REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT,

OF

MAINE.

BY TIMOTHY LUDDEN,
REPORTER TO THE STATE.

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1858.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

HON. JOHN S. TENNEY, LL. D., CHIEF JUSTICE.

HON. RICHARD D. RICE,
HON. JOSHUA W. HATHAWAY,
HON. JOHN APPLETON,
HON. JONAS CUTTING,
HON. SETH MAY,
HON. DANIEL GOODENOW,
HON. WOODBURY DAVIS,
} ASSOCIATE JUSTICES.

HON. NATHAN D. APPLETON, ATTORNEY GENERAL.

By the act of April 9, 1856, concerning the Supreme Judicial Court, it was enacted, that after a vacancy shall occur therein, it shall consist of one Chief Justice and six Associate Justices, and the concurrence of at least four members of said court shall be necessary in determining questions of law and equity; and thereafter a vacancy occurring on removal, by address, of the HON. WOODBURY DAVIS, the court was thus constituted, until the seventeenth day of February, 1857, when that act was repealed, and the HON. WOODBURY DAVIS re-appointed as Justice of the Supreme Judicial Court, on the twenty-fifth day of February, 1857.

*** By the act of April 15, 1857, "additional concerning the Supreme Judicial Court and judicial proceedings," it was enacted that "not less than a majority of the Supreme Judicial Court" (now consisting of eight members) "shall be competent to hear and determine questions of law and equity, and try indictments found for crime, the punishment of which is death," and the concurrence of five is made necessary in the determination of any such case, and in any ruling and instruction in a trial for capital crimes.

CASES

REPORTED IN THIS VOLUME.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

WHO HEARD AND DETERMINED THE CASES

FOR THE

WESTERN DISTRICT,

1857.

HON. JOHN S. TENNEY, CHIEF JUSTICE.
HON. RICHARD D. RICE, J.
HON. JOHN APPLETON, J.
HON. JONAS CUTTING, J.
HON. SETH MAY, J.
HON. WOODBURY DAVIS, J.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT,

1857.

—o—

COUNTY OF ANDROSCOGGIN.

—o—

THE STATE *vs.* GEORGE KNIGHT.

In all challenges to the jury for cause, the ground of challenge must be distinctly stated and entered upon the record.

By the provision of the Constitution of the Commonwealth of Massachusetts, it was indispensable that a doctrine of the common law of England should have been adopted and approved, and actually practiced upon in courts in the colony, province or state, in order to render them obligatory; and this provision declaring what laws shall remain in force excludes all others.

The common law practice in England in relation to triors in a challenge to the jury for favor, has been superseded by satisfactory provisions of statutes under the different forms of government in Massachusetts.

Challenges of jurors are allowed in criminal as in civil causes, and for similar reasons, and the court is the only tribunal which the statute has provided for their trial, whether they be principal challenges or challenges to the favor.

A question which may be answered in a manner to disclose evidence given before the grand jury cannot be proper.

A witness cannot be called upon to state his testimony given on a former occasion in a trial where the same evidence is relevant.

It is proper for a surgical expert who examined a wound to give his opinion of the character of the instrument that produced it.

State *v.* Knight.

A witness possessing scientific skill may properly be inquired of whether there be a distinction—chemical, physical or microscopic—between the qualities of human blood and that of any animal.

A diagram approximating to perfect representation, when exhibited by a witness qualified to give explanation, may be used to illustrate his meaning.

The result of scientific knowledge and experience is proper for the consideration of the jury.

The court will not determine the truth or absurdity of such facts. If untrue their fallacy is to be shown by evidence of other experts who have made application of their scientific knowledge and experience.

The jury are not bound to disregard the testimony of a witness which they fully believe, because it is inconsistent with the evidence of another called by the same party; and the evidence tending to show the mistake of the witness, being properly before the jury, is the subject of legitimate argument.

Where the unlawful killing is proved, and there is nothing to explain, qualify or palliate the act, the law presumes it to have been done maliciously, and the burden is upon the accused to rebut the presumption.

Instructions in law applicable to the evidence in the case, should always be given, on request, but a judge is not bound to give them in the language used by the counsel making the request, nor to repeat them when requested, if once given.

The judge may properly refuse to give a requested instruction involving no question of law.

The defendant was tried and convicted of murder in the first degree, before Rice, Justice, upon the following indictment:

The jurors for said State upon their oath present that George Knight, of Poland, in the county of Androscoggin, laborer, on the sixth day of October, in the year of our Lord one thousand eight hundred and fifty-six, with force and arms, at said Poland, in said county of Androscoggin, in and upon one Mary Knight, of said Poland, she, the said Mary Knight, then and there being a human being, and she then and there being in the peace of said State, feloniously, wilfully, and of his express malice aforethought, did make an assault; and that he, the said George Knight, with a certain knife, which he then and there in his right hand had and

held, her, the said Mary Knight, in and upon the throat of her, the said Mary Knight, then and there, feloniously, wilfully, and of his express malice aforethought, did strike, cut, stab and thrust, giving to the said Mary Knight, then and there, with the knife aforesaid, in and upon the throat of her, the said Mary Knight, one mortal wound, of the length of five inches, and of the depth of three inches;—of which said mortal wound, the said Mary Knight, then and there instantly died.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said George Knight, her, the said Mary Knight, in manner and form aforesaid, then and there, feloniously, wilfully, and of his express malice aforethought, did kill and murder:—against the peace and dignity of the State aforesaid, and contrary to the form of the statute in such cases made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present:—that the said George Knight, at Poland aforesaid, in the county aforesaid, in a certain bed-room within a certain dwelling-house then and there occupied by the said George Knight and Mary Knight, there situate, on the sixth day of October last past, in and upon the said Mary Knight, feloniously, wilfully, and of his malice aforethought, did make an assult; and her, the said Mary Knight, in and upon the throat of her, the said Mary Knight, with some cutting instrument and weapon, to the jurors unknown, then and there, feloniously, wilfully, and of his malice aforethought, did strike, cut, stab and thrust, and deprive of life; giving to the said Mary Knight, then and there, with the instrument and weapon aforesaid, in and upon the throat of her, the said Mary Knight, one mortal wound, of the length of five inches, and of the depth of three inches;—of which said mortal wound, said Mary Knight, then and there, instantly died.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said George Knight, her, the said Mary Knight, in manner and form aforesaid, then and there, feloniously,

wilfully, and of his malice aforethought, did kill and murder: against the peace of the State aforesaid, and contrary to the form of the statue in such case made and provided.

When the name of the first juror was called, the counsel for the defendant challenged him for favor, and demanded triors to be appointed, according to the course of the common law, to hear and determine the question as to his indifference and impartiality. But the presiding justice denied the demand for triors, and ruled that in all cases of challenge for cause, whether for favor or otherwise, the question of indifference or impartiality must be heard and determined by the court, and the juror was sworn to make true answers, and was examined by the counsel on both sides, whether he had given or formed any opinion, or was sensible of any bias, prejudice or particular interest in the cause, and also whether he stood indifferent between the State and the defendant; and after the hearing, the court ordered the juror to be set aside, and another to be called in his stead, for the trial of the defendant.

Subsequently, when another juror was called, the counsel for the defendant challenged him for cause, and again demanded triors as aforesaid, which were refused by the presiding justice, and the juror was sworn and examined as before; and the court determined that the juror was indifferent, and refused to set him aside, whereupon the defendant challenged the juror peremptorily.

The forty-seven jurors first named in the list were called before the panel was made complete, and the right of peremptory challenge of the prisoner was exhausted when the forty-sixth juror was called. The judge stated to the counsel for the defendant, after the second demand for triors was made, that it would not be necessary to repeat the demand, as the point would be saved for the full court, whether the defendant, in such cases, had a right to demand triors, or whether it was the province of the court to hear and determine the matter. Other challenges for cause were made by

the defendant, before the panel was completed; some of which were allowed and others were disallowed, on hearing before the presiding judge, under the ruling aforesaid. The government relied entirely upon circumstantial evidence to prove the guilt of the defendant.

The defendant's counsel requested the presiding judge to give the following instructions to the jury:

1. That the burden of proof is upon the government, to prove the whole charge as laid in the indictment.

2. That it is incumbent upon the government to prove the death of Mary Knight on or about the sixth of October, 1856, and in the manner and by the means alleged in the indictment, and also to identify the body found of the said Mary Knight.

3. That after the death of the said Mary Knight is proved, and the identity of her body is established by the evidence in the case, that then it is necessary for the government to prove that the said Mary Knight came to her death by the unlawful act of another person.

4. That "the possibility of reasonably accounting for the fact (her death) by suicide, by accident, or by any natural cause must be excluded by the circumstances proved."

5. That "it is only when no other hypothesis will explain all the conditions of the case and account for all the facts, that it can be safely and justly concluded that it (the death) has been caused by intentional injury."

6. That if the jury do not find from the evidence in the case that the said Mary Knight came to her death "by the unlawful act of another," that then the defendant must be acquitted.

7. That if the jury find from the evidence that the said Mary Knight came to her death by the unlawful act of another, that the question whether or not the act was perpetrated by the defendant, is a question entirely for the consideration of the jury, under all the circumstances proved in the case.

8. That to entitle the government to a verdict in its favor,

the guilt of the prisoner must be proved by the evidence in the case, "beyond all reasonable doubt."

9. That the jury are required by law to consider the defendant innocent until he is proved by the evidence of the case to be guilty, "beyond all reasonable doubt."

10. That the defendant is presumed to be innocent until he is proved to be guilty by the evidence in the case, "beyond all reasonable doubt."

11. That in order to warrant a verdict of guilty, the evidence must be sufficient to overcome the presumption of innocence, and to establish the guilt of the defendant "beyond reasonable doubt."

12. That the jury are required by law to enter upon the examination and consideration of the evidence in the case, on the basis that the defendant is presumed to be innocent until he is proved to be guilty, "beyond all reasonable doubt."

13. That the jury are required by law to examine and consider the evidence on the basis that the defendant is presumed to be innocent until he is proved guilty, "beyond any reasonable doubt."

14. That in examining and considering the evidence, the jury are bound to give the defendant the benefit of the legal presumption that he is innocent until he is proved guilty, and that before a verdict of guilty can be rendered against him, the jury must be satisfied of his guilt by the evidence in the case, "beyond any reasonable doubt."

15. That in cases depending entirely upon circumstantial evidence, "each fact necessary to the conclusion (that the defendant is guilty) must be proved by competent evidence, "beyond any reasonable doubt."

16. That the government is bound (in such cases) to prove every single circumstance which is essential to the conclusion, in the same manner and to the same extent, as if the whole issue rested upon the proof of each individual and essential circumstance.

17. That "it is essential, in circumstantial evidence, that

the circumstances from which the conclusion is drawn should be fully proved."

18. That "it is essential, in circumstantial evidence, that all the facts should be consistent with the hypothesis."

19. That it is essential, in circumstantial evidence, that the circumstances should be of a conclusive nature and tendency.

20. That "such evidence is always insufficient, where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true."

21. That "it is essential (in circumstantial evidence) that the circumstances should, to a moral certainty, exclude every hypothesis but the one proposed to be proved."

22. That "in order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be *absolutely incompatible* with the innocence of the accused, and *incapable* of explanation upon any other reasonable hypothesis than that of his guilt."

23. That the law makes it the duty of the jury to consider whether the connection betwixt the circumstances proved, and the crime charged, is a *necessary one* or only *casual* and *contingent;* and whether the circumstances proved *necessarily* involve the guilt of the prisoner or only *probably* so."

24. That when circumstantial evidence "merely establishes some finite probability in favor of one hypothesis, rather than another, such evidence cannot amount to proof, (of guilt,) however great that probability may be."

25. That "in criminal cases the mere union of a limited number of independent circumstances, each of which is of an imperfect and inconclusive nature, *cannot* afford a just ground for conviction."

26. That whenever mere inconclusive probabilities concur, the result, however the degree of probability may be increased by the union, will *still* be of a definite and inconclusive nature."

27. That the government, by calling and examining Lydia Knight, has accredited her as a competent and credible wit-

ness, and is thereby *estopped* to deny or call in question either her competency or credibility.

28. That the government, by calling and examining Lydia Knight as a witness, has accredited her as a witness of sufficient intelligence to testify in this case, and is thereby *estopped* to deny or call in question that fact.

29. That "the legal presumption of innocence is to be regarded by the jury, in every case, as a matter of evidence, to the benefit of which the party is entitled."

30. That "in order to convict the defendant upon the evidence of circumstances, it is necessary, not only that the circumstances all concur to show that he committed the crime, but that they *all* be inconsistent with any other rational conclusion."

31. That no conviction in a criminal case ought ever to take place on circumstantial evidence, where the government has introduced direct evidence tending to show that the defendant could not have committed the crime charged.

32. That direct evidence introduced by the government, tending to prove the innocence of the defendant, "shall not be held refuted, from being opposed to circumstances incongruous with that evidence."

33. That the theory that the blood of animals, such as the ox or the sheep, can be discriminated from that of man, when in a dried state, by chemical means, is too uncertain to be used as evidence, or to be relied on as evidence, in this case.

34. That the theory that the blood of the ox, or of the sheep, can be distinguished from that of a human being, when in a dried state, by microscopic observation, is too uncertain to be used as evidence, and the difference in size of the globules is too slight to be relied on as evidence in this case.

35. That the distinction between positive and negative testimony is applicable to direct testimony, and cannot be applied to circumstantial evidence, when placed in direct conflict with positive testimony.

The first twenty-nine requested instructions were given to the jury, and the remaining six were not given as requested.

Dr. Augustus A. Hayes, Assayer to the Commonwealth of Massachusetts, and a scientific expert, being called for the government, testified: "I have made chemical and microscopic examinations of the articles before me, (knife, shirts, &c.) My attention was especially called to spots said to be blood. Most persons present are acquainted with the first appearance of blood, as it issues from the wound or opening of the living body, as a deep red fluid. At the instant of leaving the body, it may be considered as a part of the organization, becoming rapidly changed by exposure to the air. In the lapse of from three to ten minutes of time, the fluid becomes changed; the process of coagulation commences; and in some twenty or thirty hours after organic life ceases in it, and it follows the laws of ordinary fluids containing solid matter—i. e., its fluid and volatile portions escape, and the solid parts are left. Blood is not a uniform fluid, but consists of a fluid holding in suspension two or three distinct bodies. One of these bodies (which distinguishes it from all other fluids) has received the name of blood globules; and these are always present in the blood of man and the higher orders of the animal creation. When we examine recent blood, these globules, then colored red, appear suspended in a fluid of a light yellowish color."

The witness here exhibited a diagram to the jury, and desired to use it to illustrate his testimony. To which the counsel for the prisoner objected. But the court overruled the objection, and ruled that the witness might use it as a matter of illustration; and the following diagrams were shown to the jury; to which the counsel of the prisoner excepted; and the witness proceeded:

"The first diagram exhibits recent blood, as seen through a microscope; second, coagulating of blood; third, recent blood, to which water has been added; fourth, blood to which a saline solution has been added.

"Although these parts are called globules, they are not spherical bodies; but, in the higher animals, have the form

of discs, compressed at their centres, so as to become concave; not unlike the form of two watch crystals, with their rounded surfaces applied to each other, and the space formed by their edges being filled and rounded—compressed at the centre, so as to be thin at that point. And these appearances, nearly, are preserved after full and complete drying. After the drying of blood has taken place, and some time has elapsed, the red color of the mass remaining is nearly lost; being succeeded by a dark brown color; especially when it has been received upon iron or steel. After a thorough drying of a covering of blood, the form of the covering remains the same, although the color is changed. The form of the disc is preserved in the dry blood.

"Blood which has been dried on iron or steel, when exposed in thin portions, under the microscope, presents the appearance of a large number of these discs or globules, cemented together by a light yellow body, not unlike glue or gum. The form of the discs can be distinctly seen, as separate from everything else. When to the dry blood, we apply a little of the solution of corrosive sublimate, or bi-chloride of mercury, the blood discs then come fully into view, and may be even measured. The simple addition of water often suspends the discs, and renders transparent the other parts of the blood, so that the form of the discs can be recognized. Certain physical changes are produced by the addition to the blood, under the microscope, of small portions of chemical re-agents. The changes which follow, serve to identify, under different points of view, small portions of blood which have been dried. The mere observation of the blood discs or globules in a fluid, sufficiently distinguishes it from all other fluids of the body, for ordinary cases. In the more careful examinations, we apply the tests which have been named, and observe the changes produced. In the chemical examinations of blood which has been dried on iron or steel, we carefully separate it from the surface on which it was dried, and dissolve it in water, or in water with the addition of a little alkali. To remove foreign bodies not dissolved, we pass the

fluid so obtained through one or more thicknesses of paper. The fluid thus separated from matter accidentally present, and especially from any rust of iron, is then, after the addition of a drop of weak acid, brought nearly to the boiling point, when a coagulation of the fluid takes place. The colored portions of the blood, with most of the animal matter present, separate after repose, and fall to the bottom of the vessel. The blood thus divided into its solid and fluid parts, is examined through the action of other bodies upon it. Taking the fluid portion that is above that which has fallen, we examine it for a compound of iron.

"We also examine it for certain saline bodies, and, finally, for a small portion of animal matter. Returning to that portion which has fallen from the fluid by the action of heat, we dissolve the whole in a small portion of alkaline water; and a certain change is then produced. We obtain a fluid, which, viewed by reflected light, is pale red, or light reddish brown. On reversing the mode of viewing it, so as to permit the light to pass through it, and looking through the solution, a greenish hue is observed. This effect of light indicates the true coloring matter of blood, which is thus characterized. The subsequent steps show the presence of albumen and other organic compounds. Albumen is best represented by the white of an egg—a transparent fluid at ordinary temperatures; but when heated to near the boiling point of water, it becomes an opaque, white, solid body. The other organic bodies can, in most cases, be pointed out by the action of metallic salts upon the solution. In regard to the blood upon steel or iron, these observations and experiments have all been made upon it; and I am therefore prepared to state to you, that both physically and chemically, there is nothing wanting to prove the presence of blood upon them, (viz., the knife, &c.)

"I made all these experiments on the substance taken from this knife, and on portions taken from every part of the blade; that in contact with the steel, and that representing the surface of the blood. I concluded from these experiments that the substance upon the blade and handle of the knife was

blood, and that blood of a uniform character, so far as composition is concerned. On different portions of the blade, the blood had dried there, preserving, to a large extent, its red color. That portion of the substance mixed with rust, or the oxide of iron, has the same appearance. There is much less blood adhering to the knife now, than appeared when in my possession. Blood separates very readily from iron and steel. As an explanation, I will add the observation that when a knife is kept so long in the warm blood that the steel blade takes the temperature, the adhesion of the blood afterwards is much more perfect than where it simply flows upon it. In this case the close adhesion of the blood distinctly indicates that the blade was of the temperature of the blood in which it was placed.

"The blood on the clevis was subjected to the same examination which I have described, and the same results, in general, were obtained, as in the case of the knife. I found blood spots on various parts of the clevis; in some cases mixed with rust, and in others quite free from it. It did not present the appearance of blood having flowed upon it, but of having been wiped upon it.

"I subjected this pin to the same tests; and I concluded that blood had been smeared on it. Some small portions still remain. The blood upon this chain and ring was subjected to the same tests and brought out the same results. Each detached portion of blood was carried through all the minute examinations which were described this morning. I arrived at the same general conclusions as in the case of the clevis. Passing the lens over the surface, you will catch a smooth red varnish. I removed from the ring and chain the more distinctly seen portions of blood, for the purposes of my examination. The spots now are very thin. These varnished appearances I know to have been produced by blood. The hook of the chain contained the larger part of the blood upon the chain. Think I cannot point out the spots now. There was less blood upon the chain than upon any other piece examined.

"I noticed no peculiarities in the blood on any one of the articles which would distinguish it from that on the other. I can distinctly and decidedly distinguish blood spots on iron and steel from rust spots, by the physical examination as given, and the conclusion may be support by the chemical examination given. An iron compound exists in the blood of all the higher order of animals; and in its organic association it is a characteristic of blood; and we have no other fluid of the animal body which contains a soluble compound of iron as a constituent of the fluid. The course pointed out in the analysis removes iron from any other source than that of the blood itself. This compound of blood is called *hæmatine*. It is the coloring part of the blood, and in connection with that the iron is found in its soluble state. Neither iron rust nor iron which has been exposed to the air, is soluble in water nor in alkali. Hæmatine is soluble to some extent in water, dissolves freely in alkaline fluids, and the appearance which the alkaline solution of blood presents, when viewed by reflected or transmitted light, is due to its presence. I can distinguish blood spots from red paint with great ease. A little alkaline water dissolves the oil used in forming the paint, and leaves the red powder or pigment in a dry state, ready to be subjected to the action of tests for the red oxide of iron or red lead, the two pigments usually employed. There is no such substance as the red oxide of iron in the blood. I distinguished these spots distinctly from red paint. There is no other known substance which gives those reactions which dried blood gives. I separated dried blood from the knife, the clevis, the pin, the hook of the chain and the large ring.

"I made examinations of two shingles marked No. 1, and one shingle marked No. 3. These three shingles were subjected to the same tests of observations under the microscope, and separations by chemical means, which I have stated, on the knife and iron articles, with the exception that the blood on the shingles was taken off by water alone—a character which I found to belong to blood which had dried on the

fibrous surface of wood. Blood was found upon the three shingles, and still remains upon them. I arrived at this with certainty. You will observe by the marks that they are outside shingles. I designate the shingles by a little clip which I took from them. The spots have the character of a smear rather than that of a drop of blood. Another shingle, numbered one, has a small portion of blood spread upon its surface. It is also an outside shingle, as I infer from the color. Shingle No. 3 has also blood spread upon it.

"Two other shingles, one marked No. 4, and one No. 2, contained no blood on the surface, but some brown, accidental matter, not blood, a portion of which still remains; had no difficulty at all in distinguishing these spots from the spots on the other shingles. The smear on one of the shingles had a rounded outline; arrived at no conclusion relative to its form, except that it was not produced by a drop, but painted on, so to speak, by some other object.

"The under-shirt which I hold in my hand, is of cotton-flannel, and was the first article of clothing examined. A portion of the fabric of the blood spot on the left arm of the shirt was removed, diminishing the size of the spot one half. The blood obtained from that portion of the fabric removed, was freely dissolved in warm water, leaving the cloth almost colorless. On the solution thus obtained, the microscopic observations before described were made, and the whole course of chemical analysis above described was pursued. I first allude to a peculiarity which the stain itself presents." The counsel of the prisoner objected to the witness describing what he called the peculiarities of the stain; as they, if any such, were open to the observation of the jury. But the court overruled the objection, and the witness stated: "I call the attention of the jury to this spot, as exhibiting, on one side of the fabric, a much larger proportion of the coloring matter of the blood than exists upon the other part, or the surface which was worn next to the skin. I cut a piece from the blood spot, on which the experiment was made.

"I call attention to this point, as it is sustained both by

chemical experiments and microscopic observations. These show that more of the coloring matter exists upon the outer surface of the fabric than can be found on the inner surface, worn next to the skin." To all which the counsel of the prisoner excepted.

The witness further testified: "There is now hardly remaining, but distinctly visible while the shirt was in my possession, a small quantity of blood on the wristband. From the portion of the shirt near the part which has since been removed, I took threads covered with blood, having the character of that on the arm of the shirt. The small portion now remaining has been recognized by me as blood."

The counsel of the government here asked the witness, whether blood flowing directly from the skin upon the shirt, could not have produced such a spot. To which the counsel of the prisoner objected. But the court overruled the objection, and the witness answered: "Blood flowing directly from the skin upon the shirt, could not have produced such a spot." The witness further testified: "The coloring matter of the blood, which is suspended in the blood, remains upon the outer surface of the fabric, the effect being the reverse of that which would have taken place had blood flowed from the arm of the person wearing it."

The counsel of the government then asked the witness the question: "In your opinion, could or not blood flowing directly upon the outer surface of the shirt, have occasioned such a spot?" To which the counsel of the prisoner objected. But the court overruled the objection, and the witness answered: "I think not."

"Blood received directly from a vein would penetrate the fabric more uniformly than in this case. I mean by uniformity, that the coloring matter would be diffused nearly equally throughout the fabric, speaking now of live blood, as it flows from the vein or artery. The spot does not exhibit the appearance presented when a jet of live blood has flowed upon the fabric. Live blood holds, for the instant, a uniformity of

composition in its parts, enabling it to permeate and equally saturate a fabric of this description. This remark does not apply to blood which has been for a few minutes exposed to the air. The appearance presented by this spot agrees more closely with that presented when blood is received through a fabric placed over it. Comparative trials were made by covering a surface of this fabric with a thin worn cotton covering. The blood received on the double thicknesses was in part retained by the upper covering, and the spot produced closely resembled this upon the shirt." To all the grounds of opinion as given above, the counsel of the prisoner excepted.

The witness further testified: "My conclusion is, that these spots were produced by blood. The portion of the shirt removed, leaving this opening, (a hole cut where the blood spot was on the arm,) was covered with blood, which had saturated its substance, but to a less extent than that of the flannel shirt. The coloring matter of the blood, and its other constituents, were present, although in very small amount, compared with the quantity obtained from an equal surface of the flannel shirt. I observed that the outer cotton shirt corresponded, when worn, at the spot where it was discolored, nearly, with the spot upon the left arm of the flannel shirt; and the appearances indicated that it had received its portion of blood"—[the counsel of the prisoner objects; the court rules that the witness cannot state the particular object from which it received its blood]—"not directly from a flowing vein. There was more blood upon the inner than upon the outer surface of the shirt. I think that blood received upon the outer surface of this shirt could not occasion such a spot as this one before me."

The counsel of the government then asked the witness the question: "Is there a distinction, chemical, physical, or microscopic, between the qualities of human blood and that of any beast?" To which the counsel of the prisoner objected. But the court overruled the objection, and the

witness answered: "There is a distinction, a physical distinction, existing between the blood of man and that of some beasts. I know of no precise chemical distinction."

The witness further testified, that "the physical distinction of the blood of man, as compared with that of some beasts, lies in the fact that the globules which characterize blood, are larger in the blood of man than in the blood of some animals. This admits of demonstration. It is no theory."

The counsel of the government then asked the witness the question: "Have you subjected any of the articles before you to any observations or tests, touching this distinction?" To which the counsel of the prisoner objected. The court overruled the objection, and the witness answered: "I have."

The counsel of the government then asked the witness the question: "Will you please state what those observations and tests were, and their results?" To which the counsel of the prisoner objected. The court overruled the objection, and the witness answered: "I made microscopic observations of the blood on the knife, in comparison with the dried blood of a sheep, also on a steel knife. The observations turned mainly on the relative sizes of the discs or globules in the dried blood from the different sources. I found those in the dried blood on the knife to differ in size so much from those of the dried blood on another knife, as to constitute a clear distinction between the two. If I may be allowed to add, very accurate measurements have been made of the globules of blood of most animals, reptiles, and species of the other orders of animated nature; and those measurements have the same claim to be received as a settled truth, as the measurements of an arc of the meridian.

"My observations did not extend so far as to determine the size of the globules or discs in either case. But they did extend so far as to demonstrate that great differences existed; and to separate, in point of fact, the blood dried upon the knife first presented to the court, from that purposely dried upon another knife, and which had been taken from a sheep. I made a number of examinations at different times,

and upon different portions of the blood from both sources, for determining that the discs or globules varied in size in the blood from the different sources; but I did not include the whole character of blood from the different sources. The result that I arrived at, was, that they differed, and that the globules and discs from the knife first presented, are larger in their dimensions than those of either of the samples from the other source. All the examinations that I made showed this. I concluded that the blood from the two sources was different microscopically." To all of which the counsel of the prisoner excepted.

The counsel of the government then asked the witness the question: "In your opinion, could the blood upon that knife first shown, have flowed from a sheep?" To which the counsel of the prisoner objected. The court overruled the objection, and the witness answered: "My opinion, on a careful microscopic examination, is, that no part of the blood upon that knife flowed from the blood vessels of a sheep. I do not hesitate in expressing that opinion. Upon this knife I first made an examination before any blood was removed. The first examination of the knife showed that a portion near the front had been dulled by coming in contact with some hard body. This portion was about an inch in length; the edge of the knife was turned. I examined it carefully with the microscope." To all which the counsel of the prisoner excepted.

The counsel of the government, in his closing address to the jury, argued:

"But the counsel further objects that it was impossible for the prisoner to do this murder while his mother was in the bed. I answer that it was equally impossible for Mary Knight to commit suicide by cutting her own throat, while Lydia Knight remained in the bed, without staining some of the old lady's garments with blood. You will remember the pools of blood that saturated the sheets of the bed; and you will also remember that the blood in one place approached within six or eight inches of the front side.

"You will observe, too, that the dead body, when first discovered by Mr. Prout and others, lay so near the front side that no grown person could lie down in that bed on the front side without moving it.

"It is therefore evident that the death of Mary Knight, whether occasioned by her own hand or her husband's, could not have taken place until after Lydia Knight had left the bed.

"So I say that the facts prove that Lydia Knight is mistaken in her supposition that Mary Knight died in that bed while Lydia Knight was in it; and I say that this is equally true, whether you call her death a murder or a suicide. I repeat, that the government does not impeach the competency nor credibility of any of its witnesses; but we do say that it is perfectly obvious that there is a mistake here. And when you remember the appearance of that old lady upon the stand, bent with age, deaf, decrepit, enfeebled in mind and body, you will not be surprised that amid the darkness, confusion and terror of that night, many circumstances were unobserved, or left no trace upon her memory. Permit me, also, to recall your attention to her appearance in this court. You have had an opportunity to observe her condition; and I appeal to your own observation. Her deafness is conceded; but the doctrine is advanced that deafness only sharpens the sight. Is it so, gentlemen, in old age? Is not old age, on the contrary, a general decay of all the faculties, sight, smell, taste, hearing and perception? Torpor, insensibility, dullness, creep over the whole body, and the mind shares the general decline.

"It is a gradual separation of the soul from the body; and the mind, finding its communication with the outward world obstructed, gradually withdraws within itself, and is roused to action with difficulty. In this old lady, the perceptive powers of the intellect seem almost effaced; only by powerful effort can her mind be aroused. Unmindful of the present, unobservant of the living, moving world about her, she lives only in the memory of the buried past."

To which the counsel of the prisoner objected; and insisted that the government had no right thus to argue against the intelligence and capacity of its own witness. But the court overruled the objection, and ruled that the course of argument was allowable, and that the counsel of the government might proceed; and the counsel proceeded as follows:

"Gentlemen, we believe that we have been fair and liberal to the prisoner in this case; and we also intend to be just to ourselves and to the government. We did not say to him, "the witness nearest this tragedy is your own mother, and consequently we shall not incur the risk of her testimony. We leave her for you to summon, and for us to cross-examine and impeach." No, gentlemen. We were straight-forward enough to summon her ourselves, and, having done so, we believe it our duty to correct her mistakes.

"You saw her in this crowded hall, indifferent to the strange scene, unmindful of you, of the court, of the audience; her mind abstracted, and her attention, when given for a moment to the prisoner's counsel or myself, as quickly withdrawn. And when, at the adjournment, the prisoner endeavored to gain her attention, and called her "mother," did she, as she stood by that box, recognize her own son? And if she did not know him here, in the broad light of noon, when he sought in vain to attract her attention, is it surprising that she failed to recognize him in the darkness of midnight?"

To each and every, the rulings aforesaid, in overruling the demand for triors, in the empaneling of the jury, and the ruling that in all cases of challenge by the defendant of a juror for cause, whether for favor or otherwise, it was the province of the presiding justice to hear and determine the matter; and to each and every, the rulings in overruling objections made by the counsel of the defendant to questions to witnesses propounded by the counsel of the government, and in sustaining objections made by the counsel of the government to questions propounded to witnesses by the counsel of the defendant; and to each and every ruling admitting the use of diagrams and plates; and to each and every rul-

ing admitting testimony offered by the government, or rejecting testimony offered by the defendant, and to the ruling allowing the counsel of the government to argue against the intelligence and capacity of Lydia Knight, a government witness; and to each and every instruction to the jury, and to the refusals to instruct the jury as requested by the counsel of the defendant, the defendant excepts.

The judge charged and instructed the jury as follows:

Gentlemen of the Jury:

The occurrences of the last three weeks cannot have failed to admonish you that we have been engaged in the discharge of duties of no ordinary character. The careful manner in which you were empaneled, the protracted and searching examination of the numerous witnesses who have been before you, and the extended and learned arguments of counsel, afford evidence of the importance attached to our proceedings by those principally engaged in them. The vast concourse of citizens who have attended the sittings of the court through this protracted trial, also bears testimony to the deep interest which pervades the community in reference to the subject of our deliberations.

The administration of justice is at all times deemed a matter of high importance. To determine conflicting rights of property between man and man, is one of the most important functions of human government. But when the liberty and life of the citizen are involved, it assumes an importance inferior to no other question which can be submitted to the decision of man.

In no country does the administration of justice assume so imposing a form, in a moral point of view, as in these United States. To be able to govern one's self successfully, is, by moralists, accounted the highest degree of human excellence. For a people, self-moved, to frame their own laws, and then, in a judicial capacity, intelligently, firmly, and impartially to enforce them, presents a spectacle of moral grandeur unsurpassed by anything in the affairs of men.

There is a conservative power in law, when well administered, which is truly surprising. It not only overshadows and protects communities, but it infuses its salutary principles into the whole mass of the people. It not only regulates and determines our rights of property, but it restrains the arm of the assassin, dashes the poisoned chalice, extinguishes the incendiary's torch, and enables us to lie down with our families in conscious security. These are the legitimate effects of wholsome laws when well administered.

In our government, the trial by jury is justly deemed an element of the highest importance. It has been denominated, in no language of fiction, the palladium of our liberties, the noblest institution ever invented by man. It is the corner-stone of our judicial system.

The importance of your duties, gentlemen, in the administration of justice, cannot be over-estimated. The protection of the weak and defenceless in their humble homes, the security of the whole community, as well as the safety of the individual citizen when unjustly accused of crime, depend upon an intelligent and honest discharge of those duties. Without it, courts would be powerless, and law useless. Each one would, from necessity, become his own protector, and the vindicator of his own wrongs, real or imaginary. In view of such momentous considerations, how important it is, that jurors discharge their duties faithfully and well. How utterly insignificant and paltry become all considerations of private interests, of party attachment, of sectarian or social ties! They sink into absolute nothingness in the estimation of any man in whom is the first element of that true manhood which constitutes the good citizen.

On you, therefore, as a most important elemental part of the highest judicial tribunal of the State, is now devolved the most responsible duty ever imposed upon men. You are to sit in judgment upon a fellow-citizen, charged with the commission of the highest crime known to our laws.

For his deliverance he has put himself upon his country,

which country, by representation, you are. And permit me to say, that upon earth there can be no exhibition of higher moral sublimity than that of men thus situated, holding with even, unwavering hands, the scales of justice, in which are to be determined, intelligently, without bias, prejudice or partiality, an issue involving not only the integrity of the law, and the safety of the community, but the life of a citizen.

That you will act honestly and manfully under this high responsibility, your past deportment affords the fullest assurance.

The prisoner is charged with murder—the murder of his wife, for which alleged crime he is now upon his trial.

The R. S., chap. 154, sec. 1, defines the crime of murder as follows: "Whoever shall unlawfully kill any human being, with malice aforethought, either express or implied, shall be deemed guilty of murder."

The killing of a human being may be lawful or unlawful. It is lawful when necessarily done in execution or in furtherance of justice; or when done upon an enemy in lawful war, or when necessary for the prevention of atrocious crimes, such as murder, robbery, housebreaking in the night-time, and the like.

It is *unlawful* when done without justifiable cause, or reasonable excuse. The unlawful killing of a human being is either *murder or manslaughter*. These offences, although both unlawful, import different degrees of criminality, and are punished with different degrees of severity. *Manslaughter*, by our statute, is defined to be the unlawful killing of a human being, in the heat of passion, upon sudden provocation, without malice aforethought, expressed or implied. There are many circumstances, in which, at common law, the destruction of human life is deemed manslaughter. The circumstances of this case do not, however, require their examination at this time.

Our statute (R. S., 154, sec. 2,) distinguishes between different degrees of murder. It provides that whoever shall

commit murder with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death, or imprisonment in the state prison for life, or for an unlimited term of years, shall be deemed guilty of murder of the first degree, and shall be punished with death.

Whoever shall commit murder otherwise than as is set forth in the preceding section, shall be deemed guilty of murder of the second degree, and shall be punished by imprisonment for life in the state prison.

The term *malice* is intended to denote an action flowing from a wicked and corrupt motive. A thing done, *malo animo*, where the fact has been attended with such circumstances as carry in them plain indications of a heart, regardless of social duty, and fatally bent on mischief.

Malice, in its legal sense, differs from the sense in which the word is used in common conversation. Though in law, as in common speech, the term includes acts done from ill-will, hatred, malevolence, and a desire for revenge; it also includes all wrongful and wicked acts intentionally and deliberately done without just cause or excuse.

Thus, in a trial for murder, which is always charged as having been committed with "malice aforethought," it is not necessary to prove that the accused was influenced by feelings of particular or special ill-will to the deceased. If it be proved that the act of killing was intentional, the result of deliberation, of a design to kill, without justifiable cause, it will involve legal malice.

Men, when in possession of their reasoning faculties, are supposed to intend the results which ordinarily and naturally flow from their acts. When, therefore, a person deliberately performs an unlawful act, the ordinary and natural result of which is the destruction of human life, or the doing of great bodily harm, the law presumes such an act to be done maliciously, if life is thereby destroyed.

Express malice exists where one with a sedate, deliberate mind, and a formed design, doth kill another; which formed design is evidenced by external circumstances discovering

the inward intention, as by lying in wait, antecedent menaces, former grudges, and concerted schemes to take life.

Implied malice is an inference of law upon the facts found by a jury. It exists where one attempts to kill or maim one person, and in the attempt kills another against whom no injury was intended, or in general, in any deliberate attempt to commit a felonious act, and death is occasioned in the execution of such attempt, although the original intention may not have been to take life.

When the killing is unlawful, and neither express nor implied malice exists, the crime is reduced from murder to manslaughter. But in all cases where the unlawful killing is proved, and there is nothing in the circumstances of the case as proved, to explain, justify or excuse the act, the law presumes it to have been done maliciously; and if the accused would reduce the crime below the degree of murder, the burden is upon him to rebut the inference of malice which the law raises from the act of killing, by evidence in defence.

The indictment in this case contains two counts. In the first count, the prisoner is charged with having murdered Mary Knight with a "certain knife." In the second count, the prisoner is charged with having committed the act of murder with "some cutting instrument and weapon to the jurors unknown."

It is competent for you to find the prisoner guilty, under either count, of murder of the first degree, of murder of the second degree, of manslaughter, or not guilty generally, as you shall find the facts to be.

If you find the prisoner guilty of murder, you will inquire, and by your verdict ascertain, whether he be guilty of murder of the first degree, or of the second degree.

The prisoner is by law presumed to be innocent until he is proved to be guilty, beyond all reasonable doubt. Reasonable doubts are such substantial doubts as intelligent men, with enlightened consciences, acting upon principles of sound common sense, upon matters of highest moment, would regard. In the language of Professor Greenleaf, "The cir-

cumstances must be sufficient to satisfy the mind and conscience of a common man; and so convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interests."

The venerable and learned Chief Justice Shaw, in the case of Commonwealth *vs.* Webster, 5 Cush., 320, thus defines a reasonable doubt: "It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition, that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt; because, if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."

With this general view of the rules of law upon which this prosecution is based, and by which it is to be controlled, I proceed to call your attention to the propositions which it is necessary for the government to establish, in order to entitle it to a verdict.

In the first place, it is necessary that it should satisfy you of the death of Mary Knight, the person charged to have

been murdered; that she did not die a natural death; that she did not die by accident; that her death was occasioned by violence, and that that violence was not inflicted by her own hand, but by the hands of another; and finally, in order to charge the prisoner, it must satisfy you that she came to her death by violence inflicted by his hand, or under his immediate direction.

1st: are you satisfied that Mary Knight is dead? You have evidence on this point that she was in full life on the 6th of October last, and that she was found dead early on the morning of October 7th. These facts are not contradicted. I do not understand that there is any question as to the identity of the body found in the house of the prisoner on the morning of October 7th, that it was the body of Mary Knight.

Did she die a natural death or by accident? Neither are suggested. Did she come to her death by violence inflicted by her own hand? That is suggested. It is contended that the evidence in this case, when taken altogether, and carefully considered, does not exclude the conclusion that she might have come to her death by violence inflicted by her own hand. If this is so, if you have remaining in your minds a reasonable doubt, such as I have described to you, whether she might not have come to her death by violence inflicted by herself, it is your duty to acquit the prisoner: for if there is a reasonable doubt whether a murder has been committed, no one can be charged with the commission of the crime of murder.

To determine that question, you must recur to the evidence which tends to show her previous character, habits, situation, and condition, anterior to, and at the time of her death. It is proper for you to consider whether there was anything connected with her previous life and habits, indicative of a tendency to self-destruction.

Then you are to consider the situation in which the body was found after her decease, and to gather from the surrounding circumstances, in connection with the positive tes-

timony, such facts as will tend to throw light upon the manner in which she came to her death.

What, then, was her condition immediately anterior to her death, and what was the condition in which her body was found? I propose to call your attention to the prominent facts bearing upon this question. It seems to be admitted, that on the night of October 6th, Mary Knight retired early to her bed in the sitting-room of the prisoner. The next evidence we have which shows her situation, comes from Lydia Knight, the mother of the prisoner, who tells you that on that night she occupied the corner or parlor bed-room: that she retired to bed at an early hour, before the setting of the sun, and that after she had been asleep, she does not know how long, the deceased came to her room, having in her hands a lighted candle and a pillow; that she desired to occupy the bed with the witness; that, having received permission to do so, she disrobed herself to some extent, extinguished her candle, and got into bed upon the back side; that witness afterwards distinctly heard an outcry from the deceased, and that she felt arms thrown upon her; that she neither saw nor heard any other person present. The witness further states, that from the time the deceased came to her room till the hearing of the outcry, she had not been asleep. This, I believe, is substantially, the positive testimony you have from Lydia Knight, on this point.

You have also the testimony of the two children, that they had been asleep; that they were awakened by the outcries of the deceased; that they immediately arose and partially dressed themselves. They both testify that they heard two shrieks, after which all, so far as the deceased was concerned, was silent. After much search in different parts of the house, a light was obtained by them, and they returned, through the room occupied by the girl, into the room occupied by the boy; and, as they approached the corner bedroom, the old lady, Lydia Knight, came out, and at that time, the little girl saw passing into the parlor what she called a

"glimpse" or "shadow." She immediately after heard a noise in the parlor which she designated a "racket." The little boy was dispatched for the nearest neighbor, Mrs. Rice. She, with the two little children, with a light, approached the bed-room, the little boy being in advance. As they approached the door, he observed the deceased upon the bed, and perceiving blood, exclaimed, "Aunt Mary has cut her throat." They retreat in alarm. Other neighbors were called. Mr. Prout, Mr. McCann, and others came. They, being led by Mr. Prout, visited the room. Mr. Prout has described the condition of the deceased more fully than any other witness upon the stand. He found her lying upon the bed, diagonally, her head and shoulders within a foot of the front side of the bed, her feet and limbs further back upon the bed. Over her head and neck was a pillow, pressed down, or to use his words and those of another witness, "jammed down." Blood was observed upon the front side of the bed, within six or eight inches of the side of the bed. On the other side of the deceased was a pool of blood. He had an imperfect view of the wound. No change was made in the situation of the body at this time.

The deceased was visited afterwards by others, among whom was Dr. Carr; and his general description substantially conforms with that of Mr. Prout. He however states other circumstances tending to show the character of the wound, and perhaps to throw additional light upon the manner in which it was made. Inserted into this wound was the night-cap of the deceased, and a handkerchief of the prisoner, as identified by Mrs. Jordan. There was a deep cut upon one of the fingers of the left hand of the deceased. Her hair was in a disordered condition, being brought forward, and the ends glued to her face with blood. You will have occasion further to examine the testimony of Dr. Carr, when you consider whether this wound was inflicted upon the deceased by some person other than herself, and whether these facts and circumstances do or do not show deliberation and concerted action, not only before but after the fatal blow was

struck. One other fact bearing upon that point. I have already called your attention to the fact testified to by several witness, that when the deceased was found, her head was covered by a pillow, pressed down upon her face. In connection with that testimony it may not be an impertinent inquiry, how came that pillow there?

The testimony of the little girl is, that she made up the bed on which the deceased died; that when she made it up she took a pillow from the parlor bed and put it upon this bed, for the use of grandmother. The testimony of Lydia Knight is, that when she retired that night there was but one pillow upon her bed; that when the deceased came to her bed, she brought with her a candle and a pillow. The little girl testified that there were four pillows that belonged to the bed in the sitting-room. Mr. Rice testified that in the morning he observed that the bed in the parlor had but one pillow upon it.

Two pillows were found upon the bed in the corner bedroom, on the morning of the 7th, in addition to the one pressed upon the head of the deceased.

In view of these facts, the question becomes one of considerable importance, whence came the third pillow? Was it brought there by the deceased, or by the hands of some other person after she had retired? The testimony of the old lady is, that after the deceased came to her bed, she (witness) did not go to sleep again till she heard the outcry, and that the deceased did not rise after she came to bed.

Was the wound of such a character as that it could have been inflicted by the hands of the deceased? On this point you will consider the description of the wound itself—its character and extent—and the testimony of the physicians as to the effect which such a wound would produce upon the deceased, and how speedily it would terminate life.

You will also take into consideration the testimony of the physicians who, as experts, are permitted to give opinions, in addition to stating facts; you have heard their opinions whether the wounds could have been inflicted by the deceas-

ed upon herself, and the reasons upon which those opinions are based.

There is still another consideration. This woman was found lying in bed, with all the great arteries and blood-vessels of the neck severed, apparently at a single blow. You have a description from the surgeons, of the effect upon the flow of blood, that would be produced by the sudden severance of all the great blood vessels of the neck. You will consider whether the blood would not, under such circumstances, be thrown out in jets, and spattered over the whole room; whether, after the infliction of such a wound, by which all the blood vessels of the neck were severed, the deceased would have had power remaining sufficient to arrange matters in the manner described by the witness.

There is still another consideration. If this testimony leaves you in any doubt, any uncertainty, how the wound was inflicted, you will still make another inquiry; if inflicted by the deceased, with what weapon was it done? Is it or not obvious that it must have been done with some cutting instrument of considerable magnitude? No such instrument appears to have been found in the room or upon the premises. There are still other considerations:—the appearance of blood upon the window-stool, and drops of blood upon the floor, may bear upon this question. It is in evidence that there was found upon the bed, the next day, a razor; but it bears no marks of blood—there is nothing upon it to indicate that it was the instrument used for the infliction of the wound. It has not been suggested by any party that this instrument caused the death of the deceased. The question may arise, why it was found in that condition; who placed it there? That question may or may not be of importance. Experience has shown that it not unfrequently occurs, when death has been occasioned by unlawful violence inflicted by persons other than the deceased, that the murderer seeks to divert attention from himself and to produce the conviction that the deceased committed suicide, by surrounding the body, as far as he may, with circumstances tending to pro-

duce such belief. Many cases of this description are found in the books.

One case is that of a man found dead with a pistol by his side. The first supposition was that he had committed suicide; but upon extracting the bullet, and comparing it with the bore of the pistol, it was found so large that it could not have been fired from that pistol. This fact repelled the idea of suicide. [The judge cited several other similar cases, and continued.]

I call your attention to these cases, not that they have any particular bearing, as authority on this case, but to induce you to examine carefully the circumstances surrounding this case, when you determine whether there is reason to believe that it is within the range of possibility that the deceased could have come to her death by her own hand; whether all the circumstances can be explained on the hypothesis that she committed suicide, or whether they are of such a character as absolutely to exclude such a conclusion.

You are to determine that question, and, as I said before, if a careful examination of the evidence leaves on your mind any reasonable doubt, whether she did not come to her death by violence inflicted by her own hand, then you will have no occasion to proceed any further; whatever your own feelings or impressions may be, it will be your duty to acquit the prisoner. If, on the other hand, the evidence brings your minds to the conclusion that she came to her death by violence inflicted by the hands of another, you will proceed a step further in your investigations, to a question more directly bearing upon the prisoner.

