconvenient. The town is liable criminally for defects in or upon the road, and for neglects in the performance of its statutory duties in reference to the highway. The defect or want of repair, is either inert matter left incumbering the street, upon or over it, or structural defects endangering the public travel. For injuries arising from any or all of these causes towns are made civilly responsible by statute.

But nuisances may obviously be committed *upon* an highway, by its unlawful use, for which those committing may be liable civilly to such as may therefrom suffer special damage, and be punished criminally by indictment, as thereby annoying the traveling public generally. The carrying an unreasonable weight, with an unusual number of horses, in *Rex* v.

Egerly, 3 Salk, 183; the driving a carriage through crowded streets with dangerous speed, in *U. S.* v. *Hart*, Pet. (Cir. Ct.) 390; the selling by a constable, at auction, in the public thoroughfares, in *Com.* v. *Millman*, 13 S. & R. 408; the placing at the window the effigy of a bishop labelled "spiritual broker," thereby drawing crowds to the shop, in *Rex* v. *Carlisle*, 3 C. & P. 636; the keeping coaches at a stand in the street awaiting customers, in *Rex* v. *Cross*, 3 Camp. 326; the loading and unloading wagons in the street, in *Rex* v. *Russell*, 6 Earl, 427; the congregating of carts for the reception of slops from the distilleries, in *The People* v. *Cunningham*, 1 Denio, 524; the collecting crowds in the streets by using violent and indecent language to those passing the street, thereby obstructing their free passage, in *Barker* v. *Com.* 19 Penn. 412, were severally held to be nuisances, as annoying the whole community, and incommoding and endangering the traveling public.

These, and similar acts, done upon the streets, undoubtedly interfere with the right of passage, yet the road during this time may be *as a road* safe and convenient—needing neither repair nor amendment. Yet it can hardly be contended that a town is civilly responsible for the unlawful acts of individuals passing over "a safe and convenient" road, because such acts may render its passage unsafe and inconvenient; or that it is indictable for defective public highways in consequence of the misconduct of persons upon and while in the use of the same.

If this were to be held as the meaning of the statute, then too heavy a load, or too many horses, would be regarded as defects in a public highway, to be repaired by unloading or unharnessing; want of repair would accompany the rapid horse *pari passu* as he ran along the streets, and the needed repairs would follow *passibus aequis* in the foot-prints of the flying steed; as the visage of the labelled bishop appeared at or was withdrawn from the window, the street would be safe or unsafe, convenient or inconvenient; the presence of the auctioneer with his crowd, would create a defect, and his and their departure would leave the street repaired; the coaches

congregating at their stand, or the carts assembling at the distillery, would make the street defective — their separation, loaded with passengers or slops, would accomplish the needful reparation; the violent and indecent language of the brawling drunkard would constitute "an obstacle natural or artificial," thereby creating a defect to be repaired by silence or removal. But such a construction would be absurd.

It has been repeatedly held that the liability of a town to pay damages or to be indicted by reason of defects or want of repair, depends upon proof of the same facts, and that in all cases when their condition is such as would render them liable for damages, they may be indicted. *Howard* v. *North Bridgwater*, 16 Pick. 189.

Now, it is apparent, that there may be many acts done *upon* the road, while in the use of it as a road, which may render the traveling unsafe, endangering the public safety, while the streets are free from all defects, need no repair, are safe and convenient, answering the most stringent requirements of the statute. The actors may be punishable criminally, or they may be liable civilly to those sustaining damages by reason of such wrongful acts done on a safe and convenient road; but the road is not, in consequence of such acts, a nuisance, by reason of any defect or want of repair, nor is the town in any way responsible for such misuse of the right of public passage.

The town or city most assuredly cannot be held liable, unless the statute gives the power of prevention and removal. If the town or city be powerless in the premises, if they cannot, by their highway surveyors, forcibly remove teams or wagons temporarily stationary, under the charge of their owners, *from off* the road, they should not be made responsible for injuries caused by their presence.

It becomes, then, important to ascertain what power of removal, if any, in reference to the obstructions arising from teams or vehicles of any description, temporarily stationary, but under the charge of their owners or drivers, is given by the statute.

By R. S., c. 25, § 71, "every surveyor is hereby authorized, within his district, to *remove* any obstacle, natural or artificial, which in any wise obstructs or is *likely* to obstruct or render dangerous the passage of any highway or townway."

The removal contemplated, is the removal of the obstacle, natural or artificial, obstructing or *likely* to obstruct the highway, from off the same. It has no reference to a removal which is effected by advancing along the traveled path of the road. Now can it be pretended, in case of a wagon or team, with horses attached, and under the care of the owner, that a power of removal is given to a surveyor? They may obstruct to the extent of the space they occupy, as does any man who passes over the street, but they are not *likely* to remain obstructing, for nobody supposes the horse and wagon, any more than the driver, is to be a fixture, or to remain permanently in the position in which they stand. But if they may be removed, how and to what place is the removal to be made? If the surveyor removes them off the traveled path, has not the owner the right of resistance? Has the surveyor dictatorial power to determine the length of time a teamster with his team may remain stationary, for purposes in themselves lawful? If he has the power of removal, can he remove the team out of the road? If he cannot, then the city is not liable. If he can, then every team temporarily standing in the highway, is a defect or want of repair, for which the town or city is indictable. If he can only remove by advancing, then the obstruction simply changes its position upon the road, and is not removed. It is obvious that the power of removal is to be exercised by removing the obstruction off the traveled path of the road, and that it does not apply to the class of cases under consideration. It will hereafter be seen that the liabilities of those temporarily obstructing the public passage, are to be determined by recurrence to the principles of the common law, and the provisions of R. S., c. 26, which regulate the law of the road.

By R. S. c. 25, § 98, "whenever any logs, lumber or other obstructions, shall be *unnecessarily left* in any highway or town

way, it shall be the duty of the surveyor, within whose limits the same may be *so left*, or in his absence, of any other surveyor within the town, forthwith to remove the same. Such surveyor shall not be liable for any loss or damage happening thereto, unless occasioned by *gross negligence or design*," &c. The section, then, authorizes the sale of the logs and other obstructions, at public vendue, for the purpose of defraying the expense of removal; and further provides that "the person by whose neglect or willful default said logs, lumber or other obstruction shall be *so left*," shall also be liable to be prosecuted at common law for such nuisance.

This section relates to obstructions caused by valuable property *left* unnecessarily upon the highway. They must possess value, else they would not be the subject of sale. They must be *left*, for the statute only applies to what is *so left*. They must be *left unnecessarily*, else the obligation "forthwith to remove" is not imposed upon the surveyor. The statute impliedly assumes that articles of value may be *necessarily* left in the street; but when so left, they must not unnecessarily remain.

From both these sections, it is apparent that the removal is to be of the obstruction, whatever its character, from *off* the traveled part of the road.

Where the obstruction is of value, the right of removal exists, not when merely left, but *only when unnecessarily left* on the highway.

Now, if a loaded team is standing in the highway, under charge of the owner or driver, or if the owner is sitting in his wagon, the team or wagon stationary in the street for temporary purposes, can the surveyor, by virtue of § 71, remove them as obstructions from off the highway? Or can he, under the provisions of § 98, forcibly dispossess the person in possession of the team or wagon, and sell the horses and wagon or other vehicle, as obstructions *left*, when they were *not left*, but were under the charge of the owner, and temporarily stationary for purposes lawful in themselves?

It is manifest that the town is not to be held liable for temporary obstructions, such as those to which we have referred, but that the rights and liabilities of parties are to be determined by the *law of the road* which regulates and prescribes the duties and obligations of all passing over the same. The distinction so apparent, between the wrongful acts of those using the road, but interfering with and obstructing the right of passage, and defects in and the want of repair of the road, is recognized by the statute making special provision for the punishment of such unlawful acts.

The law of the road is defined by R. S., c. 26. By § 4, it is enacted, that "no person shall permit his carriage or other vehicle, to travel or pass upon any such bridge or turnpike, or other road, without a *suitable driver or conductor;* nor shall *leave the same* on such bridge or road *stationary* in such a situation as to obstruct other persons traveling with any carriage or vehicle."

By § 5, a penalty not exceeding twenty dollars, nor less than one, is imposed for the offence specified in § 4, to be recovered "on complaint before any justice of the peace in the county where the offence is committed, within sixty days;" and it is further provided, that "any person injured by any of the offences or neglects aforesaid, shall also be entitled to recover his damages in an action of the case to be *commenced in one year after such injury.*"

It will be observed, that the penalty for the violation of § 4, is imposed where the team is permitted to travel or is *left* stationary, "without a suitable driver or conductor."

It would seem, therefore, to follow, that remaining stationary *with a driver,* for a temporary purpose, is not a violation of the law of the road.

If it were to be held a violation of the law of the road, the statute of limitation of one year by R. S., c. 26, § 5, would be a bar to any suit for damages after that time. If remaining stationary under the charge of a driver were to be held a defect, damages might be recovered against the

town, for which they would be entitled to remuneration as against the individual through whose misconduct, in so remaining, they occurred. *Lowell* v. *Short*, 4 Cush. 275.

But if the time of one year, as provided by R. S., c. 26, § 5, be a bar, the town might be compelled to pay without opportunity to recover over, for the town is liable for six years by R. S., c. 25—while by c. 26, the individual causing the liability is relieved by the lapse of one year. If this section was held inapplicable, when a town has been compelled to pay for the acts of an individual, then a different rule would obtain when the suit is brought by a corporation than by an individual, which is absurd.

The results from this examination of the statutes are these:—

That all obstructions are to be removed from off the highway;—

That when they consist of articles of value *left unnecessarily*, they may be removed at the expense of the owner;—

That permitting a team to travel or remain stationary without a suitable driver or conductor is an offence against the statute regulating the law of the road;—

That a team temporarily stationary in the street, under the charge of the owner or driver, is not a defect nor want of repair to be amended, nor obstruction to be removed;—

That it is not a violation of the statute regulating the law of the road, though the person so permitting may be civilly responsible in damages to the person injured.

If, however, the individual whose acts were the cause of the plaintiff's injury, were to be regarded as having violated R. S., c. 26, § 4, still the defendants can neither be held civilly nor criminally liable because a stranger may have violated the law regulating the passage of travelers over a public highway *as and for* a defect or want of repair *in and upon* the same.

The Court was requested to instruct the jury "that the city of Bangor is not liable for obstructions in the streets and on the bridges, caused by teams loaded with trees for

the market, and under the care of the owners or drivers of the teams."

A bridge or street is for the passage of teams loaded with trees — with masts — with any article of necessity, use or ornament, or not loaded, as the case may be. The passage of an individual obstructs the street to the extent of the space he occupies. The more numerous the passers, the greater the obstruction, till the passage becomes unsafe and dangerous. Yet such obstruction is not an "obstacle natural or artificial" which the surveyor may properly remove. So teams, moving along, loaded or not, to the extent of the space they occupy, obstruct the highway; but they constitute no "obstacle natural or artificial" — no "defect or want of repair." The mast, while being hauled to the wharf or shipyard, obstructs and endangers the public travel, but while in the process of being moved to its place of destination it constitutes no defect in the highway; notwithstanding, under some circumstances, the owner might be liable in damages to those who may have been injured thereby.

The requested instruction should have been given.

The second requested instruction was, that "if the jury are satisfied from the evidence that the injury complained of was occasioned by teams *standing* on the bridge for the market and waiting for purchasers, and under the care of the drivers or owners, the city is not liable in this action."

The obstruction temporarily caused by the owners of teams under their care, waiting for purchasers, is not a defect or want of repair. If it were to be so held, then the defect would be stationary only while the teams were standing, and would be repaired by their motion on the same highway. If the ways should be thereby incommoded or endangered, their want of safety or convenience would not be amended by any action of the surveyor. Numerous wagons meet on the crowded thoroughfare of a populous city, obstructing each other and endangering the passers by. They are there for lawful purposes. They may be at rest for the purpose of enabling their owners to sell the loads thus con-

veyed to market. Their presence may be an inconvenient obstruction, for which they may be indictable as for a nuisance; but the road upon which they stand is none the less safe and convenient—though its use by others may thus be rendered difficult or even dangerous. These acts may be nuisances upon the road; but they are distinct from the road—not defects nor want of repair—acts for which towns should no more be held liable, civilly or criminally, than for a brawl or riot thereon.

The second instruction should have been given.

The requested instructions, which were refused by the Court, apply to cases where the loaded teams are standing or moving under the charge of their driver, without express or implied consent on the part of the city.

The instructions given, are in no respect an answer to, or a compliance with, the requests made. They ignore the real question here presented, which was the liability of the city for teams moving or standing on its streets, under the charge of their drivers, without assent, express or implied, on the part of the city.

The Court instructed the jury, that "if the city government authorized persons with their teams and wagons to occupy a portion of such street or bridge, and make it a customary stand day after day, during the season of their business for trade with their customers, and it was by them so continuously occupied, *or* if it was occupied by them without express authority of the city government, but with their knowledge, and *without objection* on their part or interference therein, and the jury believed, from the evidence, that the city (the defendants,) assented to such use and occupation, that it would be for the jury, from the evidence in the case, to determine whether or not such occupation of the street or bridge was an obstruction which would render it unsafe for travelers, and constitute a defect therein which would render the defendants liable for injuries and damages occasioned thereby."

This instruction is in the alternative, the first branch of which relates to the law as applicable to a stand authorized

expressly by the city government. It is not material to consider whether this be right or wrong, as there is no pretence of any express authority for that purpose.

The second branch of the alternative relates to the occupation of a stand, to which the city may have impliedly assented, and for which they are to be held liable in consequence of such implied assent.

Those occupying a stand were there either rightfully or wrongfully.

If rightfully, the action of the city government would be entirely ineffectual—neither enlarging nor diminishing the rights of those occupying.

If wrongfully, the members of the city government could not bind the city by their individual assent to the wrongful acts of others. *Mitchell* v. *Rockland*, 41 Maine, 363; *Thayer* v. *Boston*, 19 Pick. 513.