I may remark, gentlemen, that you are to determine these facts upon what is termed circumstantial evidence. There has been much discussion as to the weight and influence which circumstantial evidence is entitled to receive at your hands. Legal writers divide evidence into two great divisions, called positive evidence and circumstantial evidence.

Positive evidence is that in which the witness testifies from his own personal knowledge of the specific fact to be

proved. It is the most simple in its character, and generally deemed most satisfactory. It, however, has its dangers. It ordinarily presents fewer points for observation and comparison than circumstantial evidence, and therefore gives greater facilities for swearing falsely with impunity.

Circumstantial evidence is compound in its character. It consists in the proof of facts not directly in issue, and of presumptions or inferences deduced from those facts.

Rules have been adopted for the application of this kind of evidence, to which I desire to call your attention. Different legal writers have stated these rules in different forms of language, though in substance they generally concur. For simplicity, conciseness and completeness, I have found no author whose statement of these rules I think preferable to that of Mr. Starkie. It is as follows:

1st. "That the circumstance from which the conclusion is to be drawn, should be fully established." That is, the facts should be proved beyond a reasonable doubt. What is a reasonable doubt I have already explained. You will perceive at once that unless your fundamental facts are proved, you have no solid basis from which inferences can be safely deduced.

2d. "All the facts should be consistent with the hypothesis to be established.

3d. "It is essential that the circumstances should be of a conclusive nature and tendency." That is, those circumstances on which reliance is placed, should have a direct necessary tendency to establish the proposition sought to be proved.

4th. "It is essential that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved."

If the facts proved are consistent with any hypothesis other than the one sought to be established, the proof fails. Therefore, if the material circumstances in this case may be explained on any reasonable hypothesis other than the guilt

of the prisoner, he must be acquitted, though they may all be explained on the hypothesis that he is guilty.

The moral and physical world is governed by fixed laws. Those laws, when their operation becomes known, form the basis of circumstantial evidence. When we have learned by experience, or otherwise, that a given cause produces a particular effect in many instances, we infer that the same cause, under like circumstances, will produce the like effect. And upon such experience we act with undoubting confidence, and without hesitancy. On such evidence are based most of the acts of our lives. It is, however, acting upon circumstantial evidence. This kind of evidence is composed of physical circumstances and moral coincidences. When these unite and harmonize, this species of evidence is presented in its most convincing form.

To explain: you, gentlemen, are, as I understand, most of you, farmers. If you observe a field that yesterday was covered with growing grass, which to-day lies in the swarth, you at once infer that the mower has been present with his scythe. If you see the sheaves of wheat standing in the field, you infer that the reaper has done his work. You pass a forest upturned by its roots, and you infer that it has been swept by the tornado. The earth is covered with newly fallen snow, and you observe that upon the highway it has been disturbed. You examine the impressions upon it, and determine with unerring certainty, whether they were made by the ox team and sled of the woodman, the horse and lighter vehicle of the ordinary traveler, or by the road breaker with his shovel and triangle. Those are physical circumstances, which, being seen, or their existence proved, authorizes certain conclusions on which you act in common life.

So, too, in the administration of justice, long experience has shown that it is safe to draw certain inferences from the existence of certain facts. Thus, when property, recently stolen, is found in the possession of one not its owner, an inference arises, in the absence of any explanation, that the

one having the possession committed the larceny. After a recent murder, the possession of the weapons by which the murder was committed, or marks of violence, or stains of blood upon the person of one proved to have been in a situation to participate in the crime, unexplained, authorizes the inference that a party, thus situated, is in some way connected with the transaction. These physical circumstances may, however, be of conclusive or inconclusive character, depending, to some extent, upon moral coincidences.

Where men are found to keep silence, when they are surrounded with circumstances of suspicion which require explanation, or give a false explanation, or attempt to induce others to relieve them by falsehood and perjury, inferences necessarily arise prejudicial to them; and when such moral coincidences are connected with physical circumstances, it frequently gives a conclusive and inculpatory character to circumstances which otherwise might be inconclusive or slightly inculpatory.

Thus, Mr. Foreman, to illustrate: suppose your horse to have been stolen from your stable. Immediately after, you find him in the possession of a man who has appropriated him to his own use. The fact of possession, under such circumstances, is a fact tending to implicate the possessor as the thief. It is not, however, absolutely conclusive. He may have purchased him of the real thief. But suppose, further, on being asked for an explanation of the manner in which he obtained possession, he refuses to explain, the circumstance of possession thereby assumes a stronger inculpatory character. Suppose, still further, that instead of making no explanation, he makes a false one, and attempts to sustain his false explanation by subornation of perjury. Under such a state of things, the physical circumstance of possession becomes much more highly inculpatory or conclusive in its tendency.

Almost every conceivable physical circumstance is capable of being qualified in this way, by the existence of moral

coincidences. Take one of the strongest cases in the books, where a man is found dead. On his person is a mortal wound, inflicted by a cutting instrument. On examination, in that wound is found a part of the instrument which had been broken and left in the body of the murdered man. Another is searched, and on his person, immediately afterwards, is found a broken dirk-knife. By comparison, it is found that the two parts of the steel so exactly coincide and fit together, as to render it morally certain that they are parts of the same knife. This, you perceive, is a circumstance strongly, almost conclusively inculpating the man upon whose person the knife was found.

Yet he may not be guilty; it is possible that he obtained the knife from some other person, and knew nothing of the purposes for which it had been used. The evidence, though strong, is not absolutely conclusive; but if, on being interrogated, he refuses to explain how and where he obtained possession of the fatal knife; or if he state falsely, or attempt to procure others to do so, the character of the original circumstance of possession becomes much more strongly conclusive in its character.

[The judge here gave several other cases in illustration of this principle, which are omitted.]

These principles apply with equal force in cases of murder, to recent marks of violence; to the possession of weapons recently used for the destruction of life; to the blood upon the person; to articles of clothing, belonging to the accused, found near the body of the deceased person; and, in general, to all the circumstances which connect the accused with the crime, and may be of importance in applying the evidence in the case.

Again, the force and strength of circumstantial evidence depends very much upon the character and number of the circumstances proved. The more numerous the facts which are material, and of conclusive tendency, provided they are independent of each other, and the more diverse the sources

from which they come, the more conclusive will be their general character, provided they all point in the same direction, and all harmonize with each other.

It can hardly be supposed that many circumstances, especially if they be those over which the accused could have no control, forming altogether the links of a transaction, should all unfortunately concur to fix the presumption of guilt upon an individual, and yet such conclusion be erroneous.

Truth is alwas consistent with itself. Facts are like perfect cubes; it matters not from whence they come; they will always harmonize with each other, and with surrounding objects. Falsehood, on the other hand, is inharmonious and irregular, with sharp angles and jagged corners. It is with much difficulty that two falsehoods can be made to coincide and fit together. But if their number be largely increased, they become an incongruous mass of mis-shapen materials, harmonizing neither with surrounding objects nor with themselves.

You have been told, gentlemen, that the law does not contemplate the possibility of the conviction of an innocent man. That is true. Neither does the law contemplate that it is possible that a guilty man shall go unpunished. But, gentlemen, human law, though said to be the perfection of human reason, is not absolutely perfect. Infirmity, imperfection, is stamped upon everything pertaining to humanity. There is no eye, save the eye of Omniscience, that sees with absolute certainty.

But though human law does fail at times, and the guilty escape unpunished, and possibly at times punishment falls upon the innocent, yet there is much more certainty in its operation, when well administered, than is generally supposed. One who has never considered the subject, would be surprised, on observing the almost unerring certainty with which the avenging ministers of the law detect and bring to punishment those who violate its mandates. There is something in the very nature of crime which tends to its

own exposure. Security is not the natural condition of the wicked. That Being who has written the records of this world's progress in the solid rocks, and on the cliffs of the mountains, writes also the history of secret crime in characters which will be found so legible that they may be read with almost unerring certainty, if you will only give them your attention.

Such, gentlemen, is the character of circumstantial evidence, which is often inconsiderately spoken against; but, if properly understood, and its principles correctly applied, it will seldom lead to erroneous results.

With these rules for ascertaining truth, thus imperfectly illustrated, before you, and with an earnest desire to arrive at just conclusions in this case, let us proceed to an examination of the facts proved, that you may determine what legitimate inferences should be drawn therefrom, as to the guilt or innocence of the prisoner.

We now proceed upon the hypothesis that you may find that the deceased did not commit suicide.

In view of all these considerations, looking at the character of the evidence, direct and circumstantial, and applying it to the great fact to which I have called your attention—the manner in which the deceased came to her death—determine, as men, on your consciences, on your responsibility, how that fact was. If you find that the deceased committed suicide, it is an end of the case; the prisoner must be acquitted.

If death was occasioned by violence inflicted by the hand of another, whose hand was it that inflicted the violence? Was it the hand of the prisoner at the bar? That solemn question you must decide. The presumption of the law is, that he is innocent. He is entitled to that presumption, step by step, throughout the investigation. He is to be deprived of it only when it is overcome by the testimony.

Have the government overcome that presumption? They answer in the affirmative. The respondent, by his counsel, in the negative. You are to decide. To satisfy you that he

has committed the offence, the government affirm, in the first place, that he had the opportunity. They affirm, also, that he had the motive. They tell you that the circumstances in this case, all tend to show that he did the deed. The prisoner responds that it is not so.

First, then, had he the opportunity? This raises one of the controverted points in this case, and as it is of a character which particularly addresses itself to you as practical men, I feel the less responsibility upon that point. I refer you to the appearances in the neighborhood of the "*heater piece.*" The fact is proved by positive testimony, not controverted, that the prisoner, on the evening of the 6th of October, about seven o'clock, with his oxen and cart, and one thousand of shingles, started for Israel Herrick's, where he procured some seven and a quarter thousands additional, and loaded them upon his cart; that he left Herrick's at about twenty minutes before ten o'clock in the evening, declaring that he was going to Gray. The next morning, it appears from the testimony, that he was found at the tavern of Brown, in New Gloucester, at ten minutes before four o'clock.

The government affirm that he did not pass directly down to Brown's; that he drove his team down to the mouth of the *Hayes road,* across the north branch of that road, to the rear of the *heater piece;* that he there left his team; thence proceeded to his own house, committed the fatal deed upon the body of his wife, returned to his team, and then proceeded on his way to Brown's.

The prisoner himself has given an account of the transaction, testified to by the witness Brown. Brown tells you that the prisoner arrived at his house at ten minutes before four o'clock in the morning; that when there he desired some refreshment, and proceeded to give an account of the manner in which he had passed the night, in which he said that he left Herrick's at about ten o'clock; that he arrived at Brown's between twelve and one o'clock; that he drove under the shed, fed his oxen, sat down and fell asleep, and remained there until the time he called Brown up.

Now the government say that this account of his was false: that in the first place he had not been waiting at Brown's; that he did not arrive there at the hour he stated; that he had not been under the shed of Brown; but that he had, after a forced drive, just arrived at the place; and they have introduced many witnesses to establish this hypothesis.

First, they call your attention to the physical appearance of the earth, the marks of the cart and the tracks of the oxen. They tell you that these left the main road, going into a by-path, where, many years ago, there had been a road; that there he stopped his team; that he took off his oxen and chained them to the wheel; and that from the appearance of the ground you must be satisfied that they remained there a very considerable period of time. You will be able to judge with a good deal of accuracy, how this was. You are farmers, and may have had occasion to observe circumstances of this character. The government point you to the indication of a stone having been removed from the earth and placed before the wheel as a trig, to the appearance of the cart-tongue having been swung off, to tracks of oxen having been driven round to the wheel, to the appearance of a recent manure dropped from an animal at rest, to the appearance of an animal having lain down at a place where numerous tracks pointed towards the wheel marks.

The government tell you that all these indications could not have occurred, unless the team had remained there some considerable time. Then it is contended, that concurring with these circumstances, are other facts proved in the case; that the evidence shows that the prisoner could not have been upon the road during any period of time from ten o'clock until half past twelve or thereabouts. The evidence relied upon to establish these propositions, is in substance this:

Mr. Wallace, living north of Herrick's, having a sick child, and desiring the services of a physician, testifies that he called his neighbor, Mr. Lunt, and desired him to procure the services of Dr. Eveleth, who lived some three miles below Poland Corner.

Mr. Lunt testifies that he left his house near eight o'clock; that he passed by Herrick's, and that when he passed down he saw a team of oxen and a cart in Herrick's barn; that he went to Dr. Eveleth's, and that he started on his return, with Dr. Eveleth, at twenty minutes before ten; that Eveleth got a little in advance. They both testify that going up the road by Herrick's they met no team. The testimony is that the prisoner left Herrick's at precisely the same time that Lunt, in company with Dr. Eveleth, left the doctor's house on his return, and the government contend that if they had both kept upon the road, allowing for the difference between the travel of an ox-team and that of horses, they would have met somewhere in the neighborhood of Poland Corner. The government ask you to infer that the prisoner had turned off and stopped behind a little hillock in the rear of the heater piece, and could not have been in the little divergence of the road between the heater piece and Herrick's, because the prisoner must have gone very much further. It is also said that the divergence is very small, and that a team passing upon either branch could be seen with the same facility by one traveling on the other branch, as if they both traveled on the same road.

This hypothesis, it is contended, is still further strengthened from the evidence that Dr. Eveleth left Wallace's at twelve o'clock, and returned home over the same road, where he arrived at about one, and that he saw no team on the way.

It is said, by making a mathematical calculation, that if the prisoner had proceeded directly on, Eveleth must have passed him before he arrived home. The hypothesis that he had not passed, receives, it is said, still additional confirmation from other testimony; that is, that a team was heard and seen upon the road passing Hanscom's, who lives just below Dr. Eveleth's, at two o'clock. Sawyer and Gilman testify that they saw and heard a team passing the Shakers' at three and one quarter o'clock. Tobie testifies that a team passed his house at three and a half o'clock, and that he recognized the voice of the prisoner speaking to his oxen, as he

went by. Benjamin Brackett testifies that he heard a team pass between three and four o'clock, and Daniel Brown testifies that the prisoner made his appearance at his tavern about ten minutes before four.

Now it is said, that, taking these various points of time, and assuming that the prisoner came out of the heater piece at twenty-five minutes past twelve, the rate traveled thence will show that he must have driven his oxen at about two and a half miles an hour; that it is evident that he traveled at this rate from the heater piece to Hanscom's, at the same rate from Hanscom's to the Shakers', and so on, reckoning between each place where the team was heard to pass; and that the same result will be obtained by reckoning from the heater piece to each of the places mentioned. The government say that these coincidences, taken in connection with the testimony of Brown, that he did not drive his team under his shed, that there were no traces of his stopping any considerable time at his house, and the appearances at the heater piece should satisfy you beyond a reasonable doubt that the prisoner stopped his team at the heater piece, and was himself in the vicinity of it from ten o'clock till about half past twelve.

This proposition is controverted on two grounds; first, that it would be impossible for oxen to travel at the rate they must have traveled to perform the journey in the time indicated; that oxen with such a load and over such a road cannot travel at the rate of two and a half miles an hour. There is much testimony on this point. It would be folly for me to undertake to give a jury of farmers any light upon a subject so peculiarly within their own knowledge. The question for you to determine is, not what is the ordinary rate of travel for an ox-team; but to what rate of speed may those animals be forced by a party desiring to make rapid progress. Is there anything impracticable in the speed claimed by the government? I make the suggestion whether you may not have observed differences in the character of these animals, and whether the character of the load may or

may not affect their speed; whether a team loaded with stone or heavy timber, might or might not travel with the same speed as one loaded with smaller lumber.

There is another consideration which I passed over, to which I will call your attention. The counsel for the prisoner say that the theory of the government, that the prisoner's team stopped at the heater piece, will not support the hypothesis that he went to his house, because it was one mile and ninety-two rods from the heater piece to his house. You are asked, the government are asked, where are the foot-prints of the prisoner which connect him with his house in his passage to and from the heater piece. It is said that there is a space of one mile and ninety-two rods which you are asked to overleap without testimony.

Gentlemen, you are to try this case by the evidence *in* the case, and not by that which is *out* of it. You are to determine whether the evidence adduced produces reasonable satisfaction to your mind. If it is sufficient, you are not to *say* we will not find a verdict because other evidence has not been produced.

It is undoubtedly the rule that the government should produce the best evidence of which the case admits under the circumstances, and it was culpable negligence on the part of the government, if by any reasonable examination they could find foot-prints which would have connected the prisoner with the house, and they omitted to do so, or if an examination would have shown that no such foot-prints existed.

You must, however, look at the circumstances—consider the situation of the parties at the time of this death. This death occurred in a remote and secluded part of the country, among a population where such occurrences are very rare, and where there is no effective detective police. You will recollect whether the evidence tends to show that the inhabitants did or not for many hours suspect that a murder had been committed.

The idea at first seemed to prevail that the deceased came to her death by suicide, and the people who came to pay

their respects to the deceased, or on missions of condolence or mercy, came there with that impression. While this impression lasted, there is evidence of passing to and fro, both on the one side and on the other; down the road to Waterhouse's and Herrick's and back, and also passing to and from the parlor window. You will consider whether, when it was suspected that a murder had been committed, it was not too late to detect tracks upon the road. If, however, the absence of such proof throws an insurmountable barrier in your way, then the hypothesis of the government fails. But, if the situation of the parties at the time, and subsequent occurrences were such that you may suppose that it would not have been possible for the government to have given you this species of evidence, then it is no imputation on the integrity or intelligence of the prosecuting officers that they have not done so, because they are not called upon to perform impossibilities. With these considerations, then, I ask, are you satisfied that the prisoner had the opportunity to commit the crime?

If he had the opportunity, had he a motive to do it? Men do not commit crime, ordinarily, without a motive, although they sometimes act from those which are apparently inadequate. Was there any motive here? One motive assigned is, that he had allied himself to a woman very much his senior in years, some years ago, when their disparity of age was not comparatively as great as now; that he had conceived the idea of marrying a younger woman; and that on one occasion he had indicated this to one of his neighbor's; and that the sickness of his wife was of such a character as to raise suspicions that he had resorted to unjustifiable means to procure her early decease. Then, again, it is suggested that the title to the property, as indicated by the deeds in the case, shows that he was to be benefitted, pecuniarily, by her death. This evidence you will consider.

Sidney Verrill testifies that some weeks before October 6th, he aided the prisoner to grind a knife which the prisoner produced, and which has been put into the case; that he asked him what he intended to do with it that the prisoner

made no answer; that he put it away in some place unknown to the boy; and that it was not used about the premises. The boy tells you that subsequently having occasion to search for apples in a hole in the hay mow, he there found this knife, and that it was very sharp. The government affirm that this circumstance, when taken in connection with subsequent events, shows that the knife was prepared in anticipation of this crime. They say that it was not before used for any purpose; that it was secreted until the night of the 6th; that it was afterwards ascertained that it had been removed from the hay mow, and was found covered with blood, near a fence, in the prisoner's field, under circumstances tending to connect the prisoner with its use. The prisoner's counsel contend that the facts do not authorize such a conclusion; that they were grinding knives at the time, and having ground one for use, the prisoner proposed to grind this one also, as a matter of convenience; that it was put in the hay mow, not secreted, but in a place open to the view of everybody.

It is further suggested that the prisoner had knowledge of the situation of the house and of everything in it; that the candles, the matches, and the pillows were known to no other person; that the pillow found upon the head of the deceased must have been taken from the bed in the sitting-room; and that the parlor door must have been locked to secure against intrusion; that the windows must have been prepared in advance; and that the party having thus secured the door, and opened a place for retreat, the crime was perpetrated. These acts, it is contended, could not have been done by any one not having knowledge of the house. There has been no explanation as to the knife referred to. If it was found in a place equally accessible to other parties as to the prisoner, he was not called upon to account for it; but if he secreted it in a place where it was under his entire control, then it furnishes evidence against him of a more conclusive character, provided you should be satisfied that the knife found is the one with which the wound was inflicted.

The finding of the knife, the locking of the door, and the opening of the window, have a tendency, more or less strong, to show that the act of killing was one of design and deliberation. I call your attention to the handkerchief of the prisoner found in the throat of the deceased. It is claimed by the government that this is a circumstance of a highly inculpatory character, directly affecting the prisoner. Harriet N. Jordan testifies that it was the handkerchief of the prisoner; that she washed and ironed it, and put it in his possession about a week before the witness left for Portland; that it was a handkerchief which the deceased was never accustomed to use. This testimony is of importance. It is suggested by the counsel of the prisoner that the handkerchief might have been placed where it was found, by the deceased herself. This is on the hypothesis that she committed suicide. But if you are satisfied that a murder has been committed, then the testimony that the handkerchief of the prisoner was found pressed into the wound, diminishes the probability that the deceased would have had possession of it and placed it there.

If you are satisfied that it was not in the possession of the deceased, nor used by her, and that there was a physical imposibility that it could have been placed in the wound by her, as it was found, you will inquire how it came there. The possession was, so far as the evidence shows, last in the prisoner. Has he shown how or when he parted with that possession? Does or not the testimony so connect him with that handkerchief as to require explanation? You will judge.

Again, a knife has been produced, which was found, it is said, on the premises of the prisoner. Is there anything in the position of the prisoner, and the circumstances under which that knife was found, by which you may infer that the prisoner had possession of it, or that it was used to kill the deceased? His counsel say that there is nothing to show that the prisoner was within six rods of that knife; no reason to believe that it might not have been placed where found by any other hand as well as his. This circumstance (the finding

of the knife) is of an inconclusive character, unless you are satisfied that it was placed there by him or by his procurement. If, on the other hand, the circumstances are such as to satisfy you that it was in the possession of the prisoner, and deposited where it was found, by him or by his procurement, and that it was used to take the life of the deceased, then it becomes a circumstance of conclusive tendency against him, unless satisfactorily explained.

There has been considerable discussion as to the character of the stains found upon the knife and other articles, to which your attention has been called. The government affirm that they have produced evidence sufficient to satisfy you that the various articles described by the witnesses were stained with human blood; that you should infer this from appearances in the wound when compared with the knife,—portions of it appearing, it is said, to have been made by that instrument; that the knife fits to the first incision or thrust in the wound, and that it gives evidence of dullness at the point where it was thrust, as is contended, upon the bones of the neck.

Two experts have been called, who assure you that there is a marked and palpable distinction between human blood and the blood of the lower animals. They both testify with great apparent confidence that the stains found upon the shirt of the prisoner and upon the knife, shingles, ring, chain, clevis and pin, were stains of blood which could not have flowed from the veins of a sheep. You heard their testimony, and you will give it the consideration to which you think it justly entitled. They do not testify that these stains were human blood. The government claim that this testimony excludes the possibility that the stains in the articles referred to could have come from the sheep slaughtered by the prisoner.

Next, as to the stains on the person of the prisoner. Mr. Rice testifies that he saw the prisoner on the 7th of October, on the piazza of his house, in conversation with Mr. Holt; that he then discovered upon the arm of the prisoner, a spot which he thought to be blood, about two inches long and one

inch wide. Mr. Holt testifies that he observed what he believed to be blood upon the shirt sleeve of the prisoner, and upon his overalls. Mrs. Small and Mrs. Herrick testify that they washed the overalls. Mrs. Small testifies, that, before she washed them, she discovered upon the left side what she supposed was blood; that she was desired to wash them by the prisoner. You heard her description of what occurred when they were subjected to washing. The counsel for the prisoner admits that there were indications of color upon the overalls, and upon certain other articles, but contends that the evidence shows that it was red paint, which was used by the prisoner the Friday before, while painting the house which he was building at "Black Cat." It does not occur to me that there was any distinct evidence as to the particular day on which that labor was performed. You may have had some experience in such matters, and may be able to determine whether red paint, placed upon clothing, worn, and exposed for several days in succession to open air, would immediately give off the color of red, on being placed in water; whether oil paint is thus easily removed, upon the application of water. If the discoloration of the water, testified to by the witnesses, was produced by red paint, then it should not prejudice the prisoner; but if it was occasioned by recent blood, you will judge whether it was or not a circumstance which required explanation.

So, too, as to the stains upon the shirts of the prisoner, and upon his person. You will consider whether, in the situation in which the prisoner then was, those were or not physical circumstances which required explanation, and whether the witholding of such explanations, if such were the fact, or the explanations, given, were or not such moral coincidences as tended to qualify the character of those circumstances, and to give them an inculpatory and conclusive tendency.

These suggestions will also apply to the stains upon the shingles, chain, ring, clevis and pin, provided you are satisfied,

beyond a reasonable doubt, that they were stains of blood, and were occasioned by the prisoner.

It is contended that the conduct of the prisoner, his acts and declarations, have had a strong tendency to establish his guilt. His statements, testified to by Brown, as made on his arrival at his house, are relied upon by the government with much confidence. The time of his arrival at that point if he were innocent, could, it is said, be of no importance. But if he should be charged with the murder of his wife, it is said that it would be of the utmost importance to him to be able to establish the fact that he was so situated as to render it impossible that he could have committed the crime, and hence his desire to convince Brown that he arrived at his house as early as twelve or one o'clock. These statements, it is contended, were not only false, but were manifestly made with special reference to a future defence. When these statements are said to have been made, no charge of crime appears to have been made against him; nor, indeed, does he appear then to have been suspected by any one.

Of a similar character is a part of the conversation of the prisoner, testified to by Thurston. This witness testifies that when he informed the prisoner that, as near as he could learn, his wife died between twelve and one o'clock, he replied, that was the time, he, (the prisoner) arrived at Brown's.

It is contended that these statements of the prisoner were false; and that, being made at a time when he was under no embarrassment, in consequence of being charged or suspected of having committed the murder of his wife, they show guilty knowledge, and a concerted scheme to avert suspicion, and in case he should be charged, to prepare a defence in advance. You will examine this part of the testimony carefully, and, applying the principle which I have explained to you, draw such inferences from the facts proved as you may think legitimate.

Then, again, you will consider his alleged attempts to suborn witnesses. It is said that he applied to Herrick, Downs, the two Edwards, Gilson and Brown, desiring each of them

to aid him to escape from the dilemma in which he found himself; that he desired them to do it by perjury; these are circumstances of a very grave character, tending, if true, to give an inculpatory and conclusive character to material acts which might otherwise be of an inconclusive character.

It is said that he made remarks at his wife's funeral, in relation to his step-daughter, (the daughter of his wife) which showed a cold and hardened heart, and that he indulged, on that occasion, in gross conversation, in levity, in low and obscene jokes, and that such conduct has a tendency to show his guilt. I do not so understand it. I think that conduct cannot be used for that purpose.

But there is one view in which his deportment on that occasion may be of importance. It is contended that his alleged attempts to suborn witnesses, and his failure to give satisfactory explanations when the circumstances of the case reasonably called for explanation, that his giving unreasonable and false accounts really ought not to weigh heavily against him, because they were made under circumstances where he had not full control over his mental faculties. This man, it is said, left his home in peace and security, to pursue his business at a distant village, when suddenly and unexpectedly he was met with the overwhelming intelligence that the person who was most dear to him had fallen by violence inflicted by her own hand; that in this condition he was crushed and overwhelmed with grief, and could hardly be expected to have the full control of his mental faculties; and then, in addition to this great calamity, that, on his return home, he shortly observed that suspicious eyes were fastened upon him, that fingers were pointed at him as the guilty author of the fearful transaction which had occurred; and that thus he labored under double embarrassments; first, suffering under the greatest of earthly calamities, the sudden loss of his wife, and then under the additional one of being unjustly pointed at as guilty of her murder; and that, under such overwhelming circumstances, he might well be expected to say and do things which in his calmer moments he would not have said

or done. Human experience has shown that men have been left, in times of adversity, to do and say things that are absolutely unaccountable.

There are cases on record where men at such times, under a pressure not ordinarily brought to bear upon human beings, have admitted themselves to be guilty of the crime of murder; and have thereby placed their lives in jeopardy, when, in fact, they were entirely free from guilt. Hence has sprung a rule of law which prohibits the government from giving in evidence the declarations of parties who are so situated that those declarations are not supposed to be voluntarily and freely made. That rule has been invoked in this case, and enforced; but I desire to ask you whether or not the evidence shows that the prisoner was in that disordered condition of mind; whether or not he was so overwhelmed with calamities and oppressed with grief, at the times referred to, that he made these various declarations as to his own conduct, and did these various acts in relation to procuring testimony, whatever they were, not knowing what he was doing, or what he was saying.

As explanatory of that point, and tending to show the real condition of his mind, it is legitimate to show how he deported himself at the funeral of his wife. It is a pertinent question to ask, whether, under that which, to ordinary men, would be the most solemn of all earthly occasions, he was indulging in obscene jests, in frivolity and laughter. That testimony becomes pertinent, in connection with his acts, as tending to show, whether, when he performed these acts, he was deprived of his right mind, and was acting under the pressure of an overwhelming calamity, or whether he was in the full possession of all his faculties.

Was the death of Mary Knight occasioned by her own act? If so, you will acquit the prisoner. If not, by whose hand was it occasioned? Was it occasioned by the hand of the prisoner? To determine this, gentlemen, you will look at all the circumstances in the case, and determine whether they are all consistent with the hypothesis, or whether any

of them are inconsistent with it. I have, in this connection, to remark upon the testimony in relation to the condition of the window. It is said, that although the circumstances may be such as to create suspicion, and nearly all point in one direction, yet that, wholly incompatible with the hypothesis of the guilt of the prisoner, is the fact that the window in the parlor was so situated that it was absolutely impossible for him to have made his escape through it from the parlor. This is a circumstance for you to consider, as bearing strongly upon the point whether the deceased was murdered or not, as well as upon the question of the guilt of the prisoner.

It is contended in behalf of the prisoner, that the government have proved that a murder could not have been committed; that they have introduced Lydia Knight, the only human being who was in the immediate vicinity of the deceased at the time of her death, and that her testimony negatives the hypothesis of murder. From all the testimony the inference seems to be very strong that this witness must have been in that room at the time of the death. She testifies that the deceased got into bed with her; that she occupied the front side; that the deceased occupied the back side of the bed; that, while she was in bed, she thought she felt the arms of the deceased thrown upon her, and heard an outcry; and that she has no knowledge of the manner in which her death was occasioned. She also testifies that she saw no person there; that she was not conscious, in any way, that any third person was present. She tells you that it was not possible, in her opinion, for any person to have gone upon that bed and committed the murder without her knowledge.

The defendant, by his counsel, contends that it is not in the mouth of the government to question the competency of Lydia Knight, or impeach her credibility. He tells you that if the crime had been committed as alleged by the government, Lydia Knight must know it.

It is a rule of law, that a party voluntarily introducing a witness into court, shall not be permitted to deny the compe-

tency of that witness, nor to allege his terpitude nor impeach his general credibility. The government have not controverted the competency of Lydia Knight, nor called in question her general credibility; but, gentlemen, I must be permitted to say that the government have, in my judgment, taken a most charitable view of the conduct of Lydia Knight. They are not permitted, as I have said, to deny her competency, nor her general credibility. They have not assumed to do either; but they are permitted to show facts inconsistent with her testimony, by other evidence. If Lydia Knight was in that room with Mary Knight at the time of her decease, and did not see the blow struck by which her life was taken, you are not compelled to come to the incredible conclusion that Mary Knight is not dead. You are to consider all the evidence. It does not necessarily follow that because Lydia Knight was present, but did not observe the manner or time of death, that it did not occur. There is a distinction between positive testimony and negative testimony. By observing this distinction, testimony comparatively in conflict may frequently be reconciled. Thus two of your panel may have been in condition to observe the counsel of the prisoner perform a certain act during this trial. One may have had his attention particularly called to him at the time; while the other, sitting in plain view of the counsel, did not observe that act. Suppose that matter were to be investigated, and you two gentlemen were to go upon the stand. and testify to what you saw. While you, Mr. Foreman, might testify distinctly to the transaction in all its details, your fellow, with equal truth, would testify that he saw nothing of the transaction; yet you both sat in plain view of the counsel. Does this supposed case present a necessary conflict of testimony? Not at all. Your fellow, Mr. Foreman, would testify to all he saw. You would testify only to what you saw. Your attention being called to the transaction, you observed it,—the attention of your fellow then being in another direction, he did not observe it. This is an

illustration of positive and negative testimony. I suggest to you whether it may or not be reasonable to explain the testimony of Lydia Knight upon this principle. Such is the explanation of the government. She tells you that she heard the outcry, and was very much alarmed. You observed her upon the stand. She is apparently far advanced in years, and perhaps it may not be unreasonable to suppose that her faculties have become somewhat impaired. Is it or not unreasonable to believe that in her alarm she was really unconscious how the death of Mary Knight occurred? That she did not, is a charitable conclusion; but, however it may be, you are to find the real facts from all the evidence in the case.

If you can resolve the apparent conflict of testimony on that principle, you will undoubtedly be happy to do so, and thus save the character of the old lady from reproach.

You will also, in this connection, consider the testimony of the children, the condition in which the body was found, the marks of violence testified to upon the face and side of the deceased, alleged appearances of blood upon the floor and the window sill, and upon the spring of the window, and also upon the outside of the house, and the alleged situation of the joist in front of the window. You will also consider the absence of blood marks upon the doors, the end window, and the torn curtain, and upon the sash which had been removed, and the situation in which that sash was found.

You will determine from the testimony whether the stains upon the window sills were or not impressed thereon before the sash was placed in the condition in which it was found in the morning, as these stains are alleged to have been under the sash.

From this fact the government ask you to infer, that after the murderer had made his escape, some hand unsmeared with blood had adjusted that window as it was found, and they suggest that it may have been done by Lydia Knight, who, it will be recollected, the witnesses testify was absent at one time during the night of the decease of Mary Knight,

and on search was found in the corner bed-room. I do not recollect that either party interrogated Lydia Knight upon that point.

It is strongly insisted that the situation of that window is *absolutely* inconsistent and incompatible with the guilt of the prisoner; that he could not, by possibility, have committed the murder and escaped through that window, and that there is no suggestion of escape in any other direction. The consideration is worthy your attention, whether there were greater obstacles to the escape of the prisoner than there would have been to that of any other person. If you come to the conclusion that Mrs. Knight did not commit suicide, but was killed by the hand of another, that other hand must, in some way, have come in contact with her. What person had the most favorable opportunity to perform this act? Who had a motive to do it? Who possessed the means and had the facilities with which to accomplish it? In what direction, and to whom do the circumstances in the case, as proved, point, as being connected with the transaction? Do these circumstances *all* point in one direction? Are they proved beyond a reasonable doubt? Are the circumstances of a conclusive and inculpatory character? Do they point to the prisoner as the guilty party? And are they of such a character as actually to exclude, to a moral certainty, and beyond all reasonable doubt, every other hypothesis except that of the guilt of the prisoner?

The prisoner stands before you charged with the crime of murder. That charge is not to prejudice you against him. He is entitled to the presumption of innocence till it is overcome by legal testimony. That testimony, in all its material facts, must be consistent with his guilt. If there is any substantial circumstance proved which cannot exist consistently with his guilt, it acquits him. If on the other hand, the circumstances are all consistent with his guilt, if they conclusively tend to prove his guilt, and are of a character to exclude all reasonable doubt that the crime could have been committed by any other person, and if you are satisfied be-

yond all reasonable doubt that the fatal wound was not inflicted by the deceased herself, but was inflicted by the prisoner—if the government have proved all this, they have done all that they are required to do, and are entitled to a verdict at your hands. If they fail to do this, the prisoner is entitled to a verdict of acquittal.

If you find the defendant guilty of murder, you will also inquire, and by your verdict ascertain, whether he is guilty of murder of the first degree or guilty of murder of the second degree, and will answer when you return your verdict.

Gentlemen, during the progress of the trial, many cases of erroneous convictions have been read to you from the books, and, in view of these, you have been admonished of the dangers which surround jurors when called to act upon circumstantial evidence. The case of the Boorns, of Vermont, and of Jennings and Shaw, of England, have been the subjects of particular attention. So far as the presentation of those cases may have a tendency to induce you to act with caution and carefully to scrutinize and weigh the evidence in this case, it is well. But if designed to strike terror into your minds, and to induce you to refuse to act except upon positive testimony, they will serve no good purpose. They do not tend to show any marked superiority of one class of testimony over another. The *Boorns* were convicted on their own confession; *Jennings*, on the testimony of a perjured witness; *Shaw*, on a combination of circumstances amounting to little less than positive testimony, including what was supposed to be the dying affirmation of his own daughter. Those, and cases of a similar character, which are almost invariably pressed upon the attention of jurors in capital trials, where the evidence is circumstantial, stand out as land-marks, far removed from each other in judicial history, and tend to illustrate, not so much the dangers peculiar to any particular kind of evidence, as the infirmity incident to all human institutions.

Gentlemen, I have thus passed hastily over the leading features in this case. It has not been my design to recapit-

ulate in detail the testimony, or to determine the facts, but simply to aid you as far as I am able, in arranging them in their proper order. What the testimony of the witnesses has been, and what facts are established, either directly or inferentially, you, and you alone must determine.

This trial has occupied several weeks. A vast amount of testimony has been introduced, and this whole case has been presented with a degree of ability, seldom, if ever, excelled in any court of justice. You are fully possessed of the opinions of the counsel of the government and the defence, both of whom have presented their views with distinguished ability. Further light can hardly be expected. The court has endeavored to hold the scales of justice even, between the government and the prisoner. The hour in which you are to act, has now come. Other parties connected with this trial have discharged their duties; you are now called upon to discharge yours.

In the progress of this protracted trial you may have speculated upon portions of the testimony as it has been produced. One fact may have had a tendency on your judgments to inculpate and another to exculpate the prisoner. These facts may have been matters of discussion among you, and from these discussions partial opinions may have been formed. You would be something more than human if impressions thus made did not remain.

But when you now retire to consider your verdict, you should at once dismiss all such impressions or partial opinions. You must now look at the whole case, and consider all the facts and circumstances as a whole, and in view of all the light that has been thrown upon them, you should examine the case, not with a view to maintain opinions, nor to gain a triumph over your fellows; but discarding all pride of opinion, all strife for victory, and acting under a sense of your high responsibility, each should seek only for the truth.

To all which charge and instructions, and to each of them, and to each and every part thereof, the counsel of the prisoner excepted.

POINTS AND AUTHORITIES FOR THE DEFENDANT.

BY N. CLIFFORD.

I. The demand for triors was improperly refused, and the judge erred in ruling that in all cases of challenge for cause, whether for favor or otherwise, the question of indifference or impartiality must be heard and determined by the court.

1. Every person accused of crime is entitled to an impartial trial, and except in trials by martial law or impeachment, by a jury of the vicinity.

Nor can any person be deprived of his life, liberty, property or privileges, but by judgment of his peers or the law of the land. Const., art. 1, sec. 6. Const. of Mass., 1780, art. 1, sec. 27.

The legislature is authorized to provide by law, "a suitable and impartial mode of selecting jurors, and it is expressly ordained that their usual number and unanimity in indictments and convictions shall be held indispensable." Const., art. 1, sec. 7. Const. Mass., 1780, art. 1, sec. 12.

The mode of selecting jurors is accordingly prescribed by statute, and it is to that proceeding, undoubtedly, that the framers of the constitution refer in the above provision. It confers the powers as the words import, to make provision for the choice of jurors from the mass of the citizens.

It contemplates a proceeding anterior to the service of the venire, and has no reference whatever, to the formation of the panel at the trial. R. S., chap. 135.

Jurors are first selected and then summoned, and the list is made up by the clerk from the returns upon the venires.

After the list is thus made up, the prisoner is entitled to be furnished with a copy of it, to assist him in exercising his right of challenge. R. S., chap. 172, sec. 22.

It is obvious therefore that the power conferred upon the legislature to provide for the selection of jurors has nothing to do with the right of challenge in court.

That matter is left entirely to the long established and well known principles of the common law.

2. An impartial jury is one selected or drawn and returned pursuant to the statute and impanneled according to the usages and principles of the common law, as it existed when the constitution was formed.

It must be considered, therefore, that the right of challenge *for cause*, though derived from the common law, is a constitutional right in this state, and one which cannot be impaired even by legislative enactment. Otherwise a person accused of crime might be deprived of an impartial jury.

3. Peremptory challenge stands upon a different basis. It was allowed originally as a matter of favor, and has always been considered subject to legislative control. It was so in England, and is so here. Whar. Crim. Law, (4th ed.) sec. 2958. R. S., chap. 172, sec. 17.

It is doubtless competent for the legislature to enlarge or diminish their number, and perhaps to disallow such challenges altogether. Laws of Maine, 1821, chap. 59, sec. 42. Same, 1849, chap. 105, sec. 1.

Not so with respect to the right of challenge for cause. It is part and parcel of the right of trial by jury, and can no more be abrogated than the constitution itself, by which it is secured.

The guaranty of an impartial jury is of no value if the accused may be deprived of the means of making that guaranty available.

Challenge for cause is the only means allowed of right to the accused at the trial for that purpose. People v. Bodine, 1 Den. on p. 309, near the bottom of the page.

4. It follows therefore that the right of challenge to the polls for cause is an indispensable incident to the right of trial by jury, and though it was derived from the common law, it is by necessary implication, secured by the constitution of this State to every person accused of an indictable offence. Const. Ar. 1, Sec. 6; People v. Bodine, 1 Den. pp. 304 and 305; Low's Case 4 Me. 449; 3 Co. Litt. 157, b. p. 523; 2 Hale's P. C. (1st Am. ed.) p. 275; 2 Hawk P. C. chap. 43 2 Kent's Comm. (6th ed.) p. 13, 1 K. 612; 2 Inst. p. 50;

Hoke v. Henderson, 4 Dev. (N. C.) p. 15; 3 Story's Com. on Const. pp. 652, 661; Taylor v. Porter, 4 Hill on pp. 144, 146; Whar. Crim. Law, (4th ed.) sec. 2944 and 3022; Lewis' Crim. L. p. 611; 5 Bac. Abr. by Bouvier, 436; 1 Bouv. L. Dic. (6th ed.) p. 217. Title, challenge to the polls for favor.

5. Challenges to the polls for cause are twofold. Principal cause, and challenge for favor. Principal cause is where a cause is shown which, if found true, stands sufficient of itself without leaving anything to be tried by triors. Whar. Crim. Law Sec. 2975; 2 Hale's P. C. (1 Am. ed.) 275, note 2; 2 Gabb. Crim. Law p. 391; 2 Hawk. P. C. chap. 43, sec. 10 and 32, pp. 582 and 589; 3 Co. Litt. 158, a. (p. 481.)*; 1 Chit. Crim. Law (*549) p. 548.

Challenges for favor take place where, though the juror is not so evidently partial as to amount to a principal challenge, yet there are reasonable grounds to suspect that he will act under some undue influence or prejudice.

The causes of such challenges are manifestly numerous, and dependent on a variety of circumstances; for the question to be tried is whether the juryman is altogether indifferent, as he stands unsworn. Whar. Crim. Law sec. 3022; Carnal v. the People, 1 Parker C. R. p. 272; Smith v. Floyd, Barb. Sup. C. R. p. 524; State v. Creasman, 10 Ire. p. 395; Malone v. the State, 8 Geo. p. 408; Bishop v. the State, 9 Geo. p. 121.

Where the cause of challenge stated amounts to a principal cause, *if the facts are undisputed*, the question whether the juror stands indifferent or not, is one of law, to be determined by the court. People v. Bodine, 1 Den. on pp. 364 and 365.

Whether the challenge be one for principal cause or for favor, if the facts are disputed, the question must be submited to triors. Ex parte Vermilyea, et als, 6 Cow. on p. 559; People v. Mather, 4 Wend. on pp. 239 and 240; Whar. Crim. Law sec. 30 and 41; Lewis Crim. Law page 611, at the bottom of the page; People v. Bodine, 1 Den. on pp. 304 and 305; 3 Co. Litt. (1 Am. ed.) (481)* p. 522; Bac. abr. juries, E. 12.

6. When the challenge is for favor the question whether the juror is indifferent or not must in all cases be submitted to triors. 3 Co. Litt, (1 Am. ed.) 158, b. p. 526; case of the Abbott of Strata Mercella, 5 Coke R. part 9 p. 32, cites as authority 9 E. 4, 5 b. 15 E. 4 24a. 4 E. 4, 18 E. 4, 18a, 16 E. 4, 7 b. 14 H. 7, 1 b. 19 H. 6, 48 b. 7 H. 4, 46a; 11 Petersdorf Abr. (740) p. 542; 2 Hale's P. C. (1 Am. ed.) 275; 1 Chitt. Crim. Law (549) p. 548; 3 Bac. abr. juries 12, p. 765; 2 Hawk. P. C. chap. 43; Whar. Crim. Law, sec. 3038; 3 Jac. law dic. Jury II, p. 576; 2 Tidd Prac. 779; Viner abr. trial of challenges A. e. p. 290; McCormick v. Brookfield, 1 South. p. 69; U. S. v. Johns, 4 Dall. p. 413; Howe's prac. jury p. 247; 1 Arch. Crim. Law by Wat. p. 163-4; Prindle v. Huse, 1 Cow. p. 432 and note on p 441; Mechanics' and Farmers' Bank v. Smith, 19 Johns. on p. 121; 4 Bl. Comm. p. 353, note 8; Lohman v. the People, 1 Coms. R. on p. 384; Lewis Crim. Law pp. 611 and 612; 1 Archb. prac. pp. 207 and 208; 2 Gabb. Crim. Law, p. 395; Anonymous, 1 Salk., R. 151; 3 Bl. comm. on p. 363.

7. The right of challenge for cause, is a right derived from the common law, and is not now nor was it ever conferred, or the manner of its exercise regulated by statute in this state, since the adoption of our constitution. Barrett v. Long, 16 Eng. law and eq. p. 1; Brook's abr. title challenge.

Our ancestors brought with them the common law, and their respect for it appears in all the statutes of the colonial governments, of which the act respecting trials passed in 1641, is a striking example.

It provides that "it shall be in the liberty of both plaintiff and defendant and likewise of every delinquent to be judged by a jury, to challenge any of the jurors, and if the challenge be found just and reasonable by the bench, or the rest of the jury, as the challenger shall choose, it shall be allowed him, and 'tales de circumstantibus' empanneled in their room." Anc. Charters of Mass. chap. 98, p. 199.

The act setting forth general privileges is equally explicit and instructive.

It provides among other things that, "In all capital cases there shall be a grand inquest who shall first present the offence, and then twelve men of the neighborhood to try the offender, who, after his plea to the indictment *shall be allowed his reasonable challenges.*" Anc. charters of Mass. chap. 2, p. 214.

Jurors at first were chosen by the freemen of the respective towns, and when so chosen it was made the duty of the constables "to warn them to attend the court whereto they are appointed." Colony laws, anc. charters, chap. 61 p. 144; Prov. laws, anc. charters, chap. 5, p. 221, and chap. 61, p. 332.

And by the act last mentioned, it is provided that if by reason of challenge or otherwise there do not appear a sufficient number of good and lawful men to make up the petit jury or juries to serve at the said court, then and in such case the said jury or juries shall be filled up de talibus circumstantibus.

The choice of jurors was further regulated by the act 33 George II, passed in 1760, requiring lists to be prepared and laid before the town at a meeting called for that purpose.

Under this act the jurors were drawn from the jury box, very nearly in the manner of the regulations of our revised statutes.

And the fourth section of the act provides almost in the words of chapter 115, section 65, of our revised statutes "that the justice of the respective courts aforesaid are hereby directed upon motion of either party *in any case* that shall be tried after the first day of June next, and during the continuance of this act, to put any juror to answer upon oath whether returned as aforesaid, or as talisman; whether he doth expect to gain or lose by the issue of the cause then depending. Whether he is in any way related to either party, or hath directly or indirectly given his opinion, or is sensible of any prejudice in the cause." Prov. laws, Anc. Charters, p. 626.

It must be obvious that the provisions above cited related solely to civil causes, and that there is no pretence that it repeals or is in any respect inconsistent with the act of 1641.

or the act declaring general privileges passed in 1692. Idem. pp. 191, 214.

Both those statutes recognizing challenges in criminal cases as at common law were unrepealed and in full force in 1780, when the constitution of Massachusetts was adopted. That constitution provides as follows:

"All the laws which have heretofore been adopted, used and approved in the Province, Colony, or State of Massachusetts Bay, and usually practiced on in the courts of law, shall still remain and be in full force until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution." Constitution of Mass., chap. 6, article 6; Comm. v. Webster, 5 Cush., on pp. 303, 304.

Chief Justice Shaw says in that case that the common law "was adopted when our ancestors first settled here, by general consent.