But if the occupation was wrongful, how has the city given its assent thereto? Not by votes, nor by the acts of agents thereto authorized. It has conferred no authority on any one. It has clothed no one with power in the premises. The inaction of the city government is not consent. Nor is the inaction of the citizens proof of assent. If these acts of occupation are unlawful, they are nuisances to the public, *not to the city nor to its citizens.* If any statute has been violated, it is a public wrong. The duty of enforcing a penalty for a violated law, is not so peculiarly incumbent upon the defendants, that they are to be regarded as assenting, because of a failure to commence public prosecutions. If this is a public offence, the inference of assent is as strong against the public *generally* as against the citizens of Bangor *particularly;* for neither the city government nor the citizens were under any such peculiar obligation to avenge the violated majesty of the law, that they are to be held as assenting to such violation, and as responsible therefor, because they have neither officially nor individually interfered to prosecute.

The acts and declarations of Weaver are inadmissible. He had no authority as marshal in the premises. His acts were

unauthorized, and do not bind the city, and his statements were inadmissible.

There are no acts proved from which the jury were justified in inferring assent on the part of the defendants.

The instructions given were erroneous, and those withheld should have been given. *Exceptions sustained.*

RICE, CUTTING, MAY and DAVIS,* J. J., concurred.

TENNEY, C. J., HATHAWAY and GOODENOW, J. J. dissented.

DISSENTING OPINION, by

TENNEY, C. J.—The presiding Judge was requested to instruct the jury, that the city is not liable for obstructions in the streets and on the bridges, caused by teams loaded with trees for the market, and under the care of the drivers or owners of the teams. This instruction was not given, further than the same may be embraced in the general instructions. The jury were instructed, that if the city government authorized persons with their teams and wagons, to occupy a portion of such street or bridge, and make it a customary stand, day after day, during the season of their business, for trade with their customers, and it was by them so continuously occupied, or if it was occupied by them without *express* authority from the city government, but with their knowledge, and without any objection on their part, or interference therein, and the jury believe from the evidence, that the city assented to such use and occupation—that it would be for the jury from the evidence to determine, whether or not such occupation of the street or bridge, was an obstruction, which would render it unsafe for travelers, and constitute a defect therein which would render the city liable for injuries and damages occasioned thereby.

* The Act of April 9, 1856, providing that the Supreme Judicial Court, after the occurrence of a vacancy therein, should consist of a Chief Justice and six Associate Justices, was repealed by the Act of February 18, 1857, and the Act of March 16th, 1855, providing that the Court should consist of a Chief Justice and seven Associate Justices, was thereby revived.

Under this statute Hon. WOODBURY DAVIS was appointed and commissioned an Associate Justice of the Court in February, 1857.

The sum of this instruction, in connection with the refusal to give that first requested is, that the city is liable, for any injury caused by an obstruction in a street or upon a bridge, where the obstruction is produced by the occupation of parts thereof by teams and wagons in charge of their respective owners, day after day as a customary stand for business, the city having reasonable notice thereof. Is this the true construction of R. S., c. 25, § 89, which creates a liability for any bodily injury, &c., through any defect in any highway, townway, causeway or bridge, &c.?

It is well settled, that a stick of timber, or other obstruction, *left* in the highway, rendering the same wanting in safety and convenience for travelers, and by reason of the same, a traveler in the use of ordinary care receives an injury, is such a defect in the way, as to make liable the party, bound to keep the same in repair and having reasonable notice thereof, to the person receiving the injury. *Springer* v. *Bowdoinham*, 7 Greenl. 442; *Johnson* v. *Whitefield*, 18 Maine, 286; *Bigelow* v. *Weston*, 3 Pick. 267.

Highways are specially designed for the use of travelers; while they are used as such, no liability is incurred by a town, county or person bound to keep them in repair, for an injury received, by the interference of one traveler with another, notwithstanding one of them may be so regardless of his duty, as to cause the injury to his fellow traveler by an obstruction of the way. But if the street is suffered to be partially filled with wagons, to remain stationary, that their owners, being present, may make sale of articles contained therein to customers, so that they constitute an impediment to the ordinary travel, it is difficult to perceive a reasonable ground of distinction, in the fact, that the owners have not left their wagons; or that the cattle or horses, which brought them to the stand, remain attached or near. The case does not differ from that where booths are erected in the street or upon a bridge in a city for the purpose of selling fruit or other articles, by the authority of the city, or with the knowledge of its officers, which erection is an essential ob-

struction to the travel. Can it be insisted, that an injury to a traveler through such erection, would not render the city as liable as it would be, if a stone or a log had caused it? The liability of the city being fixed, if the obstruction was a stick of timber, *left* in the street, apparently in the possession of no one, can it be exonerated, if the owner was sitting upon it, after it was placed in the street, attempting to make sale of the same? If the city is relieved from liability in the latter case supposed, and not in the former, it is upon a ground, which affords no security to the careful traveler.

DISSENTING OPINION of

GOODENOW, J.—The jury must have found, under the instructions given by the presiding Justice, that the street where the accident happened was not "safe and convenient," according to the requirements of the statute; and that the city government authorized persons with their teams and wagons to occupy a portion of such street or bridge and make it a customary stand day after day, during the season of their business, for trade with their customers, and that it was so continuously occupied; or that it was occupied by them without *express* authority from the city government, but with their knowledge and without any objection on their part, or interference therein, and that the defendants assented to such use and occupation. They also found, specially, "that the horse took fright from the standing tree, which might be further increased by being whipped, by the bushes on the other loads."

The "standing tree" is the one spoken of by S. F. Walker, in his testimony, as "an evergreen 18 feet high, standing erect on the wagon; there was any amount of dirt on the roots; the only tree on the team. The largest tree he ever saw in the market." He says, "these teams had not been there a great while; cannot say how long."

The presiding Justice instructed the jury, that the charter and ordinances of the city did not impose on the defendants any additional legal liabilities and obligations to make and repair highways, and he also instructed them *generally*, con-

cerning the duties of towns and cities to keep their highways, streets and bridges, safe and convenient for travelers, &c.; and concerning their liabilities for injuries and damages occasioned by defects therein; and also upon the subject of *notice* to the defendants of such defects; and also concerning what constituted ordinary care. And it is admitted that upon all these subjects his instructions were *unexceptionable*. He did not instruct the jury "that the city of Bangor is not liable for obstructions in the streets and on the bridges, caused by teams loaded with trees for the market, and under the care of drivers or owners of the teams." And I am of opinion, that he properly declined to give the instructions in the terms requested.

In *Frost* v. *Inhabitants of Portland*, Mr. Justice WESTON says:—"It is insisted, if roads are otherwise in a state of repair, towns are not answerable for deposits or incumbrances placed upon them; but that the party injured must look to the individual by whom the nuisance was caused. A deposit in the road as effectually destroys its usefulness, as an excavation, however occasioned. The individual may not be known, or *may not be responsible*. The policy of the law fixes this duty upon towns who have officers charged with its performance. Thus every citizen has an interest, not only to prevent an incumbrance, but to hasten its removal. It is too narrow a construction, to hold that a deposit which, while suffered to remain in the road, renders it impassable, is not a defect in it. The law looks not to the cause of the defect, or to the remedies which the town may have over, or to any cumulative remedy which the person injured may have against others."

I am of opinion that the presiding Justice properly declined to give the second and third requested instructions; and that on the subject of due care on the part of the plaintiff, and notice to the defendants, he was at liberty to use his own language, and was under no necessity to adopt the language of the counsel for the plaintiff. The testimony of Holt and

Lumbert, was inadmissible, upon the question of notice to the defendants.

Upon the motion to set aside the verdict as against evidence, I do not find that it is so clearly against evidence, or the weight of evidence, as to require us to disturb it.

INHABITANTS OF BREWER *versus* INHABITANTS OF EDDINGTON.

The latter clause of the fourth mode of gaining a settlement in a town, (R. S. of 1841, c. 32, § 1,) provides, that "when any new town shall be incorporated, composed of a part of one or more old incorporated towns," such inhabitant as "shall *actually dwell* and *have his home* within the bounds of such new town at the time of its incorporation, shall have the same rights in such new town in relation to settlement" as he would have had in the old: — *Held*, that the question of settlement in the new town depends upon the fact of an *actual home*, and not upon a *temporary residence*.

The settlement of a person, supported by the town as a pauper, at its poor house, situated within the limits of a new town incorporated out of the old one, does not become fixed in the new town, from the fact of his thus living therein.

A poor house cannot be regarded as having the characteristics of a statute home.

A settlement acquired in any town prior to its division, adheres to that town afterward, unless the facts existing at the time of division are such as to transfer the settlement to another town.

D., being without family, and having no legal settlement in this State, commenced work for A. as a laborer on his farm in the town of B. He continued thus with A. for the space of six years, when A. would keep him no longer; and, being without property, he was supported during the ten succeeding years by the town, at its poor house. A portion of B., including the site of its poor house, but not including the residence of A., was then incorporated into a new town. Subsequently another portion of B., including the residence of A., was annexed to E.: — *Held*, that the pauper by living in the poor house, did not have such a home in the new town as to fix his settlement therein; and that he did not actually dwell and have his home in that part of B. which was annexed to E. in any such sense as to transfer his settlement to that town. It therefore remained in B.

ON REPORT from *Nisi Prius*.

ASSUMPSIT for supplies furnished by the plaintiff town to one Day, a pauper, who is alleged to have his legal settle-

ment in defendant town. The general issue was pleaded. The proper notices and replies were admitted to have been given, there being no question made except as to the settlement of the pauper. The following facts were agreed.

The pauper, having no legal settlement in the State, came into Brewer in about the year 1838, and lived and made his home at one Dwelley's in that part of the town which is still Brewer, for about eighteen months, when he left and went to live and make his home in the family of one Austin in said town, where he so lived for six years and eight months more; at the end of which time Austin refused to keep him any longer. He then fell into want in Brewer in the year 1845, and the town of Brewer commenced supporting him as a pauper, and have supported him as such ever since. For the first eight weeks they employed said Austin to board him at one dollar per week; after which time he was supported by the town on the town farm.

The pauper has always been a single man, and has never possessed any property, real or personal; and during the time of his living in the families of Austin and Dwelley he worked for his support.

On the 13th of April, 1852, the town of Brewer was divided, and the eastern part of it incorporated into the town of Holden. At the time of this division, the pauper was supported by the town in that part of Brewer which became Holden, being in the poor house on the town farm, which poor house fell in Holden at said division. On the 16th of March, 1855, a portion of the town of Brewer was annexed to Eddington. Said Austin's house was on that part so annexed to Eddington, but said Dwelley's on that part which still remains as Brewer.

The plaintiff town contends that upon such annexation the burden of supporting the pauper became a charge upon defendant town, and the damages sued for are such as have accrued for his support since said annexation.

If the pauper has his legal settlement in Eddington, the defendants are to be defaulted; otherwise, judgment is to be rendered for defendant town.

J. A. Peters, for plaintiffs.

In this case, we contend, that the authority of *Mt. Desert*, v. *Seaville*, in 20 Maine, cannot be carried so far as to apply; that, therefore, the pauper cannot belong to Holden.

We contend that the pauper must belong to Eddington, under the mode first named in Art. 4, § 1, c. 32, R. S.

The annexation of part of Brewer to Eddington was, in effect, the same thing as a division of the town. 1 Maine, 130; 16 Maine, 69; 13 Maine, 299.

The pauper had a legal settlement in Brewer, and in that part of it which, in the division, fell to Eddington; and his last dwelling place fell there on said division; and he gained no settlement elsewhere. He comes literally within the mode named. His own residence was in Brewer, now Eddington. Holden poor house was the town's residence for him. He had no intention about it. He was in Holden a mere boarder, being there for a merely temporary purpose, having no control of himself more than a slave or a *non compos mentis*.

Here are two divisions of Brewer, one of them becomes Holden, and the other Eddington. Upon one of them he gained a settlement and lived till he became a pauper; and upon the other he has lived ever since he was a pauper. It would seem he must belong to one or the other — to Holden or Eddington, or else they take our territory and leave the paupers.

That he would fall upon Eddington rather than Holden, I would cite *Smithfield* v. *Belgrade*, 19 Maine, 387; *St. George* v. *Deer Isle*, 3 Maine, 390.

A. W. Paine, for defendants.

The pauper Day gained a settlement in Brewer by five years residence prior to the year 1845, when he fell into want. During the latter portion of the time he lived with Austin — the former portion with one Dwelley.

During all the time he was a single man, having no family and no property, working for his living. He had, then, no claim upon any one for a support; nor any right, either legal or moral, to claim a home at any place in town. He was a

cosmopolite, living in fact upon the charity of those who were kind enough to grant it, but who had a right at any time, without a moment's notice, to withdraw that charitable support from him. In the course of the year 1845, Mr. Austin, upon whose farm he had lived for six years, withdrew his support, as he had a most perfect right to do. Thus being left without support he fell of course into want.

The whole town then became his supporter, and he had no other home than that which the town might provide. Such a home the town of Brewer did provide, and have continued since to provide. He was the pauper of the whole town and not that of any particular portion of it.

While thus taken care of by the town, and thus furnished with a home, after ten years of pauperism, a small portion of Brewer is set off and annexed to the town of Eddington. The question arises under this statement, to whom the support of the pauper belongs.

He was a pauper of Brewer, and to that town he belongs, until he acquires a new settlement in some other town.

The only question arising is, whether by reason of the annexation the pauper's settlement was transferred to Eddington. If not, then, judgment is to be rendered for defendants.

In coming to a decision upon this point, it matters not in what part of the town the pauper gained his settlement. *Lexington* v. *Burlington*, 19 Pick. 426.

The whole matter is settled by the "fourth" clause of § 1 of the Pauper Act. R. S., c. 32.

This provides for the case directly, in the last provision of the clause cited.

The "annexation" has the effect of a new incorporation from an old town or towns.

The pauper was legally settled in Brewer.

In order, however, that his settlement should be transferred to Eddington it is necessary, in addition to the foregoing facts, that the pauper should actually dwell and have his home upon the part annexed, at the time of the annexation. *Southbridge* v. *Charlton*, 15 Mass. 248; *Fitchburg* v. *West-*

minster, 1 Pick. 146; *New Portland* v. *New Vineyard*, 16 Maine, 69; *Hallowell* v. *Bowdoinham*, 1 Greenl. 129; *New Portland* v. *Rumford*, 13 Maine, 299; *Smithfield* v. *Belgrade*, 19 Maine, 390.

What reason there can be, under the circumstances, to allege of the pauper, that, at the time of the annexation, "he was actually dwelling and having his home upon the territory annexed," it is very difficult to conceive.

Even if his whole pauper life is ignored, and he placed back to the moment of its commencement, he is then found not having a home there, but he is at most found on the territory to be sure, but not with any home there or any right to a home.

The Legislature and the courts seem to place particular stress upon this dwelling at the time on the territory, by using the word "actually." All implied dwellings seem thus put out of question. No inferential homes are to be looked for.

The case of *Mt. Desert* v. *Seaville*, 20 Maine, 341, is full authority for us.

How far the Court may go to overrule the case I do not know.

There is no doubt that it should be overruled, so far as it is supposed to sanction the doctrine that the pauper's residence is one that can give a new settlement, or be the basis of a new settlement.

Whether such a doctrine is sanctioned by that case, is very doubtful. The opposite is very distinctly affirmed in Stevens' case, in *Smithfield* v. *Belgrade*, 19 Maine, 390, and 16 Maine, 137; and I do not understand that the two cases conflict or were even intended to.

But though a pauper residence may not be such as to give a new settlement, yet it does not follow by any means, that it can be so completely ignored as to give effect to a previous state of facts, to be combined with new facts, the result of both which shall give a new settlement.

Because poison will not support life, it does not follow that life will exist for the reason that poison is absent.

The absence of a negative, does not necessarily imply the presence of a positive.

If we would ignore the ten years of this pauper's life, and thus bring him back to 1845, we should in all justice take things as we then find them, and not combine these facts with new facts transpiring in 1855, and by the combination get up facts to change the settlement.

It seems a great injustice, that while time is thus annihilated on the one side, it should not be equally so on the other.

And, in a legal view, every act should be governed and judged by the contemporary law.

To apply the principle to this case. Here are two facts — one, that the pauper once had a home at Austin's — another, that a part of Brewer is annexed to Eddington. The statute provides that when the latter fact exists in actual connection with the former, the result follows that the pauper belongs to Eddington. Now is it just or legal to retain the latter fact as an actual one, and then make the other fact an actual one of the same day, by resorting to a legal fiction whereby to annihilate ten years of time?

Again; it is a well settled principle of pauper law, that a man may be regarded as having a home in any particular town, though there may be no place in that town where he can claim a right to stay or even to stop. *Parsonsfield* v. *Perkins*, 2 Greenl. 411; *Boothbay* v. *Wiscasset*, 3 Greenl. 354.

Such was the pauper Day's case. His home was Brewer. For want of a more definite one, he applied to Brewer for support, and they rendered him the support he asked.

Had he any other? In other words, had he any home at Austin's from which he may be regarded as a temporary absentee during the ten years of his pauper life? If not, he certainly can in no sense be said to be an actual dweller there.

The strong language used in the statute is worthy of note. The dwelling must not only be "actual," but he must "dwell and have his home."

And here arises the particular point which is relied upon as decisive of the case, viz.:—

That the pauper, in order to acquire a settlement in Eddington, by the annexation, must, at the time of the annexation, have had his home and dwelling upon the annexed tract; and this cannot be concluded from any state of facts existing at any previous time. Such state of facts may be evidence, but not such evidence as will conclude the party on either side.

The question, then, depends upon this: whether, on the 16th day of March, 1855, Day had his home at Austin's. If not, then he is not annexed to Eddington. The only fact to establish the affirmative, consists in his having had his home there ten years before. But that home had been taken away from him, and he had been rightfully rejected from it. He had, then, ceased to have a home there before he became a pauper, and there is no pretence that since that time Austin has done aught to re-establish his home at his house. His having been turned off, and not otherwise having any rights there, his home could not by any stretch of language be said to be there in 1855.

A home, or dwelling-place, does not necessarily continue until another is gained. A man may break up his home and become a wanderer, and there will be an end of his dwelling-place, as effectually as if he were to gain a home in another place. *Jefferson* v. *Washington*, 19 Maine, 302; *Exeter* v. *Brighton*, 15 Maine, 58; *Phillips* v. *Kingfield*, 19 Maine, 381.

In *Jefferson* v. *Washington*, 19 Maine, 301, the Court say, "when the Legislature speak of dwelling-place and home as being requisite to establish a settlement, it cannot mean to use these terms in a vague and indeterminate sense. Something specific was in contemplation. It was intended to define so that it could not be misunderstood, and so that it should be obvious to the common sense of every man, what should constitute a settlement. Constructive dwelling-place and home, if there be any such, could not have been in contemplation. If a man actually has a home or dwelling-place, all his fellow-townsmen can at once see and know it."

In *Turner* v. *Buckfield*, 3 Greenl. 231, the Court say, "by

dwelling and having his home, the Legislature meant some permanent abode," &c.

In *Wayne* v. *Greene*, 21 Maine, 361, the Court say, "residence and change of place are facts which are obvious."

MAY, J.—On the 13th day of April, 1852, the easterly part of the town of Brewer was incorporated into a new town by the name of Holden; and, upon the facts stated in the case, it is very clear, that the pauper, whose settlement is in controversy, had, at and before the time of this division, acquired a legal settlement in Brewer, by more than five years continued residence in that part of the town which still remains Brewer. The Act incorporating Holden contains no provisions with reference to the settlement or support of the paupers then upon the town of Brewer, or for the adjustment of any questions relating to such settlement. *Holden* v. *Brewer*, 38 Maine, 472. In this particular the rights of the old and new town are left to depend wholly upon the general law.

The pauper, for whose support this action is brought, at the time of the division, and for several years before, was, and had been supported by the town of Brewer at their poor house on the town farm, which upon the division fell into the territory which became and now is the town of Holden. The pauper having gained a settlement in the town of Brewer before its division, will retain such settlement until a new one is acquired.

It may be well first to inquire whether, under the circumstances of this case, the pauper gained a new settlement in Holden, by reason of the Act incorporating that town, under any of the provisions of the general pauper law then in force. If he did, the plaintiff cannot recover. Such settlement can have been gained only under that provision of the Revised Statutes, which is contained in the latter clause of the fourth mode in § 1, c. 32, by which it is provided, that "when any new town shall be incorporated, composed of a part of one or more old incorporated towns, every person legally settled

in any town of which such new town is wholly or partly so composed, or who has begun to acquire a settlement therein, *and who shall actually dwell and have his home* within the bounds of such new town *at the time of its incorporation*, shall have the same rights in such new town in relation to settlement, whether incipient or absolute, as he would otherwise have had, in the old town where he dwelt." Under this provision all those persons, who at the time of the division *actually dwelt and had their homes* in that part of the old town which became incorporated into the new, and who had their legal settlement in the old town, as it existed before its division, acquired a new settlement in the new town; whilst all other persons continued to have their settlement in the old town. The question of settlement in the new town depends, therefore, upon the fact of an *actual* home, and not upon a *temporary* residence within its limits at the time of its incorporation.

In the case now under consideration, Day, the pauper, appears to have had his last voluntary home at Austin's, in that part of Brewer now Eddington, unless his residence at the poor house in Holden, where he was supported at the time of the incorporation of that town, can properly be regarded, within the meaning of the provision of the statute just cited, as his actual home. His residence there at the poor house, we think, cannot properly be regarded as possessing the characteristics of a statute home. It is true, that he seems to have had no right or inducement to return to his former residence. His home there was broken up, and ceased, by the refusal of Austin to keep him any longer. He was a single man, and without any means or property for his support, having, so far as the case discloses, no earthly object to attach him any more to one place than to another. His residence at the poor house was a matter of necessity. He must be regarded as being there neither *animo manendi*, nor *animo revertendi*. He was subject to removal at any time, not at his own will, but at the option and discretion of others. The

town, or its overseers of the poor, might remove him at pleasure. His supplies were all furnished by the town. We are of opinion that such a residence does not constitute a home, within the meaning of the statute. An opposite construction of the statute would fix the settlement of all the paupers who happened to be residing at the common poor house at the time of the division of any town, upon that town in which the poor house might happen to be, whilst the construction which is adopted, leaves them to fall into the old or new town, as their actual homes at the time of the division, if they have any, may require. Such a construction is more equitable and humane.

It is said that such a construction of the statute is in conflict with the case of *Mount Desert* v. *Seaville*, 20 Maine, 341. But that case, though somewhat similar, is not like the present. There, the paupers did not reside, *as such*, in the new incorporated town, at the time of the division of the town of Mount Desert. It is true they had acquired a settlement in the old town, by residing many years in that part of it which was afterwards incorporated into the town of Seaville. If the paupers had acquired their settlement in that part of Mount Desert which remained, after the incorporation of Seaville, and had been at the time of such incorporation, resident as paupers for the mere purpose of support within the new town, then the case would have been like the present.

The question, whether the home which the paupers in that case had, prior to their falling into distress, some eleven years before, and which, by the division of Mount Desert, fell into the new town of Seaville, continued to exist at the time of its incorporation, does not seem to have been very fully considered by the Court. It was sufficient, that such home did not exist *at the time of the incorporation*, to prevent the paupers from gaining a new settlement thereby in the new town of Seaville. The question, whether such a residence as the paupers had in that part of Mt. Desert which remained, would constitute a home within the meaning of the statute, was not

discussed at all. So far from it, the opinion in that case distinctly asserts that it is not material under what circumstances they resided there. It is true, the Court must have found, under the circumstances of that case, that the paupers did not actually dwell and have their homes in the town of Seaville, at the time of its incorporation; but they may have done so, because they were satisfied that their old homes had been broken up and discontinued in that case as in this, rather than because the paupers had established a new one in that territory which remained as Mt. Desert. That case, therefore, can properly be regarded as going no further than to decide, that a settlement, acquired in any town prior to its division, adheres to the old town, unless the facts existing at the time of the division are such as to transfer such settlement to the newly incorporated town; and that the facts necessary to transfer such settlement did not exist in that particular case.

In the present case, it appears that the pauper, after his removal from Austin's, had no home remaining where it was before he fell into distress and went to the poor house; such home having, as we have seen, been broken up and lost. But his settlement was in the plaintiff town at the time of its division; and, in our judgment, he did not, by reason of his removal and residence at the poor house, there dwell and have his home in that part of said town which was incorporated into Holden, in any such sense as to gain a new settlement in that town for that reason. His settlement, therefore, remained in Brewer, and was there March 16, 1855, when that portion of the town in which he gained his settlement was annexed by an Act of the Legislature to the defendant town.

It does not appear, from any facts in the case, that the pauper, at the time of the annexation of a part of the town of Brewer to Eddington, actually dwelt and had his home, in any sense, upon that part of the town of Brewer which was so annexed. His home, then, had ceased to exist, when he went to the poor house in 1845. It does not appear that he ever returned to reside there afterwards even as a pauper. Under

such circumstances, his settlement still remained in the town of Brewer. *Starks* v. *New Sharon*, 39 Maine, 368.

Plaintiffs nonsuit.

TENNEY, C. J., and HATHAWAY, J., concurred in the result.

GOODENOW, J., concurred.

JOHN TREAT, JR., *& al. versus* DANIEL LORD *& al.*

The State, by virtue of its sovereignty or right of eminent domain, may abridge, control or destroy a public easement in a stream within its limits; but until it does so by positive legislation all persons may lawfully enjoy such easement in common with the State.

It is otherwise in regard to public lands. The person who enters upon them without license is a trespasser; he has no rights in them in common with the State; he may disseize the State, and after he has acquired title by lapse of time, a release or grant of them by the State to other persons will not disturb his title; but such rights as are a part of the State sovereignty, conferred for the public good, cannot be lost by disseizin.

A conveyance by the State of all its right, title and interest in and to the lands over which a navigable stream flows, does not authorize the grantee, or those claiming under him, to use exclusively or to destroy the public easement in said stream.

The statutes in relation to the right of erecting mills and mill-dams, and of flowing lands, are not to be so construed as to excuse or justify the erection of a dam in such a manner as to overflow a public highway already appropriated and in actual use, and thereby render it impassable, nor to interrupt or destroy the public easement or right of way in a stream upon which it is constructed.

If a stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs, a public easement exists therein. In such case the owner of the soil can use it in all modes not inconsistent with the public right.

The right of the public exists in such a stream notwithstanding it may be necessary for persons floating logs or boats thereon sometimes to go upon its banks.

No accidental or intentional obstruction in a stream, not there in its natural state, will legally take from it its inherent and natural capability as a public highway.

Whether a stream is capable of being used as a passage-way for the purposes of commerce is a question of fact for the jury.

Streams which are so small and shoal that no logs can be driven in them without being propelled by persons traveling on their banks are not navigable in any sense to give the public a right of way in them.

It is not the right of counsel to have a requested instruction to the jury, in itself proper, given in the precise words of the request. It is sufficient if it be substantially given.

The Court is under no obligation to give instructions, however correct in law, which have no connection with the evidence in the case.

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

This was an action of trespass *quare clausum*. The general issue, with a brief statement, was pleaded.

Plaintiffs showed that, at the time of the alleged trespass, they were in possession of the land over which Cold stream flows, and the land on both sides of it, from the point where it issues from Cold stream pond to the dead water, about half a mile below; that they had on said stream four dams, on three of which they had valuable mills; that on June 5th, 1854, and from that time to the date of the writ, the defendants and their servants, against the consent of plaintiffs, drove a large quantity of mill-logs from said pond down said stream, removed plaintiffs' mill-logs in their mill-pond to their damage, cut away or broke through a dam and flume of plaintiffs', and sluiced defendants' logs through one of plaintiffs' mills, &c.