"It was adopted and confirmed by an early act of the provincial government, and was formerly confirmed by the provision of the constitution above cited.

"So far, therefore, as the rules and principles of the common law are applicable to criminal law, and have not been altered and modified by acts of the colonial or provincial government, or by the state, they have the same force and effect as laws formally enacted."

8. Those who allege the alteration must show it. The burden is upon the government in this case, and if they set up a repeal of the common law right, they must show it clearly; as the maxim is that statutes passed in derogation of the common law are to be construed strictly, and are not to operate beyond their words or the clear repugnance of their provisions. Stowell v. Zouch, Plow. R. 365; 1 Kent's Comm., part 3, sec. 20, p. 464; Heydon's case, 2 Coke, R. part 3, p. 9; 6 Bac. abr. statute 4; 1 Bishop Crim. Law, sec. 91, and case cited; 2 Weller 75.

A statute which is to take away a remedy given by the common law aught never to have a liberal construction.

Hammond v. Webb, 10 Mod., 282; 6 Bac. abr. statute 6, page 388.

Where the new statute does not repeal the old law, both have a concurrent efficacy, and suitors may elect under which they will proceed. 1 Bishop Crim. Law, sec. 93, and cases cited.

Statutes are never repealed by nonuser. White v. Boot, 2 Term, p. 274; 1 Bishop Crim. Law, sec. 56, and cases cited.

The common law is an essential part of the jurisprudence of this state.

Our constitution provides that "all laws now in force in this state, and not repugnant to this constitution, shall remain and be in full force until altered or repealed by the legislature, or shall expire by their own limitation. Const., art. 10, sec. 7.

And it is provided by the act creating the Supreme Judicial Court, that "the said court may exercise jurisdiction, power and authority agreeably to the common law of this state, not inconsistent with the constitution or any statute. R. S., chap. 96, sec. 7.

9. Whence comes the right of challenge at all, whether peremptory, or for cause?

Challenge for cause is not mentioned in any statute now in force, nor in any one that ever was in force in this state.

Peremptory challenges are only referred to for the purpose of limiting the number.

Take for example the act of 1821. It is as follows: "And no person who shall be indicted for any such offence shall be allowed to challenge peremptorily above the number of twenty persons of the jury." Laws of 1821, chap. 59, sec. 42.

No person * * * * shall be allowed to challenge peremptorily more than twenty persons of the jury. R. S., chap. 172, sec. 17.

That number is reduced to ten by chap. 100, sec. 1, of the Laws of 1849.

At common law, the prisoner on a charge for treason, was entitled to thirty-five peremptory challenges, and such was

the law of the commonwealth, derived from the common law, until after the declaration of independence.

It was not until 1777 that any change was made in this respect. The number was then reduced to twenty, and the attorney general was forbidden to challenge peremptorily any juror about to be empanneled for any criminal accusation or charge. Appendix 2, Laws of Mass., chap. 61, secs. 13 and 14, p. 1050.

Section thirteen applies to trials for treason, and has no reference whatever to other capital offences.

The authority conferred upon the court by Revised Statutes, chap. 115, sec. 65, furnishes no answer to the inquiry.

10. Challenge for cause is the right of the accused. It is an absolute right, and not one dependent either upon the discretion or caprice of the court. No such right is conferred or even recognized in that section.

The court may or may not make the inquiries, and so far as that provision is concerned, neither the prisoner or his counsel have any rights whatever. Comm. v. Gee et. al, 6 Cush., pp. 177 and 178.

Parties may adopt that mode by consent, and if they do, it is clearly a waiver of the common law right of challenge for cause. People v. Mather, 4 Wend., on p. 240; Lewis Crim. Law, on p. 612; Whar. Crim. Law, sec. 3041.

It is a convenient mode, and one frequently followed, and unless triors are demanded, it may be regarded as satisfactory.

No greater error, however, can be committed, than to regard that provision as repealing by substitution the common law right.

One is an absolute right vested in the prisoner, which he may exercise himself or by counsel, the other is merely discretionary with the court, and cannot be exercised by the prisoner or his counsel, except as a matter of concession by the court or presiding justice.

Waiving these difficulties, which are insuperable, there is still another, quite as serious as the one described. Every interrogatory prescribed in that provison has reference en-

tirely to causes of principal challenge. Assuming (what I deny) that the provision was intended as a substitute for the common law right, then the right of challenge for favor does not exist.

All must agree that by the common law it did exist as a right, and for centuries was regarded in England as a valuable right. Our ancestors brought the common law with them, as appears by the terms of their charters from the crown, and they adopted and confirmed it by repeated statutes, some of which have been referred to.

And now, if it is lost, when was it lost? Where was it lost? By what means was it lost?

11. We go further, and contend that the provision when rightly construed, is in all respects save one, perfectly consistent with our views, and that is its discretionary aspect.

Suppose it may be applied in capital cases, which we deny, unless by consent, it does not militate with the argument in any respect except the one mentioned.

12. Every one of the interrogatories prescribed relate to principal cause, which is always determined by the court when the facts appear and are undisputed. The provision must receive a reasonable construction according to the rules of law, and when so construed it will be found to support our views.

"Statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration in the common law further or otherwise than the act expressly declares; therefore in all general matters the law presumes the act did not intend to make any alteration, for if the legislature had that design, they would have expressed it in the act." 1 Bishop Crim. Law, sec. 86, and cases cited; 6 Bac. Abr. Title Statute 4, p. 384; Arthur v. Bokeman, 11 Mod., 150.

Applying that rule to the interpretation of that provision, and there is not a word in it contradictory to the common law right of challenge for cause.

Take the phrase "if it appear from his answers * * * another juror shall be called and placed in his stead for the trial of the cause." It is just so at common law, if the challenge is for principal cause, and it appear from the answer of the juror, or in any manner, that he is not indifferent, the question becomes a mere question of law, and is determined by the court unless the facts are drawn into dispute, and then the question must be submitted to triors.

Suppose the fact is disputed, the provision of our statute is silent as to the manner in which the disputed fact is to be ascertained. It must be construed in accordance with the common law, and if so construed, it may well be inferred that the disputed fact shall be ascertained in the manner and by the means prescribed by the common law.

But the provision has reference entirely to trials in civil cases, and cannot be made applicable to the impanneling of jurors in capital cases.

13. Jurors in civil cases are impanneled generally for the term, and not for any particular cause. It was so in Massachusetts, and has always been so in this state. R. S., chap. 115, sec. 58–60; Laws of Mass., March 12, 1808, vol. 4, p. 41.

It is obvious that this provision was intended to prescribe interrogatories to be propounded to jurors after they are sworn, and the panel is made up, and they are called for the trial of a particular cause.

The words of the provision are expressly to that effect, "*another juror shall be called and placed in his stead for the trial of the cause.*"

Another juror could not be placed "in his stead," unless the juror displaced or set aside had already been placed in the panel.

It must cost much ingenuity to make this provision apply to the impanneling of a jury in capital trials, where a new list is required to be made from the venires, and arranged in alphabetical order, and when the prisoner is required to make his challenges "before the juror is sworn."

Such conclusion would be contrary to every known rule of interpretation, contrary to the very words of the provision, and contrary to common sense. It cannot, therefore, be adopted.

14. The only remaining provision in the Revised Statutes is the following: The same challenges of jurors shall be allowed in criminal as in civil causes to the attorney general or other prosecutor, and to the defendant. R. S., chap. 172, sec. 31.

That section is an affirmation of the common law in all criminal trials *under the degree of felony. Parties in civil suits never had the right of peremptory challenge, and consequently it cannot be applied in capital cases.* Marsh v. Coppoch, 9 Carr. and P., p. 480.

Suppose it were otherwise, it can make no difference. It relates to the character of the challenges, and not to the manner in which they are to be made.

No statute is in existence specifying the manner in which challenges for cause shall be tried, nor was there ever one in this state or in Massachusetts, except the one cited before, passed in 1641. Anc. Char., chap. 98, p. 199; 2 Bon., S. D., Trial 606.

That provision of the Revised Statutes is a new one, unknown in the history of previous legislation in this state, consequently can have no influence in determining what are the constitutional rights of a person accused of a capital offence.

The meaning of the phrase "impartial jury," must be ascertained by the state of things which existed when the constitution was formed, and not by anything which has since occurred.

Waiving that, however, and assuming that the rules of interpretation before cited are correct, it follows that this provision cannot be held to make any change in the common law right of challenge for cause.

It does not purport to make any such change, nor can it be so construed without supplying words which the provision does not contain.

The rule of construction must be reversed to give it any effect inconsistent with our views.

15. Challenge is a technical word. It is an "exception to jurors who are returned to pass on a trial." 1 Chit. Crim. Law, p. 534; 1 Bouv. Law Dic., challenge, p. 216.

It must be made as they are called, and before they are sworn.

No such proceeding is contemplated by the provision in chap. 115, sec. 65, of our Revised Statutes.

That proceeding is not a challenge in any sense. Neither in form, nor the time of making, nor in the manner of its exercise.

The right of peremptory challenge continues until the juror is sworn. 3 Co. Litt. (483*); Regina v. Frost, 9 C. and P., 129, (38 E. C. L. 70); Whar. Crim. Law, sec. 3026; 1 Chitt. Crim. Law, p. 545; Lewis Crim. Law, on p. 612; People v. Bodine, 1 Den., p. 181; Comm. v. Knapp, 9 Pick., p. 419. Cannot be made after the juror is sworn. Comm. v. Knapp, 10 Pick., on p. 480. May be made after oath. Comm. v. Twombly, 10 Pick., in note on p. 480; U. S. v. Morris, 1 Curtis, on p. 37. Must precede the statute questions. Comm. v. Webster, 5 Cush., on p. 298.

This is not good law if statute questions constitute a challenge for cause. The right continues until the juror is sworn. Morris, case 4; Howell's Case Trials, p. 1255; Manley v. State, 7 Blackf., 593; Morris v. State, 7 Blackf., 607; the justices, &c., v. Plank Road Co., 15 Geo. 39.

16. It was first enacted in 1760, as a cumulative mode of securing an impartial jury in civil cases, and was never regarded, as far as can be ascertained from the course of legislation, as repealing the common law right of challenge. 7 Dane Abr., chap. 222, art. 17, p. 380; Robinson v. the State, 1 Kelley, (Geo.) 563; People v. Doe, 1 Manning R. (Mich.) 451; Copenhavin v. the State, 12 (Geo.) 444; Stuart v. the State, 8 Eng. (Ark.) 720.

Serious doubts were formerly entertained how far jurors could be examined on the voire dire as a ground of challenge,

and there are not wanting contradictory decisions upon that point. Anonymous, 1 Salk., 153.

The law is now well settled that a juror is bound to answer all questions which do not tend to render him infamous. People v. Bodine, 1 Den., p. 281; Whar. Crim. Law, sec. 3010; Mechanics' and Farmers' Bank v. Smith, 19 Johns., on p. 121; 3 Bac. Abr. Title Jury E.; People v. Jewett, 3 Wend., p. 314.

17. It seems certain, therefore, that Mr. Dane has furnished the true solution and design of this provision.

It was not to abridge the rights of parties, or to deprive them of their common law right, but to furnish the court with additional means to secure an impartial jury.

Subsequent legislation has stripped that provision of all its value as a right, and made it purely a matter of discretion.

We think it clear, therefore, that the challenges allowed in criminal cases and referred to in the Revised Statutes, chap. 172, sec 31, are the challenges known and allowed in that "great repository of rules, principles and forms, the common law," and not the discretionary proceeding referred to in chap. 115, sec. 65 of our statute before mentioned. Comm. v. Webster, 5 Cush., on p. 303.

18. A bill of exceptions lies for refusing triors, or upon any question arising upon a challenge to jurors in a case where triors may be demanded. People v. Freeman, 4 Den., on p. 33; 2 Tidd Prac., 786; Archb. Prac. 210; Bul. N. P. 316; Rex. v. Edmunds, 4, Barn. and Cress. p. 471.

Any law or decision which would place a right, so important as that of the right of challenge for cause, in capital trials, within the control of a single judge, will require a solid foundation on which to rest, or it cannot stand.

It is no answer to say that the prisoner may except; so he may in all matters of law.

It should be remembered, however, that challenge for cause, whether principal or for favor, involves questions of fact where there is no remedy by bill of exceptions, and challenges for favor are always "left to the conscience and dis-

cretion of the triors to find the jurors favorable or not favorable." People v. Bodine, 1 Den., on p. 305.

"They are final judges upon the matters submitted to them; and from their decision, when properly instructed, the law has provided no appeal." Freeman v. the People, 4 Den. on p. 34; 3 Bl. Comm., on p. 363.

19. A single judge has no right to hear and determine such matters, and the presiding justice erred in refusing the demand for triors and in ruling that "in all cases of challenge for cause, whether for favor or otherwise, the question of indifference or impartiality must be heard and determined by the court."

"Other challenges for cause were made by the prisoner before the pannel was completed; some of which were allowed and others were disallowed, on hearing before the presiding judge, under the ruling aforesaid."

20. The prisoner, therefore, is entitled to a new trial, if the right to demand triors in a capital case exists in this state.

II. 1. The questions, propounded by the counsel of the defendant, on cross-examination, to L. D. Rice, were proper, as effecting the credibility of the witness, and were improperly excluded. Desailly v. Morgan, 2 Esp. R., 691.

"A witness may be asked what he has said or written at a previous time at variance with his testimony." Ros. Crim. Evidence, p. 182; Tucker v. Welsh 17, Mass. 166.

Clearly, the second question was proper, and the ruling of the judge, in excluding it, was erroneous. The prisoner had a right to know where the witness so testified, if it was not before the grand jury. 1 Greenl. Ev. sec. 462, and sec. 449 on p. 576.

The witness voluntarily testified that, "this is not the first time I have testified that I saw Mr. Prout put his hand on deceased's face." Surely, after that the prisoner had the right to inquire where it was he so testified. 1 Stark. Ev., (199*), 198; Thomas v. Newton, Moo. and M., 48.

2. The question propounded by the government to Domin-

icus J. Prout, was clearly improper, as was also the answer of the witness. Both questions and answers should have been ruled out.

A party has no right to confirm a statement of his witness by proving that he gave the same account out of court.

Proof of declarations, made by a witness out of court in corroboration of testimony given by him on the trial, is clearly inadmissible. Ware v. Ware, 8 Greenl., on p. 55; Whar. Crim. Law, sec. 820; Dudley v. Bolles, 24 Wend. on p. 472.

"*A fortiori* he cannot be permitted to corroborate his own testimony, that he made the same statement to others." Deshon v. Merchants' Ins. Co., 11 Met., on p. 210; 1 Greenl. Ev., sec. 469; King v. Parker, 3 Doug., 242.

A question is always irregular, when it assumes a fact not proved, or admitted. 1 Grenl. Ev., (6th ed.) sec. 434, p. 554; Turner v. the State, 8 Sm. and Marsh., p. 104; People v. Mather, 4 Wend. on p. 249; 1 Stark. Ev., (7th Am. ed.,) (189*) 188 and note; Ros. Crim. Ev., 169.

3. Experts, in the strict sense of the word, are persons instructed by experience. 1 Bouv. Law Dict.

Every fact stated is matter of common observation, and no more within the province of an expert than is the conclusion to be drawn from any statement of circumstantial facts.

Other legal writers define the term as referring to persons professionally acquainted with the science or practice of which they are called to testify. Stark. on Ev., p. 408; Campbell v. Richards, (27 E. C. L., on p. 210,) 5 Barn. and Adol., p. 837; 2 Stephen N. P., p. 1778.

It seems to be admitted that the opinion of such witnesses is admissible whenever the subject matter of the interrogatory is one requiring peculiar skill and experience, in order to attain the requisite knowledge to answer the inquiry understandingly, or, in other words, when it so far partakes of the nature of science as to require a course of previous study or experience to qualify the witness to give the requisite information.

4. Opinions even then should be strictly limited to scien-

tific deductions. Jefferson Insurance Company v. Cotheal, 7 Wend. 72. It does not follow that the opinion of the witness is admissible because it appears that he is a man of science, nor even that the general subject matter of the inquiry is one of a scientific nature. 1 Stark. Ev., (175*) p. 174.

5. The opinion of witnesses, whether men of science or otherwise, cannot be received when the inquiry is into a subject matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it. Folkes v. Chadd., 3 Doug., 157; 1 Greenl. Ev., (6th ed.,) sec. 440; Rex. v. Searl, 2 M. and M. R., 75; 1 Smith's Leading Cases, (286) p. 544; Best Prin. of Ev., sec. 346.

6. Whenever an interrogatory is more comprehensive than the law allows, it should be rejected.

III. 1. The engraved plates and the skeleton of the bones of the human neck, introduced and exhibited to the jury, were in the nature of medical works, and therefore were inadmissible. Ware v. Ware, 8 Greenl. R., pp. 56, 57; Com. v. Wilson, 1 Gray, 337; Collier v. Simpson, 5 Car. and P., p. 74; Cocks v. Purday, 2 Car. and Kiw., 270.

2. The last question propounded to Dr. Alonzo Garcelon was improper and should have been excluded.

Secret things belong to God. He alone knows what is impossible.

Persons in a sudden phrenzy often perform strange and almost incredible acts, and frequently inflict injuries and wounds upon themselves which no sane person could perform. Besides, the right hand of one person for all practical purposes is the same as the left hand of another.

One person can perform physical acts with ease, when it would be impossible for another of equal strength to approach their performance.

The witness did not, and could not know whether it was impossible for the deceased to have inflicted that wound.

That might depend upon her situation at the moment, as whether standing, sitting or lying on the bed, or it might depend upon the physical peculiarities of the muscles of the

arm or shoulder, or upon a variety of circumstances known only "to that Being, who," (in the language of Judge Rice,) "has written the records of this world's progress in the solid rocks."

It may be true that the record of this world's progress is written in the solid rocks, but it is scarcely to be supposed that an expert may be asked to tell the day or the year when that record commenced.

Science cannot determine the matter with sufficient certainty to allow the question to be asked in a court composed of men whose knowledge at best is imperfect.

Experts are allowed to give opinions only where the conclusion is an inference of skill and judgment, and the examination ought to be carefully limited to interrogatories of that nature, as the right to use such testimony is founded on an exception to the general rule. 1 Stark. Ev., (174*) p. 173.

The general rule is that witnesses ought to be examined as to facts only, and not as to any opinion or conclusion which they may have drawn from facts, for those are to be found by a jury. 1 Greenl. Ev., sec. 440; Rex. v. Wright, Russ and Ryan, p. 456.

IV. The deed, George and Mary Knight to Moses S. Jordan, was improperly admitted and read to the jury.

1. It is apparent that an indictment for murder cannot be regarded as "*an action touching the realty*," and therefore it is not a case where office copies of deeds might be read as evidence. Rules of Court, No. 26, p. 14; Hutchinson v. Chadbourne, 35 Maine, 189; Kent. v. Weld, 2 Fairf., p. 459; Doe v. Scribner, 36 Maine, 168; Jackson v. Nason, 38 Maine, 85, per. Rice, J.; Dunlap v. Glidden, 31 Maine, 510.

These cases are decisive that office copies could not be used, and therefore it is equally clear that the original could not without proof of its execution. "It is a general principle of the law of evidence that the party offering to prove a fact by deed, must produce the original and prove its execution." Kent v. Weld, 2 Fairf., p. 459; 1 Grenl. Ev., (6th ed.) secs. 569 to 573 inclusive.

2. No case is known where it has been held that evidence that a party once had a deed in his possession, is sufficient to dispense with proof of its execution by the subscribing witness.

3. The cases cited affirm a different rule, and it is believed that none can be found to sustain a departure from the principle which they affirm. Vacher v. Cocks, (20 E. C. L., on p. 366,) 1 Barn. and Adol., p. 145, per. Bayley, J.; Cronk v. Frith, (38 E. C. L., on p. 77,) 9 Car. and P., p. 197; Betts v. Badger, 12 Johns., 225; Jackson v. Kingsley, 17 Johns., 158; 2 Stephen's N. P., 1704; Knight v. Martin, 8 East, 548, overruling; Rex. v. Middleton, 2 Term, 41.

Office copies can "be admitted only in actions touching the realty, and in all other actions the general principle of the law of evidence prevails, that a party offering to prove a fact by deed, must produce it and prove its execution. Hutchinson v. Chadbourne, 35 Maine, on p. 192; Kent v. Weld, 2 Fairf., 459; Wilkins v. Cleaveland, 9 Barn. and Cress., 864, (17 E. C. L., on p. 515;) 1 Chitt., C. L., p. 579, (580*;) Ackler's case, 1 Leach, C. C., 175.

It is insisted also for the same reason that the deed, Moses S. Jordan to George Knight, was improperly admitted.

5. The testimony of Dr. Augustus A. Hayes furnishes a striking example of the perversion of the rule, that the opinion of experts should be limited and confined to such matters as are of a scientific nature.

He was allowed, notwithstanding the objections of the counsel of the prisoner, to call the attention of the jury to what the witness characterized as a "peculiarity which the stain itself presents," and was allowed to describe it according to the impressions which it made upon his mind.

All this matter of description was as open to the observation of the jury as of the witness, and should have been excluded. People v. Bodine, 1 Den., on pp. 311, 312; 2 Russ. on Cr., p. 923.

A party calling and examining a witness, has no more right to stultify the witness, when the testimony is against him,

than he has to impeach his competency or credibility under like circumstances.

It is admitted, and all the authorities agree, that a party is estopped to impeach either the competency or credibility of a witness, however much he may be disappointed in his testimony.

The rule is, that "a party by calling and examing a witness, accredits him as competent and credible, and is estopped from avowing the contrary." Stockton v. Demath, 7 Watts., 39; People v. Safford, 5 Den. pp. 117, 118.

ERRORS ALLEGED IN THE INSTRUCTIONS GIVEN TO THE JURY.

1. The judge instructed the jury that "in all cases where the unlawful killing is proved, and there is nothing in the circumstances of the case as proved, to explain, qualify or palliate the act, the law presumes it to have been done maliciously; *and if the accused would reduce the crime below the degree of murder, the burden is upon him to rebut the inference of malice which the law raises from the act of killing by evidence in defence.*"

It is the last paragraph of the instruction to which objection is made.

Cases may be cited, undoubtedly, which furnish some countenance to the doctrine of the instruction.

The true rule, however, was laid down by Mr. Justice Wilde, though differing from the majority of the court in Comm. v. York, 9 Met., pp. 133 and 134.

1. That when the facts and circumstances, accompanying a homicide, are given in evidence, the question whether the crime is murder or manslaughter, is to be decided upon the evidence, and not upon any presumption from the mere act of killing.

2. That if there be any such presumption, it is a presumption of fact, and if the evidence leads to a reasonable doubt, whether the presumption be well founded, that doubt will avail in favor of the prisoner.

3. That the burden of proof, in every criminal case, is on

the state to prove all the material allegations in the indictment; and if on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him.

That rule is now generally adopted and has been regarded as law ever since the opinion of that distinguished judge was published, wherever the question has been considered.

According to my understanding of the matter, it is now the law of Massachusetts; and if not, it is destined to be the law of every people where the English language is spoken. Comm. v. McKie, 1 Gray, 61; Comm. v. Hawkins, 3 Gray, on p. 466; Benn and Heard, Lead. Crim. Cas., pp. 347 to 360; State v. Fly, 26 Maine, 312; State v. Merrick, 19 Maine, 398; State v. Tibbets, 35 Maine, 81; Whar. Crim. Law, (4th Am. ed.,) sec. 717.

2. "When men are found to keep silence when they are surrounded with circumstances of suspicion, which require explanation, or give false explanation, or attempt to induce others to relieve them by falsehood and perjury, *inferences necessarily arise prejudicial to them;* and when such moral coincidences are connected with physical circumstances, it frequently gives a conclusive and inculpatory character to circumstances which otherwise might be inconclusive, or slightly inculpatory."

It is the province of the jury to judge of the force of circumstances, and not for the court. The proposition, as stated, left nothing for the jury to determine, except to ascertain whether the inculpatory circumstances were proved.

It should have been left to the jury to draw their own inferences. 1 Stark Ev., (7th Am. ed.) p. 577; 1 Greenl. Ev., sec. 49.

3. "That Being, who has written the record of this world's progress on the solid rocks and on the cliffs of the mountains, writes also the history of secret crime in characters which will be found so legible that they may be read with almost unerring certainty, if you will only give them your attention.

"Such, gentlemen, is the character of circumstantial evi-

dence, which is often inconsiderately spoken against; but, if properly understood and its principles correctly applied, will seldom lead to erroneous results.

"With these rules for ascertaining the truth, thus imperfectly illustrated before you, and with an earnest desire to arrive at just conclusions in the case, let us proceed to the examination of the facts proved, that you may determine what legitimate inferences should be drawn therefrom as to the guilt or innocence of the prisoner."

It seems to the counsel of the prisoner, that the rules for ascertaining truth from circumstantial evidence, are colored, and their efficacy as a guide to right results, is greatly overstated, and that, too, in a manner calculated to mislead the jury, and therefore erroneous. Miller v. Marston 35, Maine. 153; Pierce v. Whitney, 32 Maine, 113.

4. "You are asked, the government are asked, where are the foot-prints of the prisoner which connect him with his house in his passage to and from the heater-piece.

"It is said that there is a space of one mile and ninety-two rods which you are asked to overleap without testimony.

"Gentlemen, you are to try this case by the evidence *in* the case, and not that which is *out* of it."

Circumstantial facts, when grouped together, are justly characterized as a chain of circumstances, and it is their connection and consistency which gives them force and efficacy, as evidence in judicial trials.

The absence of proof, naturally to be expected, especially in cases depending upon circumstantial evidence, often furnishes an argument as strong against a given hypothesis, as would a positive repugnance in the circumstance proved. 1 Phill. Ev., (1st Am. ed.) Appendex, Rule 13, p. 61; 1 Stark. Ev., p. 573.

5. "If, however, the absence of such proof throws *an insurmountable barrier in your way*, then the hypothesis of the government fails.

"But if the situation of the parties at the time, and subsequent occurrences are such that you may suppose that it

would not have been possible for the government to have given you this species of evidence, then it is no imputation on the integrity or intelligence of the prosecuting officers that they have not done so, because they are not called upon to perform impossibilities."

This instruction is clearly erroneous. It does not allow the jury to acquit the prisoner unless the absence of such proof (the footprints) "throws an insurmountable barrier in the way" of the conclusion of guilt.

It is violative of every principle of law intended for the protection of the innocent in jury trials.

6. "If Lydia Knight was in that room with Mary Knight at the time of her decease, and did not see the blow struck by which her life was taken, you are not compelled to come to the incredible conclusion that Mary Knight is not dead.

"It does not necessarily follow that because Lydia Knight was present, but did not observe the manner or time of death, that it did not occur.

"There is a distinction between positive testimony and negative testimony."

There is an important distinction between positive and negative testimony, and in cases where the principle applies, it is not unfrequent that the judge, at the trial of an issue, depending upon the conflicting statement of witnesses, reminds the jury of it as a means of reconciling those statements consistently with the integrity of the witness.

It is contended that the principle in this case was wholly misapplied. 1 Stark. Ev., p. 578; 3 Bck. Com., p. 371.

7. "It is strongly insisted that the situation of that window is *absolutely* inconsistent and incompatible with the guilt of the prisoner; that he could not, by possibility, have committed the murder and escaped through that window, and that there is no suggestion of escape in any other direction.

"The consideration is worthy your attention, whether there were greater obstacles to the escape of the prisoner than there would have been to that of any other person.

"If you come to the conclusion that Mrs. Knight did not

commit suicide, but was killed by the hand of another, that other hand must in some way have come in contact with her.

"What person had the most favorable opportunity to perform this act?

"Who had a motive to do it? Who possessed the means and had the facilities with which to accomplish it? In what direction and to whom do the circumstances in the case, as proved, point, as being connected with the transaction?

"Do these circumstances *all* point in one direction? Are the circumstances of a conclusive and inculpatory character? Do they point to the prisoner as the guilty party? And are they of such a character as actually to exclude, to a moral certainty, and beyond all reasonable doubt, every other hypothesis except that of the guilt of the prisoner?"

It is apparent that the remarks of the judge were equivalent to an absolute denial of the rule of law "that all the facts should be consistent with the hypothesis." 3 Greenl. Ev., sec. 137, p. 127; 1 Stark. Ev., p. 572; 3 Greenl. Ev., sec. 134; Willes on Cir. Ev., p. 168.

V. Errors in refusing requests for instruction.

1. The counsel of the prisoner requested the judge to instruct the jury that "in order to convict the prisoner upon the evidence of circumstances, it is necessary not only that the circumstances all concur to show that he committed the crime, but that they all be inconsistent with any other rational conclusion." 3 Greenl. Ev., sec. 137, p. 127; Hodge's Case, 2 Lew. Crim. Cas., 227, per. Alderson, B.; 1 Stark. Ev., p. 560.

2. And the counsel of the prisoner requested the Court to instruct the jury that no conviction in a criminal case ought ever to take place, on circumstantial evidence, where the government has introduced direct evidence tending to show that the prisoner could not have committed the crime charged. 1 Stark. Ev., pp. 577 and 583.

3. And the counsel of the prisoner requested the court to instruct the jury, that direct evidence introduced by the government, tending to prove the innocence of the prisoner

"shall not be held refuted, from being opposed to circumstances incongruous with that evidence." 1 Phill. Ev. (1 Am. ed.) appendex, p. 56, Rule 5; 1 Stark. Ev., p. 586.

4. And the counsel of the prisoner requested the court to instruct the jury:

That the theory that the blood of animals, such as the ox or sheep, can be discriminated from that of man, when in a dried state, by chemical means, is too uncertain to be used as evidence or to be relied on as evidence in this case.

"The counsel of the government then asked the witness: Is there a distinction, chemical or physical or microscopic, between the qualities of human blood and that of any beast."

To which the counsel of the prisoner objected, the court overruled the objection, and the witness answered: "there is a distinction, a physical distinction, existing between the blood of man and that of some beasts. I do not know of any precise chemical distinction."

We deny that the blood of man when in a dried state can be discriminated by chemical means from the ox or the sheep, and insist that the theory that it can be so discriminated is not a science, and therefore that the instruction was improperly withheld. Taylor's Med. Jurisprudence, pp. 236 and 237 and 238.

5. And the counsel of the prisoner requested the court to instruct the jury that the theory, that the blood of the ox or of the sheep can be distinguished from that of a human being, when in a dried state, by microscopic observation, is too uncertain to be used as evidence, and the difference in size of the globules is too slight to be relied on as evidence in this case.

It is contended for the prisoner, that such evidence is too uncertain and unreliable to be received in a court of justice, and we deny that such discrimination can be made with sufficient certainty to authorize the court to allow the statements of the witness to be submitted to a jury in a criminal case. Whar. and Stille, Med. Jur., pp. 562 and 563; Taylor's Med. Jur., pp. 239, 240, and authors cited; Carp. Prin.

Phys., pp. 159 and 160; Todd and Boman Physiological Anatomy, p. 634, (1857;) Dunglison Med. Dict., p. 408.

6. And the counsel of the prisoner requested the court to instruct the jury that the distinction between positive and negative testimony is applicable to direct testimony, and cannot be applied to circumstantial evidence when placed in direct conflict with positive testimony. 1 Phil. Ev., (1st Am. ed.) appendix, p. 55, rule 5.

POINTS AND AUTHORITIES FOR THE STATE,

BY N. D. APPLETON, ATT'Y GENERAL, AND C. W. GODDARD, COUNTY ATTORNEY.

I. Triors were properly refused, because,

1. The common law authorizing their appointment (3 Blackstone, 363; Bacon's Abr., E. 12,) was modified in Massachusetts by the colonial ordinance of 1641, which substituted for the ancient system another tribunal, to wit: *the bench, or the rest of the jury*, at the election of the party challenging.

"Also it shall be in the liberty of both plaintiff and defendant, and likewise of *every delinquent to be judged by a jury*, to challenge any of the jurors, and if the challenge be found just and reasonable *by the bench, or the rest of the jury, as the challenger shall choose*, it shall be allowed him, and *tales de circumstantibus* empanneled in their room." Anc. Charters and Laws, chap. 98, sec. 3, p. 199. We do not deny that by ancient and modern law practice, triors were allowed, as the counsel contends. But when trial of jury came to this country, it was not accompanied by all which there attended it. This was never adopted, but was modified by statute in 1641. No distinction between challenge for cause and favor. 3 Bl. Com., 361.

2. But this privilege, to wit, of submitting the challenge to the rest of the jury instead of the bench, seems never to have been exercised by the party challenging, and thus became obsolete.

"Notwithstanding the privilege allowed of referring the challenge to the bench or the rest of the jury, a practice might insensibly grow up under the influence of the circumstances already alluded to, (their simpler habits,) in which the first settlers were placed, which should withdraw the decision upon the competency of jurors challenged *from the rest of the jury*, and give it *to the court*." American Jurist, vol. 12, p. 330. And accordingly no instance of its adoption in practice has been found.

3. Thus, by the repeal of the common law relative to triors, in 1641, and the entire disuse or rather neglect of the privilege substituted, the duty of hearing and determining all challenges to jurors, passed by statute and usage into the court.

And this was one of those ancient usages, originating from laws passed by the legislature of the colony of Massachusetts Bay, which were annulled by the repeal of the first charter, and from the former practice of the colonial courts, accommodated to the habits and manners of the people. Commonwealth v. Knowlton, 2 Mass., 534, bottom of the page.

And thus it became in part the common law of Massachusetts, and was adopted in her constitution. Constitution of Mass., chap. 6, sec. 6; Sackett v. Sackett, 8 Pick., 309; Gowen v. Emery, 16 Pick., 107; Cotterell v. Myrick, 12 Maine, 222; American Jurist, vol. 12, pp. 230–240, and cases there cited.

So the old common law right of polling the jury has never been adopted in this state nor Massachusetts. Com. v. Roby, 12 Pick., 514; State v. Fellows, 5 Maine, 333. Likewise the right of an alien to a jury *de medietate linguæ*. Dane's Abr., p. 331, chap. 221, art. 6, 93.

4. Hence, we find that triors have never been appointed nor claimed in this state, nor in Massachusetts, and that the common law touching this subject has never been practised upon here nor in that state. Borden v. Borden, 5 Mass., 67. (Language of Mr. Dexter on this point, acquiesced in by the deft's counsel, and sustained by the court.) Com. v. Knapp,

9 Pick., 498; same case, 10 Pick., 480; Com. v. Webster, 5 Cushing, 295; Com. v. Rogers, 7 Metcalf, 500. All of them being "cases which excited great intererest at the time, and in which learned and active counsel were employed."

5. Nor in any other New England State. Rollins v. Ames, 2 N. H., 349; Boardman v. Wood, 3 Ver., 570; 2 Swift's System of Connecticut Laws, 233.

"Challenges" (to the favor) "are often tried in this way" (by triors) "in most of the states *south* of New England." Dane's Abr., vol. 7, chap. 221, art. 7, sec. 12. Therefore it is denied that any such right exists. For in the language of Lord Coke, "As usage is a good interpreter of laws, so non-usage, where there is no example, is a great intendment that the law will not bear it;" or of his great master, Littleton. "no action can be brought, insomuch as it was never seen or heard, &c.; and if any action might have been brought for this matter, it shall be intended that at some time it would have been put in use." Co. Litt., 81 b. and 383 b.

6. Moreover this trial of challenges is expressly vested in the court, by act of June 26, 1784, sec. 8, Laws of Massachusetts, which provides, that

"If it shall then (on challenge) *appear to the court*, that any juror does not stand indifferent in the cause, he shall be set aside from the trial of that cause, and another called in his stead."

And upon the separation of Maine from Massachusetts this provision is copied into chap. 84, sec. 9, of the laws, 1821.

7. The same provision, that the *court*, and *not triors*, shall try all challenges, both in civil and criminal cases, is now the express law of this State. R. S., chap. 115, sec. 65; R. S., chap. 172, sec. 31; 12 Pick. Com., v. Robie; 2 Howe's Practice is the only authority from which any suggestion should be made that triors may be appointed.

8. But even if the common law right to triors did exist in this state, the prisoner's exception cannot avail, because it does not appear from the exceptions what the *ground* of challenge was, whether for principal cause or for favor. This

should appear on the record, for how else can the court know whether it was for principal cause or for favor?

"When a juror is challenged for principal cause or for favor, the *ground of challenge should be distinctly stated*, for without this the challenge is incomplete, and may be wholly disregarded by the court. It is not enough to say, '*I challenge*,' and stop there; the *cause* of challenge must be *specified*." Freeman v. The People, 4 Denio, 31.

This appears nowhere in the prisoner's exceptions, and according to the law in states where triors can be claimed, this defect is fatal.

9. But granting, for the sake of the argument, all that the prisoner claims; conceding that the right to triors exists here, and that the ruling of the court denying them was erroneous; still the prisoner's exception cannot be sustained. Because it does not appear from the exceptions that a single juror was challenged for cause, either for favor or otherwise, who was not either rejected by the court, according to the prisoner's request, or else peremptorily challenged and excluded by the prisoner.

Not a single juror on the panel which convicted him was challenged or objected to, and if he had been allowed triors according to his demand, so far as his panel was concerned, they would have had nothing to try.

Hence, the prisoner has literally enjoyed the privilege of selecting his own jury, and cannot now be allowed to complain of the result of his own election. (The People of New York v. Knickerbocker, 1 Parker's Criminal Reports, 302; Freeman v. the People, 4 Denio, 31; People v. Bodine, 1 Denio, 300.)

II. The prisoner's question to L. D. Rice, "Is not this the first time (excluding what you may or may not have stated before the grand jury,) that you have *testified* that you thought you saw blood on the prisoner's wrist?" was properly excluded, because,

1. An *affirmative* answer must have disclosed a portion of the witness' *testimony before the grand jury.*

The admission of that question, in view of the previous testimony elicited by the prisoner, would have been an infringement of the rights of the witness and of the privilege of the grand jury and the government, and contrary to the settled and uniform policy of the law.

2. A witness cannot be asked what was his *testimony* on former occasions. (Regina v. Holden, 8 Carrington and Paine, 606; [34 Common Law Reports, 507;] Regina v. Shillard, 9 Carrington and Paine, 280; [38 Common Law Reports, 121.])

3. The prisoner's next question to L. D. Rice, "Where was it that you so *testified*, provided it was not before the grand jury?" was open to the same objections as the preceding, (Exc. No. 2,) and was properly excluded, because,

Although, at first sight it appears unobjectionable, seeming, like the former, to exclude all reference to the grand jury, it will yet be perceived that a *negative* answer would have involved the fact that the witness had testified before the grand jury, and before the grand jury only, that he "saw Mr. Prout put his hand on the deceased's face," because Mr. Rice had already testified on cross-examination, that "that was not the first time that he had sworn that he had seen that act."

The court is not obliged to permit the introduction of a collateral fact, which might occasion a new issue. State v. Whittier, 21 Maine, 341.

IV. The question propounded by the government to Mr. Prout, "Did you on that day, or the day after, inform any person of having seen the prisoner coming from the place, and in the direction above described?" was properly allowed, because,

1. The answer would be explanatory of the testimony of Morrill, Thurston and als., showing the knowledge and information on which their conduct was based. It was an independent *fact* proper to be known, and within the witnesses' own knowledge, a part of the history of the transaction intimately connected with the finding of the knife; a fact which

led to it, and without which it probably would not have happened. Its obvious effect, when answered affirmatively, was to show that the search instituted at that particular point and time, was an intelligent and not an accidental one.

2. This was no hearsay testimony, but derives its effect solely from the credit attached to the witness himself, and does not rest on the veracity of others from whom the witness might have received information. It admits of the usual tests of truth which the law requires; the sanction of an oath, and the test of a cross-examination. 1 Phillips' Evidence, 184; 1 Greenl. Ev., 111.

3. The information given by Prout to Thurston was admissible as being a part of the *res gestæ* connected with and explaining the facts and circumstances attending the finding of the knife.

It was itself a fact, a circumstance accompanying this principal event, and as one of the surrounding circumstances, it was rightly shown to the jury along with the principal fact, viz.: the search for and finding of the knife, and its admissibility depended upon its degree of relation to the main fact. This degree of relation was properly determined by the judge, being a subject for the exercise of his sound discretion. 1 Greenl. Ev., p. 120, sec. 108; Lund v. Tyngsboro', 9 Cushing, 42.

As to what circumstances are a part of the *res gestæ*. Poole v. Bridges, 4 Pick., 378; Allen v. Duncan, 11 Pick., 308; Stansbury v. Arkwright, 3 Car. and Paine, 575; [24 Com. Law Rep., 462;] Taylor v. Williams, 2 Barn. and Adolph., 845; [22 Com. Law Rep., 195;] Rydley v. Guide, 9 Bridgham, 349; [23 Com. Law Rep., 304.]

4. If this was not a part of the *res gestæ*, it was by reason of the vagueness of the answer, which, if it failed to show the connection between the information and the search before the knife was found, became immaterial and without injury to the prisoner. Bemis' Webster case, 115.

V. The question to Dr. Carr, first objected to by the prisoner, "What was the general character of the instrument

occasioning the wound, as indicated, in your opinion, by the wound?" was properly admitted, because,

1. Dr. Carr was called, and testified as a medical and scientific *expert*, and for the express purpose of giving his *opinion* on medical and scientific subjects, and his *opinion* was for that reason admissible when other men would be confined to the statements of *facts*. Roscoe's Crim. Ev., 167; 1 Chit. Criminal Law, 620; 1 Greenleaf's Ev., pp. 489 and 611; 1 Starkie's Ev., 154; State v. Smith, 37 Maine, 370; Davis v. Mason, 4 Pick., 156; Com. v. Webster, 5 Cushing, 295; [Report of Webster case, pp. 72, 79, 97 and 98; Opinions of Drs. Wyman, Jackson and Holmes, and p. 184, testimony of Tyler;] Norman v. Wells, 17 Wend., 162; Forbes v. Chad., 3 Doeg., 157; Cotterell v. Myrick, 12 Maine, 222; Boyce v. McAllister, 12 Maine, 308; Sweetser v. Lowell, 33 Maine, 447; 1 Archbold's Crim. Law, 168, 3; Hathorn v. King, 3 Mass., 371; Definition of the word *expert* in Bouvier's Law Dict., and in Webster's Dict.; Van Dine v. Burpee, 13 Met., 291; Hobbie v. Dana, 17 Barb., 11; 2 Archb., 261, (note.)

2. It did not *directly* involve a main fact—either that the prisoner was guilty of murder, or that a murder had been committed—nor does it fall within any other exception to, or qualification of, the general rule. It was peculiarly within the knowledge of a physician and surgeon, and not equally, if at all, within the knowledge of the jury. And it was necessary for their clear comprehension of other portions of his testimony, to wit: the appearance of the wound, the condition of its edges, &c.

3. The *answer* was strictly responsive to the question, was within the medical and scientific knowledge of the witness, was not within the sphere of the judgment and observation of ordinary men, and was unobjectionable in every respect.

VI. The question to Dr. Carr next objected to by the prisoner, "Could a person, in your opinion, after the infliction of such a wound as that disclosed, perform acts of voluntary motion?" as well as the next question to the same witness,

"In your opinion, did or did not the wound indicate whether more than one impulse was communicated to the instrument producing it?" was properly admitted for the same reasons heretofore given.

These questions all related to an important and legitimate inquiry, to wit: whether the death of the deceased was a suicide or a homicide.

This the government did not attempt to prove *directly* by the opinion of Dr. Carr, but by showing the inability of the sufferer to communicate to the instrument producing the fatal wound, *the second impulse*, which, in the doctor's opinion, was given by the hand that inflicted it, as well as the impossibility of her retaining the voluntary power to suppress the flow of blood, jam down the pillow, and perform the other acts testified to as having occurred after the infliction of the wound.

VII. Dr. Garcelon was properly allowed to illustrate his testimony descriptive of the wounds by diagrams, plates and skeleton.

These were not admitted as *evidence* nor *authority*, but simply as *chalk* for *illustration*, and as such have always been admitted in the courts of Massachusetts and this state, both in civil and criminal trials. (Report of the Webster case, pp. 62 and 69.)

It is of no consequence whether the first three questions put by the government to Dr. Garcelon, and objected to by the prisoner, were properly admitted or not, because, whether in themselves objectionable or not, the answers to them were, at the prisoner's request, all stricken out. An improper question becomes injurious only when answered.

Consequently the prisoner has sustained no injury from the questions, and they therefore can furnish no ground for exception, and should not have been included in the exceptions.

VIII. The question to Dr. Garcelon last objected to by the prisoner, "State, whether, in your opinion, as a physician and surgeon, the wound described on the neck of the deceased, could have been inflicted by the right hand of the

deceased?" was probably put, for the reasons given in answer to exceptions No.'s 5, 7, and 8.

IX. The deed from the prisoner and his wife to Jordan, and the deed from Jordan back to the prisoner *alone*, were properly admitted without proof of their execution, because,

1. They were relevant to the issue as tending to show one of the prisoner's *motives* to the murder. Will. on Cir. Ev., chap. 2, sec. 4, p. 51, chap. 3, sec. 1, p. 54; Hendrickson v. the People, 1 Parker's Crim. Law, 486; Com. v. Watkins, 11 Conn., 47.

Hence they were neither collateral nor irrelevant, and instead of *prejudicing* the jury, their admission tended very strongly to throw *light* upon his conduct, and to *explain* it to the jury.

2. It was not necessary for the government to prove the deeds by the subscribing witness.

Surely this could not reasonably be asked of the government in a prosecution for forgery, of the very deeds in question, because it would involve the absurdity of requiring the government, *in limine*, to prove an instrument to be valid, and a signature genuine, when the very *gravamen* of the charge sought to be established is, that the former is worthless and the latter counterfeit. 1 Starkie, p. 349 and notes.

Equally absurd would it be to require it of the government in this case, where nothing is claimed of the prisoner by conveyance, where the title to no real estate is in controversy, and where, instead of seeking to establish the validity of his deeds, the government point to his certain fraud and probable forgery as a strong additional inculpatory circumstance. His guilty motive is made apparent by his connection with forged papers.

The possession of documents under such circumstances, affords ground for affecting parties with an implied admission of the statements contained in them. 1 Greenl. Ev., 231: Shaley v. State Georgia, 11 Georgia, 123.

Hence the propriety and importance of the question to Jordan, "Did you ever see the deed (from George and Mary

Knight to you) before?" Also the other question to the same witness, "Did you ever know of its existence before?"

The negative answers to both show, that though the deed purported to be duly executed to Jordan, and though it was treated by the prisoner as a valid deed, and even recorded as such, yet in fact it never had any validity, and was made for a fraudulent and sinister purpose.

X. Dr. Hayes, a distinguished chemist and assayer of the Commonwealth of Massachusetts, was properly allowed to illustrate his testimony on the subject of the blood-stains and the qualities of blood by a diagram.

Dr. Hayes was properly permitted to point out to the jury the peculiarity which the blood-stain on the prisoner's under-shirt presented, as exhibiting on one side of the fabric a larger portion of the coloring matter of the blood than on the other side,

Because a reference to a visible fact was necessary to a proper explanation of the chemical experiments and microscopic observations to which he, as an expert, had subjected the stain, which experiments and observations sustained the inference drawn from its outward appearance.

The government, therefore, contend that an expert has a right to illustrate his testimony touching the experiments he has made, and their results by reference to a peculiarity in the appearance of the article experimented on, even if that peculiarity is of such a character as to be "open to the observation of the jury."

So also the question put by the government to Dr. Hayes, "Whether blood flowing directly from the skin upon the shirt, could or not have produced such a spot?" as well as the next, "In your opinion, could or not blood flowing directly upon the outer surface of the shirt, have occasioned such a spot?" and the subsequent explanations of and reasons for his opinion, were properly admitted,

Because all his testimony related to a subject peculiarly within the knowledge and sphere of experience of a chemist and microscopist, and of no one else, viz.: the fact that the

chemical and physical constitution of blood is such as to show in a given case that the stain on a flannel undershirt worn next to the prisoner's skin on the night of the murder of his wife, could neither have issued from his own veins upon it, nor flowed on it from without, except through the interstices of some other fabric which had strained it of some of its original coloring matter.

The government ask with confidence, who but an expert, a man of rare scientific experience, is qualified to form such an opinion, upon the facts presented on the trial of this case?

To exclude such testimony would be alike dangerous to the government, and to the innocent accused.