Plaintiffs further showed, that the Legislature of Massachusetts, on Feb. 7th, 1820, passed a resolve empowering and directing the commissioners of the Land Office of said State, to convey to Joseph Treat of Bangor, five thousand acres of land therein described, being the same now marked "Treat's Grant," in Greenleaf's map of Maine, including the *locus in quo*, on condition, among other things, that said Treat should give his bond, with sufficient sureties, conditioned that within two years from the passing of the resolve, he would faithfully erect and put in operation a good and sufficient saw-mill and grist-mill on Cold stream, so called; that said Treat complied with said condition; and that said commissioners, on Feb. 14th, 1820, conveyed to him said five thousand acres of land, agreeably to the terms of the resolve; that said mill is still standing and in operation; that at the same time he erected a

dam across said stream, to raise a head of water for his mills, which dam is still standing, being one of those through which defendants passed their logs; and put in evidence tending to show, that he, and those claiming under him, had remained in possession of said stream ever since, claiming and enjoying exclusive right there, excluding the passage of any logs, boats, rafts, &c., through that part of said stream, except by their special license. And they further showed, that said Treat's title to said stream, and the lands on both sides of it, for some half mile from the pond, through mesne conveyances, had become vested in them prior to the time of the alleged trespass; and also that, at the date of said resolve, and said deed to Joseph Treat, all the lands bordering on said Cold stream pond, and all the lands now constituting the towns of Enfield, Lincoln, Lowell and Burlington, were unsettled, and the property of the State of Massachusetts. There are no waters connected with said pond, except those lying in some one of said towns.

Defendants showed that prior to entering plaintiffs' close, they demanded of them seasonably to open a passage for their logs, which plaintiffs refused to do, and forbade defendants driving their logs through; that defendants thereupon drove through. And they introduced evidence tending to show that they did as little damage to the plaintiffs as they could under the circumstances. They showed that the logs which they drove through, were cut on the shores of Cold stream pond, and that this stream is the only outlet of the pond.

They also introduced evidence tending to show that said Cold stream, from its quantity of water, the nature of its channel, &c., was capable of being driven in its natural state, when cleared of brush and fallen trees.

Plaintiffs introduced evidence tending to show that said stream was narrow and shoal, varying from ten feet to two rods in width, and in its narrowest parts carrying a depth of about one foot of water in the time of the spring freshet; and in its wider parts, divided and running round among the

rocks and standing trees; that there was a fall of about fifty-seven feet between the pond and the still water; that at the time said Treat commenced his works there, the outlet of the pond was so obstructed by rocks that logs could not be driven into the entrance of the stream; that owing to those obstructions, and the falls, and spreading out of the stream, as stated, it was impossible to drive logs through that stream before the improvements were made by Treat, and those claiming under him, by removing the obstructions, deepening the channel, &c., even if the brush and down trees had been removed; that many of those trees had been there a very long time, some of them "from time immemorial," and were a complete obstruction to the floating of logs in the stream.

Much evidence was introduced on both sides concerning the capability of the stream in its natural state; also on the point whether defendants did unnecessary damage to plaintiffs in driving their logs through.

The presiding Judge instructed the jury, that if Cold stream was such a stream as the public would have an easement in for the driving of logs, on account of its inherent capacity for being so used, then the resolve of the State of Massachusetts, and the proceedings under it, the bond of Treat, and the conveyance to him, would have only the effect of a deed from the proprietor of the soil, which would convey the land only subject to the public easement; that the right of way was in the waters, and the plaintiff in such case would have no authority to prevent its exercise; that he could by law erect and continue his dams and mills, but was bound to provide a way of passage for the defendants' logs; that some streams are entirely private property, and some are subject to the public use and enjoyment; that the test has been sometimes held to consist in the fact whether they are susceptible or not of use as a common passage-way for the public. And, by request of plaintiffs' counsel, the Judge instructed the jury, "that if the stream were incapable in its natural state of being used to propel logs without the

erection of dams or other structures on plaintiffs' land, there could be no public servitude in it."

The Judge also instructed the jury, that the law, as established in this State, and which they would take for their guide, was, that "the true test to be applied in such cases, is whether or not a stream is inherently and in its nature, capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs—when a stream possesses such a character, then the easement exists, leaving to the owners all other modes of use not inconsistent with it;" that a stream might possess such a character, even though, when the forest was first opened on its shores, it were so obstructed by fallen trees, brush and drift wood, that neither vessels, boats, rafts or logs could be floated, through its course, upon its surface, until such obstructions had been removed; that, perhaps, many such streams, when the forests about them were first opened, would need such clearing out before they could be profitably used; and that it was a question for the jury to determine, from the evidence in the case, whether or not the stream was inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs.

That one of the elements of such capability might be, in the opinion of the jury, a sufficient fountain or head of water, and if so, was there such an one here?

That they would determine what obstructions existed upon this stream, and whether they were of such a nature as would take away from the stream its inherent capability; as, for example, whether a rock so situated as to be easily removed by a person wishing to drive, would deprive the stream of its inherent capacity for such use, when such rock might be the only obstruction in the stream.

That if they found that the stream possessed such inherent and natural capacity, the plaintiffs had no right to prevent the floating of logs through it, even though it possessed that capacity only at the time of the spring freshet; that defend-

ants had a right to drive their logs through whenever that right might be exercised, at any state of the water, and were not responsible to the plaintiffs for any damage they might thereby occasion, they having requested plaintiffs to remove their obstructions, and it having been refused, unless defendants had unreasonably or unnecessarily injured the plaintiffs' property; that defendants had a right to go through, and were not liable in damages for their acts, unless in so doing they unreasonably or unnecessarily injured plaintiffs' property; that, in such a stream, the right of the public exists, notwithstanding it may be necessary for persons floating logs thereon to use its banks.

Plaintiffs' counsel requested the Judge to instruct the jury, that if the stream was incapable of being used without traveling on its banks to propel the logs, there could be no public servitude in it, which instruction was refused: and the Judge then added, that if it was necessary to go on the banks more or less for the purpose of driving logs, that fact would not take from the stream its public character, if they found it capable in other respects of being used as a public stream.

The jury returned a verdict for defendants.

To all which rulings, instructions and refusals to instruct, the plaintiffs excepted.

Rowe & Bartlett, for plaintiffs, elaborately argued, in writing, the questions involved in the case. They maintained the following propositions:—

1. Cold stream is not navigable, in any sense of the term, at the site of the plaintiffs' mills, and no easement for running logs in it can exist, *publici juris*. Lord HALE'S *De jure maris*, c. 23, (in note to) 6 Cow. 538–39; 3 Comyn's Dig. Tit. "Chimin" A. 1; 3 Kent's Com. 414; *Hooker* v. *Cummings*, 20 Johns. 90; *Adams* v. *Pease*, 2 Conn. 481; *Munson* v. *Hungerford*, 6 Barb. Sup. Ct. 265.

In the discussion of this point, the counsel referred to and reviewed *Brown* v. *Chadbourne*, 31 Maine, 9; *Berry* v. *Carle*, 3 Maine, 273; *Wardsworth* v. *Smith*, 11 Maine, 281; *Parker*

v. *Chapin*, 5 Pick. 199; *Esson* v. *McMasters*, 1 Kerr, (N. B.) 501; *Rowe* v. *Titus*, 3 Allen, (N. B.) 326.

2. The stream not being navigable, the plaintiffs had a right to erect their dam by virtue of the statute "for the encouragement of mills." R. S. of 1841, c. 126, § 1; *Wilson* v. *Forbes*, 2 Dev. (N. C.) 30; *State* v. *Godfrey*, 12 Maine, 370.

3. The Judge erred in instructing the jury that the stream was subject to public servitude, even though in its natural state logs could not be driven in it without the removal of rocks, and traveling on the banks to propel the logs. We contend that the case of *Brown* v. *Chadbourne*, 31 Maine, 9, does not authorize such an instruction, but on the contrary forbids it.

4. But, whatever the character of the stream, the evidence we offered shows a license from the State of Massachusetts to erect dams. *People* v. *Pratt*, 17 Johns. 195; *Crenshaw* v. *Slate River Co.*, 6 Randolph, 245; *Com.* v. *Breed*, 4 Pick. 460; *Boston and Roxbury Mill Co.* v. *Newman*, 12 Pick. 467; *Wellington & al., pet'rs., &c.*, (Cambridge common,) 16 Pick. 102–3–4; *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Peters, 245; *King* v. *Montague & al.*, 4 Barn. & Cr. 598; *Com.* v. *Charlestown*, 1 Pick. 179, 182; Opinion of TANEY, C. J., in *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 580–81.

John A. Peters, for defendants.

1. Upon the question of the rulings upon the public character of the stream, I cite and confidently rely upon *Brown* v. *Chadbourne*, 31 Maine, 9.

2. On the question of plaintiffs' title, I cite Parsons on Contracts, vol. 2, page 515; 11 Peters, 548 & 420; 13 How. 81; 6 How. 531; 10 Barb. 243.

The Court will notice that there is nothing in the case to show or even indicate that the plaintiffs cannot have the beneficial use of their grant, notwithstanding the public right.

MAY, J.—This is an action of trespass *quare clausum*, for breaking and entering the plaintiffs' close, consisting "of mills and four dams, with the mill-ponds, and mill-yards, and sites

appurtenant to said dams and mills," situate upon Cold stream, at Enfield, in the county of Penobscot; and for hoisting his gates and tearing away his said dams. The defendants justify the acts complained of, so far as proved, because, as they say, the said Cold stream is a public, navigable stream, upon and over which the public have a right of passage for driving logs, and the said acts were necessarily committed for the enjoyment of such right.

The case comes before us upon exceptions, taken to the rulings of the Judge who presided at the trial; and the first instruction relates to the legal effect of the deed from the Commonwealth of Massachusetts to Joseph Treat, under which the plaintiffs claim, and which was executed in pursuance of a resolve of the Legislature of that State, passed Feb. 7, 1820. In relation to this, the jury were instructed, "that if Cold stream was such a stream as the public would have an easement in for the driving of logs, on account of its inherent capacity for being so used, then said resolve, the proceedings under it, the bond of Treat, and the conveyance to him, would have only the effect of a deed from the proprietor of the soil, which would convey the land only, subject to the public easement; that the right of way was in the waters, and the plaintiffs would have no authority to prevent its exercise; that he could, by law, erect and continue his dams and mills, but was bound to provide a way of passage for the plaintiffs' logs." It is contended, that by virtue of the proceedings under said resolve, inasmuch as the said Joseph Treat was bound by his bond to erect and put in operation a good and sufficient saw-mill and grist-mill on said Cold stream, within two years from the passing of said resolve, which must necessarily include the right to erect and maintain a dam or dams, across the same, it must have been the intention of the Legislature to have granted him full power and authority so to do. Said resolve authorizes the commissioners of the Land Office of that State to convey, and their deed does convey, to said Treat, his heirs and assigns, *all the right, title and interest* of said Commonwealth *in and to* a certain tract of land of the

contents of five thousand acres, describing it by metes and bounds, which include the *locus in quo*. This instruction, is based upon the fact, that the public had an easement in said stream, for the passage of logs, at the time of said conveyance; an easement which conferred upon all persons having occasion so to use it, the right to do so, without any license or grant from said Commonwealth. It is true, the right to control, abridge, or even destroy such easement, then existed in said Commonwealth, by virtue of its sovereignty, or right of eminent domain, disconnected from, and not dependent upon its ownership of the soil; but until so exercised by positive legislation, all persons might lawfully enjoy such easement in common with said Commonwealth. It is otherwise in regard to the public lands. If any person enter upon them without license, he is a trespasser, and the Commonwealth may be disseized of such lands; but after the disseizor has acquired a title by lapse of time, his title will not be disturbed by any release or grant to other persons from the Commonwealth, whilst such rights as are a part of the State sovereignty, conferred for the public good, cannot be lost by disseizin. The right of property is one thing, and the right to regulate or control the use of property, *pro bono publico*, by appropriate legislation, is quite another thing. The first *is property*, subject to be conveyed by deed or other legal mode of disposition; but the last is a part of the sovereign power itself. We are of opinion, therefore, that the resolve of the Legislature of Massachusetts, and the proceedings under it, including the bond and deed aforesaid, cannot fairly be construed as conveying any thing but the right of property to which they refer; that the said Commonwealth, at the time of said conveyance to Joseph Treat, had no such exclusive right of property in the easement, for the passage of logs, upon Cold stream, (if such easement existed,) as would pass by a grant of all its *right, title and interest in and to* the land over which said stream passes; and that by the deed to said Treat, conveying no rights to him other than the rights of property, which the grantors then had, he was not authorized by virtue

thereof, nor are those claiming under him, to use exclusively or to destroy the public easement then existing upon said stream.

It is now further contended, that the plaintiffs had a right to erect and maintain their dams by virtue of the statute for the encouragement of mills. R. S., c. 126, § 1. This point does not appear to have been raised at the trial. The Judge neither made, nor was requested to make any ruling relating to it. It is not perceived, however, how the proposition contended for can be sustained. The statutes in relation to the right of erecting mills and mill-dams and flowing lands has never been "so construed as to justify or excuse the erection of a dam in such a manner as to overflow a public highway already appropriated and in actual use, and thereby render it impassable." The contrary has been directly held. *Commonwealth* v. *Stevens*, 10 Pick. 247.

The reasons for such decision seem to apply with equal force to a public right of way or easement in a river, and where there is the same reason there should be the same law. In the case before the Court, it does not appear that the erection of mills and dams upon said stream would necessarily interfere with the rights of the public in driving logs thereon, especially, if suitable provisions were made therefor; if so, the rights of the mill owner and the public could both be enjoyed without any conflict between them. No error is perceived in the instructions of the Court relating to the plaintiffs' right to maintain their dam.