The question put to Dr. Hayes by the government, and objected to by the prisoner, "Is there a distinction, chemical, physical or microscopic, between the qualities of human blood and that of any beast?" was properly put, as appears from the clear and unhesitating testimony of Dr. Hayes in reply.

Dr. Hayes had been sworn as an expert, without objection, and had testified at great length and with great ability, touching the qualities of *blood*, a subject with which both his reading and experiments had rendered him perfectly familiar.

This question, like all the preceding, related to the same general subject, *the qualities of blood;* it simply narrowed down the inquiry to *human* blood.

How can the court decide in advance, that no such distinction as Dr. Hayes testifies to, in fact exists, without arrogating to themselves the wisdom of experts?

It is impossible, in the very nature of things, to make a question of law here, where there is nothing but fact.

Surely the distinction cannot be made that Dr. Hayes, having acquired familiarity on the entire subject of blood, by his own personal studies and researches, has been permitted to testify thereon, as an expert, in a court of justice, up to a certain point, giving all the characteristics of blood generally, and then shall be peremptorily forbidden to utter a word tending to show that the vital fluid of man differs from that

of any brute, excluding his learning just at the point where it is most useful?

Such a decision would voluntarily blind justice to the advancing light of science, jeopardizing at one time the safety of society, and at another the life of the innocent accused.

The courts of this state, as well as of other enlightened commonwealths, on both sides of the Atlantic, have admitted testimony of this character.

The testimony was properly admitted, to receive from the jury, in the language of the presiding judge, "the consideration to which they thought it justly entitled."

The same reasons fully authorized and required the admission of the testimony in answer to the next question, put by the government to Dr. Hayes, "Have you subjected any of the articles before you to any observations or tests touching this distinction?"—to the succeeding, "Will you please state what these observations and tests were, and their result?" and to the last, "In your opinion, could the blood upon the knife first shown, have flowed from a sheep?"

The reply did not prove that the blood was human, but that it was not ovine.

XI. The objection to that part of the closing argument of the counsel of the government which referred to Lydia Knight, "That the government had no right to argue against the intelligence and capacity of its own witness," Lydia Knight, to the extent pursued by the government on that occasion, is without foundation, either in principle or authority.

1. The counsel of the government *expressly* conceded the competency and credibility of Lydia Knight, and all its other witnesses, disclaiming all purpose of impeaching either, and claiming only the right to correct mistakes. This the government had a right to do. 1 Greenl. Ev., p. 599, cases cited in the note; 2 Phillips' Ev., p. 448, note 392; 1 Starkie's Ev., 424; Gilbert's Law of Ev., 151. A party may always correct his own evidence, though by directly contradicting him. Lawrence v. Baker, 5 Wend., 305; Johnson v. Leck, 12 Wend., 105; Cowdin v. Reynolds, 12 Serg. and Rawle, 281;

Steinback v. Columbia Ins. Co., 2 Caines, 131; Crowell v. Kirk, 3 Devereaux, 357; Friedlander v. London Ass. Co., 4 Barn. and Adolph, 193; Bradley v. Ricardo, 8 Bingham, 57; Regina v. Ball., 8 Car. and Paine, 745; [34 Eng. Com. Law Rep., 616.]

2. It was not only the *privilege*, but the *duty* of the government to call Lydia Knight, because she was present at, or very near the time of the beginning of the assault, which terminated in the murder with which the prisoner was charged. Under circumstances somewhat similar, Patteson, Justice, said that the witness ought to be called, and animadverted upon the course of the prosecuting officer, in intimating an opposite purpose. Regina v. Holden, 8 Car. and Paine, 606.

But in being generous and liberal to the prisoner, they do not understand that they are bound by every answer of their witness, however erroneous, and estopped from pointing out to the jury, in argument, even honest mistakes.

How unreasonable is such a doctrine, and how impracticable in its application! It would seem difficult to contrive one more unjust or dangerous. 1 Hale's P. C., 455, note 1, 1st Am. ed.; note, Com. v. Knapp, cited 4 Black., to show that the prisoner must reduce the crime below murder, chap. 23, p. 425 to 429; 1 East. P. C., pp. 224, 340 and 436, chap. 26; State v. Varney, 8 Bos. Law Rep.; 2 Metcalf, 1; 19 Pick., 25.

XI. The prisoner's sweeping exception to the entire "charge and instructions" of the presiding judge, "and to each of them, and to each and every part thereof," without further allegation or specification, was not only unreasonable, unusual and improper, unjust to the court and to the government, but unauthorized either by the letter or spirit of our law. R. S., chap. 96, sec. 17; Jackman v. Bowker, 4 Metcalf, 236; Decker v. Mathews, 2 Kernan, 313; 1 Starkie, pp. 472 and 473.

Although, in the opinion of the counsel for the government, the charge, even as reported, will sustain itself without

any defence from them, they are unwilling to concede the legality of the form in which this exception is presented, or the reasonableness of requiring them to answer it. Com. v. York, 9 Metcalf, 133; 1 Chitty's Crim. Law, 483; Roscoe, 651 and 652; Com. v. Webster, 6 Cushing, 305; 1 Starkie's Ev., 474; Ware v. Ware, 8 Greenl., 42.

XII. The thirtieth instruction requested by the prisoner, "That in order to convict the prisoner upon the evidence of circumstances, it is necessary not only that the circumstances all concur to show that he committed the crime, but that they *all* be inconsistent with any other rational conclusion," had been already substantially and repeatedly given by the judge to the jury, in his charge, as well as in Nos. 18, 19, 20, 21 and 22 of the prisoner's requested instructions.

The language of Mr. Greenleaf (Greenl. Ev. 3, sec. 137,) is borrowed and condensed from Starkie, (1 Starkie's Ev., pp. 507 and 512,) and in his charge the court instructed the jury in the words of the original author, of which it is not known that Mr. Greenleaf's language is any improvement.

This court will determine whether, on every point of law discussed in the charge, a sufficient number of repetitions of the same idea were not allowed the prisoner in the twenty-nine requested instructions given. Com. v. Dana, 2 Metcalf, 329; Wolcott v. Keith, 2 Foster, 196.

3. If so, then the *form* of the instruction is immaterial, provided the idea has been already substantially given. Wolcott v. Keith, 2 Foster, 196.

XIII. The thirty-first instruction requested by the prisoner, "That no conviction in a criminal case ought ever to take place on circumstantial evidence, where the government has introduced direct evidence tending to show that the prisoner could not have committed the crime charged," was properly refused, because,

1. The requested instruction was based on a state of facts which did not exist in the case. There was no such direct evidence.

2. It attempts to draw a distinction between direct and circumstantial evidence, unknown to the law. Any intrinsic and necessary superiority of one over the other is denied. 1 Starkie, 494.

3. Such a doctrine might withdraw from the consideration of the jury material testimony, proper for their consideration, and of the weight of which they should be the exclusive judges, by embarrassing the government in every case of circumstantial evidence, with the apprehension that some direct evidence of the character named might be elicited from some of their witnesses.

4. The cases cited in answer to exception No. 34, show that it was the duty of the government to introduce, and of the jury to consider and weigh the whole testimony in the case, applicable to the question at issue. The requested instruction would have rendered this impossible.

5. The doctrine of the requested instruction is, that however overwhelming and conclusive the number and weight of the circumstances against a prisoner, in any criminal case, still he shall never be convicted thereof upon such testimony, provided that any direct evidence, however little, tending in any degree, however slight, to negative the hypothesis of his guilt, may, during a trial of whatever length, have been elicited from any one of the government witnesses. It is obvious that such a rule would render a conviction for any offence, upon circumstantial evidence, on a seriously contested trial, a practical impossibility, and consequently it cannot be law.

6. The judge in his comments on the testimony of Lydia Knight, as well as in other parts of his charge touching the nature and effect of circumstantial evidence, had already given all the instructions on this subject which were necessary and proper.

The same reasons and authorities apply to the refusal of the judge to give the thirty-second instruction requested by the prisoner, "That direct evidence introduced by the government, tending to prove the innocence of the prisoner, shall

not be held refuted, from being opposed to circumstances incongruous with that evidence."

This requested instruction is merely the counterpart of the preceding, and was properly refused.

XIV. The thirty-third instruction requested by the prisoner, "That the theory that the blood of animals, such as the ox or the sheep, can be discriminated from that of man, when in a dried state, by chemical means, is too uncertain to be used as evidence, or to be relied on as evidence in this case," was properly refused.

1. It was not pertinent nor applicable to the case, for no evidence had been introduced tending to show that the blood of the *ox*, in a dried state, could be distinguished from human blood.

2. The judge had already, in the charge, given full, ample and correct instruction on this point.

The same reasoning and authorities apply to the thirty-fourth instruction requested by the prisoner, "That the theory that the blood of the ox, or of the sheep, can be distinguished from that of a human being, when in a dried state, by microscopic observation, is too uncertain to be used as evidence, and the difference in the size of the globules is too slight to be relied on as evidence in this case."

This was properly refused for reasons given in the preceding.

XV. The last instruction requested by the prisoner, "That distinction between positive and negative testimony is applicable to direct testimony, and cannot be applied to circumstantial evidence, when placed in direct conflict with positive testimony," was properly refused,

Because it attempts to introduce into the law a distinction between direct and circumstantial evidence, which the law has never recognized.

Each has its appropriate sphere, and either may be more or less satisfactory than the other, according to the peculiar circumstances of the case. These can never be defined in advance by any such general and unbending rule as the one now

sought to be introduced into the law, and consequently the law recognizes no fixed and permanent superiority of one over the other. Wills on Cir. Ev., p. 31; 1 Greenl. Ev., sec. 13, a.; 1 Starkie 494–5.

TENNEY, C. J.—The prisoner was put to the bar for his trial, upon the plea of not guilty of the charge of murder, as alleged in the indictment, and the clerk proceeded to empannel the jury. Upon the call of one of the jurors, the counsel of the prisoner challenged him *for favor*, and demanded the appointment of triors "*according to the course of the common law, to hear and determine the question of his indifference and impartiality.*" The presiding judge denied the demand for triors, and ruled that in all cases of challenge for cause, the question of indifference and impartiality must be heard and determined by the court.

The counsel of the prisoner having cited English authorities in support of the right to triors, we are to understand that the "common law" referred to in the demand, was the common law of England. Such is also the intention as disclosed by the whole argument. It becomes necessary, therefore, to ascertain what the common law of England on this subject was, at the time that it is claimed as having been adopted in Massachusetts, as a part of the code of that colony, province, state or commonwealth, or in this state since its separation. We are not, however, aware, that so far as the question now before us is involved, it has undergone in England any essential change.

Under the English law, challenges to the jury are of two sorts; challenges to the array, and challenges to the polls. The former are at once an exception to the whole panel in which the jury are arrayed and set in order by the sheriff in his return; and they may be made on account of partiality or some default of the sheriff or his under officer, who arrayed the panel. 3 Bl. Com., 359.

Challenges to the polls *in capita* are exceptions to the particular jurors; these are reduced to four heads by Sir Ed-

ward Coke; *propter honoris respectum; propter defectum; propter affectum; and propter delictum.* Ibid, 361. The particular definition of the three heads first named do not become material to our present inquiry.

Jurors may be challenged *propter affectum* for suspicion of bias or partiality. This may be either a principal challenge, or *to the favor.*

A principal challenge is such, when the cause assigned carries with it, *prima facie*, evident marks of suspicion, either of malice or favor; either that juror is kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action pending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney; or of the same society or corporation with him; all these are principal causes of challenge, which, if true, cannot be overlooked, for jurors must be *omni exceptione majoris.* Ibid, 363.

Challenges *to the favor* are when the party hath no principal challenge, but objects only to some probable circumstances of suspicion, as acquaintance and the like, the validity of which must be left to the determination of *triors*, whose office it is to decide whether the juror be favorable or unfavorable. The *triors*, in case the first man called be challenged, are two indifferent persons named by the court, and if they try one man and find him indifferent, he shall be sworn, and then he and the two triors shall try the next; and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest. Ibid, 363.

The right in respect to the challenge of jurors to the favor, and the mode of hearing and determining the question of indifference by triors belonging to parties in civil suits did not essentially differ from the right of the crown, and one accused of crime. In capital cases, a privilege was granted to the accused, *in favorem vitæ* to make peremptory chal-

lenges, which would not involve the necessity of triors, or any hearing whatever. In 4 Bl., Com., p. 352, it is said "challenges may here be made either on the part of the king or on that of the prisoner, and either to the whole array or to the separate polls, for the very same reasons, that they may be made in civil causes, for it is here at least as necessary as there; that the particular jurors should be *omni exceptione majoris*, not liable to objection, either *propter honoris respectum, propter defectum, propter affectum or propter delictum.*" And reference is made to book 3, which treats of private wrongs, and to page 363 from which the foregoing quotation is made touching triors in civil suits. And again on page 363, the same commentator remarks, "challenges upon any of the foregoing accounts are styled challenges for cause, which may be without stint in criminal and civil trials."

The subject of challenges of jurors is discussed at some length in Gabbett's treatise on Criminal Law, cited and relied upon by the prisoner's counsel. In volume 2 of that treatise it is said, as to challenge to the polls, if it be a *principal* one, it is sufficient if the ground of it be made out to the satisfaction of the *court;* but a challenge to the favor must, as already observed, be left to the discretion of triors. If this challenge be made to the first juror who is called, two triors are appointed by the court, and if he be found indifferent and sworn, he will be joined with these triors in determining the next challenge; and when a second juror who has been challenged, has been also found indifferent and sworn, then every subsequent challenge shall be referred to the decision of these jurymen, and the other triors shall be discharged. Lord Hale puts a case where the triors are appointed by the parties, and not by the court; for he lays it down, that if the plaintiff challenges ten and the prisoner one, then he that remains shall have added to him one chosen by each party, and they three shall try the challenge. But if several be sworn and the rest be challenged, the court may assign any two of those sworn to try the challenge. And when six

jurors are sworn and the rest challenged, the court may appoint any two of the six sworn to try the challenges. Co. Lit., 189; 7 Dane Abr., 334. The foregoing are all the modes found in treatises upon the subject, touching the trial of challenges made to the favor.

"A challenge to the array must be in writing; but in the case of challenge to the polls, the intention of challenging is verbally intimated by such words as these: "I challenge him," or "challenged;" and when the challenge is peremptory these words will suffice, but when the challenge is for cause the defendant must immediately show the ground of objection." Ibid 393.

In King v. Edmonds, 4 Barn. and Ald., 471, Abbott C. J. says: "When a challenge is made, the adverse party may then demur, (which brings into consideration the legal validity of the matter of challenge,) or counter plead, (by setting up some new matter consistent with the matter of challenge to vacate or annul it, as a ground of challenge,) or he may deny what is alleged for matter of challenge, and it is then, and then only, that triors are to be appointed."

"The challenges in this case ought to have been put upon record, and the defendants are not in a condition, in strictness, to ask of the court an opinion upon their sufficiency."

From the authorities cited, it is obvious that in all challenges for cause, the ground must be distinctly stated, and entered upon the record. The necessity of this is very manifest, when the purpose is that the question of indifference should be submitted to triors instead of the court; for the distinction between a principal challenge and one to the favor is not always clear; and it is only in the latter that the question of indifference of the juror challenged can be submitted to triors.

By the exceptions in this case it does not affirmatively appear that these preliminary steps were taken on the part of the prisoner, when the challenge was made, though it was announced to be for favor. If the grounds of challenge had been made as required by strict rules, it might have been

a case where the challenge was principal, and not *to the favor;* and if so, the prisoner was not aggrieved. But the grounds of challenge may have been *for favor*, and as the judge expressed his intention to deny his right to triors in challenges for any cause, and to raise the question whether such denial could be erroneous, it is proper, in order to avoid the possibility of doing injustice, to regard this point in the case as open.

Did the right claimed by the prisoner, at the time of the call of the jurors to constitute the panel for his trial, under a challenge *for favor*, legally exist?

It is proper that we should look into the history of legislation in Massachusetts, and this state since its separation, and the constitutions of both, so far as they can have any bearing upon this question.

In chapter 98 of "Charters and general laws of the Colony and Province of Massachusetts Bay," 199, entitled "Acts respecting trials," section 1 refers to all causes between *party and party;* and section 3 provides that it shall be the liberty of both *plaintiff* and *defendant*, and likewise of every delinquent, to be judged by a jury, to challenge any of the jurors, and if the challenge be found just and reasonable by the *bench*, or the *rest of the jurors*, as the challengers shall choose, it shall be allowed him. This chapter was manifestly designed to apply to trials in civil and criminal matters.

Chapter 2 of the same, page 214, entitled "An act setting forth general privileges," secures to persons certain rights and liberties touching the enjoyment of property, freedom from arrest and imprisonment, and trial for alleged offences, and forbids the deprivation of these generally, unless by the law of the province, and by the judgement of his peers, in a jury consisting of twelve of the neighborhood of the accused, in which the offender shall be allowed his *reasonable challenges.* The rights designed to be secured by this chapter are those referred to in *magna charta*, and appertain to matters both of a civil and criminal nature.

By chapter 61 of the same, page 230, which is entitled

"An act for establishing a superior court of judicature, court of assize and general gaol delivery within the province," (see sec. 1,) such a court is established, having *cognizance of all pleas, personal or mixt, as well as pleas of the crown*, and all matters relating to the conservation of the peace, and punishment of offenders, &c.; and, in section 5, provision is made for the attendance of jurors upon said court, making no distinction between those who shall sit in civil and criminal trials, but providing for other jurors than those originally returned, when the latter are deficient in number by reason of challenges.

By chapter 275 of the same, entitled "an act for the better regulating the choice of jurors," provision is made for a different mode of selecting jurors for the purpose of serving as such at the superior court of judicature, court of assize and general gaol delivery, to be put into one box in each town, and those to serve at other courts in another box; and as a method of preventing partial juries, the fourth section provides, that the justices of the respective courts aforesaid are hereby directed, upon motion from either party, in any cause that shall be tried after the first day of June then next, and during the continuance of this act, to put any juror returned as aforesaid, or as talesman, to answer upon oath "whether he doth expect to gain or lose, by the issue of the cause then pending? whether he is any way related to either party, or hath directly or indirectly given his opinion, or is sensible of any prejudice in the cause? And if it shall then appear to said *court*, that such juror does not stand indifferent in said cause, he shall be set aside from the trial of that cause and another appointed in his stead."

No other law upon the subject of challenges or exceptions to jurors appears to have been enacted by the Colony or Province of Massachusetts Bay before the declaration of independence; or by the State of Massachusetts afterwards, till the adoption of the constitution of the Commonwealth in 1780.

It does not appear from any record, or work of authority,

that challenges to jurors for favor were ever submitted to the determination of triors before the declaration of independence, by virtue of the common law principle, which seems to have been well defined and understood in the country of its origin. But as early as 1641, in the colonial act, chapter 98, there was an important modification of that principle, in allowing the party making challenge to submit the question of indifference of the juror to the bench, or the *rest of the jury.* In this provision there is no restriction in respect to the challenge to a juror for any cause. The choice was with the challenger, whether exception taken was a principal challenge or to the favor; and we have seen that, at common law, when a challenge to the favor was made, the trial was not *by the rest of the jury.*

The act of 1760, chapter 275, referred to, so far as it was applicable, was mandatory, and not to be enforced as the court, or either of the parties should elect in the case of objection to a juror, by either party. In all challenges coming within the provision of the act, this was the only mode, by the terms used, and operated so far, a repeal of the former act, as being inconsistent therewith.

But it is insisted for the prisoner, that this provision refers only to trials in civil matters, and is inapplicable to trials for criminal offences. This deserves consideration. The impartiality of juries under the English common law being secured by the intervention of triors, in civil and criminal cases precisely in the same manner, and that mode having existed from time immemorial, it may not be unreasonable to suppose that if a distinction in that respect was intended by the authors of the provincial law of 1760, such intention would be expressed or in some way manifested. But nothing in the act itself discloses such a design.

Again, this act provided not only a new, but what was then thought a better mode for regulating the choice of petit jurors, by providing boxes, in which the names of persons deemed qualified to serve as jurors should be placed for the different courts, and the names drawn therefrom from

time to time as their services were required. The names of those in one box, supposed to have higher qualifications than the others, were drawn to serve in the superior court of judicature, court of grand assize, and of general gaol delivery, a court having cognizence of pleas of the crown, including capital cases, as well as of civil matters.

No provision is found in any other law of the colony or province, in force at the date of this law, requiring or authorizing the jurors for criminal trials to be obtained in any other mode than by being drawn from the box in each town to which *venire facias* writs were sent. But the provisions made for the attendance of jurors for the superior court, and the services thereat, are general, and apply equally to the exercise of its jurisdiction over civil and criminal suits.

The mode of determining the impartiality of jurors challenged or objected to, and the tribunal which is intrusted with the power of hearing the challenge or objection, are also applicable, by the language used, to all jurors, without distinction between those called for the trial of civil actions and cases in which the party is accused of a crime. The inquiry prescribed will embrace everything necessary to secure impartiality, and if the authors of the law were willing that the investigation should be confined to the answers of the juror challenged, when a civil suit is to be tried, no good reason is seen for its being regarded insufficient in a criminal trial; especially as by the new mode of preparing the lists, they were deliberately selected by the selectmen of the several towns in which they resided, and were afterwards submitted to the town in the corporate meeting of its voters.

In the trial of Judge Chase, on impeachment, one article of which was, that the respondent overruled the objection to a juror called to sit in the trial of one James Thompson Callender, indicted for a libel, and who wished to be excused from sitting in that trial, because he had made up his mind as to the publication from which the words charged to be libelous in the indictment were extracted, and the juror was sworn and sat in the trial. It was argued by the respondent and

his counsel that it was not a good cause of challenge, that a juror called had *formed* an opinion, if he had not delivered it. Mr. Dane regards this reasoning as something light and trifling, and refers to the legislation in some states (Massachusetts, &c.,) which is the same as that embraced in the provincial act of 1760, chapter 275, requiring the court to ask the juror himself the question, whether he had *formed an opinion*, and the author remarks, "thus a wise provision obliges a juror, if he has formed an opinion to declare it, and he is then set aside." 7 Dane's Abr., 380.

This ruling of Judge Chase having occurred in a criminal trial, the remarks of Mr. Dane were entirely inapplicable, on the hypothesis that the statute provision referred to by him was designed for trials of civil actions only.

By the constitution of the commonwealth of Massachusetts, chapter 6, article 6, "all laws which have heretofore been adopted and approved in the Province, or Colony of Massachusetts Bay, and usually practiced upon in courts of law, shall still remain and be in force, until altered or repealed by the legislature; such part only excepted as are repugnant to the rights and liberties contained in this constitution."

This provision is intended, probably, to embrace, not only existing enactments of the legislatures of the Colony, Province or State of Massachusetts, but those unwritten rules and maxims of the common law of England, which had been treated practically as applicable to the altered condition of the emigrants therefrom to this land of their adoption, affected perhaps by the simpler forms in applying the great principles of their general laws.

By this provision of the constitution, it was indispensable that a doctrine of the common law of England should have been adopted, and approved, and usually practiced upon in courts in the Colony, Province, or State, in order to be treated as obligatory. The conditions on which they were to become a part of the code of the Commonwealth were in their character affirmative, and no principle of those laws was embraced in this article, unless it be affirmatively proved. The language

will not admit of the construction, that by adopting the constitution, the whole common law of England was *ipso facto* introduced, and only such parts excluded as were shown not to have been previously adopted, approved, and practiced upon in the courts of law. The history of Massachusetts, from the time of the first establishment of a colonial government therein, to the time of the constitution, shows that their laws, being generally of their own enactment or adoption, were satisfactory. The provision to which we refer was not designed to enlarge or change their system or principles of jurisprudence, but to make those in practical operation effectual. The provision in the constitution declaring what laws shall remain in force, excludes all others by a well settled legal maxim, *expressio unius exclusio alterius est.*

It is well settled that many of the doctrines of the English common law were never adopted here, either by practice or legislation. And if they have not been transplanted in either of those modes, they have been treated by courts and jurists as having no binding authority.

In the introduction of Dane's Abridgement to the American Law, the author having engaged in professional and political employments in the spring of 1782, (page 3) says, on page 5, that "the object is to make our American charters and constitutions, statutes and adjudged cases the *ground-work* on each subject; and therewith to incorporate that portion of the English law *recognized* in the United States, beginning with the *magna charta* and the first charters and statutes in our colonies. The *ground-work* has been thus viewed, because it is obvious that when constitutions and laws made in our country are not consistent with English law adopted here in practice, the former must prevail and the latter yield.

In the case of Commonwealth v. Roby, 12 Pick., 496, which was an indictment against the defendant for murder, when the jury answered at the call of the clerk, that they had agreed upon a verdict, a motion was made in behalf of the prisoner, that the jury should be polled, which motion was overruled. After argument, the court affirmed its decision,

saying, if the question depended upon a revision and application of legal authorities, the point would certainly demand a more ample investigation.

"But it is conceded that this practice has never been used in this commonwealth, and the application is to introduce a practice not before adopted. Such an application is at the judicial discretion of the court, and must be supported by some good and substantial reasons of justice and propriety;" and referring to chapter 6, article 6, of the constitution, the court adds, "the plain object and purpose of this constitutional provision was to confirm and perpetuate the laws, including the common law, as they had been usually practiced in courts of justice, thereby confirming and sanctioning all such alterations and modifications in the practice as had been sanctioned by actual usage and approbation in the courts of justice."

It is insisted that the statutory provision requiring the court to examine the juror, on motion of either party, varient from the common law practice, was not intended to apply to *challenges*, in the technical meaning of the term, nor to abrogate this practice, but was designed to secure impartial juries by additional requirements.

If the statutes referred to were enacted as a substitute for the common law principle, or for the provision of the colonial act of 1641, chapter 98, the particular terms used to signify an exception taken to a juror is of little importance. It is not believed that an objection to a juror clearly made known, without the use of the word "challenge," will fail on that account to secure rights, to which the party making it would otherwise be entitled. The term is used in law, for an exception to jurors, who are returned to pass on a trial." 1 Chit. C. R., 533. But any other word expressive of the same exception, if the grounds of the exception are properly stated, is not found to have been held insufficient. The form now in general use in this state and others, when the jury is about to be empanneled for the trial of a criminal cause, is, that if the defendant will *object* to any of the jurors he will

do so as they are called, and before they are sworn; and in capital trials the form is the same, touching objections for cause.

If every inquiry, prescribed by the statute to be made by the court, should be answered in the negative, and no more, it is not perceived that anything would be omitted, which could be properly proposed to the juror by triors. If, upon such examination, the court should find that the juror was not indifferent in the cause, he was to be set aside, and a new one called in his stead, making the judgment conclusive in that event in favor of the challenger. But under the common law, in a challenge to the favor, it was the right of *both* parties, that the hearing and determination should be by triors. The statute has, therefore, abridged so far, the right enjoyed under the former mode, by the party adverse to the challenger.

By the common law, witnesses could be examined by triors. 2 Gabbett on Crim. Law., 395. This was not provided for in any of the statutes of the Colony, Province, State or Commonwealth of Massachusetts, before the separation of this state therefrom. If the common law practice was not wholly abrogated, but was in force, only so far as the statutes were absolutely repugnant to it, when a juror, to whom exception was taken for favor was found indifferent by the court, upon his own answers, triors could have been appointed to hear witnesses upon the question of his competency; thus upon the same challenge providing for two distinct tribunals.

To hold that the prisoner's challenges to the favor are to be determined by triors, under the common law, modified by these statutes, would be incorporating into the practice upon this subject such alterations as would make it an anomaly, highly derogatory to the intelligence of the authors of the statute, inconsistent with their obvious intention, having no precedent, and not insisted upon by the prisoner's counsel.

Has the common law principle of submitting challenges *to the favor* to the hearing and determination of triors been usually practiced upon in courts of Massachusetts before the adoption of its constitution? It is said in an article in the

American Jurist, volume 12, page 330, published in 1834, "It has been lately decided by a respectable judge, that the competency of a juror upon a challenge to the favor, may be determined under the laws of Massachusetts, by triors appointed by the court for that purpose." And it is laid down in Howe's Practice, page 247, that all challenges *for favor* are tried by triors, in the mode pointed out in the English authorities before cited. We are not informed in what court it was that this mode of determining the competency of jurors was allowed; nor whether it was by the consent of the prosecuting officers, and the party accused. Consequently we cannot know whether it can be regarded as authority, in that commonwealth, on a controverted point. If it were so it is not binding upon courts in another jurisdiction, but must have respect according to the intrinsic merits of the argument in its support, which is not before us.

The authorities referred to by Judge Howe, in support of the text cited, are confined to treatises of English jurists.

So far as any discussion touching the introduction in practice of the principle contended for by the prisoner's counsel, in Massachusetts, has taken place, the authority is against his position. As early as the year 1809, it was treated in the Supreme Judicial Court, by a jurist of the highest standing, and among those who had been engaged for the longest period and in the most extensive practice, as not having been adopted there. Borden v. Borden, 5 Mass., 71.

In Rollins v. Ames, 2 N. H. 350, the court say a challenge to favor, in England, is determined by triors, but here the court uniformly decide on its validity. In Connecticut all challenges of jurors are decided by the court. 2 Swift's System of Laws of Conn., 233; Boardman v. Wood, 3 Vermont, R., 570. The subject is ably discussed in the article in the American Jurist referred to, and the authorities bearing upon the question of the adoption of the practice in Massachusetts, of determining the competency of jurors by triors, are cited and commented upon; and the writer concludes that this principle of the common law has not been usually practiced

upon in its courts, and is not a part of its law. "Challenges are often determined by triors south of New England." 7 Dane's Abr. 334. This statement of a fact, coming from one of the learning and experience of the author, in the text of a work, having for its object what it is declared in the introduction to be, is certainly evidence entitled to great weight, though of a negative character.

After the adoption of the constitution of Massachusetts, the legislature re-enacted the provision in the provincial law of 1760, chapter 275, section 4, in the statute of June 26, 1784, entitled "an act for regulating the choice and services of petit jurors," section 8, and in the statute of 1808, chapter 139, section 9. The same provision was incorporated into the statutes of this state in the revision of the statutes of Massachusetts, after our separation. This legislation since 1780 was all during the connection of the learned author of the abridgement of American law with the bar, and when, according to his own account, in the introduction, page 3, he early turned his attention to the subject of this great work, and in good earnest engaged in collecting materials upon it. If the competency of jurors challenged to the favor was determined by triors, during this period, to such an extent as to make the practice a part of the law of the commonwealth under the provision of the constitution referred to, he must have known it. The language quoted from his 7th volume, page 34, is little short of conclusive, that in New England no such practice prevailed. Hence, we may well infer, in the absence of proof to the contrary, that under similar statutory provisions of the provincial legislature, the common law of England, on this subject, had not been recognized.

The mode provided by the provincial statute which has subsisted to the present time in Massachusetts and in this state, for the trial of all exceptions taken to jurors for every cause, by the court, is direct and uniform, and is in harmony with the general character of legal proceedings in this coun-

try, distinguished from those in England by their greater simplicity.

No one can doubt that the court are as competent to decide any questions which are determined by triors in other places, as those appointed by the court. The range of inquiry of the juror is as broad in one case as the other.

The positive evidence of the adoption of the English common law right of triors in cases where the principle was applicable, being entirely wanting at the time of the formation of the constitution of 1780, according to uniform authority, and the rule of that constitution, prescribing that laws previously existing shall continue till changed by the legislature, of itself amounts to a failure of a foundation upon which the principle contended for can be sustained.

The constitution in this state is invoked by the prisoner's counsel, as securing the right contended for, free from any power of the legislature to interfere therewith.

By act 1, section 6, "no person shall be deprived of life, liberty, property, or privileges, but by the judgment of his peers, or the law of the land." By this section, in another part, "The legislature shall provide by law a suitable and impartial mode of selecting juries, and their number and unanimity in indictments and convictions shall be held indispensable."

The meaning of the words, "the law of the land," as used in the constitution, has long had a construction, which is regarded as fully settled. This term, as Lord Coke says, "is (to speak once for all,) the due course and process of law." Coke, 2 Inst., 46. The law, in this sense, as held by Blackstone, 1 Com., 44, is a rule, not a transient, sudden order from a superior, to or concerning a particular person, but something permanent, uniform, and universal. The words "law of the land," as used in magna charta, from which they are borrowed in reference to criminal matters, are understood to mean, due process of law; that is, by indictment, or presentment of good and lawful men. 2 Kent's Com., sec. 24. Judge

Story in 3 Com. on Const., sec. 1783, says, "the clause, 'by the law of the land,' in effect, affirms the right of trial according to the process and proceedings of the common law."

When the constitution of Massachusetts was formed, "each individual of the society had a right to be protected by it, in the enjoyment of his life, liberty and property, according to standing laws, part 1, art. 10, and no subject could be arrested, imprisoned, despoiled, or deprived of his property immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature were forbidden to make any law that should subject any person to a capital or infamous punishment, excepting for the government of the army or navy, without trial by jury. Part 1, art. 12, and chap. 6, sec. 6, so often herein referred to, gave validity to existing laws, which had been adopted and approved in the Colony, Province, or State of Massachusetts Bay, and usually practiced upon in the courts of law.

"The law of the land," in this constitution, did not refer to any country or government which was foreign to the commonwealth, but to that land and to that people therein, which adopted this as their frame of government. But the law referred to was the common law of Massachusetts, and so far as it was the means of security of life, liberty, property, and privileges of the people, it was the great principles of magna charta, embracing the trial by jury as therein secured, and all the maxims of law which were brought to this country by our ancestors, on its settlement, and continued in practice; or recognized as parts of the common law of England afterwards, and customs of their own, which were permanent, uniform and universal. We have seen that whatever laws might have been an established part of the common law of England, which were never adopted and approved in Massachusetts Bay, and usually practiced upon in courts of law, did not, under the constitution, become a part of the system of jurisprudence.

The trial by jury, according to its meaning in magna charta, and as it was understood in England generally till the emigration of our ancestors, in practice was introduced into our colonial system of jurisprudence at an early period. And the inquiry is not improper, whether it is not to be considered as adopted here, with all its incidents, under the constitution of Massachusetts, in which this great security of private rights was manifestly designed to be carefully preserved and guarded.

The number constituting a jury of trials, and perfect unanimity in a verdict, were essential elements in the jury trials.

It was also indispensable that the individuals composing the jury in a given case, should be impartial, indifferent, and under no bias or prejudice, *omni exceptione majores.* It is likewise important that the jury, as an array, should be free from objection on account of any irregularity in the manner practiced under the writs by authority of which they are summoned. But if all the essential elements were secured in their integrity, the particular mode in which this was done in England has not been practically treated as absolutely required. There the jury were summoned in a manner very different from that which has here prevailed for a century. A verdict, as we have seen, was not required necessarily to be secured by polling the jury upon motion of either party; and we are not satisfied it would be a material infringement of this important right, secured by the constitution of Massachusetts that the court should be vested by the legislature with the power to determine conclusively the indifference of jurors, in the place of triors, in certain cases, of the appointment of the court.

Before the adoption of this constitution, the statutes of the Colony and Province of Massachusetts, touching the manner of testing the competency of jurors, had been held obligatory. The statute of 1760, chap. 275, was in force at the time when this constitution became the supreme law of the commonwealth. The several parts of this constitution took effect simultaneously. By chap. 6, sec. 6, thereof, those

statutes became binding while they continued unrepealed. They underwent no essential change afterwards, so long as this state was a constituent part of Massachusetts; and at the time of the separation and the organization of the new government, they became a part of the law of Maine. Con. of Maine, art. 10, sec. 3.

The common law principle, in relation to triors, not having been shown to have been adopted in Massachusetts, but another mode believed to be quite as effectual to secure impartial juries, provided by legislative authority, was that which had been usually practiced upon in courts, and became the law of that commonwealth, under the constitution.

When the constitution of Maine was adopted, if there had been no other provisions touching jury trials in criminal cases than that contained in art. 1, sec. 6, already quoted, this section could not be construed to refer to the common law of England, as such, but to that common law which was then permanent, uniform and universal in Massachusetts, in the modified form in which it stood at the time that the new government assumed the functions of an independent state. In criminal prosecutions, the accused could be deprived of life, &c., only by the judgment of his peers, or the law of the land, as the law had been, and was then under the constitution of Massachusetts, and that legislation designed to give efficacy to that constitution.

But the part of the constitution of Maine quoted from, (art. 1, sec. 7,) not only allows, but requires the legislature to enact statutes to secure the selection of juries, which shall be impartial.

The construction of this provision which would restrict legislative enactments for the selection of names of impartial persons, from whom jurors might be summoned upon writs of *venire facias*, regardless of the impartiality of those called to sit in a given case, cannot be admitted. It is obvious, that it was designed also to embrace laws in reference to the empanneling of juries for each trial.

Until twelve men are actually empanneled and sworn, it

cannot be said that a *jury* exists, in the strict sense of the term. The requirement in the same sentence of the established number, and of unanimity, must refer to a jury prepared and qualified in all respects to sit in a trial.

In obedience to this constitutional requirement, the legislature, in 1821, re-enacted former statutes in substance, for the purpose of having in attendance upon courts, under a summons thereof, persons suitable for jurors, and of hearing and determining the indifference and impartiality of each, who should be called upon to sit in a trial, either civil or criminal, in case of objection.

In the Revised Statutes which went into operation in 1841, it was the design to range under separate chapters provisions which had often before been under one chapter. The title of chap. 115, is "Of proceedings of civil actions in court." And it is provided in sec. 65 thereof, that the court, on motion of either party in a suit, may examine on oath any person called as a juror therein, whether he is related to either party, or has given or formed an opinion, or is sensible of any bias, prejudice or particular interest in the cause, or if it shall appear from any competent evidence introduced by the party objecting to the juror, that he does not stand indifferent in the cause, another juror shall be called and placed in his stead, for the trial of the cause. The inquiries to be made by the court are substantially the same as those required in other and previous statutes, with the addition that other evidence may be introduced, which was allowed before triors under the English common law.

It is insisted that this examination is not imperative upon the court, under the Revised Statutes, but is purely a matter of discretion. Such a construction, when the objection to a juror is for cause, which would amount to a principal challenge, as would authorize the court to permit the juror to sit in the trial when objected to, without any examination or hearing of testimony, is unreasonable, and is certainly at variance with the practical interpretation of the provision. The language of the statute may have been varied under a

view taken by this court in the case of Ware v. Ware, 8 Greenl., 42, that a juror objected to might be legally set aside, though it was not made to appear that the objection had a sufficient basis. The court say in that case, "but as strong objections were still urged against him by the appellee, he was set aside by the judge, who expressed a desire to have the cause decided by an unobjectionable jury, and thereupon another was called," and this was held not erroneous. The evidence introduced by the party objecting, from witnesses, may show the incompetency of the juror, without inquiry of him, and the latter evidence may with propriety be omitted.

We cannot suppose that the change of the auxiliary verb from *shall* to *may* was designed by the legislature to recognize the existence of the English common law practice, which was superseded by a satisfactory provision of the statute, which has existed under the different forms of government in Massachusetts.

Challenges of jurors are allowed in criminal as in civil causes. R. S., chap. 172, sec. 31. They must have been for similar reasons, and the court is the only tribunal which the statute has provided for their trial, whether they be principal challenges, or challenges to the favor. Something more than silence of the statute is necessary to induce the belief that a practice in English courts which had never existed under the colonial, provincial or state government of Massachusetts, was intended to be introduced under the constitution of this state, and the general provisions for determining the competency of jurors just referred to.

It is suggested that the provisions of sec. 31 of chap. 172, was not designed to apply to capital trials, because the right of the prisoner in such, to challenge peremptorily a certain number of jurors has always been recognized, and never denied, but the right exists in no other cases. The privilege of peremptory challenge in capital cases, has been admitted from time immemorial, is believed to have been allowed under our colonial and provincial systems, and in the commonwealth of

Massachsetts; and is clearly implied by the statutes of this state of 1821, chap. 59, sec. 42; by R. S., chap. 172, sec. 17, and by statutes of 1849, chap. 100, sec. 1, limiting the number of such challenges. The challenges referred to in sec. 31, chap. 172, have regard to those for cause, as no other are allowable in civil trials. By giving the accused the same right of exception to jurors in criminal as in civil causes does not restrict him so as to take away the right of peremptory challenge.

2. L. D. Rice, a witness for the state, on his direct examination, testified that on the afternoon of the day next succeeding the death of the deceased, he saw something on the sleeve of the shirt of the prisoner, which he thought was blood; and that on cross-examination, that he was a witness before the magistrate and before the coroner's inquest. In answer to the prisoner's inquiry whether he had testified before, that he saw blood on the prisoner's wrist, answered in the affirmative; and then the question was proposed in behalf of the prisoner, if this was the first time he had so testified, excepting before the grand jury. This question being objected to, was excluded. It is not controverted by the prisoner's counsel that a witness is not permitted to disclose evidence before the grand jury. It follows that a question which *may* be answered in a manner to make such disclosure cannot be proper. If the witness had testified to the same fact only before the grand jury, an affirmative answer would be tantamount to the statement that he had testified the same before that body.

It has been regarded as an established rule, that a witness cannot be called upon to state his testimony given on a former occasion in a trial where the same evidence is relevant, and the authorities cited for the state sustain the rule. The question was properly excluded.

The same reasons will apply to the exclusion of the question put by the prisoner's counsel in cross-examination, "where it was that he testified he saw Prout on the night of October 6th, 1856, put his hand on deceased's face."

3. William F. Morrill, for the state, testified that he was present with George F. Thurston and James Dunn, when a knife was found by the side of a fence, between the prisoner's field and the woods, near a pair of bars. The case finds that the day subsequent to the death of the deceased, Dominicus J. Prout testified that he saw the prisoner coming out of the woods, from a pair of bars leading therefrom to the prisoner's field. The prisoner was walking fast; when he saw the witness and another man who was with him, he did not walk quite so fast. The prosecuting officer inquired of the witness if he, on the same or the next day informed any person of having seen the prisoner coming from the place, and in the direction above described. The answer was that he informed Thurston, and went with him to the place after the information was given. The question and answer were objected to.

The ground of this objection is, that the state cannot thus corroborate its own witness. It is not perceived how the inquiry and the answer could have this affect, the one informed not having been called to confirm the statement of the witness, but the inquiry was undoubtedly made to connect the discovery of the knife after the death of the deceased, with the prisoner, upon the spot where the knife was found, when he exhibited conduct which might be thought suspicious; and also to show that the discovery of the knife was upon search therefor, by the person informed of the prisoner's previous presence at that place, and not accidental.

If the one who saw the prisoner near the bars, had the day subsequent, himself found the knife, it is very clear that the fact of his having seen the prisoner at that place, and the finding of the knife upon his own search, would all have been unobjectionable in evidence. The first named fact being within the knowledge of one, and communicated to another who found the knife, or who was present when it was found, is not the ground of a legal distinction.

4. A surgical expert examined the wounds upon the deceased, and against the objection of the prisoner's counsel,

was allowed to state that in his opinion, the instrument by which they were caused, was a pointed, cutting and sharp instrument. To determine the general character of the instrument from a wound produced, must necessarily depend upon the experience and skill of one accustomed to examine wounds, and it has been properly regarded by courts as an important step in the proceedings in criminal trials where no direct evidence is found.

The form and appearance of the wounds upon the deceased having been ascertained by an expert, it was a proper inquiry to the same, when a witness, whether the razor before him, independent of the place where it was found, and the dust upon it, in his opinion could have produced the wound, and proper to be answered. The most obvious object was to ascertain if the wound examined corresponded in form with that which could be caused by that particular instrument. If his intention was to base his opinion upon other circumstances than the form and properties of the razor, such intention could have been ascertained on further examination, and if the opinion was founded upon facts of which the jury could judge as well as an expert, it could have been excluded.

5. Dr. A. Garcelon, called by the government, and shown to be an expert as a physician and surgeon, was at the examination of the body of the deceased, and was permitted, subject to objection, to exhibit to the jury certain engraved plates of the humnn neck, and of the bones of the neck, and also a skeleton of the human neck, in order to illustrate his testimony in describing the wounds, and especially that upon the vertebræ of the spinal column. The object of the exhibition of these plates and bones was to render the testimony of the witness intelligible, and not to make them evidence of themselves. Maps and diagrams not claimed to be strictly accurate are permitted to be used as chalk for purposes of illustration, and to make more clear a verbal description. The authorities cited for the prisoner are not in point.

6. The admission of the answer to the question put to Dr. Garcelon by the counsel of the government, that in his opin-

ion as a physician and a surgeon, the wound described in the neck of the deceased could not have been inflicted by her own right hand, was not legally erroneous. The question could be properly answered only by one who had the knowledge of an expert in anatomy and surgery. The answer given is a fact, which, like other facts, may be controverted by proof. It is to be received as testimony in reference to the party injured, and is a denial by the witness that the wound could have been inflicted by the deceased under any state of the mind of a human being, known to him, and having the power to use her right hand in the ordinary manner. If the presiding judge had excluded the answer, it must have been upon the ground that he could better determine what facts claimed to be within the range of surgical science were incredible than one experienced therein.

7. The papers purporting to be deeds from George Knight and Mary Knight to Moses S. Jordan, and from the grantee therein to George Knight alone, and the testimony of Dennis L. Bragdon, John H. Otis, and Moses S. Jordan, in reference to these papers and others which were left for record, were admissible. The rule of this court, No. 14, does not apply to this question. These deeds are not treated by the counsel of the government as certainly genuine, but as documents in the hands of the prisoner which, by his acts, he must have regarded as of value to him, he being a party to them. If the deeds were genuine, his conduct in reference thereto may be supposed to have had some relation, as a circumstance, to the issue before the jury, as indicating a motive for the crime charged. If not genuine, and he treated them as valid, the forgery might be exposed in some mode, if the deceased was in life. If the subscribing witness had been called, and had denied their genuineness, it is not perceived that they and other evidence could have been excluded.

8. Dr. A. A. Hayes was called, and examined as an expert touching the properties of human blood, ascertained by chemical tests, and by microscopic observations, and he exhibited

a diagram, and desired to use it in order to illustrate his statements, and was allowed to do so for that purpose, subject to the prisoner's objection. It appeared from the testimony, that one diagram exhibited recent blood as seen through a microscope; another, the coagulating of blood; a third, recent blood, to which water had been added; a fourth, blood to which a saline solution had been added.

It would be very difficult for an expert of the most accurate and extensive observation, to exhibit in language with precision, so as to be understood, those delicate appearances which are appreciable only by the sense of vision. Nothing short of an exact representation to the sight can give with certainty, a perfectly correct idea to the mind. The witness was permitted to present the diagrams, merely to explain his meaning, and not as an infallible test of truth. A diagram approximating in any degree to perfect representation, when exhibited by one qualified from knowledge and experience to give explanations, may do much to make clear his testimony, without danger of misleading.

9. The witness exhibited a shirt, which he remarked was of cotton flannel, and which he testified he had examined. He stated that he first alluded to the peculiarity which the stain presented. And the counsel of the prisoner here objected to the witness' describing what he called the peculiarities of the stain; as, if any such existed, they were open to the observation of the jury. The court allowed the witness to call the attention of the jury to a spot (pointed out,) as exhibiting on one side of the fabric a much larger proportion of coloring matter of the blood, than was presented upon the other part, or the surface which was worn next to the skin. The witness then stated that he cut a piece from the blood spot on which the experiments were subsequently made.

The opinion of the witness was not introduced, as supposed in argument. The attention of the jury was directed to the shirt in question, that they might notice by inspection, the actual appearance of the blood stain, exhibited to them

as the basis of experiments which were made, and which were described in another part of the testimony of the witness.

The question whether such a spot as that exhibited upon the shirt could, or could not have been occasioned by blood flowing directly upon the outer surface thereof was allowed to be answered by the witness as an expert, when, as it is contended, it was a question which called for an answer not within the province of the witness, and one not within the province of an expert. The witness testified "that the coloring matter of the blood, which is suspended in the blood, remained on the outer surface of the fabric; the effect being the reverse of that which would have taken place, had the blood flowed from the arm of the person wearing it." Whether the witness' theory touching the coloring matter of the blood, and the appearance presented when it has flowed upon cotton flannel is correct or otherwise, it is not for the court to determine, it being a matter for the jury upon evidence. It appears that this proposition of the witness was made upon chemical experiment, and observations aided by the microscope. It is not perceived that the answer to the question was not peculiarly the result of scientific knowledge and experience.

Dr. Hayes testified touching the properties of blood of animals, and was allowed to state that such a distinction exists in the appearance of human blood and that of the sheep, that one may not be mistaken from the other, after such experiments as have been made by men of science and skill. Objections were made by the prisoner's counsel to the questions which elicited these answers. The history of the developement of scientific principles by actual experiments, within a few of the last years, show us that many things which were once regarded generally as incredible, are now admitted universally to be established facts. And so long as the existence of facts, which are the result of experiments, made by those versed in the department of science to which they pertain, are received as evidence, it would be

legally erroneous for the court to determine that the absurdity of such facts was so great as to require their exclusion. If the facts so offered in proof are untrue, their fallacy is to be shown by the evidence of other experts, who have made application of their scientific knowledge and experience. The court is required to be learned in the law, and to apply it by instructions to the jury, but to be learned in all matters of science is not required, and such learning, if possessed by the court, cannot with propriety be given by it to the jury; nor can it withdraw from them the consideration of scientific facts, testified to by experts.

10. The counsel of the government introduced Lydia Knight, the prisoner's mother, who occupied the same bed with the deceased, the night of her death. The testimony, when taken alone, may not be inconsistent with the prisoner's innocence of the crime charged. And although the death was occasioned by violent means, as we infer from the testimony of others, either by her own hand, or that of an assassin, yet it was unknown to Lydia Knight, according to her account.

The counsel for the state, in his closing remarks to the jury, endeavored to show that the death of the deceased took place after Lydia Knight had left the bed, contrary to her own express statement, and although he disclaimed the intention of impeaching the competency or the credibility of this witness, he insisted upon other facts adduced in evidence that she was mistaken; and to show that this mistake was not unnatural, nor inconsistent with the most honest intentions, he referred to her extreme age, her appearance before the jury, bowed down, deaf and decrepit, generally in a feeble condition, both physical and mental, and having forgotten her own son who addressed her as his mother. This course of argument was objected to by the prisoner's counsel, but permitted by the court.

That a party calling a witness cannot impeach his competency or credibility, if his testimony turns out unfavorable to him, is well established. But it certainly would not tend

to develope truth, to preclude a party from showing that his witness was honestly mistaken, and no such rule is recognized in law. The rule of law is, that if a witness proves a case against the party calling him, the latter may show the truth by other witnesses. In Buller's N. P., 297, the rule as to the right of a party to contradict his own witness is thus laid down: "A party shall never be permitted to produce *general evidence* to discredit his own witness," for the reason, it "would enable him to destroy the witness, if he spoke against him, and to make him a good witness, if he spoke for him, with the means in his hands of destroying his credit, if he spoke against him. But if a witness proved facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise; for such facts *are evidence in a cause*, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only."

In Ewer v. Ambrose, 3 Barn. and Cres., 229, it is said by Littledale, Justice, "when a witness is called by a party to prove his case, and he disproves that case, I think the party is still at liberty to prove his case by other witnesses. It would be a great hardship if the rule were otherwise, for if a party had four witnesses upon whom he relied to prove his case, it would be very hard that by calling first the one who happened to disprove it, he should be deprived of the testimony of the other three. If he had called the three before the other who had disproved the case, it would have been a question for the jury upon the evidence, whether they would give credit to the three or to the one. The order in which the witnesses happened to be called ought not, therefore, to make any difference."

The rule laid down by Bosanquet, J., in Bradley v. Ricardo, 8 Bing., 220, is that a party who calls a witness into the box is not permitted to prove generally that he is unworthy of credit, but may contradict him as to particular facts, and the rule in Buller's N. P., cited, is held to be correct. It is laid

down in the same case, that by so contradicting the witness, his testimony is not to be altogether repudiated, and Aldenson, J., says, "the rule laid down by Mr. Justice Buller is intelligable and clear; namely, that a party shall not be permitted to throw general discredit upon a witness whom he has put into the box; but it would be monstrous if the whole of his testimony were to be struck out, because a subsequent witness sets him right as to a single fact which he may have stated incorrectly."

The rule invoked by the prisoner's counsel from Russel on Crimes is that in Buller's N. P., before cited, with the exception of the last sentence, which is as follows: "Still a party is not at liberty to set up so much of his witness' testimony as makes for him, rejecting and disproving so much as makes against him." The language just quoted is that of Lord Ellenborough, in Alexander v. Gibson, 2 Camp., 556, to which he adds "that a witness giving evidence against the party calling him, may be contradicted by witnesses on the same side, and that in this manner his evidence may be entirely repudiated." In the case of Bradley v. Ricardo, before cited, Gaselee, J., says in reference to the remarks of Lord Ellenborough, "With defference to Lord Ellenborough, it seems to me it is for the jury to say, whether his evidence is to be entirely repudiated or not. It is going too far to determine that the party shall suffer because a witness is not consistent in his testimony." These remarks of Gaselee, J., are founded in reason. There is no inflexible rule of law that the jury are bound to disregard important testimony of a witness, which testimony they fully believe, because it is inconsistent with the evidence of another, called by the same party. Such is the frailty of human memory that a witness may state a fact which is untrue, but with the fullest belief that he actually knows it; the jury may be satisfied of the error, and of the uprightness of the witness, and are they legally compelled to reject other parts of the evidence of the same witness, which they fully believe?

Lydia Knight having an opportunity of knowing facts, not

within the knowledge of any other person, excepting the deceased, and the one who may have caused her death, she was called in behalf of the prosecution, with great propriety. In Regina v. Holden, 8 Car. and Payne, 606, which was a case of murder, Patterson, J., inquired why the daughter of the deceased, a child nine years old, was not called. It appeared that she was present when the fatal injury was produced, and that she was present in court. The counsel for the prosecution stated that her name was not on the back of the indictment, and that she was brought by the other side, and that he did not intend to call her. The judge then said "she ought to be called. She was present at the transaction. Every witness who was present at a transaction of this sort ought to be called, even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusion as to the real truth of the matter." The daughter of the deceased was examined.

The mother of the prisoner had made the statement of her knowledge of the transaction, which the counsel for the state insisted was founded in mistake, in some particulars, as shown by other facts and circumstances in the case. The evidence tending to show the mistake of the witness being properly before the jury is the subject of legitimate argument.

11. The jury were instructed that "where the killing is unlawful, and neither express or implied malice exists, the crime is reduced from murder to manslaughter. But in all cases where the unlawful killing is proved, and there is nothing in the circumstances of the case as proved, to explain, qualify or palliate the act, the law presumes it to have been done maliciously; and if the accused would reduce the crime below the degree of murder, the burden is upon him to rebut the inference of malice, which the law raises from the act of killing, by evidence in defence."

The doctrine enunciated in these instructions has been much examined by courts of the highest standing, and jurists of great respectability, within a few of the last years. Uncom-

mon learning, research, and power of ratiocination have been exhibited in support of the principle; and those who have denied its soundness have maintained the denial in arguments of distinguished ability and force. An attempt to discuss the question again cannot be expected to throw much additional light upon it. The instruction is a doctrine of the English common law, of Massachusetts, as recognized in the case of Com. v. Knapp, 9 Pick., 496; Com. v. Knapp, 10 Pick., 484; Com. v. York, 9 Met., 93; Com. v. Webster, 5 Cush., 82. It is not known to have been denied by courts of this state, but it has been expressly admitted, and the jury instructed accordingly by this court, sitting as a full court in State v. Sager, in the county of Kennebec, in the year 1834; in State v. Varney, in the county of Penobscot, in 1845, and in State v. Cripps, in the county of Sagadahoc, in 1855, none of which are reported in the Maine Reports, but distinctly recollected. The instruction given, having the weight of authority in its support, and not having been satisfactorily shown to be erroneous, is sustained.

12. Exceptions are taken to the remark of the presiding judge, that "where men are found to keep silence when they are surrounded by circumstances of suspicion, which require explanation, or give false explanation, or attempt to induce others to relieve them by falsehood and perjury, inferences necessarily arise prejudicial to them." Whatever conduct of a person creates suspicion against him in the minds of those knowing his conduct, or informed thereof, must be to his prejudice. The two propositions are substantially identical. If explanation will overcome the unfavorable suspicions, it will at the same time subdue the prejudice.

The remark was rather a maxim in morals than any rule in law, which could operate injuriously to the prisoner. It was general, and in it no legal error is perceived.

13. No particular ground for the exception to the general remark of the presiding judge, touching circumstantial evidence is pointed out in the argument by the prisoner's counsel, though it is said that "it seems to the counsel, that the

rules for ascertaining truth from circumstantial evidence are colored, and their efficacy as a guide to right results, is greatly overstated, and that, too, in a manner calculated to mislead the jury." The opinions of the judge thus expressed, and thought objectionable in law, are not subject to exception.

14. The case finds, that the counsel for the prisoner relied upon the want of proof of his foot-prints over the ground, between the heater piece and his house, a space of one mile and ninety-two rods. The jury were instructed that they must try the cause by the evidence *in* the case, and not by that which is *out* of it. And they were further instructed, that they must determine whether the evidence before them gave them reasonable satisfaction. If sufficient, they were not to say "we will not find a verdict because other evidence had not been produced." No error is perceived in this. When evidence is introduced which produces full conviction in the mind, of the truth of the proposition attempted to be established, it is difficult to perceive that the omission to introduce further proof of facts, which may or may not exist, and which, if adduced, might be corroborative of that already before the jury, can cause doubt.

The subsequent remark connected with the same subject, that "if the absence of such proof throws an insurmountable barrier in your way, then the hypothesis of the government fails," is not deemed erroneous, when viewed with the evidence, and all that was said in the instructions upon this point. The prisoner's counsel gives to the language of the judge an erroneous interpretation, when he holds it to mean, that it does not allow the jury to acquit the prisoner unless the absence of proof of the foot-prints throws an insurmountable barrier in the way "of the conclusion of his guilt." The government attempted to sustain the charge in the indictment by a connected train of circumstances. If the train was absolutely broken, so that the separate parts were insufficient to produce satisfaction in the minds of the jury, the hypothesis was not sustained. The prisoner relied upon the want of

evidence of his passage over the ground indicated by his foot-prints between his house and the heater piece. The hypothesis of the government was, that the prisoner did pass over this ground, and relied upon other evidence than his foot-prints for proof of that fact. The judge suggested for the consideration of the jury circumstances which might or might not account for the want of this proof, after the prisoner was suspected of an agency in the death of his wife, consistently with the fact, that he did pass over this ground, and adds in the language quoted. It is quite manifest that he designed to say, that if the effect of the evidence of the government on this point was so weakened, from the want of proof of the foot-prints, that they were not satisfied that he passed over the ground between the heater piece and his house, or in other words, caused a reasonable doubt of this fact, this position of the government was left without support by the evidence.

15. The instruction that "it does not necessarily follow, that because Lydia Knight was present, but did not observe the manner or time of death, that it did not occur; there is a distinction between positive testimony and negative testimony," is held not to be erroneous. It was not disputed that Mary Knight was dead, or that she came to her death at the time assumed by the government. Lydia Knight's testimony shows that she must have been present when the death occurred. But she did not know that the deceased died at a time when she was so present, and she could not have known by what agency death took place. This is purely negative, and does not necessarily overthrow positive evidence, which tends to show that the death took place at a certain time, during which Lydia Knight was present. We perceive no legal ground for the exception to this instruction.

16. The judge remarked to the jury, "if you come to the conclusion that Mrs. Knight did not commit suicide, but was killed by the hand of another, that other hand must in some way have come in contact with her. What person had the most favorable opportunity to perform this act," &c. This is

regarded by the prisoner's counsel as an absolute denial of the rule of law, that all the facts should be consistent with the hypothesis set up by the government. The judge herein stated no rule of law, nor denied any legal proposition whatever. The attention of the jury was called to certain matters of fact for their consideration, without any reference to the law, which had been stated or which was stated afterwards. The government had attempted to satisfy the jury by circumstances, that if the death was caused by an assassin, that the prisoner had the most favorable opportunity to inflict the fatal wounds; that he had a motive to do it; that he had the means and facilities with which to accomplish it, &c., and the judge asks in view of the circumstances adverted to, whether they all point in one direction, and whether they are of such a character as to exclude to a moral certainty, and beyond all reasonable doubt, every other hypothesis, except that of the guilt of the prisoner? These remarks were not legally objectionable.

17. The judge was requested to instruct the jury, "that to convict the prisoner upon evidence of circumstances, it is necessary, not only that the circumstances all concur to show that he committed the crime, but that they all be inconsistent with any other rational conclusion. The instruction was not given upon the request. A judge, when called upon, is bound to give instructions in law which are applicable to the evidence in the case; but he is not bound to give them in the language used by the counsel making the request, nor to repeat them when requested, if once given.

In his general instructions to the jury, the judge had said to them, that the prisoner was "entitled to the presumption of innocence until it is overcome by legal testimony. That testimony, in all its material facts, must be consistent with his guilt. If there is any substantial circumstance proved, which cannot exist consistently with his guilt, it acquits him. If, on the other hand, the circumstances are all consistent with his guilt, if they conclusively tend to prove his guilt, and are of a character to exclude all reasonable doubt that the

crime could have been committed by any other person, and if you are satisfied beyond all reasonable doubt, that the fatal wound was not inflicted by the deceased herself, but was inflicted by the prisoner; if the government have proved all this, they have done all that they were required to do, and are entitled to a verdict at your hands. If they fail to do this, the prisoner is entitled to a verdict of acquittal." These instructions, and others of similar import to that requested, were as full as that requested upon the point we are considering, and were as favorable to the prisoner as he could legally claim.

18. The court declined to instruct the jury as requested, that no conviction in a criminal case ought ever to take place on circumstantial evidence, when the government has introduced direct evidence, tending to show that the prisoner could not have committed the crime charged. No authority is cited, and none has been found in support of this doctrine. If the whole circumstantial evidence should satisfy the jury beyond all doubt, of the guilt of the accused in a case wherein a witness called for the prosecution had made a direct statement of a fact, tending in a slight degree to show his innocence, and the jury were satisfied that the witness was mistaken in that statement, to give it the effect contended for would overthrow the established rule that a party is not concluded by testimony against him of his own witness, and would allow this statement while believed by the jury to be founded in mistake to have absolute control, so that the most convincing proof of guilt would be arbitrarily nullified thereby. This cannot be admitted.

The instructions which appear by the bill of exceptions to have been next requested, are similar in principle to those just considered, and the same reason for their refusal will apply.

19. The instruction requested in relation to the distinction which the government attempted to show between human blood, and that of other animals named, involved no question of law, and was properly refused.

20. Another request for instructions, made in behalf of the prisoner, and refused, was, that the distinction between positive and negative testimony, is applicable to direct testimony, and cannot be applied to circumstantial evidence when placed in direct conflict with positive testimony. Circumstantial evidence is composed of facts equally with that which is denominated direct. It consists of proof, which applies immediately to collateral facts supposed to have a connection near or remote with the fact in controversy, while the latter consists of proof applicable immediately to the fact in issue, to be shown without any intervening process. Satisfactory proof is required for the establishment of the facts relied upon in both species of evidence. The distinction invoked has no legal foundation.

Upon the fullest consideration we have been able to give to the numerous questions involved, and which have been relied upon in argument, some of which are of great importance in themselves, and all are of momentous interest to the prisoner, we have come to the conclusion that the exceptions must be overruled; judgment on the verdict.

RICE, APPLETON, CUTTING, MAY, and DAVIS, JJ., concurred.

NOTE.—For the convenience of counsel for the defendant, and by consent of the attorneys for the government, this case was heard in the middle district, and determined by the judges who there presided.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE LEWISTON FALLS BANK *versus* ARTEMAS LEONARD.

1. A notarial certificate that he "exhibited the note at the place of business of the promissors and demanded payment thereof, was answered by the person in charge, that the promissors had left no funds there to pay said note, and that said note remaining unpaid, he duly notified the endorsers by written notices, sent them by mail, and that this was done at the request of proper authority, the time limited and grace having expired," affords reasonable inference that he stated substantially these facts in the written notices which he sent.

2. Notwithstanding the actual residence of the endorser of a note at the time he endorsed the note in suit, and at the time it became due, was in a place other than that to which notice of its dishonor was sent: yet if he held himself out to the public as a resident of the latter place, and thereby deceived the holder, and led him to change his course, and send the notice to that place he is estopped to deny the fact.

REPORTED by MAY, J.

This is an action of assumpsit against the defendant as endorser of a promissory note, made by the Maine Carpet Company, and signed by E. E. Rice, Treasurer, for $5000,00, dated at Boston, on the twelfth day of March, 1856, payable to Rufus K. Page, or order, in four months after date, and by him endorsed in these words: "Pay the order of A. Leonard," and by the defendant endorsed in blank; also endorsed by Albt. H. Small, Cash'r, in these words: "pay C. H. Warner, Cashier, or order." The writ is dated the twenty-ninth day of July, A. D., 1856.

The plaintiff offered in evidence the note in suit, also the notarial certificate of protest and notices of non-payment of the note, signed by A. Bates, Notary Public, dated at Boston, the 15th day of July, 1856; which were read to the jury.

The plaintiffs called Albert H. Small, who testified that he is cashier of Lewiston Falls Bank, and has been cashier for three and a half years last past; that he recognized the note in suit as one discounted at the Lewiston Falls Bank; that after the note was discounted, he forwarded it to the Bank

of Commerce, in Boston, the correspondent of the Lewiston Falls Bank, for collection; that the day after it fell due he received notices to himself, and one to each of the other endorsers, from Adolphus Bates, Notary Public, of its non-payment, and requiring payment; that he immediately enclosed the notices to the several endorsers, directed to them, in separate envelopes, and deposited them in the post office in Lewiston, paying the postage; that he deposited the notices in the post office the same day he received them, he should judge within ten minutes after he received them, and directed the notice to the defendant, to Hallowell, Maine; that he directed the notice to defendant to Hallowell, because he believed that to be his place of residence, and that he made no inquiries as to defendant's place of residence after receiving the notices. He further testified, that he had known defendant by reputation, for ten years, as a prominent business man in the town of Hallowell; that he had information that defendant was of Hallowell from E. E. Rice, Treasurer of the Maine Carpet Company, and from other business men in that vicinity; that at the time the note was discounted, in conversation with E. E. Rice, Treasurer of the Maine Carpet Company, he understood him to say that defendant was of Hallowell, and President of the Bank of Hallowell; that Rice took the money on this note, but did not negotiate it. It was negotiated by Mr. Alden Sampson. Mr. Rice brought the note to the bank and had it discounted. He (Rice,) spoke of defendant as of Hallowell, in contra-distinction to *Silas* Leonard, of Augusta.

Daniel Holland, called by the plaintiffs, testified that he is president of the Lewiston Falls Bank, and was president of said bank at the time the note in suit was discounted; that he saw E. E. Rice, Treasurer of the Maine Carpet Company in the bank at the time this note was discounted; that he has been president of Lewiston Falls Bank since October, 1854; that he was acquainted with defendant only by reputation; that he had seen the man; that at the time the note was discounted he learned from E. E. Rice that defendant was a

prominent business man in Hallowell, and always had been, and was president of the Bank of Hallowell; that after the note in suit was discounted, and before it was dishonored, he had other information that defendant was resident of Hallowell, aside from that obtained from Rice; that he communicated such information to Mr. Small, the cashier.

Alden Sampson, called by plaintiffs, testified that he resides in Manchester; that Manchester was formerly a part of Hallowell; that his manufacturing business is in Manchester; did his bank business in Hallowell; that he is a stockholder in Lewiston Falls Bank, and a director in the Northern Bank in Hallowell, and had done his banking business in Hallowell for fifteen or twenty years; knows defendant and has known him for twenty years and upwards; so far as he knew, defendant had always resided in Hallowell; had resided there since he had known him; that he had never done business with defendant since he had been president of the Bank of Hallowell; had been in habit of visiting village and now city of Hallowell, on an average of twice a week; that he knew many of the business men of Hallowell, and defendant among the rest; that he negotiated the note in suit, think in February, 1856, and represented Artemas Leonard, (the defendant,) as president of the Bank of Hallowell; the Bank of Hallowell is in Hallowell; thought defendant had spent a portion of the winters in New York for four or five years; that he learned within four weeks, for the first time, that defendant was not president of the Bank of Hallowell; that he never knew defendant to spend any summer in New York, until last summer; that he has not had any intimate business relations with defendant for the last few years, and did not know what Mr. Leonard had been in New York for; that to the best of his knowledge defendant has been in Hallowell summers, except the last summer, and thought that defendant had not been absent from Hallowell for an entire year before last year.

A. S. Washburn, called by plaintiffs and testified: that he is cashier of the Bank of Hallowell, and has the custody of

records of bank; that at organization of bank, defendant was elected director and president of the Bank of Hallowell; that defendant was a stockholder in the Bank of Hallowell. He had no agent in Hallowell, to his knowledge, except that Mrs. Hill, his daughter, resided there; that defendant has signed some bills of Bank of Hallowell since he has been in New York; that he had sometimes taken letters from the post office in Hallowell, addressed to defendant; had transacted business for him as cashier; knew defendant's box in post office, and Mrs. Hill has occupied it; but did not know whether that box had been in her name or not. Bills for postage, and rent of box in post office, have been made out to defendant and sent into bank for payment, and that he paid them.

Deposition of C. L. Hill read by defendant, in which she says: "I reside in Hallowell, and am the daughter of Mr. Artemas Leonard. Mr. Leonard now lives in the city of New York. He has lived there since the first part of the year 1853. I have taken some letters from the Hallowell post office and sent them to him; some I have taken and have not sent to him." "He boarded with a family in New York." In answer to the following question by plaintiff's attorney, "What kind of letters was it that you received and did not forward to your father?" she answered, "Notices from the Lewiston Falls Bank. I have them in the house now."

The case was taken from the jury by consent, and reported to the full court with power to draw such inferences as a jury might, and who are to enter such judgement upon so much of the foregoing testimony as is legally admissible, as the law may require.

Morrill & Fessenden, counsel for plaintiff.

The main question that has been raised in this cause is, whether sufficient notice has been given to the defendant of the dishonor and non-payment of the note in suit, and whether due and reasonable diligence had been used to give it.

The mercantile law, regulating the liabilities of parties to notes and bills, does not require actual notice of dishonor to

an endorser, in order to charge him, but reasonable care and dilligence in giving such notice; each case must stand on its own peculiar circumstances, there being no universal rule on this subject, and when such dilligence is unsuccessful it will excuse want of notice. The law prescribes no specific mode of enquiry; and it is sufficient if any mode be resorted to, which, under the circumstances of the case, is characterized by reasonable dilligence. Hartford Bank v. Stedman and Gordon, 3 Conn. R., 489; Hill v. Varrell, 3 Maine R., 233; Chouteau v. Webster, 6 Met. R., 1; Bayley on Bills, 280; Story on Prom. Notes, 367, 368, 369, and 370, and in note on page 414; Clark v. Bigelow, 16 Maine R., 246.

The law does not presume that the holder of negotiable paper is acquainted with the residence of an endorser thereon. U. S. Digest, vol. 2, supplement, p. 625; Eagle Bank v. Chapin, 3 Pick., 180.

The testimony in the case shows that sometime in February, 1856, Alden Sampson applied to Daniel Holland, the president of the Lewiston Falls Bank, (the plaintiffs,) to discount the note in suit. Subsequently, in March following, E. E. Rice, Treasurer of the Maine Carpet Company, by whom the note was signed for said company, presented it for discount, and it was discounted. The note when so presented, had been transferred by Rufus K. Page, the payee, by a special endorsement, to Artemas Leonard, the defendant, and by Leonard endorsed in blank. At the time the money was paid over to Rice, by the plaintiffs for the note, he informed not only Holland, the president of the bank, but also Albert H. Small, the cashier, that the defendant was of Hallowell, and President of the Bank of Hallowell, and spoke of him in contra-distinction to Silas Leonard, of Augusta. And it further appears by the testimony, that both Holland and Small had other information, obtained from persons residing in that vicinity, between the time when the note was discounted, and the time when it fell due and was dishonored, that defendant was a resident of Hallowell, and that the plaintiffs supposed and believed that the defendant resided in that

town, and had no knowledge that he ever removed from there, or pretended that his residence was in any other place; and this information was obtained from Rice, who was a party to the note, and at the very time it was discounted, and who must be regarded as the special agent of the defendant for completing the transaction of negotiating the note, which had been commenced by Sampson. And the note being placed in Rice's hands for that purpose by the defendant, whose property it was, it is contended by the plaintiffs that what ever representations, declarations and admissions he (Rice) made to the officers of the bank, at the time it was discounted, respecting the place of residence of the defendant, would bind him; because such representations, declarations, or admissions, relate to and constitute a part of the res gestæ, and because the plaintiffs dealing with Rice, standing in the relation he then did to the defendant, are to be considered as dealing with the defendant himself. Story on Agency, 4th ed., pp. 134, 135-139; Greenl. Ev., vol. 1, p. 125.

And further the plaintiffs say, that under all the circumstances of this case, as appears by the testimony, they have used all that care and diligence which the law requires of them in communicating the notice to the defendant, and were excused from making any further inquiries for the residence of the defendant, and that the notice given is sufficient to bind him.

The testimony in the case shows that the note in suit was endorsed by Albert H. Small, in his capacity of Cashier of the Lewiston Falls Bank, and sent to the Bank of Commerce, in Boston, their (plaintiffs') correspondent, for collection, and that when it fell due, notices to himself and to the other endorsers, were sent to him under the same cover, within the time prescribed by law, and that he, the same afternoon he received them, enclosed the notices to the defendant and Page, in separate envelopes, directing the one for the defendant to Hallowell, Maine, and deposited it in the post office in Lewiston, paying the postage. And the attention of the court is asked to the facts proved, that the defendant

had at that time, a box in the post office in Hallowell, standing in his name; that letters were frequently received there for him; the bills for postage and rent of the box were invariably made out in his name, and paid by Mr. Washburn for him, and that, too, as late as the month of April last, and he never notified the post master that he did not wish to occupy the box any longer; that Mrs. Hill was accustomed to take out his letters and forward them to him, and the notices from the Lewiston Falls Bank were received there by her, and retained in her possession. The plaintiffs say that sending the notice by post, directed as it was, was a proper mode, and sufficient to bind the endorser, even if the party to whom it was directed can prove that he never received it. Bayley on Bills, chap. 7, sec. 2, p. 275; also note 116 on same page. Story on promissory notes, pp. 408, 409, 412, 413, 414, 415, and in note on the five last named pages; 2 Greenl. Ev., note on p. 156.

The plaintiffs cannot be said to have remained in a state of passive and contented ignorance relative to the residence of this defendant, for, as has been stated, they had information directly from Rice, who was not only a party to the note, but was in fact the defendant's agent, voluntarily given, and that too, as an inducement to the plaintiffs to take the note, but also other information obtained from persons in the vicinity of Hallowell, that the defendant did reside in Hallowell, and it was reasonable for the plaintiffs to suppose that such was his place of residence, at the time of the making and dishonor of the note. And there is no evidence in the case that the plaintiffs knew or had any reason to believe, or ever supposed that he had any other place of residence than that; but, on the contrary, they thought and believed, and had every reason to believe, not only from the representations of Rice and Sampson, but also from common report, and the reputation which the defendant had of being a prominent business man in the town of Hallowell, that such was his place of business and residence. And further, they had every reason to believe that such was his residence from the acts

and conduct of the defendant himself. The evidence in the case discloses, that for a long period of time before, at the time of the making, negotiation, and dishonor of the note, the defendant had been, and was, a director in, and president of the Bank of Hallowell, which is in Hallowell, having been elected the last time in October, 1855, and acting in that capacity up to October, 1856, which was after the dishonor of the note, and never resigned his office as such, and during all that time he performed some, if not all the duties required of a person holding such an office. R. S., p. 751; Act of Amendment of 1841, chap. 1, sec. 4.

And it is a well established principle of law, if upon diligent inquiries, information is obtained of the residence of the endorser in a place where he does not at that time actually reside, and notice is directed accordingly to that place, it will be sufficient to bind the endorser.

The plaintiffs contend that if, under all these circumstances, it is found, or appears that they were actually ignorant of defendant's residence, yet acting as they did under the information which they had, that he was a resident of Hallowell, obtained in the manner it was, they have used sufficient care in ascertaining defendant's place of residence, and in communicating the notice, and that he should be held under the notice already given. Bayley on Bills, 2d Am. ed., chap. 7, sec. 2, pp. 282, and note 125, on same page—283, 284, and note b, on p. 284; Story on promissory notes, pp. 368, 369, 418; Bank of Utica v. Davidson, 5 Wendall, 587; Chapman v. Lipscombe, 1 Johns., 294—this case is referred to in Hill v. Varrell, 3 Maine R., 233, 237.

It has been held that parties may be, and frequently are so situated that notice may well be given at either of several places, and while, in such cases, the holder is in duty bound to use due diligence in communicating such notice, it is not required of him to see that the notice is brought home to the party. Bank of Columbia v. Lawrence, 1 Peters Sup. Ct. R., 582; this case is noticed in Story on promissory notes p. 364.

The plaintiffs contend that under all the circumstances and facts shown in this case, and the law cited, they were justified in sending the notice to the defendant in the manner, and to the place they did send it; and that the defendant should be held liable as an endorser, and that they are entitled to judgment in this case, for the amount of the note and costs.

Record and *Walton*, counsel for defendant, argued,

1. That the notice which the plaintiffs undertook to give was defective and insufficient to charge the defendant, if he had received it, and cited 3 Kent's Com., 108; Gilbert v. Dennis, 3 Met, 495; Nailor v. Bowie, 3 Md. R., 251. That its purport simply was, that the note *remained unpaid*, and payment of the endorsers thereof *required;* and that such notice does not assert or imply that the note had been dishonored.

2. That between the allegation and proof there is a fatal variance; the one alleging notice to the defendant, of nonpayment and dishonor of the note, the other showing that no such notice was sent to his place of residence. Hill v. Varrell, 3 Maine R., 233; Harris v. Richardson, 19 Eng. Com. Law R., 506.

To the general rule of law, that in an action against the endorser of a promissory note, it is necessary for the plaintiff to prove that the *defendant had due notice of the dishonor of the note*, there are some exceptions, one of which is, that if, *after diligent inquiry*, he cannot find the residence of the endorser, or mistakes it, the remedy is not lost. 3 Kent's Com., 107. Mr. Greenleaf invariably uses the same form of expression—*diligent inquiry*, vol. 2, 180–195; Whittier v. Graffum, 3 Maine R., 82—"*diligent inquiry* and search would have been sufficient;" Porter v. Judson, 1 Gray, 175—no sufficient evidence of *diligent inquiry*.

In the case at bar the defendant has never had notice of the dishonor of the note in suit. The plaintiffs seek to excuse themselves upon the ground of ignorance and mistake in supposing his residence at Hallowell, without showing

that they made diligent inquiry, to find it. Was not the mistake the result of negligence which *diligent* inquiry would have corrected?

What evidence will satisfy the court of *diligent inquiry?* Granite Bank v. Ayers, 16 Pick., 392; Pierce v. Pendar, 5 Met., 352; Wheeler v. Field, 6 Met., 290; Phipps v. Chase, 6 Met., 491; Porter v. Judson, 1 Gray, 175, before cited; Barker v. Clark, 20 Maine R., 156; Hill v. Varrill, 3 Maine R., 233; Firth v. Thrush, 8 B. and C., 887. The acts of the plaintiffs fail entirely to show due diligence.

GOODENOW, J.—This is an action of assumpsit against the defendant, as endorser of a promissory note, of which the following is a copy:

Dolls. 5000. BOSTON, March 12th, 1856.

Four months after date, we promise to pay to the order of Rufus K. Page, five thousand dollars, value received, for Maine Carpet Company. E. E. RICE, Treas'r.

This note was endorsed by Page in these words: "Pay to the order of A. Leonard," and by the defendant endorsed in blank; also endorsed by Alb't H. Small, Cash'r, in these words: "Pay C. H. Warren, Cashier, or order."

The plaintiffs offered in evidence the note, also the notarial certificate of protest, and notices of non-payment of the note, signed by A. Bates, Notary Public, dated at Boston, July 15, 1856.

The defendant contends that the notice which the plaintiffs have undertaken to prove, if duly sent or received, is defective and insufficient; that it does not state that the note has been *dishonored,* or state facts from which *its dishonor* might reasonably have been inferred.

The Notary states what he did do; that he exhibited the note at the place of business of the promissors, in Harrison Avenue, and demanding payment thereof, was answered by the person in charge, that the promissors had left no funds there to pay said note, and that said note remaining unpaid, he duly notified the endorsers by written notices, sent them

by mail, &c.; and that this was done at the request of the cashier of the Bank of Commerce, on the 15th day of July, 1856, the time limited and grace having expired.

It may be reasonably inferred that he stated substantially these facts in the written notices which he sent. By R. S., chap. 44, sec. 12, the protest duly certified by a notary public, under his hand and official seal, shall be legal evidence of the facts stated in such protest, as to the same, and also as to the notice given to the drawer or endorser, in any court of law. In Bradley v. Davis, 26 Maine, 50, Mr. Chief Justice Whitman says, "It is not stated in the statute that such certificate shall be conclusive evidence of those facts;" all that was stated in the notarial certificate in this last named case, after stating the demand, &c., was, "I then notified the maker and endorser of the non-payment of said note," and the court say, "we have no reason to doubt that the notice contained all that it was essential that a notice should contain; and that it contained information that the note had been protested for non-payment." In the case at bar, if the notice had, in part, been deficient in any important respect, it might easily have been proved by the defendant, as his daughter, Mrs. Hill, stated in the deposition taken by him in this case, that she had the notices in her house at the time the deposition was given. This case differs from those cited, where the notices were actually produced, or the exact terms of them proved or admitted, by which their inefficiency was conclusively established; as in the case, Gilbert v. Dennis, 3 Met., 506, and 9 Met., 174.

The next and most important question in this case is, was the notice to the defendant rightly directed and sent to him at Hallowell? He contends that his residence at the time the note was protested was in the city of New York, and that notice should have been sent to him at that place, instead of Hallowell.

There is nothing on the note to indicate the residence of the defendant. It is dated at Boston. Rufus K. Page was a prominent business man in Hallowell. The defendant had

been, for many years, a resident of Hallowell, a prominent business man there, and a director and president of the Hallowell bank. The plaintiffs were in Maine.

The defendant contends that in January 1853, he transfered his residence from Hallowell to New York, and that he has had no residence in Hallowell since that time, but that his residence has been in the city of New York.

When the note was negotiated by Alden Sampson, he represented to the plaintiffs that the defendant was president of the Bank of Hallowell, in Hallowell. Daniel Holland, president of the Lewiston Falls Bank, testified that at the time the note was discounted, he learned from E. E. Rice, that the defendant was a prominent business man in Hallowell, and always had been, and was president of the Bank of Hallowell.

The defendant testified that he removed from Hallowell, in the month of January, 1853, to the city of New York, and that he has ever since had his residence there. A. S. Washburn, cashier of the Bank of Hallowell, testified that there had been no new bills issued from the Bank of Hallowell since 1854; that he "thought there were bills of that bank, dated as late as the winter of 1854, over the signature of the defendant, and issued by witness, as cashier;" "that the defendant had signed some bills of the Bank of Hallowell *since he had been in New York.*"

By the records of the Bank of Hallowell, it appears that at the annual meeting of the stockholders, held October 9th, 1855, the defendant was chosen one of the directors of the bank, and is the first person named on the list, and the second person named is R. K. Page. In January 1853, the defendant was elected president of the Bank of Hallowell, by the directors, and not since. He held the office of director of the bank until October 1856. He never made any formal resignation as director, at any time. He was not re-elected a director in October, 1856.

Thomas W. Newman testified that he was and had been post master at Hallowell since the first of May 1853. That the defendant has had a box in the post office at Hallowell,

which has been marked and known as the box of Artemas Leonard, during all that time; that all letters directed to Artemas Leonard, or Mrs. Hill, his daughter, have been put into that box. That the bills have been made out in the name of the defendant, and have been paid by Mr. A. S. Washburn, cashier of the bank.

By the statute of this state, on banks, chap. 77, sec. 4, it is provided that none but a stockholder in such bank, and a citizen of and *resident in the state*, shall be eligible by the stockholders to the office of director. Men are presumed to know the law; and it is not to be presumed that the stockholders of this bank, and the defendant, or either of them, intended to violate it, in their management of this institution. Will it be said that he was chosen a director of the bank, after his removal from the state, without his knowledge and consent? This, to us, seems improbable. Besides, it is satisfactorily proved that he acted as president of the bank, and signed bills as such, after his alleged removal to New York. Every bill signed by him, and put in circulation after January, 1853, was notice to the public, that, at the date of the bill his residence was in this state; and it is not contended that he had a residence at any other place in the state, if he had none in Hallowell. The defendant does not state that he has, or ever had a place of business in New York, that he ever kept house there, or voted or paid taxes in that city. He might have had a temporary residence there, for the purpose of avoiding taxation in Hallowell; or he might have supposed by residing in New York, he could give a wider circulation to the bills of the bank; or he may have desired to have the place of his residence uncertain and equivocal, in order to avoid his responsibility as an endorser.

Notwithstanding his actual residence was in the city of New York at the time he endorsed the note in suit, and at the time it became due; yet, if he held himself out to the public, or allowed others to hold him out to the public as a resident of Hallowell, and thereby deceived the plaintiffs,

and led them to alter their course, he is in the same category with one who holds himself out as a partner of others, when he is not such in fact. He is estopped to deny the fact.

We cannot avoid the conclusion that if the defendant did not receive due notice of the protest for non-payment of the note in suit, it was because he did not wish to receive such notice. It was his own fault.

The notice was duly deposited in the post office, directed to him at Hallowell. It came into the hands of his daughter, Mrs. Hill. In answer to the question, "Since 1853, have any letters been received at the Hallowell post office for your father, and if so, what became of them?" she says, "I have taken some of them and sent them to him; some I have taken and have not sent them." Subsequently the inquiry is made of her, "What kind of letters was it that you received and did not forward to your father?" She answered, "Notices from the Lewiston Falls Bank. I have them in the house now." She says, subsequently, "My father did not ask me to send them." She does *not* say that she was not instructed by her *father not to send them.* It would have been very natural for her to have forwarded the notices to her father, after having ascertained what they contained, unless she had, in some way, intimations from him not to do so, but to retain them. We are to draw such inferences in this case, as a jury might draw. It seems to us a question of fact, rather than a question of law. The fact seems to be established, that the defendant has actually resided in the city of New York, most of the time since January 1853, till the present. That since that time, he has held himself out, or allowed others to hold him out, as a resident in this state, by permitting himself to be chosen a director of the Bank of Hallowell, and president of the same, and acting as such by signing its bills. That the plaintiffs were led by these circumstances communicated to them, to believe that his residence was in Hallowell, at the time the note in suit was endorsed, and at the time it was protested for non-payment, and that they acted accordingly. They might well

have supposed, from all the facts and circumstances known to them, that his permanent residence was still in Hallowell, and that a notice directed to him at Hallowell would be more likely to reach him through the post office, than if directed to him at the city of New York.

We are of opinion that the plaintiffs have used due diligence in order to give the defendant notice of the non-payment of the note when it became due and payable, and that according to the agreement of the parties, *a default must be entered.* If it should be supposed that proof of depositing notices in the post office, directed to the defendant at Hallowell, and received by his daughter, Mrs. Hill, is not equivalent to actual notice, and therefore does not sustain the allegation in the writ, of actual notice, the plaintiffs may have leave to amend, by alleging the use of due diligence on their part, in order to give notice.

MAY and DAVIS, JJ., concurred in the result.

PATRICK O'DONNELL *versus* WILLIAM H. LEEMAN.

No action can be maintained upon a memorandum of an auctioneer of the sale by him of real estate, unless such memorandum within itself or by reference to some other paper shows all the material conditions of the contract.

Hand-bills and newspaper notices signed by the defendant and published by him just before the sale, and exhibited at the time in which the terms of sale are fully stated, cannot be received as evidence in aid or explanation of an imperfect memorandum.

Where no terms of payment are stated in a contract, the money must be paid within a reasonable time, but there is no rule that money payable in a reasonable time, can, at the election of the party paying, be divided so as to make it payable at different times, and in different years.

ON EXCEPTIONS to the rejection of evidence and order of nonsuit by MAY, J., presiding at *Nisi Prius.*

This is an action to recover damages for an alleged breach of a contract, as follows:

"Oct. 9, 1855. This day sold W. H. Leeman house and land on Bartlett street, in Lewiston; was struck down to Patrick O'Donnell for $1200, one third cash down."

HAM BROOKS, Auctioneer.

C. W. Goddard and *P. R. Guiney* for plaintiff.

1. The memorandum of the auctioneer is sufficient to satisfy the statute of frauds. Chitty on contracts, p. 305.

2. In the sale of lands at auction the auctioneer is the agent of both parties. Cleaves v. Foss, 4 Maine R., 1; Alna v. Plummer, 4 Maine, 258.

3. His authority need not be in writing. Alna v. Plummer, 4 Maine R., 258.

4. The memorandum of the auctioneer is sufficient. It states the terms of the contract, the parties thereto, and a description of the property sold.

5. If the memorandum is not so full as would be desirable, the plaintiff should have the benefit of a reasonable, fair, and liberal construction. Chitty on contracts, pp. 76, 79, 80, 82, 84.

6. Contracts should be construed so as to give effect to the intent of the parties. Note 1, Cobb v. Fountaine, 3 Randolph, 487; Chitty on contracts, p. 110.

J. Goodenow for defendant.

MAY, J.—The declaration in this case alleges a contract in writing, of a sale from the defendant to the plaintiff, of a dwelling house at auction, upon certain specified terms and conditions. According to the contract alleged, the price to be paid was twelve hundred dollars; one third cash down, and the residue in equal payments, in one and two years. The memorandum of sale, as contained in the auctioneer's book, is as follows:

"Oct. 9, 1855. This day sold W. H. Leeman house and land on Bartlett street, in Lewiston; was struck down to Patrick O'Donnell for $1200, one third cash down."

HAM BROOKS, Auctioneer.

That the auctioneer in cases of such sales, whether of real or personal estate, is the agent of both parties; and that a memorandum signed by him at the time of the sale, stating the particulars of the contract, and the parties thereto, is a sufficient signing within the statute of frauds, is well settled. Emerson v. Hulis, 2 Taun., 46; McCoomb v. Wright, 4 John. Ch. R., 666; Chitty on contracts, 305; Cleaves v. Foss, 4 Maine R., 1; Alna v. Plummer, 258.

It is equally well settled that unless there be a memorandum showing, within itself, or by reference to some other paper, all the material conditions of the contract, no action can be maintained upon such contract, either at law or in equity. Sales at auction are now held to fall within the statute; as much so as other sales. Pike v. Balch et. al., 38 Maine R., 302. Merrill v. Classon, 12 Johns. R., 102; Bailey et. al. v. Ogden, 3 John. R., 309; Morton v. Dean, 13 Met. R., 385; and it cannot well be doubted that evasions of this statute, made as it was for the suppression of perjury, ought not to be encouraged.

The memorandum in this case contains no reference to the condition of the payment, except in the words, "1-3 cash down." It does not appear from it when the residue was intended to be paid. It was attempted at the trial to show the terms of payment to be as alleged in the writ, by the introduction of certain handbills and newspaper notices, signed by the defendant, and published by him just before the sale, and which, it is said in argument, were exhibited at the time of the sale, and in which the terms of the sale, it is said, were fully stated. The evidence offered by the plaintiff to connect the handbills and notices with the memorandum, and to explain it, was excluded by the presiding judge.

That such extrinsic evidence was inadmissible the following authorities clearly show: 2 Parsons on contracts, p. 298; Hinde v. Whitehouse, 7 East., 558; the First Baptist Church in Itheca v. Bigelow, 16 Wend., 28; the Inhab. of the First Parish in Freeport v. Bartol, 3 Maine R., 340.

It is said, however, that if such evidence is not admissible,

then the contract, upon its face, as stated in the memorandum, stipulates for the payment of one-third cash down, and the residue in a reasonable time; and that if so, the notes tendered in this case, having been made payable in one and two years, should be deemed a compliance with the terms of the contract in this respect. Considering the nature and value of the estate to be conveyed, and that long credit is often, if not usually given in such sales, perhaps a somewhat extended time of payment might be regarded as reasonable; but we know of no rule by which money that is made payable *in a reasonable time*, can, at the election of the party paying, be divided so as to make it payable at different times, and in different years. A reasonable time is indivisible; and the party to whom the money is payable, under such a contract, cannot be required to take it in separate payments, and at separate times.

The auctioneer's memorandum in this case failing to show any such contract as is alleged, so far as relates to the terms of payment, it becomes unnecessary to decide upon its sufficiency in other respects, or upon the admissibility of the other evidence offered. According to the agreement of the parties, the nonsuit must stand.

WILLIAM T. RICHARDSON *versus* DANIEL BEEDE, JR.

The case of receipts is an exception to the general rule that oral testimony is not admissible to vary or contradict a written instrument.

They may always be explained by oral testimony, although purporting to be in full of all demands.

At the trial of this action, which was brought on an annexed account, the defendant offered a receipt purporting to be in full of all demands, which the plaintiff was allowed by the Chief Justice presiding, being a witness for himself, to explain, by stating the circumstances under which it was

given. To this the defendant objected upon the ground that it was not competent for the plaintiff to vary or contradict the written receipt, except to show that it had been obtained by fraud or mistake. The verdict being for the plaintiff, the defendant excepted to the admission of the testimony.

Record and *Walton* for defendant.

Morrill and *Fessenden* for plaintiff.

Receipts are not in all cases conclusive. Rollins v. Dyer, 16 M. R., 475.

RICE, J.—Assumpsit on an account annexed to the writ.

During the trial the defendant introduced the following receipt from the plaintiff:

YARMOUTH, Nov. 6, 1854.

Received of Daniel Beede, Jr., sixty-five dollars in full of all demands. (Signed,) WILLIAM T. RICHARDSON.

The plaintiff being a witness for himself upon the stand, was asked by his counsel to state the circumstances under which the receipt was given.

To this the defendant objected, upon the ground that it was not competent for the plaintiff to vary or contradict the written receipt, except to show that it had been obtained by fraud or mistake; but the court overruled the objection and the plaintiff was permitted to testify.

So far as a receipt goes only to acknowledge payment or delivery, it is merely *prima facie* evidence of the fact, and not conclusive; and therefore the fact which it recites may be contradicted by oral testimony. 1 Greenl. Ev., p. 305.

The case of receipts is an exception to the general rule that oral testimony is not admissible to contradict or vary a written contract. They may always be explained by oral testimony. Brooks v. White and als., 2 Met., 283; Stackpole v. Arnold, 11 Mass., 27; Johnson v. Johnson, 11 Mass., 359; Rollins v. Dyer, 16 Maine R., 475; Wilkinson v. Scott, 17 Mass., 249.

The fact that this receipt purports to be in full of all demands, does not change the rule. The authorities cited by

the defendant's counsel are all adverse to his position on this point.

Exceptions overruled, and judgment on the verdict.

JESSE WADSWORTH *versus* EZEKIEL TREAT.

In an action of damages for assault and battery, where the act was wantonly done, the plaintiff may recover for the mental anxiety, public degradation, and wounded sensibility which an honorable man would feel, and which he suffered under such a violation of the sacredness of his person.

This is an action for assault and battery, for striking plaintiff in the face. Plea, the general issue, and comes before this court upon exceptions to the rulings of MAY, J., presiding at *Nisi Prius*.

The plaintiff introduced evidence tending to prove that on June 30, 1854, soon after defendant had settled with, and paid him the amount of a small execution, recovered in 1853, against the defendant, and in favor of Elijah Wadsworth, a son of plaintiff, the defendant struck plaintiff in the face, a violent blow, which was the injury complained of. The verdict was for plaintiff.

The defendant offered to prove, in mitigation of damages, that the original claim on which the judgment was recovered and execution sued out, was groundless, and that the action was commenced by the plaintiff, and that the defendant was prevented from making defence by inevitable accident; but it appearing that the claim declared upon in that suit originated in 1852, and that judgment was rendered in 1852, the court excluded the testimony.

"In assessing the damages, if you come to that," the court said to the jury, "you will look at the violence of the blow, and at the effects it produced. If any of the organs of the face were injured by the blow, if you find the blow was unlawfully given, so that they ceased to perform their ordinary

or proper functions, you will determine the extent of such injury, and the damages caused thereby, and this will depend in a great measure upon the value and use of such organs as were injured. The plaintiff may also recover for his loss of time and his expenses, properly expended in curing himself, so far as such loss of time and expenses were occasioned by the act complained of; he is entitled to be made whole in these respects.