2. The great question of fact in the case was, whether said stream was subject to such public servitude or not; and the jury were instructed, that in determining this question, "the true test to be applied in such cases is, whether or not a stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts, or logs; and when a stream possesses such a character, then the easement exists, leaving to the owners all other modes of use, not inconsistent with it." This is found to be in exact accordance with the law as laid down by the

Court in the case of *Brown* v. *Chadbourne*, 31 Maine, 9. Considering the importance of this rule of law to the lumbering commerce of our State, and the fact that it has been so recently fully considered and determined by this Court, after elaborate argument from able counsel on both sides, we do not feel that the ingenious reasons now offered in the argument for the plaintiffs are sufficient to require us to overrule it. We think it is clear, also, and in conformity with the case just cited, that no accidental or intentional obstructions in the stream which were not there in its natural state, would legally take from it its inherent and natural capability of being used as a passage way for the purposes of commerce. The whole question of inherent capacity was properly left to the jury. They were permitted to look at the whole evidence in the case; at the width and depth of the stream; at the quantity of water flowing in it at the different seasons of the year; and at all the obstructions or obstacles in the way of its use as a passage-way for logs or other property, whether there originally, or by accident, or otherwise; and from all these, with the other evidence in the case, they were left free to determine the inherent and natural capacity and character of the stream, so far as regarded its facilities for floating logs, to places for manufacture or sale, and thus aiding in the demands of commerce. They were to determine what obstacles existed, and their effect; as, for example, whether a rock, if any such existed, being the only obstruction in the stream, and so situated that it might be easily removed, would take away from the stream its inherent capability. They were not instructed, that a rock, originally in the stream, such as would render the stream in its natural state incapable of floating logs, even though it might be easily removed, would not deprive the public of all right to use the stream as a passage-way; but the existence and effect of such a rock, as well as of all others, was left wholly to the jury, and no request for any instruction as to the legal effect of such a rock upon the natural capacity of the stream was made. If any instruction was desired upon this point it should have been asked. The

example given by the presiding Judge to the jury, left them with precisely the same right to determine the true capacity of the stream as if no such example had been given. There is nothing in the instructions upon this point as to the capacity of the stream which is not in accordance with the law.

3. The instruction, "that in such a stream the right of the public exists, notwithstanding it may be necessary for persons floating logs thereon to use its banks," is directly settled in the case of *Brown* v. *Chadbourne,* before cited; and the reasons there stated for the existence of such right, notwithstanding such necessity, are satisfactory to us. But the Judge was requested to instruct the jury, "that if the stream was incapable of being used without traveling on its banks to propel the logs, there could be no public servitude in it," which instruction was refused. The legal proposition contained in the request, is undoubtedly a sound one. The stream, in order to have the character of a public highway, must, in and of itself, have a capacity for floating logs. Such a stream, as well as our larger rivers, will, as experience has universally shown, from its windings, and the rush of its waters especially in times of freshets, cast many of the logs which float upon its bosom, upon its shores, intervales and banks, thereby rendering it necessary to go upon such uplands for the purpose of making a clean drive. Such incidental necessity neither enlarges nor diminishes the natural capacity of the stream, nor in any way affects its public character. To meet such necessity, it is provided by the Revised Statutes, c. 67, § § 10 and 11, that all logs or other timber, lodged upon any lands adjoining any of the waters within this State, shall, in certain contingencies, and upon certain conditions, be forfeited to the owner or occupier of such lands; and that the owner of such timber may at any time before such forfeiture, enter on said lands and remove the same, by tendering a reasonable compensation for all damages as the statute requires. While, therefore, it is true, that persons driving logs may go upon the banks of our public streams and rivers, as necessity may require, it is also true, that a stream, which is so small and

shoal in its bed, that no logs can be driven in it, without being propelled by persons traveling on its banks, is private property, and not subject to such public servitude as is claimed in this case.

By the common law it is clear, that the public have no right to go upon the banks of ancient navigable rivers for the purpose of towing; and it is said by the Court in the case of *Brown* v. *Chadbourne*, before cited, that "where a river cannot be used without towing, or going upon its banks to propel what is floating, such fact would evince its want of capacity for public use; and we think such fact is conclusive, that no such public servitude exists. The right of the public so to use a stream or river for the purposes of commerce, rests in the intrinsic capability of its waters for such use, and is in no way dependent upon the necessity of using its banks. The Judge, who tried this cause, seems so to have understood the law; for, he told the jury, "if it was necessary to go upon the banks more or less, for the purpose of driving logs, *that fact would not take from the stream its public character*," if it was in other respects capable of being so used; and besides, the test which he gave for determining its public character, being that of inherent and natural capacity, would seem to exclude the idea of having any inherent natural want of such capacity to be supplied by any extraneous aid from persons traveling on its banks. It is not the right of counsel to have requested instruction, in itself proper, given to the jury in the precise words of the request. It is sufficient, if it be substantially given in any form, so that the jury may not misunderstand the law of the case.

It will be found, also, from an examination of the testimony, as reported in the bill of exceptions, that there was no particular evidence touching the question whether the public use of the stream, as a passage-way for logs, was dependent in the least degree upon any propelling power from the banks; and the Judge was under no obligation, when requested, to state any legal proposition, however correct it might be, which had no connection with the proof in the case. The jury,

under the instructions given, must have found that the stream had a sufficient *inherent natural capacity* for the floating of logs; and if they found this, it was not necessary to determine, or that they should know, what would be the effect of an insufficiency of such capacity without a propelling force from the banks, especially in a case where there was no evidence that such force was necessary or had ever been applied. We think, therefore, that no cause exists for setting aside the verdict, because such requested instruction, in the form stated, was not given; and no error being found in any other ruling, the exceptions must be overruled, and there must be judgment on the verdict. *Exceptions overruled.*

TENNEY, C. J., non-concurred.

APPLETON and GOODENOW, J. J., concurred.

HATHAWAY, J., concurred in the result.

JOHN HUNNEWELL *versus* AARON HOBART *& al.*

The gist of trespass *quare clausum* is the breaking and entering of the plaintiff's close.

Where an entry is made under authority or license given to the party by law, and he abuses it, he becomes a trespasser *ab initio*.

Where an entry is made by the authority or license of the party in possession, and the person so entering abuses the privilege, he is liable for such abuse, but is not a trespasser *ab initio*.

A. having his legal settlement in B., fell into distress in C. and was relieved by the latter town, of which the town of B. was duly notified. One of the overseers of the poor of B. and its agent, as town officers, but without authority in writing from the board of overseers of B., entered the house in which A. lived and removed his family and effects therefrom to B. A. thereupon brought his action of trespass *quare clausum* against said overseer and agent: — *Held*, that the removal having been made without authority from the overseers in writing, was illegal, and that the defendants were liable as trespassers; but that the jury having found that the defendants entered the plaintiff's house by his permission, they were not trespassers *quare clausum*, and therefore, not liable in the present action.

Requested instructions, purely hypothetical, are rightfully denied.

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

This was an action of trespass *quare clausum*. Plea, the general issue. It was proved that the plaintiff and his family had their legal settlement in the town of Madison; that being in Bangor, they fell into distress, and were supplied as paupers by the overseers of the poor of that city, who legally notified the overseers of the poor of Madison, and requested the removal of the paupers and payment for the supplies furnished them. The town of Madison paid for the supplies, and the defendants went to Bangor and removed the plaintiff and his family, with his goods and effects, to Madison. The defendants acted as town officers of Madison; Hobart being one of the overseers of the poor, and Remick town agent, but not an overseer of the poor.

The presiding Judge instructed the jury, that defendants, having no authority in writing from the overseers of the poor of Madison, as required by statute, were not justified as town officers in removing the plaintiff, his family and effects, and that they were liable as trespassers for so doing. But that the gist of this action was breaking and entering the plaintiff's close. That if defendants entered plaintiff's house without his permission, they would be liable, and their verdict should be for plaintiff. But if the plaintiff gave defendants' permission to enter his house, and they entered by his consent, then defendants would not be liable in this action. Whereupon the counsel for plaintiff requested the Judge to instruct the jury as follows, to wit:—

1. That if the defendants entered the plaintiff's house without authority of law and by permission of plaintiff, he permitting them to enter as an act of hospitality; and if they, being thus in, removed his children, or goods, or did any illegal act against the will of the plaintiff, or against his consent, it would render them trespassers.

2. That if they, by color of law, or claiming to have authority as overseers of Madison, when they had not such authority, entered under such pretence, by consent of the plaintiff, he being led by them to suppose they were so authorized, and

removed his family or goods, or did any other illegal act against plaintiff's consent, they would be liable.

But the Judge declined giving any further instructions than he had before given to the jury.

It appeared in evidence, that defendants came to Bangor the tenth of November, and removed the plaintiff and family on the morning of the next day, and that defendants called at plaintiff's house in the afternoon or evening of the tenth of November.

The plaintiff testified as follows:—"I think I was in the house in the evening before they took the things in the morning. I think that night they came in before I knew any thing about it. The next morning when they took the things, I suspected them, and told them to keep away and not to come in."

The defendant Remick, testified as follows:—"We called at plaintiff's in the afternoon, the sun an hour or two high. We rapped, and he met us at the door, and bid us come in. We stated that we came to remove him and his effects to Madison. (Hobart acted as overseer of the poor.) We called again next morning. He never forbid us going into the house. In the morning we went in as we did before. Plaintiff assented to our going in."

There was no other evidence than the testimony of the plaintiff and Remick above stated, concerning the circumstances and manner of defendants' entrance into plaintiff's house, or of what others said or did at the time. There was evidence tending to show that plaintiff forbid defendants removing his family and effects after they entered his house.

The verdict was for defendants; and the jury found specially that defendants entered the dwellinghouse of plaintiff by his consent. To the above rulings of the Court the plaintiff excepted.

A. Knowles, for plaintiff.

1. In whatever way the defendants may have entered plaintiff's house, whether by consent of plaintiff or otherwise, their subsequent acts in removing plaintiff's goods and family,

rendered them trespassers *ab initio*. *Mussey* v. *Cummings*, 34 Maine, 74, and cases there cited.

2. The defendants entered the house of the plaintiff without any special legal authority, and at most upon his consent that they might enter. They obtained such entrance for the express purpose of taking the goods and children of the plaintiff, and carrying them off. They were forbidden to do this. The purpose for which they entered is apparent. It was an illegal purpose. The *quo animo* is shown, and the law gives them no protection for any part of their doings.

Abbott, for defendants.

1. The case is improvidently here, the exceptions not having been presented until more than six days after the verdict was rendered. 37 Maine, 573, 18th Rule.

2. The first requested instruction was properly refused. *The six Carpenters' case*, 1 Smith's Leading Cases, 188.

3. There was no evidence on which to found the second requested instruction.

RICE, J. — Trespass *quare clausum*.

The Judge presiding instructed the jury, that the defendants having no authority in writing from the overseers of the poor of Madison, as required by the statute, were not justified, as town officers, in removing the plaintiff, his family and effects, and that they were liable as trespassers for so doing; but that the gist of this action was the breaking and entering the plaintiff's close. That if the defendants entered the plaintiff's house without his permission they would be liable, and their verdict should be for the plaintiff. But if the plaintiff gave the defendants permission to enter his house, and they entered by his consent, then the defendants would not be liable in this action.

In the *six Carpenters' case*, 8 Coke, 146, it was resolved, that when entry is made by authority or license given to any one by law, and he doth abuse it, he shall be a trespasser *ab initio*; but when or where the entry is by authority or license given by the party, and he abuses it, then he must be

punished for his abuse, but shall not be a trespasser *ab initio.*

This distinction will be found running through all the old authorities to the present day. The instructions were in strict conformity with law.

The requested instructions were rightfully denied. They were both purely hypothetical. The question at issue was not whether the defendants *became* trespassers by acts committed after they had entered by permission, but whether by such illegal acts they became trespassers *quare clausum.*

Exceptions overruled.—Judgment on the verdict.

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

GEORGE B. STARBIRD, (*in error,*) *versus* JAMES EATON.

The purpose of a writ of error is to enable the law Court to examine the record in a suit, and thereupon to reverse or affirm the judgment rendered therein.

When the error is one of law, the Court can act upon nothing but the transcript of the record.

Papers presented to a common law Court, and acted on as evidence, constitute no part of the record.

A note, upon which judgment is rendered in an action, cannot be considered by the Court on a writ of error, any more than a deposition or other evidence introduced in support of the action.

When the judgment is for a greater sum than the *ad damnum* in the writ, the error may be cured by a *remittitur* on the record at a subsequent term.

A judgment will not be reversed on a writ of error for a mistake in casting interest. The remedy for such error is by petition for review.

A plaintiff in error, who allowed judgment, by default, to be rendered against him in the original suit, cannot have that judgment reversed by writ of error, upon the ground that the notes on which the judgment was based, were fraudulently attested after having been delivered by the maker to the payee. Having neglected to interpose, at the proper time, what might have constituted a good defence, his remedy, if any he has, is by review.

At common law, the joinder of errors of law and fact was not permitted; but such joinder is now authorized in this State by the Act of April 22, 1852, c. 269, § 3.

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

WRIT OF ERROR to reverse a judgment recovered by the defendant against the plaintiff in error, at the April term, 1855.

The plaintiff alleged five several errors, or assigned that number of grounds of error, in the proceedings; to all which the defendant pleaded there was no error. The exceptions to the judgment chiefly relied on were:—

1. That six months interest upon a note was included in the judgment which was not declared for in the writ.

2. That the purported attestation of the note was a forgery.

The presiding Judge, after examining the record, and all matters pertaining to the case, ruled that there was no error. To which ruling the plaintiff excepted.

Joshua Hill, for plaintiff in error.

By the pleadings in this case, the facts assigned for error are admitted. The plea has the effect of a demurrer. Story's Pleadings, 371.

The original action was defaulted. There was no appearance. If the plaintiff in error has any remedy, or ever had, he has it in this form of proceeding. *Jewell* v. *Brown*, 33 Maine, 250; *Barnett* v. *The State*, 36 Maine, 200.