"In cases like this, the plaintiff is not only entitled to recover for any actual injury received by the wrongful act of the defendant, but if you find that it was willfully and wantonly done, also for the mental anxiety, the public degradation, and wounded sensibility which an honorable man would naturally feel, and which he suffered, under such a violation of the sacredness of his person as you shall find in this case to have been inflicted by the defendant.

You will therefore look carefully at all the circumstances which give character to the transaction, and which attended and formed part of it, both those which aggravate, and those which mitigate it; that if you find that the blow was unprovoked, and that it was willfully given, then you are at liberty to regard that as one of the attending circumstances, attending the transaction and entering into it, to be looked at by you, in determining what damages ought to be rendered for the injuries received; but you cannot, in a case like this, allow vindictive or exemplary damages, or damages by way of punishment.

"The plaintiff, if he is entitled to recover, will not only be entitled to recover the damages which had already arisen when the action was brought, but all such as have arisen, or may hereafter arise, as the natural and direct consequences of the act.

"As to the pecuniary value of the rights of the plaintiff, which have been injured, and as to what is a reasonable compensation for the wounded feelings and indignity he has suffered, the law furnishes no mathematical rule by which

you can compute it, as you can interest upon a note, but leaves it wholly to the sound discretion of the jury to determine from the facts in the case."

The court also said, "the law is so careful of personal rights, and of life and limb, that even a slight touch of a man's person, in a wanton, willful, and insulting manner, is made an offence, and if you are satisfied that a blow has been struck in a willful, angry, or insulting manner, the plaintiff is entitled to some damages, unless the defendant has shown a justification." He said, also, that when a cause is shown calculated to produce a certain effect, and such effect is produced, and no other cause is shown to have produced it, that the jury would be authorized to attribute such effect to the cause shown.

To which rulings, decisions, and directions, admissive and exclusive of testimony the defendant excepts.

Ludden and *Webster*, counsel for defendant.

Bradbury and *Morrill*, counsel for plaintiff.

TENNEY, C. J. From the evidence adduced at the trial of this action, which is for an alleged assault and battery upon the person of the plaintiff, in June, 1854, it appears that the acts complained of were committed soon after the defendant had paid an execution upon a judgment recovered in 1853, against him, in favor of the plaintiff's son. Proof offered by the defendant, in mitigation of damages, that the judgment was obtained in a groundless suit, which he was prevented from defending by inevitable accident, was not received. The judgment of a court of competent jurisdiction, till reversed, is conclusive evidence of a just and legal debt; to receive, or enforce payment thereof, by the creditor or his agent, is no ground of complaint on the part of the debtor, and if the evidence offered was allowed, it would authorize the jury to treat as a palliation of the defendant's unlawful and even criminal acts, the plaintiff's conduct, which was, in all respects, legal and proper. This cannot be admitted.

Exceptions are also taken to the instructions to the jury,

among others, that if the act complained of was wantonly done, the plaintiff would be entitled, also, to recover for the mental anxiety, the public degradation, and wounded sensibility, which an honorable man would naturally feel, and which he suffered, under such a violation of the sacredness of his person, as they should find in this case to have been inflicted by the defendant.

It is insisted that this instruction is erroneous in this case, because the ground of damages stated in the instructions, objected to, should have been particularly specified in the declaration, which does not appear to have been done. It cannot be doubted, that mental anxiety, and injury to the finer feelings of human nature as well as bodily suffering may be produced from wanton and unprovoked violence, inflicted by the hand of another. And if the former is a proper basis of damages, under a specific allegation in the writ, it does not cease to be so in a general declaration. The obviously probable effects of a beating may be given in evidence, though not alleged in the declaration. Avery v. Ray and al., 1 Mass., 12; Sampson v. McCoy, 15 Mass., 493.

The authorities have classed together actions of slander, of assault and battery, and some others, touching the power of the jury in the assessment of damages, and allow them the exercise of their own discretion, there being no precise rule by which the injury can be measured. Commonwealth v. Sessions, in Norfolk, 5 Mass., 437. In Coffin v. Coffin, 4 Mass, 41, Ch. J. Parsons, in delivering the opinion of the court, says in reference to actions for personal injuries, "the law has not entrusted the court with a discretion to estimate damages, but has devolved the power on a jury, as matter of sentiment and feeling, to be exercised by them, according to their sound discretion, duly weighing all the circumstances of the case, and considering the state, degree, quality, trade and profession, as well of the party injured, as of him who did the injury." Merest v. Harvey, 5 Taunt., 442.

"As the jury, in an action of trespass, are not restrained in their assessment of damages to the amount of the mere

pecuniary loss sustained by the plaintiff, but may award damages in respect to the malicious conduct of the defendant, and the degree of insult with which the trespass has been attended, the plaintiff is at liberty to give in evidence the circumstances which accompany and *give character to the trespass.*" 3 Stark. Ev., 1450.

It is said in 2 Greenl. Ev., sec. 267, *Injuries to the person* or to the *reputation,* consist in the pain inflicted, whether bodily or mental. * * "The jury, therefore, in the estimation of damages, are to consider not only the direct expenses incurred by the plaintiff, but the loss of time, his bodily sufferings, and if the injury was willful, his mental agony also; the injury to his reputation, the circumstances of indignity and contumely under which the wrong was done, and the consequent public disgrace to the plaintiff, together with any other circumstances belonging to the wrongful act, and tending to the plaintiff's discomfort." It is believed that the instructions in this respect are in harmony with the principles which have always prevailed in this state, and our parent commonwealth.

Nothing in the case shows any conduct in the plaintiff, at the time the injury was inflicted upon him, in the least improper or indicative of a want of self-respect, and hence he is entitled to the presumption that he was influenced by the same kind of honorable feelings which are generally entertained by persons of good reputation; and it is to be supposed that he and others of that character, would be affected in a similar manner by acts of violence, wantonly inflicted. The test which the jury were allowed to apply to the evidence, in determining the damages arising from the causes mentioned, was not an erroneous one.

Exceptions overruled.

JOSEPH GOODING *versus* PITMAN MORGAN.

An action may be maintained upon an express promise to cancel and deliver a note on condition that the promisee should find a receipt which he claimed to have received in discharge of the same debt, although the note was subsequently paid.

This is an action of assumpsit upon a promise to deliver back a note providing the plaintiff should find a receipt from the defendant of payment of the same demand, which was alleged to be lost.

Afterward the plaintiff found the receipt, and brought his action upon the money counts only, with the following specification: "The plaintiff claims $125,00 which was paid by him to defendant in full, of a note for that sum given by plaintiff to defendant under a mistake of the fact that said sum had been previously paid." 37 Maine R., 419.

Failing to recover in that form of action, the plaintiff now brings this action upon the promise as here stated.

The case is reported by Goodenow, J., sitting at *Nisi Prius.*

B. Freeman, counsel for plaintiff.

Shepley & Dana, counsel for defendant.

CUTTING, J. When these parties were previously before us, 37 Maine R., 419, the plaintiff's writ contained the money counts only, and his specification, that he claimed $125,00, which was paid by him to defendant, in full of a note for that sum. And the court held under the circumstances there disclosed, that such specification limited the proof and restricted the right of recovery to that claim.

In the present case the plaintiff has declared on an express promise, *that* the defendant was to cancel and deliver to him the note, provided he should find the receipt; and an averment, *that* the receipt was found, exhibited to the defendant, and the note demanded; and the proof fully sustained the allegation.

The defence set up is, not a denial of such facts, but that they were all known to the plaintiff, and constituted a perfect defence to the note at the time it was paid, and consequently the present action cannot be maintained. But *Shepley*, C. J., in the prior case remarks, "the negotiable note operated as payment of the account in full or in part; and if that account was thereby paid a second time, under a mistake and without a knowledge that it had been previously paid, a right of action immediately accrued to the plaintiff, to recover back the amount so paid a second time. This right of action would not be destroyed by a voluntary payment of the note, after a knowledge of the double payment had been obtained." The learned CHIEF JUSTICE had reference to the right of action founded on an implied promise, which would accrue only from the want of knowledge. But here, it is said, that the plaintiff not only had knowledge of his previous payment, but asserted it at the time he gave the note, and that consequently no action accrues by implication. But the testimony also discloses the further fact, that at the same time the defendant *denied* the plaintiff's assertions, and therefore a dispute arose, and by way of compromise the express promise was made, which must have all the force and effect of an implied one. That promise made for a valuable consideration has been violated, and the plaintiff in this form of action is entitled to recover his damages. And according to the agreement of the parties the defendant is to be defaulted for $125,00 and interest from June 2, 1852.

JOHN FITZGIBBON *versus* DANIEL BROWN.

Information received from a reliable scource may well be acted upon in a prosecution for a criminal offence, and amounts to probable cause when made positively and unequivocally. Probable cause does not depend entirely upon the actual state of the facts, but upon the honest and reasonable belief of the prosecutor.

Evidence of the general bad reputation of the plaintiff in an action for malicious prosecution, is admissible in mitigation of damages.

The objection that the docket entry is received instead of the copy of a judgment, must be specifically made when the evidence is offered, or it will be regarded as waived.

EXCEPTIONS to the law as given by GOODENOW, J., at *Nisi Prius*.

This was an action for malicious prosecution and false imprisonment, alleging that defendant made a complaint against the plaintiff on oath in the Police Court in Portland, on the 5th day of July, 1855, alleging that the plaintiff was guilty with others, of getting up a riot in the city of Portland, on the 3d day of July, 1855, causing the plaintiff to be arrested and imprisoned falsely, maliciously, and without probable cause.

An examination on the complaint against the plaintiff was had in the Police Court on the same day, when three of the persons joined with the plaintiff in the complaint were ordered to recognize for their appearance at the July term of the Criminal Court in Portland, and the plaintiff was ordered to be discharged from his arrest, on the ground that there was not probable cause to believe him guilty.

The plaintiff introduced certified copies of the complaint, warrant, and record, from the Police Court, and witnesses testified, that at the time of the alleged riot at Portland, he was not in that city, but was at work in Buckfield, in the county of Oxford, and did not arrive in Portland until the morning of the day succeeding the alleged riot.

The defendant pleaded the general issue.

The defendant, Brown, was introduced as a witness in his own behalf, and testified that he was a policeman in June and July, 1855, and made the complaint against Fitzgibbon before the Judge of the Police Court. That Durgin informed him that the plaintiff, Fitzgibbon, was one of those who assaulted the police, and he complained of him with the others. That at the examination in the Police Court, Durgin testified that Fitzgibbon was there, and that he knew him;

that he was informed by Durgin that the plaintiff was in the riot, that he was a police officer, and made the complaint upon that information.

William H. Plummer testified that he was a police officer in July, 1855, and arrested John Fitzgibbon on Brown's complaint; that he had seen him drunk several times.

The testimony in relation to the character and habits of the plaintiff was admitted only in mitigation of the damages.

The defendant also offered the docket of the Police Court under date of July 5th, 1855, in case State v. Fitzgibbon, on a charge of drunkenness, and the court allowed it to be read to the jury as evidence in the case, on the question of damages.

The presiding judge instructed the jury that the question of probable cause was a mixed question of law and fact; that if without probable cause the defendant made a complaint and caused Fitzgibbon to be arrested, he would be liable in this action.

That in order to maintain the action it would be necessary for the plaintiff to prove that the prosecution complained of was malicious and without probable cause; that malice would be implied from a want of probable cause. That the circumstance that the plaintiff was found drunk on the morning of the 4th of July after the riot, and that he was quarrelsome and accustomed to drink to excess was not evidence of probable cause, but if they believed that the defendant was informed by Durgin that the plaintiff was in the riot, and Durgin was a reliable man, and made the communication to the defendant positively and unequivocally, that the plaintiff was one of the rioters, it would be probable cause for including him in the prosecution.

The jury found a verdict for defendant.

O'Donnell for plaintiff, in support of the exceptions, argued that in relation to the testimony to the general character of the plaintiff was *inadmissible*:

1st. Because *general character* of plaintiff is *not* in issue in an action for malicious prosecution and false imprison-

ment. 2 Greenl. Ev., p. 458. Much less is evidence of *particular* facts admissible. Ross v. Lapham, 14 Mass. R., 279; 1 Greenl. Ev., p. 55, and cases there cited.

2d. *The docket of the Police Court was inadmissible under any circumstances.* As a judgment in a *criminal* case, it was not evidence in a *civil* action, &c. 1 Greenl. Ev., p. 537. If admissible as a record, it was not a record of the case *duly authenticated,* setting forth a complaint, warrant and conviction. Davis' Justice, third ed., p. 237.

All justices of the peace keep a *record.* R. S., chap. 116, p. 19.

A record, to be used as evidence, must be duly *attested.* Tenney, J., in English v. Sprague, 33 Maine R., 442; 27 Ib., 179; 35 Ib., 138; 26 Ib., 119; 8 Cush., 317.

Parol evidence is not admissible to supply a record, though justice is out of office. Sayles v. Briggs, 4 Met., 421; Kendall v. Powers, 4 Ib., 555. No proof that record was lost. Wing v. Abbott, 28 Maine R., 367. Or by whom entries were made. Whitman v. Granite Church, 24 Maine R., 236. The book does not prove itself. Wentworth v. Keizer, 33 Maine R., 367.

3d. Probable cause was in the case at bar, a question of *law,* not of *fact.* Ulmer v. Leland, 1 Greenl. R., 139; Stevens v. Fassett, 27 Maine R., 267; Taylor v. Godfrey and al., 36 Ib., 525; Stone v. Crocker, 24 Pick., 81–87.

4th. The charge of the judge that if the defendant was *informed* plaintiff was in the riot, it would be *probable cause,* is not sustained, as defendant had no knowledge or suspicion himself, to justify the prosecution. Merriam v. Mitchell, 13 Maine R., 457; Taylor v. Godfrey, 36 Ib., 525.

S. & D. W. Fessenden for defendant.

The evidence of Plummer, and the record of the Police Court having been admitted as evidence only in mitigation of damages, and the jury having found under the direction of the court that the defendant was not guilty, the only question now is, "were the instructions of the presiding justice correct?"

The question of probable cause is a mixed question of law and fact. Ulmer v. Leland, 1 Greenl. R., 139; 2 Greenl. Ev., pp. 452, 453; Bulkley v. Kelallas, 4 Sand. Sup. Ct., p. 450; cited in U. S. Digest, vol. 6, p. 428; Taylor v. Godfrey, 36 Maine R., p. 425; Stone v. Crocker, 24 Pick., pp. 84, 85.

2d. To maintain this action it is incumbent on the plaintiff to prove that the prosecution complained of was malicious and without probable cause, and malice would be inferred for want of probable cause. 2 Greenl. Ev., p. 449, sec. 453, and cases there cited, and p. 446, sec. 449, and p. 451.

The instructions following were correct, viz.: "That if the jury believed the defendant was informed by Durgin that the plaintiff was in the riot, and Durgin was a reliable man, and made the communication to him positively and unequivocally that the plaintiff was one of the rioters, it would be probable cause for including him in the prosecution."

What fact and circumstances amount to probable cause is a question of law. Whether they exist or not in any particular case, is a pure question of fact. The former is exclusively for the court; the latter for the jury. This subject must necessarily be submitted to a jury when the facts are in question. Stone v. Crocker, 24 Pick., pp. 84 and 85, and cases there cited. In the case at bar, the facts in question were:

1st. Was defendant informed by Durgin, that plaintiff was in the riot?

2d. Was Durgin a reliable man, and was the communication made by him to the defendant, made positively and unequivocally that the plaintiff was one of the rioters.

The testimony as to what Durgin told defendant was admissible as evidence of probable cause, and was probable cause. See Bacon v. Town et als., 4 Cush., pp. 238–240; Taylor v. Godfrey, before cited. Stone v. Crocker, 24 Pick., p. 86; Greenl. Ev., vol. 2, p. 455.

Appleton, J. The defendant, acting upon positive infor-

mation received from a reliable source, that the plaintiff had been engaged in a riot, included his name with those of others in a complaint made by him against certain individuals charged with that offense. The plaintiff, upon the hearing and examination before the magistrate issuing the warrant, was discharged, and thereupon brought this action for malicious prosecution.

The defendant, to show probable cause, proved that he had received positive information from a man named Durgin, of the plaintiff's participation in the alleged riot, and that in consequence of such information he made his complaint. The court instructed the jury that "if they believed defendant was informed by Durgin that the plaintiff was in the riot, and Durgin was a reliable man, and made the communication to the defendant positively and unequivocally that the plaintiff was one of the rioters, it would be probable cause for including him in the prosecution." This instruction was correct, and in conformity with the authorities upon this subject. It is not required that every complainant of his own knowledge should swear to the truth of every fact alleged in his complaint. If it were so, effective criminal proceedings would be at an end. The complainant may, and must in many cases act upon statements made by others, and if their statements are positive and unequivocal, and they are reliable, he must be regarded as having probable cause for proceeding criminally against those alleged to have been guilty of the commission of a criminal offence. French v. Smith, 4 Kernan, 363. The positive and unequivocal assertion of guilt by a reliable man, as of his own knowledge, would reasonably induce belief on the mind of even a cautious man, and in case of crime, well grounded belief should be followed by correspondent action. Probable cause does not entirely depend on the actual state of the facts, but upon the honest and reasonable belief of the prosecutor. Bacon v. Towne, 4 Cush., 217; James v. Phelps, 11 Ad. & Ell., 483.

"We are inclined to think, says Shaw, C. J., in Bacon v.

Towne, that evidence of the general bad reputation of the plaintiff, should have been admitted to rebut probable cause as well as in mitigation of damages." That this evidence may be received in mitigation of damages is as well settled as any principle of law. Whether it may properly be received upon the question of probable cause, is not a matter now before us, for the presiding judge expressly limited all such testimony to the matter of damages, and instructed the jury that it was not evidence of probable cause. The error, if any, in this respect, was in favor of the plaintiff, and to which he cannot except. The minutes of a deceased justice of the peace, says Shepley, J., in Longley v. Vose, 27 Maine R., 185, made upon his docket, have been regarded as substantially a record of his proceedings, and as satisfactory proof of a judgment rendered by him in a civil action. Baldwin v. Prouty, 13 Johns., 430; Davidson v. Slocumb, 18 Pick., 464. The cases cited by the plaintiff show that in certain cases docket entries may be received. It does not appear in the present case that the objection was to the fact proved. The evidence of the judgment was by the entries merely, and not by a copy of the record. If the objection had been specifically made on that ground, it might have been removed. No objection seems to have been made at the time.

But however that may have been, the evidence was only received in diminution of damages, and not as bearing at all upon whether there was probable cause or not. As the jury have found there was probable cause upon other evidence, no cause is perceived for disturbing the verdict.

No question seems to have been made as to the integrity, good faith, and proper caution of the defendant. The instructions bearing upon these points not being reported, must be regarded as liable to no just exception.

Exceptions overruled.

WILLIAM MABERRY *versus* BENJAMIN MORSE.

This court is authorized to establish such rules and regulations as may be necessary respecting the modes of trial and the conduct of business before it.

The rules established in pursuance of this authority have all the binding and obligatory force of a statute.

By the 21st rule of this court, all objections to a report of referees are required to be in writing, and the court, by its own rules, are precluded from considering them unless so made.

The plaintiff at *Nisi Prius*, GOODENOW, J., presiding, moved the acceptance of a report of referees. The defendant moved a recommitment, because injustice and partiality are manifest upon the face of the award; for excess of authority, and for newly discovered evidence. But these objections were not made in writing, and filed with the clerk. The presiding judge ordered the acceptance of the report, to which the defendant excepted.

Clifford & Adams, counsel for the plaintiff.

F. O. J. Smith, counsel for the defendant.

APPLETON, J. By R. S., chap. 96, p. 9, this court is authorized "from time to time to establish all such rules and regulations as may be necessary respecting the modes of trial and the conduct of business, not being repugnant to law, whether in relation to suits at law or in equity." The rules established in pursuance of this authority, have all the binding and obligatory force of a statute. They are binding on any justice at *Nisi Prius*, or on this court sitting in banc. Neither this court, nor any member, can dispense with or disregard them. Thompson v. Hatch, 3 Pick., 512.

By the 21st rule of this court, 37 Maine, 21, all objections are required to be in writing, and unless in writing, the court will not consider them. The exceptions signed by the counsel, excepting to the rulings of the justice presiding at *Nisi Prius*, show that no written objections to the acceptance of

this report were ever filed. The court therefore, by its own rules, are precluded from considering them.

Exceptions overruled.

ISAIAH W. RICHARDS *versus* JOSHUA MCKENNEY AND TRUSTEE.

The effect of an endorsement upon a writ by the attorney of the plaintiff, cannot be defeated by other evidence, that such endorsement was not intended to create a statute liability.

EXCEPTIONS were taken to the rulings of the CHIEF JUSTICE, who tried the cause at *Nisi Prius.*

Under the printed words "from the office of," on the back of the writ, the attorney who made it had written his name, and it is agreed that by so doing he did not intend to assume the liabilities of an endorser, but merely to indicate by whom it was made. The plaintiff is described in the writ as an inhabitant of another state, and a motion was seasonably made to dismiss for want of a legal endorsement. The court overruled the motion, and the defendant excepted.

B. Freeman, counsel for the defendant, argued, that in Slate v. Ackley, and Stone v. McLanathan, there was no satisfactory evidence, as in this case, that the words "from the office of" were adopted by the plaintiff's attorney to limit the effect of the endorsement.

Thomas H. Talbot, counsel for the plaintiff, argued that it had already been decided that the printed words "from the office of" do not *of themselves* prevent the signature of an attorney under them from making him liable as an endorser of the writ. Slate and al. v. Ackley, 8 Cush., 98; Stone v. McLanathan, 29 Maine R., 131.

It follows that the secret intention of the person so signing his name cannot be allowed to alter the force of his signature.

Every defendant has a right to know, upon the inspection of the writ, whether it is endorsed or not.

The evidence referred to in Stone v. McLanathan must be

evidence appearing on the writ itself, something to forbid all presumption of an intention to assume the liability of an endorser.

Evidence *aliunde* must have been rejected.

MAY, J. In the cases of Stone v. McLanathan, 39 Maine R., 131, and Slate v. Ackley, 8 Cush., 98, it has been directly decided that the name of the plaintiff's attorney endorsed by him upon the back of the writ, although preceded by the words, "office of," or "from the office of," is a sufficient endorsement under the statute, when it does not appear from other evidence that the words so used were adopted by such attorney to limit the effect of such endorsement.

The question now presented and argued is, whether it is competent to defeat such apparent effect, by other proof, to show such intended limitation. We think it is not. The law does not authorize it. It is required by the R. S., chap. 114, sec. 16, that all writs, where the plaintiff lives out of the state when the action is commenced, shall be endorsed by some sufficient person within the state, before the entry thereof; and the rule, that the signature of the plaintiff's attorney, upon the back of any such writ, in the absence of any words connected therewith, to show a different purpose, must be regarded as having been placed there to meet the requirement of the statute, is a sound one, and well calculated to promote the administration of justice. Such endorsement, in all cases where the suit is prosecuted to judgment, becomes a part of the record, and its apparent legal intendment should not be open to contradiction. The defendant may be induced by it to rely upon it, until the termination of the suit; and if the attorney should then be permitted to show an intention on his part, existing only in his own mind, not to be bound by it when he made it, and thereby to defeat its apparent effect, injustice would be done. The entry of a writ so endorsed is virtually an affirmation by the attorney, that such endorsement is the one required by law; and it would operate as a fraud upon the defendant to deprive

him of the statute security which *prima facie* it affords, by allowing the party making it to avoid its legal effect by the introduction of parol proof.

Exceptions overruled.

CUTTING, J., *dissenting.*—The only question of law which arises in this case and is presented to us upon the exceptions, is, did the judge at *Nisi Prius* decide correctly, when from the evidence admitted, he ruled that the endorsement of the writ was a sufficient compliance with the requirements of the statute. If there had been no other evidence but simply the endorsement, the ruling would be sustained by the case of State v. Ackley, 8 Cush., 98. But here parol testimony was admitted without objection, as in Stone v. McLanathan, 39 Maine R., 131, which explains the written endorsement, and discloses the true intention of the endorser. The evidence having thus been admitted, it becomes a part of the case, which is presented thus:

"This writ is from the office of D. L. Mitchell, who does not intend by subscribing his name hereon, to assume the liabilities of an endorser of this writ, but merely to indicate by whom it was made."

Such language, the judge held, constituted a legal and binding contract to pay the defendant his costs in the event of a successful defence. This cannot be correct, unless it is to be presumed that an attorney at law means directly the reserve of what he says, and in making a contract can never use a negative. If the question arose on exceptions to the admission or exclusion of the parol testimony, my conclusion might be different; that would present a case never as yet decided in this, and so far as I can learn, in any other state.

FEMALE ORPHAN ASYLUM OF PORTLAND *versus* BARNEWELL JOHNSON.

A corporation empowered to make contracts in writing, are not thereby authorized to confer that power upon one of their officers to contract in their behalf.

By a special act of the legislature of 1841, chap. 105, the Female Orphan Asylum of Portland, by their managers, were authorized to bind to service children under their control. It was held that a contract signed by defendant on his part, and "Mary B. Storer in behalf of the Female Orphan Asylum of Portland," was not authorized by the act.

EXCEPTIONS to the ruling of RICE, J., at *Nisi Prius*.

This is an action on a plea of covenant broken, for the care, support, and teaching of Jane Lenham, an indented apprentice.

The defendant pleaded "*non est factum*," on which issue was joined. Defendant also filed a brief statement:

1st. That he never covenanted and agreed with the plaintiff corporation, as alleged in their declaration.

2d. That the instrument declared upon purports to be an indenture of apprenticeship, in two parts; that the same was never executed by the plaintiff corporation in proper manner, so as to make the same binding on said corporation, or that could be in any way enforced, and that the same is therefore not binding on the defendant.

The execution of the instrument is as follows:

BARNEWELL JOHNSON, *Seal.*
MARY B. STORER, *Seal,*
In behalf of the Managers of the Female Orphan Asylum of Portland.

To prove the issue on the part of the plaintiff, a book was offered in evidence, purporting to be the records of the Female Orphan Asylum of Portland, which showed the organization of the society under the act of incorporation, the adoption of the constitution and by-laws previously prepared, and the choice of Mrs. Mary B. Storer as Secretary, the elec-

tion and choice of managers for the year which includes date and execution of indenture. Also election of managers for the year 1843, in which Jane Lenham was received into the Asylum; election and choice of managers for the year commencing October, 1844, and ending October, 1845, and the choice of Mary B. Storer as Secretary for the same time; authority of Mary B. Storer as Secretary, to execute bonds and indentures for and on behalf of the board of managers; election of Mary B. Storer as Secretary, and the election of board of managers for 1843–4; vote to receive Jane Lenham into the Asylum in September, 1844; the acceptance of James Lenham's surrender of his daughter, Jane Lenham, to the Asylum; election of Mary B. Storer as Secretary for 1845–6, including the time of date of indenture; vote that Jane Lenham be bound apprentice to Mr. Johnson, the defendant. The plaintiff also offered a paper signed James Lenham, surrendering his daughter, Jane Lenham, to the Female Orphan Asylum of Portland. The plaintiff then offered in evidence a paper purporting to be an indenture of apprenticeship, signed, sealed and delivered by Barnewell Johnson and "Mary B. Storer in behalf of the managers of the Female Orphan Asylum, Portland." The signatures of Barnewell Johnson and Mary B. Storer were admitted to be their signatures, but its admission as evidence was objected to by counsel for defendant, and excluded by the court.

No other or further evidence being offered by the plaintiff in support of the action, the judge ordered a nonsuit.

To which ruling and order of nonsuit the plaintiff excepts.

S. & D. W. Fessenden, counsel for plaintiffs.

As to the power to authorize the secretary to execute the indentures for the managers; referred to the 20th vol. of Maine R., 45, Garland v. Reynolds, and said that in that case the committee appointed one of their number to act as treasurer, in fact to act for the whole committee. The town ratified the doings of the committee by recognizing the acts of the treasurer. So in this case, the corporation by their acts

have adopted as their own all that their board of managers have done.

Fessenden & Butler, argued for defendant,

Action is in the name of the corporation. The indenture offered in evidence and which was the foundation of the suit, was properly excluded.

1. The plaintiff corporation is not a party to it, and the instrument does not *purport* that said corporation is a party. It does not purport to be executed in the name of the corporation by any agent, nor in the name of any agent for the corporation.

The *managers* of the Female Orphan Asylum, of Portland, are, and purport to be the parties on the one part, and defendant on the other, and if any cause of action has arisen thereon, said managers must bring the suit ex officio.

2. If the indenture can in any way be considered as purporting to be the deed of the corporation, still no authority is shown to have been given to the managers to execute the same in the name of the corporation.

And if any such authority was given, still they have not properly executed said authority. They could not delegate it to their secretary. It should have been executed in behalf of the corportion by the managers themselves, or a majority of them.

The alteration or addition in the by-laws, referred to by plaintiff, empowering the secretary to execute indentures in behalf of the managers, is not valid, inasmuch as by a former by-law, (the fifth, referred to by defendant,) no alteration in, or addition to, the by-laws, could be made without the concurrence of two thirds of the managers, at a special meeting, called four days previous.

CUTTING J. The plaintiffs, on February 18, 1828, by a special act of the Legislature, chap. 534, were constituted a body politic and corporate by the name of the "Female Orphan Asylum of Portland," with power to prosecute and

defend suits at law; to have and use a common seal; to make and establish any by-laws for the management of their affairs, not repugnant to the laws of the state; to take and hold any estate, real or personal, for the purpose of supporting, instructing and employing female children, the first attention to be given to orphans; and with all the powers and privileges usually granted to other societies instituted for purposes of charity and beneficence.

And on February 27, 1841, by an additional act, chap. 105, they were authorized to put and place out at service any of the children under their care and management, at such age as may be deemed advisable, with any suitable master or mistress, and on such terms and conditions as may be deemed reasonable, until such child shall arrive at eighteen years of age, or be married; that the master or mistress, with whom any such child has been or may be placed, in manner aforesaid, shall have reasonable control and power over her, agreeably to the terms and conditions prescribed and agreed upon, *in writing, interchanged, or to be interchanged by and between the said Female Orphan Asylum, by their managers, and said master or mistress.*

Upon an inspection of the records, which were produced at the trial and received as evidence, it appears that the society was duly organized and went into operation under the original act; that the society consisted of such ladies "as had subscribed and paid a sum of not less than two dollars annually," who were to meet "annually on the second Tuesday of October, for the purpose of electing by ballot a treasurer and a board to consist of fifteen managers, which board shall choose from among themselves a first and second directress, a secretary and an assistant secretary, if necessary; and they shall have power to fill their own vacancies. *Not less than five shall constitute a quorum for transacting business.*"

Under this organization the society was authorized to support, instruct and employ female children, but not to bind them out at service; hence the necessity of obtaining the

additional act for that purpose. And it was in pursuance of this subsequent act, that the bond now in suit was given, the execution of which having been admitted, it was offered in evidence, objected to by counsel for defendant, and excluded by the court; as to the correctness of which ruling, the principal question arises; for if correct, inasmuch as the bond was the foundation of the plaintiffs' claim, the nonsuit was subsequently properly ordered. It therefore becomes our duty to examine the bond, to see whether it be in accordance with the provisions of the foregoing statute, for by that act alone it must stand or fall, since it is an instrument unknown to the common law.

That portion of the bond or indenture, material for our consideration, is as follows:—"This indenture witnesseth, that we, the managers of the Female Orphan Asylum of Portland, in the State of Maine, have put and placed," &c. "In testimony whereof, we the said parties have hereunto interchangeably set our hands and seals," &c. Signed by the defendant and "*Mary B. Storer, in behalf of the managers of the Female Orphan Asylum of Portland,*" to whose signatures are affixed their individual seals. In the first place it will be noticed, that "we the managers," (and not the society by their managers) have, &c., and that the instrument bears not the corporate seal; consequently at common law, had the parties been reversed, no action for covenant broken could have been maintained against these plaintiffs. Stinchfield v. Little, 1 Maine R., 231; Cram v. Bangor House Proprietory, 12 Maine R., 354; Tippets v. Walker, 4 Mass., 595; Bank of Columbia v. Patterson, 7 Cranch, 299; Randall v. Van Vechten, 19 Johns., 60. How far the R. S., chap. 91, sec. 14, may change the law as settled by these decisions, it is unnecessary now to consider. Those cases, or many of them, while they decide that no action for a breach of *covenant* will lie, also decide that *assumpsit* may, and that the deed is receivable in evidence under that issue. Now in this case, inasmuch as the instrument declared on has the signature of the defendant with his seal affixed, and consequent-

ly is his deed, it is difficult to perceive, by parity of reason, why *covenant broken*, instead of *assumpsit*, may not be maintained.

But the defense presents another point, which, notwithstanding the remarks of the plaintiffs' counsel, very justly eulogistic of their clients' acts and intentions, we feel compelled to sustain; which is, that the managers had no power under the act to delegate to another the trust conferred only upon themselves, or in other words, that "delegated power cannot be delegated."

In Stoughton v. Baker, 4 Mass., 530, the court say, that "the authority given to the committee is, by the terms of the resolve, to be exercised by them or a major part of them. The exercise of this authority is personal, and cannot be delegated." The same doctrine has been reiterated in Kupper v. Augusta, 12 Mass., 185; Tippets v. Walker, 4 Mass., 595; Emerson v. Prov. Hat Manuf. Co., 12 Mass., 237; Shankland v. Corp. of Washington, 5 Pet., 390; Brewster v. Hobert, 15 Pick, 306; Lyon v. Jerome, 26 Wend, 485.

It is contended by the plaintiff's counsel that by force of the following by-law, viz: "All bonds or indentures given on receiving children into or placing them out from the Asylum, shall be executed in behalf of the board by their secretary," gave Mary B. Storer, their secretary, legal authority to execute the deed in the manner it was executed. It appears from the records introduced, that the foregoing vote or by-law, (immaterial perhaps which,) was adopted by the managers and not by the corporation, who only are authorized to make and establish by-laws; but, if established by either, it would be repugnant to the act, which become a law of the state. By the additional act it was only a contract in writing and *signed by the managers*, which gave the master the control over the child. Any contract executed in any other manner than that prescribed by statute, would not be binding and could not confer any authority upon the master.

Exceptions overruled, nonsuit confirmed.

CHRISTIAN TLLEXAN *versus* GEORGE H. WILSON AND AL.

A gold watch given by a debtor to his wife before marriage, in 1844, and while they were residing in the State of New York, and still in her possession, is liable to attachment here for the debts of the husband.

But property conveyed to the wife by her father since 1844, and while residing in this state, is not thus liable.

In the trial of actions here, the common law of New York may properly be presumed to be similar to that of this state, unless the contrary be shown.

REPORTED by the Chief Justice.

This action is upon a bond of a debtor who made a disclosure, in which he admitted the possession of eighty-five cents in money, a gold watch in possession of his wife, given her by himself before his residence in this state, and certain articles of furniture, received while residing in New York, from her father, of which there was a bill of sale, dated about the time of her marriage, but delivered her long since.

The debtor was allowed to take the usual oath by the justices who heard the disclosure, and the plaintiff by a proper officer seasonably demanded the property, which was not delivered.

To prove the laws of New York as to the rights of the husband to the personal property of his wife, the plaintiff read without objection the case of Blanchard v. Blood, 2 Barb., 352.

O'Donnell, for defendant, argued, that,

1st. The debtor disclosed no property of *his* own, and consequently could not surrender it. R. S., chap. 148, sec. 28; Ledden v. Hanson, 34 Maine R., 356.

2d. The furniture was conveyed to the wife, a *gift* upon *condition*, and not liable for husband's debts, unless *fraud* be proved. Inse B. R. Grant, 2d Story's C. C., 1842, U. S., 312; Quick v. Garrison, 10 Wendall, 335; subsequent creditors cannot interfere. Davis v. Herrick, 37 Maine R., 397.

The *condition* in bill of sale is binding on third parties, or

creditors and the grantor can reclaim his property, if taken for Wilson's debts. Coggill v. H. & N. H. R. R. Co., 3 Gray, 545; Gilbert v. Thompson, 3 Gray, 550; Hill v. Freeman, 3 Cush. R., 257; Whipple v. Gilpatrick, 19 Maine R., 429; George v. Stubbs, 26 Maine R., 247.

The husband can exersise no ownership over the property by our laws. Southard v. Plummer, 36 Maine R., 64.

By the Statute of Maine, Statute of 1844, chap. 117, approved March 22d, 1844, (before Wilson's marriage,) Mrs. Wilson, the donee, had a right to receive a gift in her own name, and as her own property, as it did not "come from the husband. Such gift is exempt from any liability for the debts or contracts of the husband.

3d. The watch, a trinket given by Wilson before marriage, did not become the property of the husband by marriage. The laws of New York and Maine made it the absolute property of the wife, and subsequent creditors of the husband cannot interfere. Davis v. Herrick, 37 Maine R., 397, before cited. The present suit is by a subsequent creditor, whose debt was not contracted until the date of judgment, in 1854 or 1855.

4th. Debtor discloses eighty-five cents, not appraised, as in the absence of the plaintiff his attorney waived all claim to it.

The debtor was duly discharged, as the case finds, under chap. 148, R. S., upon disclosure, so if any actual damages exist, it is for the sum of eighty-five cents, and quarter costs, by the operation of the statute of 1848, chap. 85, and the repeated decisions of this court. Bachelder v. Sanborn, 34 Maine R., 231; Baker v. Carleton, 32 Maine R., 337; Bray v. Kelley, 38 Maine R., 596; Torrey v. Berry, 36 Maine R., 589; Baldwin v. Doe, 36 Maine R., 494.

Or, if there be a technical breach of the bond, and the plaintiff has sustained no damages, the court may refuse costs to either party. Statute of 1848, chap. 85; sec. 3; Palmer v. Dougherty, 33 Maine R., 502; Houghton v. Lyford, 39 Maine R., 270.

But the defendants claim that there was no breach of the

bond, and they are entitled to their costs, as in ordinary cases.

Howard & Strout, for plaintiff, argued,

That the debtor discloses property which he alleges belongs to his wife, but which came to her after coverture, while husband and wife were resident in New York. By the law of New York, at that time, the personal property of the wife vested in the husband. Blanchard v. Blood, 2 Barbour, 352.

Having once vested in the husband, it was his when he removed into this state, no law of this state has divested him of the property. Com. v. Manley, 12 Pick., 175.

Being his, then at the time of disclosure, the creditor had a lien upon it, and on defendant's failure to deliver it to the officer making demand, as the case finds, there was a breach of the bond. R. S., chap. 148, sec. 34.

As all the property was required for the payment of the debt, it was not necessary that the justices should specially set out or designate it. Clement v. Wyman, 31 Maine R., 55.

Property disclosed, must be appraised, and it is the duty of the debtor to have this done. If not done, there is a breach of the bonds. Patten v. Kelley, 38 Maine R., 215; Baldwin v. Doe, 36 Maine R., 494.

The damages, in the absence of proof upon that point, are the amount due upon the execution. Sargent v. Pomroy, 33 Maine R., 389. If there is evidence upon that point, plaintiff is entitled to recover the real and actual damages.

MAY J. Nothing is better settled than the right of the execution creditor, whenever it shall appear from the disclosure of his debtor, that such debtor "possesses, or has under his control, any bank bills, notes, accounts, bonds, or other contracts, or *any other property,* not exempted expressly by statute from attachment, but which cannot be come at to be attached," to have the same, if of any value, appraised and set off, or assigned to him, that it may, at his

election, be appropriated to the payment of his debt, in accordance with the provisions of the R. S., chap. 148, sects. 29, 30, and 34; and that the debtor, if he fail, when he and the justices are allowed by the creditor and his attorney to pursue their own course, to take the necessary steps to secure the rights aforesaid, to such creditor, or if he refuse to surrender such property within thirty days from the time of the disclosure, on demand of any proper officer, having an execution on the same judgment, shall receive no benefit from the certificate described in the thirty-first section of the same chapter. Call v. Barker and al., 27 Maine R., 97; Butman v. Holbrook and al., 27 Maine R., 419; Hatch v. Lawrence and al., 29 Maine R., 480; Bachelder v. Sanborn and al., 34 Maine R., 230; Baldwin v. Doe and al., 36 Maine R., 494; Patten v. Kelley and al., 38 Maine R., 215.

The debtor in this case disclosed that he had in his possession and under his control eighty-five cents in money; and also that his wife had a gold watch which was given to her by himself before marriage, in 1844, and while they were residing in the state of New York.

By the common law all the personal property which the wife possesses at the time of the marriage passes to the husband, and becomes his own instantly; and, therefore, may be disposed of by him *ad libitum*, and is liable for his debts. The marriage is an absolute gift to the husband of all her personal chattels in possession, and a qualified gift of all her *choses in action*, depending for its effect upon his reducing them into possession or recovering them at law. Coke. Lit., 351, a 2 Black. Com., 433; Commonwealth v. Manley and al., 12 Pick., 173; Chase and al. v. Palmer and al., 25 Maine, 331; Blanchard v. Blood, Barbour, 352. This last case was cited and read at the hearing without objection, and is directly to the point that by the laws of New York the watch in controversy was the property of the husband.

Such was the law of this state prior to the statute of 1844, chap. 117, by which, and the subsequent statutes upon the same subject, the right of the wife to her property, unless

derived from her husband in fraud of his creditors, has been secured to her. We think, under the circumstances of this case, we may properly presume the laws of New York to be similar to ours as they existed by the common law, the contrary not having been shown. Legg v. Legg, 8 Mass., 99; Law Register, 5 vol., p. 321.

Upon the principles established by the foregoing authorities, there was disclosed by the debtor eighty-five cents as belonging to him, and a watch as belonging to his wife, which became legally his by virtue of his marriage, and subject to seizure for the payment of his debts, unless the same can be regarded as exempt from attachment, as a part of the wearing apparel of his wife. That watches, as well as jewelry, are sometimes worn as ornaments to decorate the person, is undoubtedly true; but we know of no authority by which a watch is exempted from attachment, whether used by the husband or the wife. Trinkets and jewels given to a wife before marriage becomes the husband's again by the marriage, and are liable for his debts if his personal estate is not sufficient. Com. Dig., 2 vol.; Baron Ferne, E. 3.

A gold watch is paraphernalia, and may be subjected by the administration to the payment of the debts of the estate of the deceased husband. Howard v. Manifee, 5 Pike, (Ark.) 668.

As the husband may dispose of his wife's paraphernalia during his lifetime, so they will be liable for his debts. 1 Brights, Husb. and Wife, 288; 1 Tom. L. D., Baron v. Tuttle, IV. 8; 2 Black. Com., 435.

The case shows that the R. S., chap. 148, p. 29, was not complied with in relation to the small sum of money and the watch disclosed, and that the debtor did not deliver the same to the officer, who seasonably demanded them, on an alias execution issued upon the same judgment. By his neglects in these particulars, the penalty of his bond has become forfeited, and the plaintiff is entitled to recover; but as the prescribed oath was taken prior to a breach of the conditions of the bond, he will be entitled only to the actual damages sus-

tained. Vide S. of 1848, chap. 85; Bray v. Kelley and al., 38 Maine, 595.

The plaintiff claims to recover not only for the value of the money and the watch, but also for certain furniture which was given to the debtor's wife by her father about two months after her marriage, in 1844. It appears, to have been given upon such conditions as clearly show the intention of her father, not to convey to her any such title as to subject the same to the control of the husband, or to the payment of his debts; and the bill of sale transferring the same to her upon condition, (the principal consideration of which is love and affection for the daughter,) seems to have been executed shortly after the marriage, and not to have been delivered until 1848, when the debtor and his wife had removed to this state. From the facts which appear in the case, it is evident that he did not before the delivery of the bill of sale, intend to transfer his property in the furniture, so that he could not reclaim it, in certain contingencies at his pleasure, else why did he retain the bill of sale. We think that the conveyance, although upon condition, did not take effect until the delivery of the bill of sale, and the delivery being in this state, and not until long after the statute of 1844, the husband acquired no property in the furniture so conveyed.

The result is that the defendant must be defaulted, and damages are to be assessed for the amount of money disclosed, and for the value of the watch, with interest from the term of the demand.

Defendants defaulted.

CUTTING, J., concurred in the default, but not in the amount of damages, which should be only nominal.

CYRUS CUMMINGS, *Adm'r. versus* ELIPHALET WEBSTER.

A party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter, if the injured party, in the exercise of common and ordinary judgment and discretion, relies upon such acts.

But a party will not be estopped by formal statements and admissions unimportant, and by which no one is deceived, and when the facts are within his own knowledge.

The by-laws of a corporation, made in pursuance of their charter, are equally binding on all the members and others acquainted with their method of business, as any public law of the state.

Trover for the conversion of a policy of insurance, and comes before the court upon exceptions to the instructions of RICE, J., and upon motion to set aside the verdict for plaintiff, as against the evidence in the case, and for a new trial.

The plaintiff's intestate, having been insured in the Hamilton Mutual Insurance Company for the term of one year, upon his stock and tools, in Portland, at the expiration of that time made application for the renewal of his policy, through the defendant, who was an agent of that company, and to whom a new policy was sent, dated January second, A. D. 1854.

To the first policy was attached the company's by-laws, referred to and adopted as a part of the same, and containing among other declarations this: "All policies not settled for within thirty days from the date thereof, shall thereby become void."

Early in January, 1854, David Boyd, brother of the plaintiff's intestate, duly authorized, called upon the defendant, offered to take the policy and pay the premium. The defendant said the policy had come, and that it was all right, but that having changed his coat, it was not then with him; that he would get it and hand it to him. Eight or ten days after, defendant told Boyd he had the policy with him then, to which Boyd replied, "If it makes no difference, I should

rather my brother would take it, as it is his business altogether." Defendant said, "very well." The property insured, was lost by fire on the second day of February, 1854, and on the next morning Boyd called upon the defendant for the policy, who then said that it did not belong to his brother, as thirty days had expired, and the premium had not been paid.

The presiding judge instructed the jury that if the defendant had undertaken to procure insurance for the plaintiff's intestate, as alleged in the writ, and on inquiry by the intestate, or his agent, had affirmed that he had effected such insurance, and such affirmation was relied upon by said intestate, he, defendant, was bound by such affirmation and was estopped to deny the truth thereof; and the plaintiff, after an offer to comply with the terms of the contract, on his part, and on demand of the policy and a refusal to deliver the same by the defendant, would be authorized to institute and maintain this action. Other instructions were given which do not become material.

Fessenden & Butler, counsel for defendant, relied upon the conditions of the contract, and that as the old policy contained the same provisions as the one alleged to have been converted, the plaintiff had express notice of the conditions on which depended the validity of his insurance.

Shepley & Dana, counsel for plaintiff.

The first instruction is fully supported by the authorities 1 Greenl. Ev., sec. 208; 1 Phillips on Ins., 24; Kohne v. Ins. Co. of No. A., 1 Wash. C. C. R., 93 Ang. on F. and L. Ins., chap. 3, sec. 31; 1 Arn. on Ins., p. 139, sec. 70. To the point that it was not necessary that the note should have been given or premium paid. Loring v. Proctor, 26 Maine R., 18; Blanchard v. Waite, 28 Maine R., 51.

CUTTING J. This is an action of trover for the conversion of a policy of insurance. Under the instructions of the presiding Judge a verdict was rendered for the plaintiff, and the

case comes before us on exceptions and a motion to set aside the verdict as being against law and evidence.

The first instruction, to which exception is taken, was based upon the opinion of Lord Mansfield, in the case of *Harding v. Carter*, (cited by Park on Ins., p. 4,) who held, "that where two brokers, instructed to effect insurance, wrote in reply that they had got two policies effected, which was false; in an action of trover against them by the assured for the two policies, they were estopped to deny the existence of the policies; and said he should consider them as the actual insurers." The doctrine enunciated in that case in 1781 has since been incorporated into most of the elementary treatises on insurance, and recognized as sound law by many eminent jurists. It is the general rule of estoppel *in pais*, "that a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of another." *The Welland Canal Company v. Hathaway*, 8 Wend., 483. *Chapman v. Searle*, 3 Pick., 38, and 2 *Smith's Lead. Ca.*, 460, where the learned author remarks, that "courts, perceiving how essential it is to the quick and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position. Such estoppels are still, as formerly, considered *odious*."