The first exception to the original judgment in the assignment of errors, is, that the judgment does not follow the declaration. The plaintiff cannot have judgment for more than he declares for. Six months interest upon a note, supposed to be declared upon in the last count in the writ, is made up and included in the judgment, when in fact interest is not declared for. *Storer* v. *White*, 7 Mass. 448.

The other error alleged is, that the signature of the attesting witness is a forgery. This is as material an alteration of the note as a forgery of the signature of the signer. It is a fraud, which corrupts the whole judgment, which should therefore be reversed *in toto*.

In *Jewell* v. *Brown*, 33 Maine, the Court say, if from fraud, accident or mistake, an erroneous judgment is entered, the whole may be reversed on error.

E. A. Harding, for defendant.

APPLETON, J. — The plaintiff in error, being duly summoned, was defaulted in the original action, the judgment in which he now seeks to reverse.

It is objected, that the notes upon which judgment was rendered, do not correspond with those set forth in the declaration. The purpose of a writ of error, is to enable the Justices of this Court to examine the record upon which a judgment has been rendered in this or in an inferior Court, and, on such examination, to affirm or reverse the adjudication. The Court will not take notice of a note described in the assignment of errors, as filed in the case, any more than a deposition or other proof offered to sustain the declaration. *Storer* v. *White*, 7 Mass. 448. The papers presented to a common law Court, and acted upon as evidence, are no part of the record. *Kirby* v. *Wood*, 16 Maine, 81. When the error is one of law, there is nothing upon which the Court can act except the transcript of the record. *Valentine* v. *Norton*, 30 Maine, 194.

There may have been a miscalculation of interest. When the judgment is for a sum greater than the *ad damnum*, it may be erroneous; but the error may be cured by a *remittitur* of the excess entered at a subsequent term. *Hemenway* v. *Hicks*, 4 Pick. 497. In the case before us, the sum for which judgment was rendered does not exceed the *ad damnum*. The Court will not reverse a judgment for a mistake in casting interest. *Whitwell* v. *Atkinson*, 6 Mass. 272. The remedy in such case is by petition for review.

The common law did not permit the joinder of errors of law and of fact in the same process. That is now allowed by an Act approved April 22, 1852, c. 269, § 3.

The plaintiff in error, seeks to reverse the judgment rendered against him, on the ground that the notes in suit in the original action had been fraudulently attested, after they had passed from the hands of the maker, and were in those of the payee.

But if there be a fraudulent attestation of the notes in suit, or of any of them, in the judgment sought to be reversed, the

party injured cannot take advantage thereof by writ of error. If the fact be as alleged, it might have furnished a good defence to the original action; but in that, having been duly summoned, the plaintiff in error submitted to a default. Neglecting at the proper time to interpose what might have constituted a defence, he cannot now reverse the judgment rendered against him for error. He might as well seek to reverse it by this process, because there may have been an original failure of consideration, or a subsequent payment of the notes, for the recovery of which the original action was brought. The remedy of the party aggrieved, if any, is by petition for a review. *Exceptions overruled.*

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

JAMES B. HILL *versus* LORENZO LEADBETTER.

In England, it has been decided, that if the consignee of goods receive *any benefit* from their transportation, he must pay the freight, although the goods have been damaged in the carrying exceeding that amount. His remedy is by cross action.

In this country, the inclination of judicial opinion is to allow the injury done to the goods by the carrier, to be set off as an answer *pro tanto* to his claim for freight.

When a portion of the goods have been lost, the consignee has been allowed in New York to *recoup* the damages so sustained, in an action against him for the freight.

The consignee, or the party receiving the goods, is in all cases responsible for the freight; the only discrepancy in the decisions being as to whether damages may be allowed in deduction, or must be recovered by separate action.

A. contracted to transport certain goods for B., and delivered them accordingly, save a portion, which he converted to his own use on the route, and for these B. brought his action, and A. suffered a default therein. A. then sued B. for his freight, and B. made no claim to *recoup* the damages so sustained; — *Held*, that the freight was earned, and no deduction having been claimed, the plaintiff was entitled to judgment for the agreed price.

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

This was an action of the case.

The plaintiff, in January, 1855, entered into a contract with defendant to haul for him a load of goods from Bangor to No. 6, in Aroostook county, sixteen miles from Patten, and to deliver them at one Knowles' in said No. 6, for an agreed price per ton. He hauled the goods to Patten, where he resided, and there took off two barrels of flour, which he kept and converted to his own use, and delivered the remainder of the load at Knowles' according to agreement.

The plaintiff testified that he took off the two barrels of flour because the load was too heavy.

He testified that he might have told one Gardiner, at Patten, that he kept the flour because he was afraid that Leadbetter would set off the hauling of the load against a sled that he claimed of him.

The defendant, on the above facts, argued that there was a special contract to haul and deliver said load entire, at said Knowles' in No. 6, and having failed for no sufficient cause to perform it, he could recover nothing for hauling.

On the part of the plaintiff, it was further proved, that Leadbetter had sued Hill in trover for the flour at the October term, 1855, at Bangor, and that Hill was defaulted in said suit, though no judgment had been rendered at the time of this trial; that Hill kept the two barrels of flour at Patten till he was sued for it, and then used it up.

The case was referred to the Court with a special agreement that either party might except.

The Court ruled on the above facts, that though there was a special contract to haul said load and deliver it entire at said Knowles', yet the plaintiff was entitled to recover of the defendant the stipulated price for hauling, after deducting therefrom whatever damage might be suffered by the defendant from the non-delivery of the two barrels of flour; and that said damage was nothing in this case, because said Leadbetter had brought his action against said Hill for the two barrels of flour, and did not claim to offset the damages for such non-delivery in this suit.

The Court, therefore, found for the plaintiff for the amount

due for the hauling at the stipulated price; to which ruling and decision the defendant excepted.

S. F. Humphrey, for plaintiff.

1. The cases in the books relative to special contracts, and the rights of parties under them, are not entirely uniform; but it is believed that the later decisions are in harmony with the ruling of the Court in this case and fully sustain it.

The result of the decisions touching this point is laid down by Parsons in his work on Contracts, as follows:—"If one party, without the fault of the other, fails to perform his side of the contract in such a manner as to enable him to sue upon it, still, if the other party have derived a benefit from the part performed, it would be unjust to allow him to retain that without paying any thing. The law, therefore, implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth; and to recover that *quantum* of remuneration an action of *indebitatus assumpsit* is maintainable." Parsons on Contracts, vol. 2, page 35.

The law, as thus laid down, is fully recognized, if not expressly decided by the Court in this State, in the case of *Rogers & al.* v. *Humphrey*, 39 Maine, 382. And it fully sustains the plaintiff's case.

2. The ruling of the Court relative to off-setting the defendant's damages is in exact accordance with the decision in the case of *Rogers* v. *Humphrey*; and is sustained by *Bassett* v. *Sanborn*, 9 Cush. 58, and *Gleason* v. *Smith & al.* 9 Cush. 484. If the defendant had suffered any damage from the non-delivery of the flour, it was at his option either to prove this damage in set-off, or to bring a separate action to recover it; but if this defendant had suffered no damage, and did not claim any damage in set-off, no deduction should be made.

The case of *Miller* v. *Goddard*, 34 Maine, 102, furnishes no answer to the view I have taken of this case. That was an action for labor, where the plaintiff had made a contract to work for a specified time, and where there had been an absolute want of performance. Had the plaintiff in that case labored during the time agreed, but performed his labor im-

perfectly, the Court would have regarded it differently. This is distinctly intimated in the decision given in that case.

But this is a case where there has been an imperfect performance, not an absolute want of performance. No engagement had been entered into to labor for a specified time.

The plaintiff's contract was not an ordinary contract for service. It does not belong to that class of contracts, but is more nearly allied to contracts for sale, or to do some specific labor on the land or the property of another. And the law applicable to these latter classes of contracts should govern in this case. Parsons on Contracts, vol. 1, page 677.

The case of *Berry* v. *Dwinel*, recently decided by this Court, but not yet reported, fully sustains the ruling of the Court in this case. And the attention of the Court is respectfully called to that decision as substantially settling the law in this case.

Brett, for defendant, cited: — *Miller* v. *Goddard*, 34 Maine, 102; *Davis* v. *Maxwell*, 12 Met. 286; *Clark* v. *Smith*, 14 Johns. 326; 2 Smith's Leading Cases, 29, 31, and cases there cited.

APPLETON, J. — The plaintiff has brought this action to recover pay for the freight of a load of goods received by him of the defendant at Bangor, and to be delivered at No. 6, Aroostook county. On his way to the place of delivery, he converted a portion of the goods to his own use, for which the defendant brought against him an action of trover, on which a default has been entered.

It has been decided in England, that if the consignee of goods receive *any benefit* by their carriage, he cannot defend himself from the payment of freight, on the ground that the goods have been damaged by the master, in carrying them, to an amount exceeding the freight. The remedy of the consignee is by cross action. *Shields* v. *Davis*, 6 Taunt. 65.

"The inclination of judicial opinion in this country, seems to be to allow the injury done by the negligence of the carrier, to be set off as an answer, *pro tanto*, to his claim for compen-

sation." Sedgwick on Damages, 451. So, where a portion of the property has not been delivered, the consignee in New York has been allowed to *recoup* the damages so sustained, in an action against him for freight. *Hinsdale* v. *Weed*, 5 Denio, 172.

In *Kaskaskia Bridge Co.* v. *Shannon*, 1 Gilman, 15, it was held, that in an action for freight, the defendant may set off a loss of a portion of the goods agreed to be transported, by the carelessness and negligence of the carrier. In *LaMotte* v. *Angel*, 1 Hawaiian Rep. 136, the question is discussed with great ability by LEE, C. J., and after a full examination of the English and American authorities, he arrives at the conclusion that, in a suit to recover the freight of goods, the consignee may set off *the loss and damage* of the goods, arising from the negligence or *misfeasance* of the carrier.

The party receiving the goods, has been held in all cases responsible for the freight — the only discrepancy between the decisions being, whether the damages from injury to, or non-delivery of the goods, are to be recovered by a separate action or by *recoupment* from the freight earned.

That question, however, does not arise here, for the defendant does not claim a deduction.

The freight having been earned upon the goods received, and the defendant not claiming a deduction therefrom for the goods not delivered, the rulings of the presiding Judge, at *Nisi Prius*, were correct. *Exceptions overruled.*

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

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT,

1856.

COUNTY OF CUMBERLAND.

OLIVER P. SHEPARD *& al. versus* JOHN T. HULL.

There are three parties to a bill of exceptions; the parties to the suit and the presiding Judge.

After a bill of exceptions has been completed by the allowance and signature of the presiding Judge, it is not competent for him to make material alterations therein.

Nor can the parties to the suit, or their counsel, by agreement, make material alterations, without consulting the Judge who presided at the trial, and having his assent thereto.

If it appear to the Court that such material alterations have been improperly made, they will be disregarded, and the cause heard upon the bill as it originally stood.

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

This was an action of assumpsit on an account annexed. The verdict was for the defendant, and the plaintiffs excepted to the rulings of the presiding Judge, excluding certain testimony offered by them in the trial of the cause. When the case came up for a hearing before the law Court on the excep-

tions, the counsel for plaintiffs read an affidavit, subscribed and sworn to by himself, setting forth that certain material alterations had been made in the bill of exceptions, after they had been allowed by the presiding Judge, signed by him, and placed upon the files of the Court. The counsel for the defendant admitted that he had made the alterations by the assent or direction of the presiding Judge.

Jabez C. Woodman, for plaintiffs.

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

TENNEY, C. J.—A party aggrieved by any ruling, order or direction of the Court, may allege his exceptions thereto; and, upon their being reduced to form and seasonably presented to the presiding Judge, it is his duty, if they are found conformable to the truth, to allow and sign them and order them to be placed on the files of the Court. If he deem them not conformable to the truth, he may and should withhold his signature, unless the excepting party consent to alter them according to the facts. If he consent to the alterations suggested by the presiding Judge or opposing counsel, he is considered as having adopted the alterations and made them a part of his bill. He may refuse to alter his bill, and if the Judge is satisfied that it is not conformable to the truth, he will refuse to allow and sign it.

But after the exceptions have been allowed, signed and placed on file, the Judge has no right to alter them or to direct alterations. If, before the adjournment of Court without day, material errors are brought to his attention, he may, on notice to the excepting party, require him to amend according to the truth; and in case he refuse, the Judge may withdraw his signature from the bill.

There are, in fact, three parties to a bill of exceptions; the parties litigant and the presiding Judge. It is not competent for the parties to the suit, or their counsel, by agreement, to make material alterations in a bill of exceptions, after it has been allowed and signed by the presiding Judge, without consulting him and obtaining his assent thereto.

It having been satisfactorily shown to us that certain alterations have been improperly made in the bill of exceptions in this case, we shall disregard all such erasures and interpolations, and shall hear and determine the cause upon the bill as it stood when it was allowed and subscribed by the presiding Judge.

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

GOODENOW, J., dissented.

COUNTY OF OXFORD.

BENAJAH PRATT, JR., *versus* ATLANTIC AND ST. LAWRENCE RAILROAD COMPANY.

The liability of a railroad company under the statute of 1842, c. 9, § 5, for damages occasioned by fire from its locomotive engines, is not confined either to real or personal estate; it exists in reference to both.

A railroad company is not liable for damages, by fire from its engines, to cedar posts deposited within a few rods of the track, and intended for use in some other place within a short time.

It is liable, however, for damages to growing timber along its route.

Although growing timber may not have been extensively insured, if at all, it is not unreasonable to suppose that it was intended to be included within the meaning of the statute, and that railroad companies have an insurable interest in such timber along its route. The statute is sufficiently comprehensive to embrace growing trees, and no reason is perceived for excluding them from its operation.

The language of the statute, "along the route," applies to buildings near and adjacent to the railroad *so as to be exposed* to the danger of fire from the engines.