Since the rule given to the jury upon this point does not vary essentially from the foregoing authorities, it becomes necessary to examine the evidence under the motion, and ascertain, whether it be sufficient to sustain the verdict.

It appears that during the year 1853, the plaintiff's intestate had been insured by policy "No. 7830," to which were attached the company's charter and by-laws referred to in, and made by adoption a part of the same. By force of that policy the intestate was admitted a member of the company, and as such was entitled to all the rights and privileges appertaining to such relation. It may be presumed, therefore, that he was well acquainted with the by-laws and understood their binding force and validity.

Article *seventh* of the by-laws provides, that "No insurance shall take effect until the application has been approved by the president, or two of the directors, and till the terms of insurance fixed by the directors have been accepted by the applicant and the cash premium been paid; and all policies not settled for within thirty days from the date thereof shall thereby become void." And by article *ninth*, that "Each person shall pay, upon the execution of his policy and before its delivery, the premium thereon." And further, by Article *thirteenth*, that "No insurance agent or broker forwarding applications to this office, is authorized to bind the company in any case whatever."

The policy now in controversy was a renewal of a previous one, and was in the possession of the defendant at the several interviews between him and David Boyd, brother of the intestate and a witness called by the plaintiff. At the first conversation, he, Boyd, asked the defendant "if that insurance on his brother's stock and tools was all right. He said it was all right, except taking the policy and paying the premium." Subsequently, at a second conversation, the defendant offered the policy, when the witness said "if it didn't make any difference, he would rather his brother would take the policy, as it was his business," and the defendant said "very well." This is the substance of all the conversation which took place between the witness and the defendant previous to the fire, and on which the plaintiff relies to sustain his action, and to bring it within the principle of the decision in *Harding v. Carter*. That the witness was the agent of the

plaintiff's intestate, and subsequent to the fire tendered the amount of the premium and demanded the policy may be admitted; about which there seems to have been no controversy. Then the question as to the defendant's conversion depends entirely on the force and effect to be given under the circumstances to the defendant's reply, "very well." The question may here be asked, if the plaintiff's intestate was "entrapped," (to use the language already quoted.) Was it not by a formal statement, which was looked upon as unimportant at the time it was made and by which no one was ever deceived? It may be assumed as a general rule that the agent possesses the knowledge of his principal in relation to the subject matter of his agency. And we have seen that the plaintiff must have known all the terms and conditions upon which during the previous year he had been admitted and continued to be a member of the company. Or in the language of the court in *Barrett v. The Union Mutual F. Ins. Co.*, 7 Cush., 181, "If the assured accepted the policy, without looking at it, or knowing what it was, he would seem himself to be liable to the charge of culpable negligence made against the defendant."

By the by-laws of the company the policy remained theirs, and could not effectually be delivered until the advance premium had been paid, and the agent had no authority to bind the company by any promise of delay. Before the tender and demand were made the thirty days had elapsed from the date of the policy, and by article *seven* the same had "thereby become wholly void."

The judge charged the jury that "if defendant had affirmed that he had effected such insurance, that the intestate was insured, and such affirmation was relied on by said intestate, the said defendant was bound by such affirmation and was estopped to deny the truth thereof." It would perhaps have been better and conveyed a clearer idea to the jury if the Judge had explained to them some of the elements which in a legal sense constitute a man's *reliance*. The charge was broad enough to embrace ignorance of the law and gross

stupidity on the part of the intestate in placing any confidence in the defendant's declarations so as to be injured thereby. But without doubt the Judge intended that the jury should understand by the term "affirmation relied on" the due exercise on the part of the intestate of common and ordinary judgment and discretion founded on his previous knowledge of the charter and by-laws of the company and their legal mode of transacting business. But it would seem that such considerations had no effect in influencing the jury, although the documents were placed before them.

The principles involved in this case are similar to those in *Hodgdon v. Chase*, 33 Maine R., 169, where the plaintiff delayed a suit to recover his account until after it was barred by the statute of limitations, upon the express verbal promise of the defendant that he would waive such defence, which on trial he violated, and the plaintiff, in consequence of relying on defendant's affirmation, lost not only his claim but was obliged to pay costs. There this court held that such a promise was not binding by the laws of the State, and if the plaintiff was too confiding and thereby sustained damage, it was through his own fault in placing more confidence in the declarations of his debtor than in the statute.

So here the by-laws of the company, made in pursuance of their charter, are equally as binding on all their members and others acquainted with their method of business as any public law of the State. And if all the facts which were laid before the jury were embodied in a declaration, on demurrer, the court must have come to the same result as in the case last cited. Therefore the jury were not authorized from the evidence to find that the plaintiff's intestate could have relied on, or was deceived by, any such affirmation, for in the exercise of common prudence he ought to have known, as a recent member of the company, that, if such a construction could be placed on the defendant's language, the company's by-laws had estopped *him* from resorting to it as an excuse for his own negligence. The whole testimony presents nothing less than a gross case of neglect

in keeping the property insured until after its unanticipated destruction, and then by interested parol testimony to make some one responsible out of the family. We say interested testimony, because it appears that, in answer to the 25th interrogatory in the application of the previous year, the same property was under incumbrance to David Boyd, and "in case of loss, amount due was to be paid to him." But we have assumed that the witness has testified truly, notwithstanding the defendant, (as disclosed by the depositions of Sanger and Philips, introduced by the plaintiff,) on oath, has denied that he ever gave credit.

Other questions arise as to the subsequent rulings and the effect to be given to the record of a former suit on the policy against the company, which at this time become immaterial. We are satisfied that the evidence upon the point already considered is not sufficient to sustain the verdict, *which consequently must be set aside and a new trial granted.*

STATE *versus* THE INHABITATS OF FREEPORT.

The legislature may authorize the construction of a bridge across navigable or tide-waters, though the navigation may thereby be injured; but any excess or irregularity in the exercise of such authority, by which navigation becomes obstructed, becomes *pro tanto* a nuisance.

A bridge across a navigable river may not necessarily be an obstruction to navigation, and if it can reasonably be so constructed as not to interfere with navigation it should be so done. The power conferred must be so exercised that no more injury may be done to the rights of others than is necessary to accomplish the purpose for which it is granted.

An act of the legislature should not be construed as authorizing any *unnecessary* infringement of existing privileges and rights.

This case is upon an indictment for a nuisance, and a verdict of guilty, was by consent rendered *pro forma;* and the whole evidence is reported by GOODENOW, J., and the full court are to render such judgment as the rights of the par-

ties may require, having power to draw such inferences as a jury should.

The evidence material to the points decided is fully stated in the opinion.

Howard & Strout, counsel for defendants.

The main point in defence is, that the legislature authorized the county commissioners to lay out a road across Cousins' river and its branches; and also authorized them to fix the kind and width of any draw in the bridge over Cousins' river, necessary to accommodate navigation. Special laws of 1832, chap. 251. By that act, the legislature evidently contemplated a draw in the bridge over Cousins' river, and not in the bridge over the east branch. But the act does not require the commissioners to appoint a draw to be made at all. The act submits that matter to their determination. They are to judge what is necessary. The commissioners have determined that matter.

The bridges are of the required width. There is a draw in the bridge over Cousins' river. The commissioners do not direct any to be made in the bridge over the east branch. That adjudication is conclusive, because the commissioners had the authority to determine, and have determined that question.

It may be said the legislature could not grant such authority.

We answer that the state has the right to authorize the building of a bridge across navigable tide waters. Spring v. Russell, 7 Maine R., 274; Cottrill v. Myrick, 12 Maine R., 222; Moore v. Veazie, 31 Maine R., 360; Moore v. Veazie, 32 Maine R., 343.

"The legislature may authorize the construction of a bridge across navigable or tide waters, although the navigation may thereby be impaired or injured." Rogers v. Ken. and Port. R. R. Co., 35 Maine R., 323; Parker v. Cutler Mill Dam Co., 20 Maine R., 353; State v. Anthoine (Maine), not yet reported.

Navigable streams belong to the public, and are subject to

the control of the sovereign power. Davidson v. Boston and Maine R. R.. 3 Cush., 106, directly in point. See remarks of C. J. Taney, in Pennsylvania v. Wheeling bridge, 13 Howard, 581. Carter v. Murcot, 4 Burrow, 2164 Comyn's Digest, Navigation, A. & B. Hale, De Jure Maris, chap. 4, cited in Cowens' Reports, vol. 6, p. 543, n.; Hooker v. Cummings, 20 Johns., 101; Carr v. Charlestown, 1 Pick., 185.

It follows that while navigable rivers belong to the public, they must be subject to the control of the legislature as the sovereign power, for public purposes. In this case the alleged obstruction is one designed by the legislature for the greater accommodation of the public, and is in fact only an appropriation by the public of a public right to a certain extent, to another public use. The fact that the last public use has impaired the former use, was a matter proper for the consideration of the legislature, but cannot *now* affect their determination.

Appleton, Attorney General, for the State.

Davis J. By a special act of the legislature, approved March 3, 1832, the county commissioners of the county of Cumberland were authorized to lay out a county road from Freeport to North Yarmouth, over Cousins' river or its branches, and the tide waters of the same; and to fix the kind and width of any draw in the bridge over said river, necessary to accommodate the navigation thereof." In December of the same year the commissioners located the road over both branches of the river, a short distance above their confluence; and they ordered that "the bridge over Cousins' river be built with a suitable and convenient draw, which shall admit of the passage of vessels up and down said river of the width of twenty-two feet."

Both branches were sometimes called "Cousins' river;" and as the eastern branch is larger than the other, it is argued that the commissioners referred to this as the one over which the draw-bridge should be built. But their language admits of no such construction. Their location fixes the

width of the bridge over "the east branch of Cousins' river," but it requires no draw; and to prevent the possibility of mistake they designate it as the branch "which is the line between the towns of Freeport and North Yarmouth." And their location and adjudication are conclusive that in the bridge over this branch a draw is not "necessary to accommodate the navigation thereof."

By virtue of the authority thus conferred, the inhabitants of Freeport constructed a bridge over this branch of Cousins' river. This bridge was built on piles; and the evidence shows that it did not obstruct the navigation of the river with gondolas and boats. The farmers residing above the bridge were still accustomed to use the river as a highway for carrying down their wood, hay, &c., and bringing back their supplies, and sea-dressing. This bridge remained for about fourteen years.

In 1846 a new bridge was built—not upon piles, as before—but of stone, covering the channel by a single arch. This arch rests upon a foundation extending entirely across the bed of the river, blocking up the current, and rendering the navigation of the river impossible for any useful purpose. This bridge the grand jury have presented as a nuisance; and upon the evidence reported a verdict of "guilty" has been returned, by consent, subject to the opinion of the court.

Navigable rivers are common highways, in which the public have the same interest that they have in other highways. The unauthorized erection of a bridge over a public navigable river, which obstructs the navigation, is an offence at common law,—on the same principle upon which the erecting of gates across a public road has been held to be a nuisance. James v. Hayward, Cro. Car., 184; Rex. v. Cross, 3 Camp., 224.

But navigable rivers, though they belong to the public, are subject to the control of the sovereign power.* Davidson v. Boston and Maine R. R., 3 Cush., 106. And the doctrine is too well settled to need any further discussion, that the legis-

lature may authorize the construction of a bridge across navigable or tide waters, though the navigation may thereby be injured. Rogers v. Kennebec and Portland R. R., 35 Maine R., 325; Commonwealth v. New Bedford Bridge, 2 Gray, 339.

The act of the Legislature of 1832, chap. 251, authorized the construction of a bridge across the east branch of Cousins' river. Did it authorize the construction of *such a bridge* as was made in 1846? For, though the inhabitants of Freeport were empowered to make a bridge, according to the location of the county commissioners, "any excess or irregularity in the exercise of such a power, by which navigation becomes obstructed, becomes, *pro tanto*, a nuisance." Renwick v. Morris, 3 Hill, 621; 7 Hill, 575.

A bridge across a navigable river may not, necessarily, be an obstruction to navigation. "I can very well conceive," says C. J. Campbell, "that a bridge may be so built in a navigable river, as to be no obstruction." And if so built, it is not a nuisance. Regina v. Betts, 22 Eng. Law and Eq. R., 240. It follows, that if it can reasonably be so constructed as not to interfere with navigation, it should be so constructed. The power conferred must be so exercised as not to injure the rights of others more than is necessary in order to accomplish the purpose for which it is granted. And an act of the Legislature should not be construed as authorizing any *unnecessary* infringement of existing privileges and rights.

The general principles applicable to this class of cases are well stated by Shaw, C. J., in the case of Newburyport Turnpike v. Eastern R. R., 23 Pick., 326. "We are to presume that in granting, limiting and modifying the powers and rights of highways, &c., the legislature had in view that common public good which is the object of them all. In all cases, therefore, where some interference is unavoidable, and legislative provisions have been made with reference to such interference, such construction ought to be put upon them, if possible, *that the powers and privileges of each shall be no*

further limited or restrained than may be reasonably necessary to enable the other to accomplish the public purpose for which it was established. Such must be presumed to have been the intention of the legislature."

Was it reasonably necessary, in making a bridge across the east branch of Cousins' river, so to construct it as to obstruct the navigation of that river with gondolas and boats? Both parties, in presenting the evidence, seem to have overlooked this question. But the case shows that the bridge which was first made, being on piles, did not interfere with the accustomed use of the river; and there is no evidence that this bridge, which was used for about fourteen years, was not safe and convenient for the public travel; or that it did not answer all the purposes for which the legislature authorized a bridge to be made. The river was a public highway, and the jury might well have concluded that there was no necessity so to construct the bridge over it as to impair or destroy the use of it for the purposes of navigation. Judgment must, therefore, be rendered according to the verdict.

BENJAMIN C. CUMMINGS *versus* BENJAMIN J. HERRICK.

A suit having been brought against several upon a note of hand, as joint endorsers, and the writ, by leave of court, having been amended by striking out the names of all the defendants but one; in an action against another of these, as a several endorser; the amended writ, if admissible, taken in connection with the notes and the endorsements thereon, and the testimony in this case, will not authorize a jury to find the fact of a joint endorsement.

Notarial protests relied on by the plaintiff and testified to by the notary as genuine, corresponding with his notarial record, and descriptive of the notes in suit, are sufficient evidence to charge the endorser upon such notes; and the production by the defendant of other and like notices can have no tendency to invalidate those relied upon or to show the want of legal notice.

REPORTED by GOODENOW, J.

Assumpsit upon six promissory notes, the history of which fully appears in the opinion of the court.

Wm. G. Chadbourn, counsel for plaintiff.

F. O. J. Smith, counsel for defendant.

MAY, J. In this case a verdict was rendered for the plaintiff, subject to the opinion of the full court upon the single question of the admissibility and effect of certain evidence offered in defence at the trial, which was excluded by the presiding judge. By the agreement of the parties as recited in the conclusion of the report, if the rejected evidence was admissible, and would have been a defence to the suit, the verdict is to be set aside and a new trial granted; otherwise judgment is to be entered on the verdict.

1. It appears from the testimony of E. L. Cummings that he brought, as attorney to the plaintiff, two suits upon the six notes now declared on, in which all the persons whose names appear upon the back of said notes were sued as joint endorsers; one of which suits was discontinued, and in the other the writ, by leave of court, was amended by striking out the names of all the defendants but one, against whom, as a several endorser, the action aforesaid proceeded. The counsel in defence proposed sending this amended writ to the jury in connection with the testimony of E. L. Cummings, for the purpose of establishing the fact that the defendant was only one of several joint endorsers of the notes in suit, and that the plaintiff in receiving said notes understood and treated the defendant as a joint endorser with the other persons whose names were upon the back thereof. If such amended writ was admissible, we are clearly of opinion that it was insufficient, when taken in connection with the notes and the endorsements thereon, and the testimony of said Cummings, to authorize the jury to find the fact of a joint endorsement, as was contended in defence. The first endorsee is the payee in all the notes, and his endorsement was necessary to negotiate them, and in the absence of con-

trolling proof the law presumes that he placed his signature upon the notes for that purpose; and that the other persons whose names are thereon were subsequent endorsers in the order in which their names stand. The fact that the plaintiff, by his attorney, sued them all jointly, may more properly be regarded as a mistake of the plaintiff in regard to the law of his remedy, than an admission, understandingly made, that the contract of endorsement was joint. At any rate, in our judgment such fact has not sufficient weight to overcome the natural presumptions of law arising upon the face of the notes and the manner of the endorsement.

2. It appears from the report of the case that the plaintiff introduced and read the notes declared on with the notary's certificates of notices and protests exactly corresponding with each of the six notes in suit. The admission of these protests was objected to, without further proof of the authenticity of the certificates and protests, and of the identity of the notes described therein. The objection was overruled by the presiding judge, and they were admitted. The defendant, having subsequently proved by the testimony of Mr. Ilsley, the notary, the authenticity of the protests, if not the identity of the notes, no question is now raised upon the report of the case in relation to the propriety of their admission.

In the progress of the trial it next appears that the defendant exhibited eight original notices issued by said Ilsley to him, corresponding in date and amount with five of the six notes declared on; but Ilsley testifies that his record shows that he protested other notes of the same date and amount with each and all the notes in suit, and that he was unable to identify the particular notice which was issued by him upon each of said notes. The protests relied on by the plaintiff are testified to by Mr. Ilsley as genuine, and they appear to correspond with his notarial record; and upon examination, are found to be exactly descriptive of the notes in suit. Under such circumstances it is not perceived how other notices, precisely like those produced by the plaintiff,

can have any tendency to invalidate the protests relied on, or to show that the defendant had not the legal notice necessary to charge him as endorser upon the notes described in the plaintiff's writ.

Judgment on the verdict.

CHARLES RICHARDSON, *in Equity, versus* WILLIAM WOODBURY, *Executor.*

An executor, who is empowered by the will to sell the real estate of the testator, and distribute the proceeds thereof to legatees, is thereby invested with the title to such estate by necessary implication.

But the executor of such a will does not thereby derive any title to real estate held by the testator in trust.

A general devise of all the testator's real estate, will include estate held in trust, unless it clearly appears in the will that such was not the testator's intention.

Lands held in trust, unless generally or specifically devised by the testator, descend to his heirs.

From the limited equity powers of this court, a deed absolute and unconditional in its terms, cannot be regarded as a mortgage, although in fact made to secure the payment of a loan.

When the grantor in a deed absolute in its terms makes the conveyance to secure a debt due from him to the grantee, a resulting trust arises by implication of law. And if when the debt becomes due, or within a reasonable time thereafter, the amount is paid or tendered in payment, the grantee may be compelled to reconvey.

Or if before the debt becomes due the grantee sells the estate for more than the sum due him, the excess may be recovered in assumpsit.

But when the time specified for the payment of the whole debt secured by the conveyance has expired, or a reasonable time, where no specific time is named, the estate becomes absolute in the grantee, discharged of the trust.

Bill in equity for the redemption of a mortgage, in which it is alleged that on the second day of May, A. D., 1855, one Thomas Warren, of said Portland, was seized and possessed

of certain real estate, situated in said city of Portland, and conveyed the same to one Jonathan Tucker, then of said Portland, and since deceased; that said conveyance, though absolute in form, was in reality made to secure to the said Tucker the payment of certain demands held by the said Tucker against the said Warren; that the said Tucker never took actual possession of the said premises, but permitted the said Warren to retain possession, and to receive the rents and profits thereof, and that he, the said Warren, has thus been in possession of said premises, and received the rents and profits thereof from the time of said conveyance to said Tucker, to the time of his conveyance of the same to the plaintiff; that the said Tucker, afterwards being summoned as Trustee of the said Thomas Warren and William W. Woodbury, made his disclosure, in writing, in said action, and therein admitted and stated that the said property was conveyed to him by said Warren, as security for said indebtedness as aforesaid.

And your orator further alleges, that said Tucker, on the thirty-first day of July, 1856, died, having before that time, to wit: On the third day of May, A. D., 1849, made and executed his last will and testament. And also having, on the eighteenth day of May, A. D., 1855, made and executed a codicil annexed to said will and testament; that the said Tucker, by the first clause in the said codicil annexed to said last will and testament, discharged and relinquished all such indebtedness secured by said conveyance as aforesaid, whereby said property became and was freed from all incumbrance, by reason of said indebtedness to said Tucker.

And the defendant answering, wholly denies that, by the first clause of said codicil, or by the whole or any part thereof, the said Tucker discharged or relinquished all, or any portion of the indebtedness by the demands secured or paid by the conveyance aforesaid, except as is hereinafter stated, or that all, or any portion of the real estate and property, conveyed thereby, became freed or discharged from all or any portion of the supposed incumbrance thereon, arising

from the demand paid or secured by such conveyance, as aforesaid, and the indebtedness thereon to said Tucker, and to his estate; and avers and alleges that the same has been ever since, and now is, held as security for such indebtedness, or in payment thereof, and to be held and disposed of by this defendant, as executor as aforesaid, according to the will and codicil of the said Tucker, and the provisions thereof, and under the laws of the state.

Fessenden & Butler, and Shepley & Dana, solicitors for complainant.

Howard & Strout, and W. Goodenow, solicitors for respondent.

DAVIS, J. On the third day of May, 1849, Jonathan Tucker made his will, in which he bequeathed the sum of four thousand five hundred dollars to Thomas Warren, "out of the money he might be owing at the time of his (Tucker's) decease." He also made said Warren one of his residuary legatees, to whom, after making a large number of specific bequests, he devised "all the rest and residue of his estate." And he appointed William Woodbury, the defendant, executor of said will. Warren, at this time, was indebted to Tucker to the amount of about $5,600.

The indebtment of Warren to Tucker was afterwards increased to about $16,000. To secure a part of this, being two notes on which was due about $5,500, on the second day of May, 1855, he gave to Tucker a mortgage deed of certain real estate in Portland. And on the same day he gave Tucker a warranty deed of certain other real estate, the consideration named in the deed being five thousand dollars. This deed, though absolute in form, appears, by a disclosure in writing subsequently made by said Tucker, to have been given and received, "as security" for the balance due from Warren, besides the two notes secured by the mortgage.

On the 18th day of May, 1855, Tucker made a codicil to his will, in which he directed the sum of four thousand five hundred dollars bequeathed to Thomas Warren to be paid to

him "without reference to any unadjusted claim against him;" and by this codicil he "discharged and relinquished all such unadjusted claim" he might have against said Warren, at the time of his (Tucker's) decease.

He also, in this codicil, directed his executor "to sell all his real estate not specifically devised," and distribute the proceeds thereof to the residuary legatees named in the will.

Tucker died on the thirty-first day of July, 1856; and the defendant accepted the trust to which he was appointed, as executor of his last will and testament.

Thomas Warren, after the decease of Tucker, claimed that the real estate conveyed by him to Tucker by his warranty deed of May 2d, 1855, was held by said Tucker only "as security" for his (Warren's) indebtment to him; that the whole of that indebtment was "discharged and relinquished" by said Tucker, by the codicil to his will; and that said estate should be reconveyed to him. On the 7th day of October, 1856, he conveyed his interest therein to the plaintiff, who prays this court to decree, "that the said conveyance from Warren to Tucker was a mortgage; that the debt secured thereby has been fully released and discharged; and that said Woodbury, as executor, release and convey all title, interest, and claim in and to the premises, to him."

Assuming that Tucker, at the time of his decease, held the title to this estate in trust; and that he, in his will, discharged the debt which it was intended to secure; can this bill in equity, for the release of the title be sustained *against the executor?*

A general devise of all the testator's real estate, will include estate held in trust, unless it clearly appears elsewhere in the will that such was not the testator's intention. Jackson v. Delancey, 13 Johns. R., 537; 1 Jarman on Wills, 638. Tucker devised "all the rest and residue of his estate" to certain persons named in his will. By this devise, the residuary legatees might have taken the estate in controversy, charged with whatever trust was attached to it in the hands

of Tucker. But by the codicil, the testator so far revoked his will that these legatees were to take, not the estate itself, but the proceeds of it, when it should be sold by the executor. It is very clear, therefore, that the title to the estate did not pass to the residuary legatees.

By the codicil, the executor was authorized "to sell all the real estate," "to make good and sufficient deeds thereof," and "to distribute the proceeds thereof to the residuary legatees." This vested the title to such estate in the executor, by necessary implication. Deering v. Adams, 37 Maine R., 264. But it vested no title in the executor except to that estate the proceeds of which the testator designed to have distributed to his legatees. It could not have been his intention to direct the sale and distribution of any estate held in trust. The title of the executor, being only implied from, and necessarily limited by, his authority to sell, if this estate was held in trust, he has no interest in it which he can release. If Tucker held any estate in trust, at the time of his decease, the title descended to his heirs, and they only can release it.

The present controversy appears to be an amicable one, both parties alike desiring a judicial determination of their rights. And we have been requested, if the bill cannot be sustained against the executor, to make such a disposition of it that an amendment may be allowed, and the proper parties be summoned to answer. We therefore proceed to consider the other questions that have been presented.

The plaintiff alleges in his bill, and the defendant admits in his answer, that the deed given by Warren, though absolute and unconditional, was intended only as security for his indebtment to Tucker; and the plaintiff prays that said conveyance may be decreed to be a mortgage. The power of this court in regard to mortgages is limited to "suits for the redemption or foreclosure of mortgaged estates." R. S., chap. 96, sec. 10. It is believed that this has always been understood to apply to those conveyances only which are legal mortgages. No power is conferred by statute,

and we think none has ever been exercised, over merely equitable mortgages. Whenever application has been made for relief by parties not within the express terms of the statute, for the redemption of estates actually mortgaged, unless it could be granted on the ground of trust, or fraud, it has always been denied, on account of "the limited equity powers of the court." Gardiner v. Gerrish, 23 Maine R., 46; Shaw v. Gray, Ib., 174.

In the case of Thomaston Bank v. Stimpson, 21 Maine R., 195, the court was called upon to regard as a mortgage a deed "absolute and unconditional in its terms, but made, in fact, to secure the payment of a loan." Whitman, C. J., in declaring the opinion of the court, says: "No doubt can be entertained but that a court having general equity jurisdiction would regard such a conveyance as a mortgage. But the statute of this state concerning mortgages has entrusted this court with very limited powers on this subject, and is specific as to the cases in which a right of redemption shall remain to the grantor beyond the time stipulated in the mortgage. In the case of mortgages of this description, no such right is saved to him; and when the time stipulated for the payment of the money had elapsed, and the payment had not been made, the estate became absolute in the grantee."

The case of Howe v. Russel, 36 Maine R., 115, has been cited, as sustaining a different doctrine. It is said in that case to have been "determined at a former hearing, that the deed, though absolute in its terms, constituted a mortgage." We have no report of the "former hearing;" but the power of the court seems not to have been questioned. The debt secured by the conveyance had been wholly paid; and the bill alleges that the conveyance was made "*to defraud the creditors*" of the grantor. It is not necessary, therefore, to conclude that the power of the court was exercised in violation of principles that had hitherto been regarded as settled.

But if the deed from Warren cannot be regarded as a mortgage, it is said that Tucker, in his written disclosure,

and the defendant, in his answer, admit that it was received by Tucker *in trust*, to secure the payment of the amount due to him from Warren. And the case of the Unitarian Society v. Woodbury, 14 Maine R., 281, has been cited to show that "a trust need not be *created* in writing, but it is sufficient if it *be proved* in writing." By the statute of frauds of 29 Charles, II., chap. 3, sec. 7, all trusts were required to be "manifested and proved by some writing, &c." Under this statute it is well settled that it is sufficient if there be "written evidence" of the trust. 1 Greenl. Ev., sec. 266.

The statute of Massachusetts of 1784, regulating uses and trusts, was a transcript of the English statute,—the third section containing the same provision—that trusts should be "manifested and proved by some writing, &c." But at the time of our separation, in 1821, this third section was omitted, in the revision of the statutes for this state. Mr. Greenleaf, in a note to the case of Bishop v. Little, 3 Greenl. R., 405, suggested that the Massachusetts statute might be regarded as still in force here, notwithstanding this omission. And there are indications that this court entertained that opinion. Evans v. Chism, 18 Maine R., 220. Whether this was so, or not, is of no importance now. For when the statutes were revised in 1840, this third section of the act of 1784 was revived.

But by the Revised Statutes, chap. 91, sec. 31, all trusts concerning lands are required to be "manifested *and created* by some writing, signed by the party, &c." This has made a most important change from the statute of 1784. It is not pretended that any trust was *created* by any writing in the case now before us, such as would bring it within the equity jurisdiction of this court.

It is true, however, that the third section of the statute of 1784, and the thirty-first section of chapter ninety-one of the Revised Statutes, both of them expressly except all "trusts which arise or result by implication of law." That resulting trusts are within the equity jurisdiction of

this court, and that they may be proved by parol, even in opposition to the terms of a deed, cannot be questioned. Buck v. Pike, 11 Maine R., 9; Baker v. Vining, 30 Maine R., 121. Thus where one man provides the purchase money, and another buys land with it, taking the deed to himself, the law implies that the latter holds the estate in trust for the former, and he may be compelled to convey it accordingly. Dwinal v. Veazie, 36 Maine R., 509. So when a grant, without consideration, was held to be made in trust, for the use of the grantor, this was held to be a resulting trust, within the terms of the exceptions in the statute and so provable by parol. 2 Story's Eq., sec. 1198.

In the case before us it is proved and admitted that the deed from Warren to Tucker, though absolute and unconditional in its terms, was given and received as security for the indebtment of the former. We cannot doubt but that the latter held the estate in trust for that purpose—a trust "resulting by implication of law." If, when the debt became due, or within a reasonable time, Warren had paid or tendered to Tucker the amount due, the latter could have been compelled to reconvey. Or if Tucker had afterwards sold the estate for more than the sum due to him, Warren could have recovered the surplus in assumpsit. Richards v. Allen, 8 Pick., 405. It becomes necessary, therefore, to consider the position of the parties, their rights, and liabilities, at the time when the will was made, and when the testator died.

If there had been a time specified when the whole debt secured by the conveyance was to be paid, there being no right of redemption, the estate would have vested absolutely in Tucker when that time had elapsed. Thomaston Bank v. Stimpson, 21 Maine R., 195. But the larger part of the debt had already been standing more than six years when the deed was made, on the second day of May, 1855. In the absence of any express agreement, Warren would have had a reasonable time during which to save his rights, and redeem the estate, by paying the whole debt. The testator

lived for more than a year afterwards, until July 31, 1856; and yet Warren did not pay the debt. Allowing the trust to continue for a reasonable time, we think that it expired, by the laches of Warren, before the decease of Tucker. When the trust thus expired, the estate then became the property of Tucker, discharged of the trust; and it then operated as a payment upon the indebtment of Warren to the amount of its value. Tucker could then have disposed of the estate by deed; and it would pass, unincumbered by any trust, in a general devise in his will.

A question similar, in most respects, to this, was before the court in the case of Fales v. Reynolds, 14 Maine R., 89. And it was there held that an absolute deed, given in fact as security for a debt, could not be regarded as a mortgage; but that, the debt not being otherwise paid as the parties had agreed, such conveyance then operated as a payment, and extinguished the debt to the amount of its value—like a mortgage, when the equity of redemption has expired.

Such, we think, was the effect of the deed from Warren to Tucker, after a reasonable time had elapsed, and he had neglected to pay the debt. Warren must have so intended, or he would have given two mortgage deeds, instead of making one of his deeds a mortgage, and the other an absolute deed, though they were both made at the same time. And that Tucker so regarded it, is evident from the language employed in the codicil to his will, by which he "discharged and relinquished all his unadjusted claim against Warren." The term "unadjusted," as applied to a demand, signifies that the amount is uncertain—not agreed upon. Before the deed of Warren to Tucker operated as a payment, by the expiration of the trust, the amount of Warren's indebtment was certain; it had been adjusted. But this payment, the value of the estate not being agreed upon, left the amount of Tucker's claim remaining unpaid uncertain, unadjusted. Tucker anticipated this in the codicil to his will; and this unadjusted balance, and this only, if not paid before his decease, we think he intended to discharge. The estate became

vested in him absolutely before his decease; and if the title passed to the executor by the will, it was only for the purpose of sale and distribution to the residuary legatees. The plaintiff took nothing by his deed from Warren, and the bill must be dismissed, with costs for the defendant.

APPLETON, J. The testator by codicil discharged and relinquished whatever "unadjusted claim" he had against Warren. By this release of unadjusted claims, he referred only to the balance which might remain upon and after adjustment, and nothing more. He could not have intended to release his *entire* debt, and leave in full force any counter claim which Warren might have. Neither could it have been his design to discharge his debt, and leave his estate liable to reconvey land, the title of which was in him by deed of warranty. By his will he had bequeathed Warren forty-five hundred dollars "out of the money he might be owing at the time of his (Tucker's) decease." By his codicil he directed this sum to be paid him "without reference to any unadjusted claim against him." The mortgage he held against Warren he gave his wife, and directed his real estate to be sold, and made specific disposition of the proceeds among his residuary devisees. There is nothing in the will or in the surrounding circumstances from which an inference can be drawn of any intention to bequeath to Warren the real estate in controversy, but rather the reverse. It is clear to my mind, that Warren derived no right under the will to the premises in dispute, and that this claim is equally devoid of legal or equitable right. Whether therefore the rights of an equitable mortgagee will be protected and enforced by this court is not necessarily before us, nor is it involved in the determination of this case, and upon this point I intend to express no opinion.

Bill dismissed.

JAMES R. DOCKRAY AND WIFE, *in equity*,

versus

HENRY THURSTON AND WIFE, AND ALS.

Where the prayer in a bill in equity is that reconveyance of an estate be ordered and decreed, although there may have been concealment of the truth, and fraudulent representations on the part of the respondent in obtaining the conveyance; yet while the complainants hold a bond given in consideration of the same, they cannot sustain a bill in equity for such reconveyance without discharging or offering to discharge such bond.

Nor until all parties interested in the estate and bond have been notified, and become parties to the suit.

A division of an estate according to the hereditary rights of the heirs, cannot be made in the absence of those whose rights are to be determined by such division.

The bill alleges that Plummer, on the second day of May, 1840, was seized of a parcel of land; that being so seized, said Plummer on the same day conveyed one-half of the same land to his daughter Jane, one of the defendants; that this deed was made in trust and without consideration; that on June 2d, 1846, said Jane reconveyed the said premises to said Plummer in execution of the trust; but there was a neglect to have the deed recorded; that Plummer died December, 1847, and there was no administration on his estate; that this reconveyance being unrecorded, the heirs of Plummer, with the exception of Samuel M., were without any other than indirect knowledge of the fact of its ever having been made; that on or about the 12th of May, 1848, said Jane made a written acknowledgement of the terms on which she held the premises; that subsequently said Jane was requested to convey to each of the heirs their proportionate part of the premises, which she refused to do, and said she had lost the deed from her father to her, also denying that she had ever reconveyed it to her father; that induced by these and other fraudulent representations of the said Jane, the said Mary Ann S. Dockray, for the sake of obtaining for the

other heirs their portions of the property, executed a deed to said Jane, May 12, 1848, at which time said Jane conveyed to Harriet Hersey, one of the heirs, the agreed portion coming to her as one of the heirs, and executed an obligation to convey to the other heirs, except the said Dockray, their respective portions; that subsequently, October, 1848, said Jane, claiming to be the owner of the land just described, received of the A. and St. L. R. R. Co. $121 in money for damages to the same, which sum she still retains.

That on the 23d of Dec., 1848, the deed from Jane to said Moses was accidentally found in his house.

In her answer Jane denies that the deed from her father to her was given without consideration, but says she gave her note for it, although she believes he intended it as a gift.

That she reconveyed the property without consideration; that for aught she knew the existence of that reconveyance was *unknown* to the other heirs. She admits also that she acknowledged to S. M. Plummer that the land had been reconveyed, and denies that she ever had such an interview with Mrs. Dockray as is alleged; but says the proposition came from Mrs. Dockray to release her interest in said land, if said Jane would convey to the other heirs.

Shepley & Dana, for plaintiff, argued that the conveyance from Moses Plummer was clearly made in trust. Though the defendants, Thurston and wife, deny this, the whole transaction shows that the statement to this effect in the bill is correct. For while Thurston and wife in their answer say that she paid for it by her note of hand, there is no pretence that she ever paid the note, and she says that she believes her father intended it as a gift.

It is admitted by Thurston and wife that the premises were voluntarily reconveyed by her to her father. If she had already *paid* for the property, she would not have made a reconveyance without consideration.

The misrepresentations of Mrs. Thurston are explicitly proved. Mrs. Dockray, in the absence of her husband, believing that the property was really in the hands of Mrs.

Thurston, was induced by her fraud and falsehoods to surrender *her* rights for the sake of obtaining for the other heirs some portion of the estate. The conveyance, therefore, executed by her on May 12, 1848, was obtained in fraud, and Mrs. Thurston should be ordered to reconvey to complainants the proportion belonging to Mrs. Dockray as one of the heirs of Moses Plummer, together with her proportion of the money received from the A. and St. L. R. R.

1. Here was a false and fraudulent representation of material facts which constituted inducements to the conveyance, on which the grantor relied and had a right to rely. Such representations constitute a ground for rescission. Harding v. Randall, 15 Maine R., 332; Hough v. Richardson, 3 Story, 659; Rosevelt v. Fuller, 2 Cowen, 129; Smith v. Richards, 13 Peters, 26; Tyler v. Black, 13 Howard, U. S., 230.

2. Where parties are dealing with each other in a fiduciary manner, as in the relation of attorney and client, or portions *or members of the same family dealing about family matters,* the obligation to a disclosure of all material facts becomes imperative. Gordon v. Gordon, 3 Swanston, 400; Story's Eq., sec. 207–8; Adams' Eq., p. [179]; Wheeler v. Leedors, Leading Cases in Equity, pp. 254, 255–6, and cases there cited.

A contract may be set aside for fraudulent misrepresentations, though the means of obtaining information are open to the party deceived, where from the circumstances he was induced to rely on the other party's representations. Regnell v. Sprague, 8 Have., 222; Adams Eq., 422.

Rand for defendants.

Bill must be dismissed because Plummer, Wilbur and Hersey, parties to arrangement and holding deed and bond, are necessary and *indispensable* parties, and do not appear, and cannot be compelled to appear—that being out of jurisdiction does not dispense with them, if necessary parties. 1 Daniell Ch. Pldg., 333; Story's Eq. Pldg., 99; Picquet v. Swan, 5 Mason, 561.

Bill itself does not make a case for interposition of a Court of Equity.

Misrepresentations (if made) must be made for the purpose of misleading and inducing party to do as he ultimately did, and must effect it.

No representations made here to induce Mrs. D. to make deed. *Mrs. D. proposed it.*

It is no where distinctly alleged in bill that Mrs. D. *was induced by alleged statements to make the release.*

Party must be misled and deceived, but if he know alleged statement to be false when made, it cannot be said to influence him. 1 Story's Eq., sec. 202.

Mrs. D. had *good reason to know* there had been reconveyance (see allegations in bill.)

Misrepresentation must be not only material to the act done, but must be in something in regard to which one party places trust and confidence in the other. 1 Story's Eq., 213, sec. 197, 199.

Must be mutual trust and confidence; here certainly was none.

It is submitted that bill itself in its allegations makes no case warranting interference of court; and if it did, the answer, *denying all material allegations in bill,* is not overcome by evidence required.

APPLETON, J. The complainants, in their bill allege that Moses Plummer, on the second of May, 1840, without consideration, conveyed to his daughter, Jane Plummer, since, by marriage, Jane Thurston, one of the defendants, a tract of land therein specifically described; that on the second of June, 1847, she reconveyed the same to her father, but that the deed was not recorded, and was mislaid; that in December of the same year said Moses deceased, leaving six heirs, of which number Mary Ann S. Dockray, the mother of the complainant, was one; that the defendants are the other heirs or the representatives of heirs living at the time of his decease; that after the decease of her father, said Jane falsely denied

to said Mary Ann S. Dockray and the other heirs the fact of a reconveyance by herself to her father, and asserted a claim to the premises in controversy in her own right; that subsequently, at the instance of Samuel M. Plummer, one of the heirs, she acknowledged in writing, under her hand, on the back of the deed of her father to herself, that the same was null and void, and that she had reconveyed to him the premises thereby conveyed to her, and that they constituted a portion of her father's estate.

The bill further alleges, notwithstanding this, that said Jane afterwards falsely denied to the heirs that she had ever reconveyed the premises in controversy to her father, or that she had ever signed any such memorandum on the back of her father's deed as is set forth, and utterly refused to convey to the heirs their several interests in the same ; that on May 12th, 1848, Mrs. Dockray and some of the heirs had an interview with said Jane, at which they endeavored to induce her to release to the other heirs their several shares, which she declined doing, asserting her title to the premises, and denying the truth of the several facts previously set forth in the bill; that at this time a settlement was effected, by which, in consideration that Mrs. Dockray would release to said Jane her interest, being one-sixth in a part of land of which said Jane had a conveyance from her father and of the lot in dispute, the said Jane conveyed to Hannah Hersey, one of the heirs of her father, one-fifth of the estate, and gave a bond conditioned to convey to each heir respectively, excepting Mrs. Dockray, one-fifth of the same.

The deed of release from Mrs. Dockray to Mrs. Thurston bears date 12th May, 1848, and the bond from Henry Thurston and wife recites this deed as part of the consideration for its excution. The obligees, of whom Samuel M. Plummer was one, do not seem to have been present at this time, and whether the bond was ever in their hands or under their control is not stated in the bill, nor is there any proof on this subject.

The answer of Henry Thurston and wife, who are the on-

ly parties defendant upon whom service has been made, and who have entered an appearance, admits the existence of an unrecorded deed from Jane to her father of the premises in controversy, and of a memorandum signed by her on the back of her father's deed to her as set forth in the bill.

The prayer of the bill is for a reconveyance of the sixth conveyed by Mrs. Dockray to Mrs. Thurston on May 12th, 1848, and for the payment to the complainants of their share of certain money received by her of the Atlantic Rail Road Company as damages.

The bill alleges that Jane Thurston, formerly Plummer, had a deed from her father of another lot in which Mrs. Dockray released her interest, but it does not seek for a reconveyance of the same. As it contains no allegations that this deed was improperly obtained, it may be assumed the release was made to embrace the second tract for the purpose of quieting her title to the same.

The effect of the arrangement of May 12th, 1848, was to divide the share of Mrs. Dockray among the other heirs. Mrs. Thurston thereby received a conveyance of her sister's sixth, and conveyed one-fifth of the whole estate to Hannah Hersey; and by her bond contracted to convey the same interest to each of the other heirs. When the conveyances contemplated should have been executed, Mrs. Thurston would retain but one-thirtieth more than her share by inheritance—the other four thirtieths conveyed to her by Mrs. Dockray being divided among her co-heirs. Mrs. Dockray, induced by the fraudulent conduct of her sister, seems to have been willing to surrender her interest in this portion of the estate, for the sake of procuring for the other heirs their legal rights. Whether she was aware of the written memorandum on the back of the deed of Moses Plummer to Jane Plummer, by which the latter recognized her rights and those of the other heirs, is not stated, nor is there any proof on the subject.

The complainants in their bill seek a reconveyance without offering to cancel or surrender the bond given by Henry

Thurston and wife. The obligors in that bond may be liable to convey according to its terms to the obligees. If they should so convey and should further be compelled to convey according to the prayer of this bill, they would lose their interest in the estate of Moses Plummer. The complainants would have the land deeded by their mother to Jane Thurston reconveyed to them, and at the same time the bond which was the consideration of that conveyance would be in full force. The defendants, Thurston and wife, would be bound by their contract and yet would be deprived of the consideration on account of which they had entered into it.

As it appears that there were others than Thurston and wife among whom the complainants' sixth has been or is to be divided, who are interested in this controversy, they should be made parties to this litigation.

This bill, as the matter is now presented, cannot be sustained, because, though there may have been concealment of the truth and fraudulent misrepresentations on the part of Jane Thurston, the complainants pray for a reconveyance of certain lands without discharging or offering to discharge the bond which was given in consideration of the deed of the same, and without procuring a reconveyance to Jane Thurston of the thirtieth deeded by her to Mrs. Hersey over and above her hereditary right; and because the other parties interested in the estate and in the bond of said Thurston and wife have not been notified of the pendency of this suit, and have not become parties to the same; and because a division of the estate, according to the hereditary rights of the heirs, as prayed for, cannot be made in the absence of those whose rights are to be determined by such division.

All who are interested in the estate may be made parties, and the bill be amended on terms.

INHABITANTS OF PORTLAND *versus* JOHN B. BROWN.

In all contracts the intention of the parties must govern, and where the price of land in question was to be determined by arbitrators, and the plaintiffs agreed to release their claim to the same, and the defendant was to pay *therefor* the sum fixed by the arbitrators as the value of the land, to entitle the plaintiffs to recover, they must aver and prove an offer to release upon payment by the defendant.

The deed of release to the defendant and the payment by him of the money *therefor* were to be concurrent acts.

This is an action of assumpsit.

The plaintiffs offered in evidence two papers, of which the following are copies:

"MEMORANDUM. In consideration that the city council of the city of Portland, for the purpose of adjusting a controversy, respecting the western line of my enclosed land between Vaughan street and the western promenade, *has discontinued so much of said promenade as lies within my enclosure*, eastward of a line drawn on a plan of the premises made by M. G. Deane, and marked with the letters A. D. C., which line is more particularly described in the report of the committee on highways, made to the city council of this date, *and has agreed to release to me all* claim of the city to the land covered by such vote of discontinuance, I hereby *engage to pay* to the city *therefor such sum as shall be determined by the arbitration of Stephen Waite, Samuel Small, and William Ross, of Portland.*

"Witness my hand this seventeenth day of April, 1854.

(Signed.) J. B. BROWN."

"The undersigned referees in the case of the city against John B. Brown, having viewed the premises and duly examined the plan of M. G. Deane in relation thereto, have, upon mature and deliberate consultation, determined that said Brown shall pay to the city the sum of eight hundred and fifty dollars, in full consideration for the land he occupies, to

which the city has the right and title, and (in addition thereto the sum of fifteen dollars, being the cost of reference.)

(Signed.) STEPHEN WAITE,
WILLIAM ROSS,
July 12, 1854. SAMUEL SMALL."

The execution of these papers was admitted. Plaintiffs called Stephen Waite, who testified, that the aforesaid award was made upon the agreement or memorandum afore described, signed by J. B. Brown, and with reference to the subject matter of said memorandum, and that said Brown was with the referees when they examined the premises, and was fully heard by them in relation to the matter submitted to their arbitration.

William Boyd, called by plaintiffs, testified, that he was the city clerk in the year 1854–5, and that on the 24*th February*, 1855, he presented and made known to the said Brown the written award of the referees, and demanded of him payment of the amount awarded, and that he declined paying it.

The defendant then moved for a nonsuit, on the ground that the plaintiffs had not tendered a deed of release to him of all their claim to the land, covered by the vote of discontinuance aforesaid, before commencing this action, and a nonsuit was ordered by the court, the chief justice presiding, to which the plaintiffs excepted.

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

1. The promise of the defendant, on which plaintiffs rely, is an independent promise to the plaintiffs. It is to pay such a sum of money as certain persons named in the contract shall award. The amount of the award is the sum sued for. Campbell v. Jones, 6 T. R., 570; Boon v. Eyre, cited in 14 Black., p. 273, (Lord Mansfield's opinion,) and p. 279; 1 Parsons on Contracts, Book 2, chap. 1, sec. 9, p. 41, and notes thereto; 1 Saund., Pordage v. Cole, 319, and note; 17 Maine R., 372, Babcock et al. v. Wilson et al.; 12 Md. R., 455, Thorp v. Thorp; 2 Md. R., 33, Smith v. Thisbury; 21 Pick., 439, Page Mill Dam Foundry v. Hovey.

J. Rand, counsel for defendant.

APPLETON, J. A controversy having arisen between the parties to this suit respecting the western line of the defendant's enclosed land between Vaughan street and the western promenade, the defendant in consideration that the plaintiffs had discontinued so much of the promenade as lies within his enclosure within certain limits, and had agreed "to release" to him "all claim of the city to the land covered by such vote of discontinuance "engaged" to pay to the city *therefor* such sum as shall be determined by the arbitration of Stephen Waite, Samuel Small, and William Ross.

The arbitrators have examined the premises, and made their award. The plaintiffs have demanded payment of the sum awarded, which, the defendant declining to make, they have commenced this suit.