A building separated by a street from that upon which the fire from the engine fell, and growing timber three hundred feet from the track, are "along the route," within the purview of the statute.

The growing trees of A. stood about three hundred feet from the line of the railroad. Fire from the locomotive engine communicated to materials growing and naturally lying between the premises of A. and the railroad, and

extended to and damaged A.'s growing timber. A. brought his action against the railroad company for the damages: — *Held*, that the company was liable therefor.

Provisions of a statute absolutely inconsistent with those of another statute subsequently enacted, are ordinarily regarded as repealed; but statutes cannot be repealed by implication, if the implication does not necessarily follow from the language used.

The simple incorporation into a private statute of a portion of the provisions of a general public statute cannot be treated as a repeal of its other provisions which are omitted therefrom.

The incorporation of such provisions into the charter of a corporation as a part thereof, cannot exonerate the corporation from the duties, liabilities and obligations imposed upon similar corporations by the general statute.

The statute of 1842, c. 9, is remedial in its nature, and applies to corporations which obtained their charters prior to its enactment.

The Atlantic & St. Lawrence Railroad Company is not by its charter (Special Laws of 1845, c. 195,) exempted from the operation of the statute of 1842, c. 9.

Section eighteen of the charter of this company looks only to the future, and has no effect to annul or modify any thing contained in the Act of 1842, c. 9.

AGREED STATEMENT OF FACTS.

This was an action on the case, to recover for damages done to growing timber on plaintiffs' land, on the 17th May, 1853, by fire communicated from defendants' locomotive engine.

The writ was dated June 30, 1854.

The title of the plaintiff to the premises was admitted; and that the premises were situated near the line of the railroad of defendants, almost three hundred feet distant therefrom.

It was also admitted, that the plaintiff's loss was sustained by reason of fire communicated by the locomotive engine of defendants', to materials growing and naturally lying on the land between plaintiff's premises and the railroad track; and thence immediately spreading to plaintiff's premises.

The depositions of Ira Crocker, James C. Churchill, Caleb S. Carter and John W. Munger, taken by defendants, together with any others legally taken by either party relating to the subject matter, were made a part of the case, subject to legal objections, and were to be considered by the Court, as they would be by a jury.

If, upon the foregoing statement of facts and the testimony in the case, the Court should be of opinion that the plaintiff was entitled to recover of defendants for the damages sustained by him, the defendants were to be defaulted,—damages to be assessed by any member of the Court. If otherwise, plaintiff to become nonsuit.

Shepley & Dana, for plaintiff.

1. The question in this case, is, whether or not a railroad corporation is answerable for damages occasioned by fire communicated by their locomotive engines to wood and timber growing along the route of their road.

It is evident, that unless they are so made answerable, and thus held to the exercise of care, owners of such property along the route are subject to hazard without a compensating benefit; they find their property suddenly put into the hands of others, without their consent. To say they are compensated by increased privileges, is not true, and does not meet the case; for no privilege will be accepted by any man which is accompanied with such constant risk, while his condition is still more intolerable, if this so called privilege is forced upon him against his wishes. Nor can it be said that the owner of such property is recompensed by the damage awarded on the laying out of the road; for, in cases like the present, where the property is not crossed by the track, but still lies so near it as to be constantly subject to the risk, no damage is awarded.

2. The statute of 1842, c. 9, § 5, provides that "when any injury is done to a building *or other property*, of any person or corporation, by fire, communicated by a locomotive engine of any railroad corporation, the said corporation shall be held responsible in damages to the person or corporation so injured." And that this liability may not be too onerous to railroads, the same section provides that they shall have an insurable interest in the property for which they may be so held responsible, in damages, along the route, and may procure insurance thereon in their own behalf.

In *Hart & al.* v. *Western Railroad Co.*, 13 Met. 99, this section (also the law of Massachusetts,) received a judicial

construction, under a state of facts essentially like the one at bar, and the reasoning of the Court applies with equal force here, and that judgment is decisive of this question.

The case of *Chapman* v. *At. & St. Lawrence Railroad Co.*, (Law Reporter, January, 1855, p. 502,) simply decided that articles, deposited by the railroad, and removable at will, are not covered by the provision, and it in no wise conflicts with the case in 13 Met. 99, nor does it weaken the force of the reasoning in that case.

3. It is difficult to conceive, that while railroads are liable for injury occasioned to buildings, growing timber, immovable, impossible to be secured, and, in some seasons of the year, highly inflammable, should not be covered by the term "other property." What does the term include then? Does it mean live stock, or grain, or tools, all which are confined to no locality, and which the company must watch, at its peril, if it would be insured thereon? And does it not cover fixed, permanent growth, which is subject to none of these changes or removals?

The defendants may answer that this extended liability would subject them to too great risk. That matter was considered in 13 Met. 99. They may say, also, they have no insurable interest in such growth. But this is not so. The property is permanent, and their liability a fair risk. The depositions taken amount to nothing. They only show that no one has ever applied for insurance on such property to their knowledge. There is nothing to show that insurance companies would not be willing to take a risk of the kind contemplated by the statute.

4. The feasibility of insurance, however, is not the question; for it is hardly to be supposed that a railroad company, which is declared by the decision in 13 Met. to be liable for injuries to houses along its route, would insure every such house; yet they have an insurable interest. The protection is possible, by the use of reasonable diligence, and that is all that is contemplated.

P. Barnes, for defendants.

1. The action is not maintainable under the authority of the recent case of *Chapman* v. *these Defendants*, 39 Maine, 92.

The defendants could not by "reasonable diligence," &c., procure insurance on this property.

For all purposes between such parties as these, growing timber is movable property. The owner cuts and removes it when he pleases; but insurance contracts are for future definite periods.

2. The company is not liable to such an action as this, and under the express provisions of its charter as compared with R. S., c. 81, and Act of 1842. Charter § § 1, 12, 18, 11.

TENNEY, J.—This action is for the recovery of damages done to growing timber, on the plaintiff's land, by fire from the defendants' locomotive engine, distant almost three hundred feet from the line of the railroad, communicated to materials growing and naturally lying on the land between the plaintiff's premises and the railroad track, and thence spreading to the land of the plaintiff.

The suit is sought to be maintained under the statute of 1842, c. 9, § 5, which provides, "when any injury is done to a building, or other property of any person, or corporation, by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be held responsible, in damages, to the person or corporation so injured; and any railroad corporation shall have an insurable interest in the property for which it may be held responsible in damages, along its route, and may procure insurance in its own behalf."

The defendants deny their liability, and in support of their denial, rely upon the case of *Chapman* v. *At. & St. L. Railroad Co.*, 37 Maine, 92. And it is insisted also by them, that they are not subject to the statute referred to.

The analogy between the cedar posts deposited some few rods from the railroad, and growing trees is not strong. The former, being considered, in the case cited, as movable property, having no permanent location, but from its nature left

for the purpose of being put to use, in some other place within a very short time, was not insurable property, so that it would be understood as falling within the purview of the statute.

But it cannot be said, with any propriety, that timber growing, and therefore attached to the soil, is movable property, having no permanent location, in the sense in which this language was applied to the cedar posts.

The property for which a railroad company may be liable in damages arising from a loss occasioned by fire communicated from a locomotive engine, is not confined either to real estate or personal property. Insurance may be effected upon either. And when a subject of insurance, the statute will apply, other things existing which will bring the case under its provisions. It will not be denied, that a dwelling-house, situated upon land of the owner, "along the route" of the railroad, is insurable. Merchandize in a store, situated in like manner, for the purpose of being sold in the store in which it is, may be regarded as insurable property.

It is true, that our attention has been brought to no case, where insurance upon growing timber has been effected. But this is not decisive of the question before us, and whether there may be therein an insurable interest. The provisions of the statute are new in this State, and have not, it is believed, for any considerable length of time, made a part of the code of sister States. The necessity for the enactment, was regarded, undoubtedly, as the offspring of the new mode of locomotion by the agency of steam, to secure owners of property, under the increased risks, by the use of fire, in causing transportation of property and passengers. It, therefore, is not unreasonable to suppose, it was designed that certain species of property would fall within its meaning as being insurable, which had not before been extensively insured, if at all.

Growing trees are often to be regarded as more valuable to remain attached to the land on which they stand, than to be removed. They are often cultivated for profit, which their

growth is supposed to promise, or for ornament, by reason of their foliage or otherwise. It cannot be assumed by any means, that they will be removed from the soil sooner than many buildings of permanent construction.

It cannot be doubted, that trees, standing upon the land, are much exposed to destruction from fires which exist in their vicinity; and when these fires, in certain seasons of drought, do commence among even growing timber, their ravages are extensive and ruinous to its owners. When land covered with trees is so situated as to be exposed daily to the fires scattered from the locomotive of a railroad train, experience has convinced those interested in such real estate, that the danger is certainly as great as that which would be incurred by the proprietors of buildings which are similarly situated in relation to a railroad. The statute is sufficiently comprehensive in its terms to embrace growing trees, and no reason is perceived for excluding them from the application which would extend to buildings.

It is very manifest, that a railroad company, under this provision, is not liable for an injury to property, in which it has no insurable interest; and it has such interest in property only as lies *along* its route. Under the word "along," and, as an adverb in Webster's Dictionary, is the following:— "Sax. *and-lang* or *ond-lang*; Fr. *au-long*, *le-long*. See Long. The Saxons always prefixed *and* or *ond*, and the sense seems to be, by the length, or opposite the length, or in the direction of the length." The first definition given is, "By the length; lengthwise; in a line with the length; as the troops marched *along* the bank of the river, or along the highway." The first definition given of the word "long" is, "Extended, drawn out in a line, or in the direction of length, opposed to "short," and contra-distinguished from "broad" or "wide." Long is a relative term; for a thing may be *long* in respect to one thing, and *short* with respect to another."

It is not deemed reasonable, that the Legislature should limit the liability of railroad corporations to a fire caused by its engine to property upon land immediately adjoining the

railroad track, when that upon a strip of land a few feet distant, owned by another proprietor, equally exposed, should be excluded. Under such a statute the security of an owner, where land was bounded upon the track, would be great or small according to the width of his lot, and the security, which would embrace the whole width, would not extend to his grantee, of a part of the same, most remote from the railroad.

The liability of a railroad company was held in Massachusetts, under a statute in all respects similar to the one now under consideration, to extend to a building, separated by a street from the one upon which the fire fell, and which it destroyed, the fire having been communicated from the latter to the former, by ordinary and natural means, and caused its destruction. And in the same case, it was considered, that the words "along the route," would describe buildings being near and adjacent to the route of the railroad, *so as to be exposed* to the danger of fire from engines, but without limiting, or defining the distance. *Hart & al.* v. *Western Railroad Corporation*, 13 Met. 99.

It cannot be doubted, that the Legislature designed to afford no greater security to property situated very near the railroad track, than to that which was more remote, provided each was equally exposed. And whether the distance from the line of the railroad, of the property destroyed, should be sixty or three hundred feet, the peril being the same, is an immaterial question, provided both are "along the route." And we agree with the Court in Massachusetts, that, as the Legislature have prescribed no particular distance beyond which the railroad company is not liable, the definition of these terms must be determined by the answer to the question, Was the property destroyed, so near to the route of the railroad, as to be exposed to the danger of fire from engines? And we do not doubt, that in this case, the growing trees were so near to the railroad as to be comprehended in the protection provided by the statute.

2. The defendants obtained their charter in the year 1845,

c. 195, Special Laws. Therein certain obligations are imposed upon them, which are similar to those which railroad corporations were under by statute of 1842, c. 9; and it is silent as to other duties, liabilities, obligations and restrictions, contained in that chapter, and does not in terms refer thereto; but does expressly confer upon the defendants all the powers and immunities, and makes them subject to all the duties and liabilities, provided and prescribed respecting railroads, in c. 81, R. S., not inconsistent with the express provisions of the charter. Hence, it is contended, that the statute under which this action is brought, is not designed to apply to the defendants.

Provisions in a statute absolutely inconsistent with those of another statute which is subsequent, are ordinarily regarded as repealed, without any repealing clause. But the simple incorporation into a private statute, like that of a railroad charter, of a portion of the provisions which are found in a public and general statute, previously enacted, cannot be treated as a repeal of other provisions which are omitted. Neither can the incorporation of such provisions into a railroad charter, as a part of the latter, exonerate the corporation from duties, liabilities and obligations, imposed upon similar corporations, by a general statute, to which no reference is made in the charter, unless the provisions of the general statute are inconsistent with those of the charter. Statutory enactments cannot be repealed by implication, if the implication does not necessarily follow from the language used.

But the statute under which this suit is sought to be maintained, is one of those remedial acts assigned for the protection of property peculiarly exposed by the introduction of the locomotive engine, operated by the means of fire, and applies to corporations which obtained their charter before its enactment. *Norris* v. *Androscoggin Railroad Company*, 39 Maine, 273. And the same general statute, being in force at the time the defendants obtained their charter, they are affected by its provisions.

The defence has no support from section 18 of the charter,

in which the Legislature had debarred itself from imposing any other or further duties, liabilities or obligations. This provision looks only to the future, and can have no effect upon the statute of 1842, c. 9, to annul or modify any thing therein contained.

According to the agreement of the parties, the defendants are to be defaulted, and the damages are to be assessed by a member of the Court.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1856.

COUNTY OF SAGADAHOC.

RICHMOND BANK *versus* JAMES D. ROBINSON.

Courts of justice will not enforce contracts made in violation of law.

The Act of 1841, c. 77, prohibits banks from making loans upon the pledge of its own stock; or from discounting paper without at least two responsible names as principals, indorsers or sureties, or adequate collateral security; or from making any loan to any stockholder of the bank until the amount of his shares shall have been paid in. Notes or other securities discounted in violation of these and like prohibitory provisions of statute cannot be enforced by legal process.

In this class of cases, the contract itself being made in direct violation of the statute, is illegal. The violation of certain other provisions of the law designed to regulate the manner in which the general business of banks shall be conducted for the security of the stockholder and the safety of the public, does not affect the validity of contracts between the bank and its ordinary customers. It may afford ground for an injunction or work a forfeiture of the charter.

A director in a bank indorsed a note which was discounted at his bank, he at the time being liable to the bank for a greater amount than was authorized by the Act of 1841, c. 77, § 19: — *Held*, that as to *him* the violation of that provision was entirely collateral; it did not enter into or affect *his* contract.

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

This was an action of assumpsit on a promissory note.

The facts in this case are given in the opinion of the Court.

It was agreed that the full Court should render such judgment as justice required, with power to make such inferences of fact as a jury might lawfully make.

C. W. Larrabee and *Bronson & Sewall*, for plaintiff, contended that the consideration of a negotiable promissory note cannot be inquired into in an action between the *bona fide* holder for value, taken before its maturity, and the maker, unless it was void at its inception. Byles on Bills, 98, note 1, Am. Ed.; Ib. 192; *Goddard* v. *Lyman*, 14 Pick. 268; Story on Prom. Notes, § § 190, 191, 192, 193, 194, 195, note 1st ed., and cases there cited; Chitty on Bills, 99, old paging, 95, 12th Am. ed., note 1, and cases there cited; *Smith* v. *Hiscock*, 19 Maine, 102; *Malbon* v. *Southard*, 36 Maine, 147; 3 Kent's Com., 1st ed., 79; *Calden* v. *Bellington*, 15 Maine, 398; *Thompson & al.* v. *Shepsum*, 12 Met. 311.

Gilbert, for defendant, cited: —

Act of amendment of April 16, 1841, § 19, p. 753, of the R. S. of 1841; Chap. 238 of Laws of 1856.

Rice, J. — Assumpsit on a promissory note, signed by the defendant, payable to Foster & Spaulding, and by them indorsed to the plaintiffs, by whom it was taken in renewal of a former note of the same parties, and for a like amount, which had been discounted by the bank. No copy of the note has been furnished us.

The evidence shows that Foster, one of the indorsers, was, at the time the note was received by the plaintiffs, a director in the bank; that the capital stock of the bank was seventy-five thousand dollars; and that Foster was then liable to the bank, either as principal, surety or indorser, to an amount exceeding eight per cent. of its capital stock.

The defence relied upon is, that the note in suit was received by the bank in violation of law. To sustain this defence, reliance is had on the following provision of § 19, of

c. 77, of Act of Amendment to the R. S.:—"The aggregate of all the debts due from the directors, as principals, indorsers or sureties, shall, at no time, exceed one-third part of the capital of such bank; nor shall the debts due from any one director, as principal, indorser or surety, exceed eight per cent. of the capital stock."

That courts will not lend their aid to enforce contracts made in violation of law, is a principal too well settled and familiar to require the citation of authorities in its support.

The banking law, c. 77, prohibits banks from making loans upon the pledge of its own stock, or from discounting paper without at least two responsible names as principals, indorsers or sureties, or adequate collateral security; or from making any loan to any stockholder until the amount of his shares shall have been paid into the bank. Notes, or other securities, discounted in violation of these and like prohibitory provisions of the statute, cannot be enforced by legal process. *Springfield Bank* v. *Merrill & al.*, 14 Mass. 322. In this class of cases, the contract itself is illegal, being made in direct violation of the prohibition of the statute.

The same statute contains another class of provisions, designed to regulate the manner in which the general business of banks shall be conducted, or to adopt general rules and regulations for their procedure. Such, for instance, as that the capital stock shall be paid in within a given time; that no stockholder shall, at any one time, hold or own more than one-fifth of the capital of any bank; that no shares in the capital stock of any bank shall be sold or transferred, except in certain specified cases, until the whole amount of the capital stock shall have been paid in; that the directors shall make half yearly dividends of the profits of the bank; that the cashier and clerks, before they enter upon the duties of their respective offices, shall be sworn and give bonds, and many others of a similar character. These provisions were designed for the security of the stockholders of banks and the safety of the public. They do not enter into and affect the validity of contracts between the bank and its ordinary cus-

tomers. Their violation may afford ground for the interposition of the public authorities by way of injunction, or prohibition, and cause for a forfeiture of charter or corporate privileges, but cannot be inquired into by a debtor of the bank, in defence of a note or other security received by it in its ordinary course of business, and not in violation of any of the prohibitory provisions of law.

Of this general character are the provisions of the statute already cited, and relied upon by the defendant. They are not of that class of prohibitions which enter into the ordinary contracts of banks with their customers, and render such contracts illegal. That such is the construction of this provision of the statute intended by the Legislature we think is apparent, from the provisions of c. 238 of laws of 1856, cited also by defendant. The second section of that Act reads as follows; "The said cashier of every bank shall also make returns to the Secretary of State of the liability of the president and directors of the several banks, as principals or sureties in their individual capacity, and as members of a firm or the agents or officers of any corporation."

These returns are required to inform the public of the condition of the banks, and that the State authorities may know whether any of those provisions of law designed for the protection of the public and of the stockholders have been violated.

In this case the directors may, in case loss shall be sustained by the bank by reason of their mismanagement, or from violation of the provisions of the statute referred to, have rendered themselves individually liable for such loss, or have rendered their bank liable to injunction or other process in behalf of the State, but the defendant cannot avail himself of this failure on their part to observe these requirements of the statute; as to *him* that violation was entirely collateral; it did not enter into or affect *his* contract. *Little* v. *O'Brien*, 9 Mass. 423. A default must therefore be entered.

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

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BURDEN OF PROOF.

In an action of trespass *quare clausum*, the burden of proof is upon the plaintiff to show affirmatively the location of the monuments named in the deed under which he claims, and that they include the place entered upon by the defendant. *Robinson* v. *White*, 209.

CERTIORARI.

The Court will not, in the exercise of its discretion, grant a writ of *certiorari* for informalities in a record, which are merely technical, which do not affect injuriously the rights of any citizen, and which are not prejudicial to the public interests. *Smith* v. *Cumberland County Commissioners*, 395.

COLONIAL ORDINANCE.

By virtue of the proviso contained in the Colonial ordinance of 1641, persons had a right to use the shores of the Penobscot river, including the right of mooring their vessels thereon and of discharging and taking in their cargoes. *State* v. *Wilson*, 9.

COMMON CARRIER.

1. A common carrier has a lien upon the goods transported by him, and the right to retain the possession of them until his reasonable charges are paid. *Ames* v. *Palmer*, 197.

2. The right of a common carrier to retain possession of goods transported by him in order to enforce the payment of his charges, does not deprive the general owner of the right of immediate possession as against a wrongdoer. *Ib.*

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INJUNCTION.

1. The process of injunction should be applied with the utmost caution. It must be a strong case of pressing necessity, or the right must have been previously established by law, to entitle a party to call to his aid this strong arm of the Court. *Morse v. Machias Water Power Co.*, 119.

2. The interposition of a court of equity by injunction, must be based on a clear and certain right in the petitioner, to the enjoyment of the subject in question, and an injurious interruption of that right, which, on just and equitable grounds, ought to be prevented. *Ib.*

3. If it shall appear to the Court, when an injunction is asked, that other parties than those named in the bill are interested in the result, the Court itself may state the objection and refuse to make a decree; or, if a decree be made, it may, for this defect, be reversed on a re-hearing or an appeal; or, if it be not reversed, it will bind none but the parties to the suit and those claiming under them. *Ib.*

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INSOLVENT DEBTOR.

It seems that the assignees of an insolvent debtor, receiving a conveyance of his "right, title and interest" in land, of which he had previously given a bond to convey upon the performance of certain conditions therein expressed, will hold the estate conveyed, subject to the prior equities of the obligee in such bond. *Bragg* v. *Paulk*, 502.

See ASSIGNMENT, 3, 4, 5, 6, 7, 8.

INSURANCE.

1. The Act incorporating an insurance company, provided "that when the property insured shall be *alienated*, by sale or otherwise, the policy shall thereupon be void;" — *Held*, that a mortgage of the insured property is not an alienation, within the meaning of that Act.

Pollard v. *Somerset M. F. Ins. Co.*, 221.

2. To avoid a policy by an alienation of the property, the transfer must be complete and entire, unless the contract of insurance otherwise provides. *Ib.*

3. But where there is a provision that the policy shall be void, if the property

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An actual entry by a demandant into premises for which he has recovered judgment before a court of competent jurisdiction, establishes his seizin and title although no writ of possession has issued. *Hurd* v. *Coleman*, 182.

See LIFE ESTATE, 3.

SETTLEMENT.

1. To set off a part of one town and annex it to another, has the same effect in regard to the legal settlement of persons residing on the territory annexed, as to incorporate a new town. *Ripley* v. *Levant*, 308.
2. The incorporation of a new town from parts of other towns, "with all the persons having a legal settlement therein," includes all who had acquired their settlements on the territory of which the new town is composed, although removed therefrom at the time of incorporation. *Ib.*
3. By R. S. of 1841, c. 32, a manifest distinction exists between the division of a town and the incorporation of a new town from parts of other towns, in regard to the rights of settlement of the inhabitants, under certain circumstances. The *division* fixes the settlement of persons, absent at the time, in that part in which was their last dwelling place. The *incorporation* places in the new town, the settlement of those who *actually dwelt and had their homes* within its limits at the time of incorporation. *Ib.*
4. A. had his settlement in the town of B., and removed therefrom after having resided for a few weeks in a portion of the town which was subsequently annexed to other territory and incorporated into a new town: — *Held*, that A. having acquired his settlement in that part which remained the town of B., and having had no dwelling place and home within the bounds of the new town when incorporated, his legal settlement was still in B. *Ib.*
5. The latter clause of the fourth mode of gaining a settlement in a town, (R. S. of 1841, c. 32, § 1,) provides, that "when any new town shall be incorporated, composed of a part of one or more old incorporated towns," such inhabitant as "shall *actually dwell* and *have his home* within the bounds of such new town at the time of its incorporation, shall have the same rights in such new town in relation to settlement" as he would have had in the old: — *Held*, that the question of settlement in the new town depends upon the fact of an *actual home*, and not upon a *temporary residence*. *Brewer* v. *Eddington*, 541.
6. The settlement of a person, supported by the town as a pauper, at its poor house, situated within the limits of a new town incorporated out of the old one, does not become fixed in the new town, from the fact of his thus living therein. *Ib.*
7. A poor house cannot be regarded as having the characteristics of a statute home. *Ib.*
8. A settlement acquired in any town prior to its division, adheres to that town afterward, unless the facts existing at the time of division are such as to transfer the settlement to another town. *Ib.*

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REVISED STATUTES OF 1841.

SUPREME JUDICIAL COURT.

1. It is incumbent on the Judge presiding in a trial, to give to the jury, at the request of a party, any instruction which is in accordance with law and is based on evidence in the case tending to show the state of facts which it supposes; but he is not bound to give it in the language of the request, nor as a "requested" instruction. *Anderson* v. *Bath*, 346.

2. An instruction, although erroneous, if it be not material and injurious to the excepting party, will not furnish ground for setting aside a verdict. *Hardy* v. *Colby*, 381.

3. When an action is legally commenced and properly pending, the Court has no authority to dismiss it, on motion, because the plaintiff has not tendered a bond of indemnity. *Moore* v. *Fall*, 450.

4. It seems, that courts may continue an action upon a note alleged to be lost or destroyed, until it shall become barred by the statute of limitations. *Ib.*

See Certiorari. Constitutional Law, 7. Contract, 18, 19. County Commissioners, 7. Equity. Error, Writ of, 1, 2, 3, 4. Indictment and Complaint, 6, 8. Notice, 1, 3. Practice. Trustee Process, 3.

SURETY.

1. A bank received interest in advance for a further period upon a note which it had discounted, and which was about to mature, and caused the word "renewed" to be written thereon: — *Held*, that the advance interest thus received was a valuable consideration, and that the time of payment of the note was enlarged. *Lime Rock Bank* v. *Mallett*, 349.

2. The liability of a surety upon a note is terminated by a valid agreement to enlarge the time of payment without his knowledge or consent. *Ib.*

3. A person whose name appears as maker upon a note, but who is in fact a surety only, and is well known to be such to the payee, may, in a suit upon the note, avail himself of the defence that the time of payment has been enlarged without his knowledge or consent and his liability thereby terminated. *Ib.*

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Benson v. *Smith*, 414.

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TOWN.

1. In this State, if a county, town or plantation, against which a suit is brought, or an indictment found, for a defective road, has, at any time within six years before the injury for which damages are sought, made repairs on the road alleged to be defective, it is not competent for such county, town or plantation to deny the location of such road. *State* v. *Wilson*, 9.
2. A town is not liable for an injury, occasioned by its defective highway, to a horse with which a person is traveling on the Sabbath day before sundown, unless the traveling is a work of charity or necessity.
Hinckley v. *Penobscot*, 89.
3. In an action against a town for an injury to a horse in consequence of a defective highway, it being shown that it occurred while traveling on the Lord's day before sundown, the burden of proof is upon the plaintiff to show that the traveling was a work of charity or necessity. *Ib.*
4. When an injury is occasioned by a defect in the highway *and some other cause* for which the town is not responsible, the town is not liable in damages for the injury. *Anderson* v. *Bath*, 346.
5. In order to render the town liable, the injury must be occasioned *solely* by its neglect. *Ib.*
6. A defect in the highway cannot be held to have occasioned an injury when some other cause combined to produce it. *Ib.*
7. If the jury find, in an action against a town for an injury alleged to have been occasioned by a defect in the highway, that there was a defect in the plaintiff's harness which did in fact contribute to produce the injury, he cannot recover. *Ib.*
8. If such defect in the harness was unknown to the plaintiff, and the exercise of ordinary care and prudence would not have enabled him to discover it, the result will still be the same; he cannot recover for the injury. *Ib.*
9. The provisions of the R. S., of 1841, c. 25, § § 57 and 89, relating to highways, apply to obstructions placed upon or over a street or road, as well as to inherent defects in its structure. *Davis* v. *Bangor*, 522.

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