In all contracts the intention of the parties must govern. By the terms of the contract, signed by the defendant, the price of the land in question was to be determined by arbitrators. That sum the defendant was to pay. It was the value of the land to be conveyed to him. Now for what was he to pay it? We think for the release by the plaintiffs of their claim to the land in question—not for the contract to release but for the land released. The plaintiffs were to release their claim to certain premises, and the defendant was to pay "*therefor*" the sum fixed by the arbitrators as the value of the same. It was not the intention of the parties that the defendant was to pay his money for the chance of compelling a specific performance at the termination of litigation, more or less protracted.

If the plaintiffs claim to enforce the contract of the defendant, they should aver and prove a performance or readiness to perform on their part. It is not requisite that they should tender a deed unconditionally and without payment, but they should be ready to give a deed upon payment. They have neither averred nor shown an offer to deed upon payment by the defendant, and are not entitled to recover. Howland

v. Leach, 11 Pick., 151. Hunt v. Livermore, 5 Pick., 395. The deed of release to the defendant, and the payment by him of money "therefor," were to be concurrent acts. Lester v. Jewett, 1 Kernan, 453.

The rule of law laid down in Portage v. Cole, 1 Saund., 319, does not apply to the contract in question. This is not a case of mutual covenants. The contract in suit is signed by the defendant alone.

Exceptions overruled.

JOHN RANDALL AND ALS. *versus* JAMES B. THORNTON.

It is not essential that the word warrant or any precise form of expression be used to create an express warranty, but if the vendor at the time of the sale affirms a fact as to the essential qualities of his goods, as an inducement to the sale, in clear and distinct terms, and the vendee purchases on the faith of such affirmation, that will constitute an express warranty.

A contract in writing is to be construed by the court, and not by the jury.

The certificate of a master carpenter as to the capacities of the ship, is to be taken as matter of description, and not of warranty, unless so intended by the parties.

This is an action for breach of warranty as to tonnage of the bark "Oak Hill." Plea, the general issue and joinder.

The plaintiffs read in evidence a bill of sale of said bark rom the defendant to the plaintiffs, dated April 20, 1855, containing the following description: All the hull or body of the good bark Oak Hill, together with all and singular her boats, sails, tackle, apparel and furniture, now lying at Portland, not yet registered, but described as follows, to wit:

"DISTRICT OF PORTLAND AND FALMOUTH,
PORT OF PORTLAND, MARCH 5, 1855.

"Ira Milliken, master carpenter, of Scarborough, do certify that the bark named the Oak Hill was built under my direction at Scarborough, during the year 1854, for John Libby,

3d, of Scarborough, State of Maine; that the said bark is United States built; has two decks, three masts, is one hundred and thirty-seven feet six inches in length, twenty-nine feet five and one-half inches in breadth, and fourteen feet eight and three-fourths inches in depth, of five hundred and forty-seven and twenty-seven ninety-fifths tons burthen. As witness my hand, the day and year aforesaid.

(Signed.) IRA MILLIKEN."

Rufus McIntire, called by plaintiffs, testified that he is surveyor of the port of Portland; that the bark "Oak Hill" was measured in the early part of January, 1855, by a return of which it appears that her length was one hundred thirty-seven feet and six inches, and her breadth twenty-nine feet five and a half inches, and that she measured on computation five hundred and forty-seven tons and twenty-seven ninety-fifths of a ton, and the same was certified and recorded February 1, 1855; that by request of persons interested he carefully remeasured said vessel April 21, 1855, and found her true length to be one hundred and thirty-three feet and ten inches, and her breadth to be twenty-eight feet and ten inches, and that she measures five hundred and nine tons and eighty-six ninety-fifths of a ton, showing an error of thirty-seven tons and thirty-six ninety-fifths of a ton too large in the former measure and certificate.

Upon this evidence the court, GOODENOW, J., presiding, ordered a nonsuit, subject to the opinion of the full court.

Rand for plaintiffs.

Any representation of the vender concerning an article sold, if relied upon by vendee and understood by both parties as absolute assertion, will amount to a warranty. Oneida M. Co. v. Lawrence, 4 Cowen, 440; Whitney v. Sutton, 10 Wend., 411.

To constitute a warranty it is not necessary to say, "I warrant." It is sufficient if the vender says the article is of particular quality or a particular size.

Here was a *particular description* of property sold, and it

amounts to a warranty of the size. Hogin v. Plympton, 11 Pick., 97; Shephard v. Kain, 5 B. and A., 240; Henshaw v. Robbins, 9 Met., 83; Cox v. Prentice, 3 M. and S., 344.

If there be any uncertainty whether statements in the bill of sale were part of the contract and consequently a warranty, or were mere opinion, the nonsuit was improper; the case should have been sent to the jury. Long on sales, 210, 212; Power v. Barham, 4 Ad. and E., 473.

Fessenden & Butler, counsel for defendants.

The nonsuit was properly ordered. Express covenants in the bill of sale apply to *title* only, no proof of any representation of defendant outside of bill of sale, or that he knew of any mistake in the measurement of the vessel.

The only ground that plaintiffs can rest their case, is upon the warranty alleged to be constituted by description of vessel in bill of sale.

Instead of the registry of the vessel, she being new, and "not yet registered," defendant inserts as a description the certificate of the master carpenter, required by the laws of the United States before registry can be obtained. U. S. Statute at Large, vol. 1, page 291, act December 31, 1792, sec. 8. This does not constitute a warranty; at most it is a mere recital, in quotation marks, of what the master carpenter certifies—there is no proof that he did not so certify. Defendant merely gives the description of said vessel as she is described to him; gives on the bill of sale all the information he has in regard to her, but does not warrant or promise that it is true. The certificate under the statute quoted is a kind of temporary register which allows a vessel to be removed from the place where she is built. If there is a warranty implied in the *certificate* then there would be in every case of transfer of vessel where the *register* is recited.

All authorities agree that representations at the time of sale of personal chattels to constitute warranties *must be intended as such*; if they are matters of mere *description* they are not warranties. Parsons on contracts, vol. 1, p. 463,

note *o*; Richardson v. Brown, 1 Bing., 344. This certificate is called by defendant *a description* in so many words.

The case of Henshaw v. Robbins, 9 Met., 83, and Harding v. Lovering, 2 Pick., 214, and kindred cases, do not apply to this case, inasmuch as there is here no representation or affirmation of *quality* or of *species* or *kind;* and as for *quantity* this was a sale of the *whole ship*, as a unit, for a round sum—not so much per ton.

As a test of the whole question: If the vessel had been of more tons burden than described in the bill of sale, could *defendant* have recovered of *plaintiffs* for the excess?

That the description of the size and tonnage of vessel in the bill of sale does not constitute a warranty, but is simply a *description*, like the number of acres inserted in a description of a piece of land with definite metes and bounds in a deed. We cite: Dyer v. Lewis, 7 Mass., 282; Powell v. Clark, 5 Mass., 355; Green on Ev., vol. 1, p. 38, sec. 26.

Even if this description constituted a warranty, plaintiffs have proved no damages by the breach. A horse may be of fifty pounds less weight than described in a bill of sale of him, and he still may be as good a horse as if he were of fifty pounds more weight. As to ships, it is a matter of common experience and knowledge, that their real capacity is not measured by what they ton, according to the arbitrary rules, for measurement of vessels, laid down in U. S. laws. A vessel of less nominal tonnage, may be really of greater capacity, and carry a larger cargo, than one of much larger tonnage, as measured by rules laid down by U. S. statutes.

RICE, J. This is an action of case for an alleged breach of warranty in the sale of the bark "Oak Hill." The consideration paid for the bark was twenty-eight thousand dollars. The bill of sale describes said bark as "now lying at Portland, not yet registered, but described as follows, to wit:

"DISTRICT OF PORTLAND AND FALMOUTH,
PORT OF PORTLAND, March 5, 1855.

"Ira Milliken, master carpenter, of Scarborough, do cer-

tify, that the bark named the Oak Hill was built under my direction, at Scarborough, during the year 1854, for John Libby 3d, of Scarborough, State of Maine; that the said bark is United States built; has two decks; three masts; is one hundred and thirty-seven feet and six inches in length; twenty-nine feet five and a half inches in breadth, and fourteen feet and eight and three-fourths inches in depth, and of five hundred and forty-seven and twenty-seven ninety-fifths tons burthen; as witness my hand the day and year aforesaid. (Signed) IRA MILLIKEN."

Then follow covenants of general warranty of title.

The proof in the case shows that on an accurate admeasurement, the bark was not as long, wide nor deep as specified in the carpenter's certificate recited above, and that she did not measure as much by thirty-seven and thirty-nine ninety-fifths tons as therein specified.

There is no evidence that either party examined the vessel or made any measurement of her dimensions before the sale.

On these facts the presiding judge ordered a nonsuit, and the plaintiffs excepted.

The books are full of cases in which the question of warranty or no warranty is discussed. These cases are by no means all consistent with each other. In an early case, Chandelor v. Lopus, 2 Crokes' Jac., 2: it was held that the bare affirmation that the article sold was a bezoar stone, without warranting it to be so, is no cause of action. The doctrines of this case, though received with approbation in England and in this country, have not been adopted in both this state or Massachusetts without some qualification, rendered necessary, perhaps, from the imperfect manner in which the original case is reported. The inference from the report is, that unless there be an express warranty, in terms, an action for breach of warranty will not lie; that bare words of affirmation will not, in law, constitute a warranty.

The established doctrine now is, that to create an express warranty the word warrant need not be used, nor is any

precise form of expression necessary, but if the vender at the time of the sale affirms a fact as to the essential qualities of his goods, as an inducement to the sale, in clear and distinct terms, and the vendee purchases on the faith of such affirmations, that will constitute an express warranty. Henshaw v. Robbins, 9 Met., 83; Bryant v. Crosby, 40 Maine R., 9. Affirmations of quantity and quality, which are made pending the negotiations for a sale, with a view to procure a sale, and having that effect, will be regarded as a warranty. Parsons' Mercantile Law, 57. To give simple representations or affirmations this effect, they must be of a character to enter into the essential elements of the contract—to constitute a substantial inducement to the purchase. If the language used is merely by way of description, to identify the thing sold, and not for the purpose of describing its quantity or quality, then they are to be treated as mere words of description and not of warranty.

The express terms of warranty in the bill of sale before us are clearly confined to the title, and do not apply to the dimensions or quality of the bark. Are the descriptive words of the carpenter's certificate incorporated into this bill of sale, to be construed as terms of warranty? Ordinarily the number of tons in a vessel, like the quantity of land in a deed, are treated as matters of description only, and not of warranty. 1 Greenl. Ev., 26, and note; Dyer v. Lewis, 7 Mass., 284.

So, too, where articles capable of division and enumeration are sold in the aggregate, the parties intending to sell the whole for a given price, an enumeration of the articles and fixing a price in detail will be treated as matter of description and not of warranty. Thus in the case of Covas v. Bingham, vol. 22, Eng. Law and Eq. Rep., 183, the original defendants sold the plaintiff a cargo Ibralia Indian corn, sixteen hundred and sixty-seven and three-fifths quarters, at thirty shillings per quarter. The corn was then afloat, and was sold by the bill of lading. On measurement the corn fell short fifty-three and one-tenth quarters. For this defic-

iency the plaintiff brought his action and recovered in the county court. But on error, in the Queen's Bench the judgment was reversed. Lord Campbell remarked, "I think that the intention of the parties, to be gathered from the contract itself was, that the *cargo* should be taken by the purchaser for better or for worse, for less or for more."

In the case before us a round sum was paid for the bark, as a whole. She was not purchased at a specific price by the ton, the price for the whole ship to be determined by the number of tons she should measure, but was sold as an entire ship, at a fixed price *in solido*, larger or smaller. While we do not intend to assert that a bill of sale of ship may not contain matter of description, as to her capacity, which may properly be construed to be representations amounting to and constituting a warranty, we are of opinion that in this case the certificate of the master, as incorporated into this bill of sale, is to be treated as mere matter of description, and does not constitute a warranty as to the dimensions of the bark, and was not so intended by the parties. The contract being in writing, is to be construed by the court, and not by the jury.

Nonsuit confirmed.

JACKSON R. MYERS *versus* THE YORK AND CUMBERLAND RAILROAD COMPANY.

At common law the assignee of a *chose in action* cannot maintain a suit in his own name unless there had been an assent to the assignment and a promise by the debtor to pay the assignee.

It is the province of the court to decide the negotiability of instruments, unless in new cases where the law merchant is doubtful, where evidence of custom may be submitted to the jury.

In the absence of proof of custom as to the negotiability of coupons or interest warrants disconnected from the bonds with which they were issued, an independent, negotiable character cannot be given them without the interposition of the legislature, unless the intention of the party issuing them distinctly so appears upon the face of the coupon itself.

REPORTED by RICE, J., at *Nisi Prius*.

This is an action of assumpsit, the statement of which fully appears in the opinion of the court.

F. O. J. Smith, counsel for plaintiff, argued that the coupon upon which the action is brought is negotiable as an attachee of bond 149, which is negotiable, and to which it refers.

J. C. Woodman, counsel for defendant, examined the records of the corporation minutely, critically, and at length, in order to show that the officers were not authorized to issue bond 149 with coupons. He also submitted an able argument against the constitutionality of the 248th chapter of the statute for 1856, as applicable to this case. These portions of the argument are omitted, as the case did not turn upon either of them.

He also argued that the certificate on which the suit is brought, was issued without consideration. The bonds were on interest. It is therefore apparent, that Mr. Myers has received the whole pay for his labor and material under the contract, and that portion of it which was to be paid in bonds, in the six per cent. bonds of the company; and that if this interest certificate contains any promise at all, on the part of the corporation, which he denied, it was without consideration. The bonds were under seal. They import a consideration, and must be paid, principal and interest. If the certificates must be paid also, it must be without any consideration.

The bonds are "payable to bearer," with interest. They are "customably transferable by delivery," and have passed into the hands of third parties. They are negotiable, and must be paid, principal and interest. 1 Parson's Con., 240; Bank of St. Clairville v. Smith, 5 Ham. R., 222.

The certificate in suit is not a coupon. See the definition of *coupon*, Webster's Dictionary, Bouvier's Law Dictionary. The certificate is not a coupon, because it was never annexed to any bond or principal contract.

The certificate was not payable to "bearer" or "holder,"

in terms, or to the holder by any other equivalent words. It was not negotiable, and as it was not issued to the plaintiff, he can maintain no action upon it. 1 Parsons on Con., pp. 202 to 208 and 239 and 240; Statute of Anne, 3 and 4, chap. 9, sec. 1; Chitty on Bills, 196; Brown v. Gilmore and al., 13 Mass. R., 160; True v. Fuller, 21 Pick. R., 141; Ball v. Allen, 15 Mass. R., 433; Douglass v. Wilkeson, 6 Wend. R., 637, 643; Moody v. Threlkeld, 13 Georgia R., 55; 2 Comyn's Contracts, 536. The certificates not being negotiable, if they contain contracts, can be enforced only in the name of John G. Myers, to whom they were issued. But if he should commence a suit on them, he would fail for want of consideration.

If it be said that the word "coupon," in itself, implies negotiability without the word "bearer," our first answer is, that these certificates were not coupons. Secondly, we say, the word "coupon" does not imply a negotiable contract, without the word "bearer," "holder," or equivalent words. No inference can be drawn that the certificate was intended to be negotiable, because the bond was payable to bearer, but the reverse.

But this certificate not being a coupon, must be construed by itself from the words it contains. If the word "bearer" was struck out of the bond, then it would not be payable to any person in particular; it would not be a negotiable contract; and no obligation or promise could arise from the corporation to pay the money secured in the bond to any other person than John G. Myers, from whom the consideration moved. Yet the argument on the other side would make this certificate miscalled a coupon, a negotiable contract, although issued without date, without consideration, without being made payable to bearer or holder, or to any known payee; and although issued in company with a bond, that was issued upon good consideration, and a regular date, but without terms of negotiability! To suppose such a result, would be to make the corporation promise the whole principal and interest to John G. Myers alone, and at the same

time promise to pay other sums equal to the interest, nine days after said interest should be paid, to as many different persons as might happen to purchase these certificates. And this by a forced implication, that the certificate contains a negotiable contract payable to "bearer," when it does not contain the word bearer nor any equivalent word or words!

To the argument, that these are negotiable contracts, because they refer to the *bonds* by number, and the *bonds* are negotiable, it is answered, that the reference by number to the bonds, if it shows anything, shows the certificate is an imperfect instrument—that it belongs to something else—to some bond. There is nothing to show that the bond belongs to the certificate. But the number of the bond on the certificate is evidence to show that the certificate belongs to bond 149; that it is a mere cast of interest for the bond holder; that it has gone astray; that it is not negotiable as a contract independently and separately from the bonds.

RICE, J. This is an action of assumpsit brought by the plaintiff as the endorsee or assignee of the following instrument:

"COUPON } YORK & CUMBERLAND } BOND CERTIFICATE
No 6. } R. R. COMPANY. } No. 149.

On the tenth day of February, 1854, the York & Cumberland Railroad Company will pay thirty dollars on this coupon, at the office of said company, in the city of Portland, Maine.

NATH'L J. HERRICK, Treasurer."

The writ contains two counts, one declaring specially upon the same instrument, as being payable to bearer, and averring the plaintiff to be the bearer thereof; the other for money had and received, to support which the same instrument or paper was relied upon.

The case which comes before us on report from the presiding judge, finds that the paper declared on, together with many others of a similar character, was delivered to J. G. Myers, at the same time that said Myers received from the defendant corporation, and receipted for, sixteen bond cer-

tificates, amounting in the aggregate to the sum of $15,500. These bond certificates were numbered from 142 to 157 inclusive, and bore date February 1st, 1851, were payable to bearer, in twenty years, with interest thereon, payable semi-annually from the date thereof. Each of said bonds was for the sum of $1000, except No. 157, which was for the sum of $500. No interest warrants or coupons were attached or annexed to any of said bonds, nor is there any reference therein to any such interest warrants or coupons.

J. G. Myers testified for the defendants, that he received from the company July 1st, 1851, bond certificates to the amount of $15,500; that bond No. 149 was among them; that he gave his receipt for said bonds, and at the same time he received a series of coupons connected together, corresponding to each bond by number, but on sheets of paper separate from the bonds; that the bonds were all in the same form, except the number, and that all the sheets of coupons were also in the same form; that he gave the aforesaid receipt in the bond book, July 1, 1851, and never allowed the company anything in addition to the $15,500, for the bonds mentioned in the receipt.

This witness also testified on cross-examination, subject to defendant's objection, that he received the coupons to represent the interest on the bonds; that the coupons corresponded with the bonds by number; that he received them with the bonds as pertaining to them, and that when he took the bonds he did not know that they bore interest independent of the coupons.

It is admitted that bond certificate, No. 149, became the property of William H. Baxter, in 1854, for a valuable consideration, and has remained his to the present time.

There is no evidence showing at what time or for what consideration the certificate or coupon in suit came into the hands of the plaintiff.

It is contended by the defendants that the evidence in the case shows that Herrick, who signed the certificate in suit,

as treasurer, was not authorized so to do by the company. But as the case will turn upon other considerations, we do not express any opinion upon that point.

In view of these facts the defendants contend that the plaintiff cannot maintain this action, because the instrument in suit was issued to the original holder without any legal consideration; that it is not negotiable, and therefore the plaintiff cannot maintain an action upon it in his own name, as endorser or bearer; that if it has ever been assigned to him, that assignment has never been assented to by the defendants, nor have they ever agreed to pay the same to the plaintiff; that no consideration has ever moved from the plaintiff to the defendants, nor does any privity of contract exist between them.

At common law the assignee of a *chose in action* cannot maintain a suit in his own name, unless there has been an assent to the assignment and a promise to pay the assignee on the part of the debtor. Long v. Fisk and al., 11 Maine R., 185. No such assent or promise has been shown in the case at bar. The action, therefore, is not maintainable on that ground.

It is, however, contended, that the instrument is negotiable, and that the plaintiff may maintain this action as the bearer thereof.

The paper itself, considered as an independent instrument, contains no words of negotiability. It is neither payable to *order* nor *bearer*, nor does it contain any words of similar import showing that it was the intention of the makers that it should have currency as an independent negotiable paper. Without some such terms it is not negotiable. Story on Promissory Notes, sec. 44.

It is, however, further contended, that the paper declared on is a "coupon," pertaining to, and in fact a part of bond certificate No. 149, which is negotiable, and that as part of that bond this coupon is rendered negotiable either with or without the bond; that it is a new species of paper recently introduced into the commercial world, and though not con-

taining in itself those technical words which have heretofore been deemed necessary to give negotiability to commercial paper, has in it, nevertheless, all the elements necessary to impart to it that character, and has, in fact, by the commercial world, been received and adopted as a new species of commercial paper.

Mr. Parsons, in the first vol., p. 240, of his work on contracts, says: "We regard the English authorities as making all instruments negotiable which are payable to bearer, and customably transferable by delivery, within which definition we suppose the common bonds of railroad companies would fall. Of the coupons attached which have no seal, this would seem to be probable. But usage must have great influence in determining the question."

The law having generally already determined when an instrument is assignable, and the mode by which the transfer is to be effected, it is the province of the court, and not of the jury, to decide on the negotiability of these instruments, unless in new cases where the law merchant is doubtful, when evidence of custom may be received. Chit. on Bills, 220; Edie v. East India Co., 1 W. Black. R., 295.

In Glyn v. Baker, 13 East., 510, it was decided that India bonds were not negotiable, there being no evidence that they were circulated as negotiable paper.

In Taylor v. Kymer, 3 Barn. & Ald., 320, it was held that India warrants, directed to their warehouse-keeper, for the delivery of goods to A. B. or his assigns, were not negotiable instruments within 6 G. 4, sec. 94.

In Gorgier v. Melville, 3 Barn. & Cress, 45, it was decided that bonds of the King of Prussia, wherein he declared himself and his successors "bound to every person who should for the time being be the holder of the bond, for the payment of the principal and interest, in the manner therein pointed out," were negotiable instruments, the title to which passed by delivery, on proof that these bonds were sold in the market, and passed from hand to hand like exchequer bills.

But in Long v. Smith, 7 Bing., 284, it was held that the coupons, payable to bearer, attached to certain Neapolitan Bordereaux, were not negotiable. The question whether such coupons usually passed as negotiable instruments, independent of the bonds or instruments to which they were attached, and referred, was left to the jury, who found in the negative.

In this country, since the mania for constructing railroads on credit has obtained possession of the public mind, and the issue of bonds payable to bearer, with coupons or interest warrants attached, has become the almost universal resort, and principal capital of railroad corporations, the country has been flooded with these securities, and we have no doubt that it would appear, on inquiry, that the custom has become general to pass such bonds from hand to hand, as negotiable instruments. But whether coupons when disconnected from the bonds with which they were issued, thus pass, we think is by no means so certain. No difficulty, however, is perceived in so framing coupons or interest warrants as to give them the character of negotiable instruments, independent of the bonds to which they were originally attached, if the parties issuing such bonds and coupons so desired. But to give them that independent negotiable character, without the interposition of legislation, the intention of the party issuing them must distinctly so appear upon the face of the coupon itself.

But it is contended that even if it should be held that a coupon could be transferred as an independent negotiable instrument, this action cannot be maintained, because the instrument declared on is not, technically, a coupon.

A coupon is defined to be a remnant shred; (papier portant interet) dividend in the public funds. Surenne's French Dict. An interest certificate, printed at the bottom of transferable bonds (state, railroad, etc.,) given for a term of years. There are as many of these certificates as there are payments of interest to be made. At each time of payment one is *cut off* and presented for payment. Hence the name

coupon. Web. Dict.; *coupons,* from the French, is a term employed in England and elsewhere to denote the warrants for the payment of the periodical dividends on the public stocks, a number of which being appended to the bonds are severally *cut off* for presentation as the dividends fall due. The practice of appending coupons prevails chiefly in reference to foreign stocks. Am. Enc. Sup.

The instrument in suit refers in the margin to bond certificate No. 149, but it is not and never was annexed, attached nor appended to that bond, although it was delivered to J. G. Myers at the same time he received the bond. That bond is an instrument perfect in itself, containing no reference to any other paper. It is dated the first day of February, 1851, and provides that the defendant company shall "pay to the bearer of this bond certificate, at their office in the city of Portland, in the State of Maine, one thousand dollars in twenty years, with interest thereon, payable semi-annually from the date thereof, at said office." By the terms of the bond six months' interest fell due February 1st, 1854. By the certificate in suit thirty dollars, a sum equal to interest on the bond for six months, became due on the *tenth* of February, 1854. The bond was receipted for by Mr. Myers, on delivery, but no receipt was given for the certificate in suit. The testimony of Mr. Myers, given on cross examination, cannot be received to contradict or change the character or legal effect of the printed and written papers in the case.

From these facts and considerations we come to the conclusion that the instrument declared on was issued improvidently and without legal consideration; that it is not a coupon or interest warrant pertaining to bond certificate No. 149; and that as a separate and independent instrument it is not negotiable.

The provisions of sec. 248, laws of 1856, do not apply to this case.

Plaintiff Nonsuit.

CUTTING and MAY, J. J., concurred; TENNEY, C. J., concurred in the result; APPLETON, J., concurred, adding the following note; and DAVIS, J., concurred with note of APPLETON, J.

NOTE by APPLETON, J. If the bonds and coupons are both to be enforced, it is apparent that the defendant corporation will be compelled to pay an amount of interest not authorized by the statutes of this state. If both were in the hands of the same holder, then payment could not be enforced. As the bonds contain a promise to pay interest, the coupons which contain a further and separate promise to pay interest must be regarded as improvidently issued.

The coupons in terms refer to the "bond certificate No. 149," and would seem to be sufficient notice of the existence of such bond, and enough to put one on inquiry as to its terms. It does not appear that the plaintiff was the holder of the coupons in suit before their maturity, for a valuable consideration, or that he came by them fairly in the due course of business, unattended with circumstances calculated to awaken suspicion. Without, therefore, deciding the question of the negotiability of coupons, it is apparent that the present action is not maintainable upon the proof before us.

COUNTY OF OXFORD.

ALBERT JEWETT *versus* WILLIAM C. WHITNEY.

An attachment on mesne process of a right and equity of redemption is sufficient to sustain a levy upon the estate in fee, if at the time of the levy the incumbrance created by the mortgage is relieved.

A levy reserving an estate less than a fee of a part of the premises set off is void in relation to the particular tract from which the reservation is made.

A co-tenant in possession, may maintain trespass *quare clausum* against a stranger for an injury to the freehold.

Where an execution was extended upon a lot of land upon which was a grist mill and privilege, and the appraisers after describing said premises in their return, use the words "exclusive of the grist mill now standing on said premises," the levy cannot be upheld; and it matters not whether it was the intention of the appraisers to exclude the grist mill as personal estate, or to reserve the mill and land under the same for the debtor, as an estate in fee defeasible by the destruction of the mill; in either case the levy will be void.

Where the defendant co-operated with co-tenants of the plaintiff wrongfully, in tearing down an old mill and erecting a new one at large expense, the plaintiff can recover but nominal damages.

This action is trespass *quare clausum*, and comes on report of MAY, J., presiding at *Nisi Prius*.

Both parties claim title to the *locus in quo*, under Sumner Stone, who conveyed by deed of warranty September 12, 1836, to Philip Barrows, who subsequently conveyed to Thomas Kilbourn the immediate grantor of Jewett, the plaintiff.

The defendant claims by virtue of an attachment and levy against Sumner Stone, and his attachment was made May 9, 1836, perfected by levy in which the *locus in quo* is described

as the right to redeem one undivided half of said tract, with one undivided half of a water privilege sufficient for a grist mill, *exclusive of the grist mill now standing on said premises.*

The plaintiff for some time prior to July, 1834, had been in possession of the mill, which is the property in dispute, taking one half of the profits of the same, at which time the defendant took possession of plaintiff's part, and received his proportion of the earnings. The mill was soon torn down and rebuilt by defendant and his co-tenants, using so much of the old as was proper for the new mill. Whereupon this action is brought for expelling the plaintiff, tearing down the mill, converting the same, &c.

At the date of the attachment by defendant, on May 9th, 1836, the premises were under mortgage from Sumner Stone to Moses Young, who conveyed by quit claim to said Stone September 13th, 1836, upon which the plaintiff contended that the equity of redemption being attached, the premises could not be held in fee under it.

The second count in the writ is for breaking and entering another close, being a saw mill standing upon the same lot of land as the grist mill, and claimed by plaintiff under the same conveyance, and by defendant under the same levy.

C. W. Walton, counsel for plaintiff.

Both parties claim title from one Sumner Stone; the plaintiff, by *deed;* defendant, by a *levy.*

1. The defendant's levy, being after the debtor had conveyed, can only be effectual by virtue of the attachment on the writ. This cannot be, because the attachment was of the debtor's *right to redeem* only, and the levy was made upon the *fee.*

It may be said that the land was redeemed pending the attachment, and that the creditor thereby acquired the right to levy upon the fee. But we contend that the evidence in the case does not show a redemption.

2. The premises in controversy between these parties was not included in the levy. The tenth parcel described in the

appraisers' certificate is the only one referring to the property in dispute between the parties. And it is perfectly clear from the language used, that it was intended to exclude from the levy the grist mill building. Any other construction would be a perversion of the language used. For not only do the appraisers in describing this parcel of land speak of it as an undivided half of said tract, with one undivided half of a water privilege sufficient for a grist mill, "*exclusive of the grist mill now standing on said premises*," but after stating the boundaries of the lot they say, " which said tract of land, and water privilege, we have on our oaths appraised at the sum of $200." Having spoken of, and separated, the premises into three distinct rights, namely, the *land*, the *water privilege*, and the *mill*, and expressly excluded the latter, the appraisers, as if to guard against the possibility of dispute, say " which said *tract of land*, and *water privilege*, we have appraised," &c., showing that the mill was not only excluded from the description of the property when it was first mentioned, but was left out in the appraisal. " *Expressio unius, exclusio alterius*," applies here with full force. It may be said that the word land alone would include in its signification the mill standing upon it. Our answer is that the word land *alone* is not used. They have partitioned the property into *land*, *water privilege*, and *mill*, and so speak of it throughout the entire levy. The true inquiry is, not in what sense the word land *may* be used, but in what sense *did* these appraisers here use it? That they did not understand the word land as extensive enough in its signification to include mills standing upon it, or at least that they did not so use it, will be seen by reference to the appraisal of the parcel next following the one in dispute. They first describe the land, and then add, " also one undivided fourth part of the saw mill standing and being on the premises." Here they *expressly include* the saw mill, while in the former case they *expressly exclude* the grist mill. Now if the appraisers supposed a levy upon " one undivided fourth part of said piece of land," would have carried with it one fourth

part of the saw-mill standing upon it, why did they add "one undivided fourth part of the saw mill?" and "one fourth part of the clapboard machine?" The truth is that they intended to include the saw mill, and the clapboard machine, and they said so;—they intended to exclude the grist mill, and they said so. And again at the close of their certificate, when they recapitulate what they have appraised, the appraisers say, "which said tract of *land, saw mill,* and clapboard machine, and *water privilege,* we have appraised," &c., being as particular to state what was included, and to leave out what was excluded, as before. To say that the appraisers intended to include, what they so expressly exclude, seems to be absurd; and would not now be argued were it not a point seriously made in defence. The plaintiff respectfully contends, therefore, that the grist mill *building* was clearly excluded, and was clearly intended to be excluded, from the levy. Whether the *land on which it stood* was *intended* to be excluded, is doubtful.

If the grist mill building was excluded from the levy, it is immaterial to the rights of the plaintiff whether the land on which it stood was excluded or not. If it was so intended, and the court so hold, that is all the plaintiff claims. If it was not, the levy is for that very reason void. For a creditor cannot, by making a levy, change the character of the estate, and convert a part of it into personal property by taking the land under buildings and leaving them as personal estate, to be torn down or removed. Grover v. Howard, 31 Maine R., 550, and authorities there cited. Howard v. Wadsworth, 3 Greenl., 471.

3. When an *undivided part* of real estate is levied upon, the officer should state in his return some excuse for so doing, or the levy will be void. In this case not only an undivided half of the estate in dispute was levied upon, but of several other parcels; and yet no reason is stated by the officer or appraisers for so doing. For this reason, therefore, the plaintiff contends that the levy is void. Rawson v.

Lowell, 34 Maine R., 201; Merrill v. Burbank, 23 Maine R., 538; Stat. 1821, chap. 60, sec. 27.

E. Gerry, counsel for defendant.

1. This being an action of trespass *quare clausum*, it cannot be maintained, because the plaintiff was not in *actual possession* of the *locus in quo* at the time when the supposed trespass was committed. Bartlett v. Perkins, 13 Maine R., 87; Chitty Pl., 1 vol., 175; Rising v. Stannard, 17 Mass., 282; Mayo v. Fletcher, 14 Pick., 525; Taylor v. Townsend, 8 Mass., 411; Shepherd v. Pratt, 15 Pick., 32; Little v. Palester, 3 Maine R., 6.

2. In order to maintain this action the possession of the plaintiff must have been entire and exclusive. Cong. Soc. v. Baker, 15 Verm., 119; Dorsey v. Eagle, 7 Gill and Johns., 321; and the authorities before cited; 1 T. R., 430.

3. One tenant in common cannot maintain trespass *quare*, &c., against his co-tenant, or any person acting with the permission and consent of the latter, for claiming and exercising against the will of the former, exclusive possession of the common property and appropriating the entire income thereof. 4. Kent, 360; 1 Chitty Pl., 179; Porter v. Hooper, 13 Maine R., 25; Rising v. Stannard, 17 Mass., 282; Duncan v. Sylvester, 13 Maine R., 417.

In the case of Rising v. Stannard, before cited, the court say, "all the tenants in common have an equal right to the possession of the land held in common, and may occupy it themselves or any one of them may authorize a stranger to occupy under him. Anders v. Meredith, 4 Dev. and Batt., 199.

Trespass *quare*, &c., cannot be mainained for acts committed subsequent to an ouster without a re-entry into possession. The authorities before cited. 3d Ed. Oliver's Precedents, p. 549, and the authorities there cited.

Nothing short of the actual destruction of the common property will enable one tenant in common to maintain

quare, &c., against another. 4 East., 119, and the authorities there cited; 1 Chitty Pl., 179 and 79.

"If one of two tenants in common of an old stone wall pull it down in order to rebuild it, and does rebuild it, this is not destruction for which trespass lies. 1 Chitty Pl., 79 and 179, before cited.

Although the R. S., chap. 129, sec. 17, authorizes tenants in common to sue in severalty, but section 18, of the same chapter, requires that notice to the co-tenants shall be given before trial.

But the defendant wholly denies that the plaintiff has any legal title to the *locus in quo*, and claims title in himself. His title rests upon the construction of a clause in a levy made by defendant upon the land of Sumner Stone, December 4, 1837, which levy is made a part of this case.

The grist mill, at the time of the levy, stood upon the land levied upon, and described by metes and bounds, and there is no reservation or exception whatever.

Sumner Stone, the debtor whose land was levied upon, as the deeds in the case show, had the same interest in the mill that he had in the land, and therefore it was liable to be taken in execution.

The levy twice recites the fact that the "mill stands upon the premises."

The same rule of construction is to be observed in regard to a levy as a deed. Waterhouse v. Gibson and al., 4 Maine R., 230.

When several particulars are named in a deed descriptive of land intended to be conveyed, if some are false or inconsistent, and the true ones sufficient to designate the land, the false and inconsistent will be rejected. Vose v. Handy, 2 Maine R., 322; Wing v. Burgis, 13 Maine R., 111; Cutler v. Tufts, 3 Pick., 272; Pike v. Monroe, 36 Maine R., 309; Hall v. Fuller, 7 Vermont, 101.

From the lapse of time since the levy, and the fact that Jewett had taken a bond of purchase from Whitney of the mill, a presumption of a title by grant under the circumstan-

ces of this case, may fairly be raised. Clark v. Faunce and al., 4 Pick., 245; Allen v. Scott and al., 21 Pick, 25.

MAY, J. If the plaintiff can recover it must be under the first count in his writ, no acts of trespass being proved under the second. Upon an examination of the deeds in the case, we are satisfied that the plaintiff has established his title to the *locus in quo*, described in his first count, unless the defendant by virtue of his attachment in his suit against Sumner Stone, and his subsequent judgment, and levy has acquired a title which overrides it. Both parties claim under said Stone, who, at the time of the defendant's attachment, was seized as mortgagor, and tenant in common with others of one undivided half, part of a certain tract of land situate in the town of Waterford, upon Crooked river, (so called,) upon which tract was a grist mill and water privilege, said mill with its appurtenances being the *locus in quo*. It appears that Stone derived his title to this, and one undivided fourth part of a certain saw mill, land, and water privilege, adjoining to the grist mill tract, by a deed from Moses Brown to him, dated February 7, 1835, to whom said Stone gave back on the same day a mortgage, to secure a part of the purchase money.

The defendant's attachment bears date May 9th, 1836. The deed from Stone on which the plaintiff, through several intermediate conveyances, relies, was a deed of warranty, dated September 12, 1836, acknowledged the same day, and recorded two days afterwards. The levy relied on was made December 11, 1837, being within thirty days from the rendition of the judgment. It further appears that Brown, the mortgagee of Stone, by his deed of quit claim, dated September 13, 1836, released and conveyed all his interest in said premises to said Stone.

It is contended in defence that the defendant's attachment, having been made before Stone had parted with his interest in the premises, and seasonably followed up by a levy upon his execution, gives him the better title. This, it is conceded,

depends upon the validity and effect of the attachment and levy. If the attachment or levy does not cover the *locus in quo*, or if that part of the levy which is upon the tract on which the grist mill stands is void, then the title of the defendant fails.

The first objection urged against the defendant's title, is, that the tract of land, on which the grist mill stands, was not attached upon the defendant's writ against Stone. The deed from Brown to Stone and the levy both describe the saw mill tract, which adjoins that of the grist mill, as *a part* of lot No. 6, in the 14th Range; and all the deeds, through which the plaintiff claims, describe both mills as situate upon the same lot. From these facts, uncontrolled by any other evidence in the case, we infer that the premises conveyed by Brown to Stone, and mortgaged back to Brown, were a part of said lot No. 6. By the return of the officer who made the attachment, it appears among other things, that he attached not only all the right in equity of redeeming the land and mills mortgaged to Moses Brown, but also all said Stone's right, title, and interest in lot No. 6, in the 14th range in Waterford. There can be no doubt but that such an attachment authorized the defendant to levy his execution upon the mortgaged premises, in fee, provided the mortgage had been paid or satisfied, and the incumbrance created by it removed before the levy. Statute of 1821, chap. 60, sec. 1, re-enacted in the R. S., chap. 114, sec. 31; Pillsbury v. Smyth, 25 Maine R., 427. The deed of quit claim and release from Brown to Stone, made in September, 1836, operated to relieve the estate from the incumbrance created by the mortgage. We cannot doubt that such was the intention of the parties to the deed. This left the mortgaged premises in a condition to be levied upon, by the defendant, in fee, or to enure to the plaintiff by virtue of his deed, if no valid levy should be made.

The second objection to the defendant's title is more formidable. It is that the grist mill, which is the *locus in quo*, is not included in the estate set off upon the defendant's exe-

cution. It is urged, and not without reason, that the appraisers, by their language and from their description of the premises, manifestly intended to exclude from the levy, either the mill as personal property, or the mill and land on which it stood as a part of the realty; and that in either view the defendant took nothing by his levy, so far as relates to the premises described in his first count.

It is true, that if the appraisers have excluded from the levy the mill and land in fee simple, then it can be effectual only to pass the residue of the tract. So, too, if they have reserved to the debtor a right to occupy the mill, then standing upon the premises, until its destruction, this being an interest in the realty, would amount to a fee, defeasible by the destruction of the mill, which, if valid, would render any interference, on the part of the defendant, a trespass, while the mill should stand. Such a proceeding, however, would be unauthorized. In effect it would be to cut up a fee simple into parts at the pleasure of the creditor. This cannot be done, unless in some cases, where the statute authorizes an execution to be levied on the rents and profits of an estate. The present is not such a case. A levy, therefore, reserving such an occupation of a part of the premises set off, would be void in relation to the particular tract from which the reservation was made. So, too, "a creditor cannot, by making a levy, change the character of his debtor's estate, and convert a part of it into personal property, by taking the land under the buildings, and leaving them as the personal estate, to be torn down or removed." Grover v. Howard, 31 Maine R., 546. There is no evidence in this case tending to show that the grist mill standing upon the premises at the time of the levy, was not a part of the realty. On the contrary, all the deeds of conveyance recognize it as such, and the counsel on both sides have, in their arguments, so treated it. Therefore, if excluded as personal estate, the levy upon the tract on which it stands is void.

Our inquiry then is, does the levy exclude the grist mill or the mill and land on which it stands, in any of the pre-

ceding modes. If the fact of exclusion is established, it may not be material to ascertain precisely in what mode.

A levy is a statute conveyance to which the same rules of construction are to be applied as to a deed of conveyance. Waterhouse v. Gibson, 4 Greenl., 230, and there is no difference in their application and effect, whether applied to an exception, a reservation or a grant. Allen v. Scott, 21 Pick., 25. The intention, as developed in the language of the conveyance, considered in connection with the state of facts existing at the time, is to control. Sanborn and al. v. Hoyt, 24 Maine R., 118. In a levy the language of the return is to be taken as the language of the parties.

In the case before us the levy was upon several distinct and separate parcels of land, and that part of its language which is more immediately applicable to the present question, is as follows: "Also one other tract of land situated in Waterford, in said county, and on Crooked river, so called, it being one undivided half of said tract, with one undivided half of a water privilege sufficient for a grist mill, exclusive of the grist mill now standing on said premises." Then follows a description of the tract by metes and bounds, and a valuation of "the land and water privilege," no mention being made of the mill in such valuation. The one undivided half is appraised at one hundred dollars. The omission to mention the mill in connection with the land and privilege in this appraisal, while in appraising the very next tract described in the same levy, which is one undivided fourth part of a certain tract of land, with an undivided fourth part of a saw mill standing thereon, the land, saw mill, and water privilege are all specifically mentioned, is a fact strongly indicative of an intention to exclude the grist mill. These two tracts, with the mills and water privileges connected therewith, were all the estate, parts of which were conveyed by Brown to Stone, February 7, 1835, as appears by his deed of that date. The consideration of that deed was $600. The valuation in the levy of the whole estate, so conveyed, if the grist mill was included in the levy, was but $275. May not

this difference in the value indicate that the grist mill standing on the premises was excluded? Besides, if we leave out of the levy the words "exclusive of the grist mill now standing on said premises," such, in other respects, is the almost verbatim similarity between the two descriptions in the deed and the levy, that we are led to infer that the appraisers must have had the description in the deed before them to copy from when they made the levy. If such was the fact, then the insertion of the words of exclusion in the levy shows clearly an intention to diminish the estate which was conveyed to Stone by the deed; and if the appraisers had not such description before them, no satisfactory reason has been assigned in the defence for using these excluding words in the levy, and none can be assigned, except that they were used for the purpose of excluding the mill, either with or without an interest in the land, from the operation of the levy. Unless such was the intention, no effect whatever can be given to the words.

In the case of Howard v. Wadsworth and al., 3 Greenl., 471, there was a conveyance by deed of one undivided half of a mill site, with the falls and privileges, "*exclusive of the grist mill now on said falls*, with the right of maintaining the same." These words of exclusion in the deed were held to be a reservation securing to the grantor the mill and the right of maintaining the same so long as it should stand on the premises. The words, "with the right of maintaining the same," do not appear to have been regarded by the court as having any influence in determining the fact of the exclusion of the mill, but simply as tending to show the nature and extent of the interest intended to be reserved. No distinction, therefore, is apparent between the case cited and the one at bar, so far as relates to the construction touching the fact of exclusion. In view, therefore, of this authority, and the considerations before stated, we are satisfied that the grist mill standing on the premises at the time of the levy, either with or without an interest in the land, (and as we have before said, so far as this case is concerned, it matters not which,)

was in fact intended to be excluded from the levy, so that the defendant, by means of it, acquired no title to the mill or the land on which it stands.

It is suggested in defence, that the word *exclusive* instead of *inclusive* was used in making the levy by mistake. If this be so, the court have no power, either at law, or in equity, to correct it. Linscott v. Fernald and al., 5 Greenl., 496; Lumbert v. Hill and al., 41 Maine R., 475. The other objectios urged against the validity of the defendant's levy need not be considered.

It is next objected by the learned counsel in defence that, under the circumstances of this case, title in the plaintiff is not alone sufficient to maintain the action. It is said the plaintiff was not in actual possession when the acts of trespass complained of were committed. It appears that he was a tenant in common with others, and his cotenants were in the actual occupancy of the mill, accounting to him for his share of the profits. It does not appear that they were lessees. At most they were but the servants of the plaintiff, carrying on, upon shares, his portion of the estate. Their possession was his possession. Hobson testifies that Lebroke, the plaintiff and himself, who were the then owners of the mill, had been in possession, occupying jointly until the defendant took possession, on the 8th or 10th of July, 1854. Such possession is sufficient to maintain *trespass quare clausum*. If however the plaintiff's cotenants could be regarded as tenants at will of his share in the estate, still the action would be maintainable for acts injurious to the freehold. Davis v. Nash, 32 Maine R., 411.

The gravamen of complaint as alleged in the writ, is the breaking and entering of the defendant into the plaintiff's close or mill, on the 8th of July, 1854, and thereafterwards tearing down and destroying said mill, and taking and carrying away the materials thereof, whereby the plaintiff has been wholly deprived of the benefit of his said mill. It is, in substance, a usurpation of the fee, and an expulsion of the plaintiff from his portion of the estate. The defendant was not a

tenant in common with the plaintiff, and the acts complained of do not appear to have been done by the license or direction of any person that was. The plaintiff's cotenants seem to have been passive, taking no adversary part in depriving the plaintiff of his share of the profits of the mill. They merely assented to the title assumed by the defendant, and agreed to account to him for the profits of the plaintiff's share, and subsequently did so. This case is therefore wholly unlike that of Rawson v. Morse and al., 4 Pick., 127.

The authorities cited in defence clearly show that possession in fact, is indispensable to the support of *trespass quare clausum*, and that after an ouster no action can be maintained for a subsequent trespass without a re-entry. If the defendant took possession under his levy, this was an ouster, notwithstanding his levy upon the *locus in quo* was void. The difficulty in the way of the defendant's position, is, that the facts in the case show a subsequent re-entry by the plaintiff before the acts of trespass complained of were committed. The testimony shows that he was in possession at the time, and that he received his share of the profits for the preceding year. The statements of Lebroke, who was a witness for the defence, as to what the plaintiff said about having a bond, or a claim from Whitney on the mill, are too indefinite and uncertain to authorize the conclusion that the plaintiff was in possession as tenant, or otherwise than in his own right. In view, therefore, of the facts, we find nothing in the relation of the parties which constitutes a defence; or in the nature of the occupancy by persons other than the plaintiff, which divested him of that possession in fact, legally necessary to the maintenance of this suit.

The only remaining question is that of damages. The proof shows that the mill, standing on the premises at the time when the defendant took possession, in July, 1854, had become nearly worthless. It was so rotten that it could not be repaired, and the witness, Lebroke, testifies that it was almost impossible to use it. In its then condition the profits of it could not have exceeded the cost of the repairs. Under

these circumstances the defendant co-operated with the co-tenants of the plaintiff in tearing down the old mill and erecting, at an expense of more than two thousand dollars, a new one in its stead. So far as the materials obtained from the old mill were of value, and would answer, they were put into the new. While the plaintiff may, possibly, have lost some immediate profits, before the date of his writ, by his expulsion from the mill, he has largely gained in the increased value of his estate. His damages, therefore, can be only nominal.

Judgment for the plaintiff for one dollar.

HANNAH DYER, *Comp't, versus* THOMAS HUFF.

The statute of 1856, "in relation to witnesses," was not intended to effect any existing statute, but to change the rule of the common law, which excluded parties of record and others from testifying.

It was only an enlargement of certain acts, and contains no repealing section. Neither was it intended to exclude the complainant in a bastardy process, "until the defendant shall first offer himself as a witness," on the ground of an implied offence against the criminal law.

EXCEPTIONS. GOODENOW, J., presiding.

This is a complaint of bastardy.

To sustain the action, the attending physician, Dr. Jesse Sweat, was called, and before being sworn the respondent's counsel objected to the introduction of any testimony showing or tending to show that the complainant at the time of her travail accused the respondent with being the father of said child, because that by the statute of this state, passed April 9, 1856, entitled "an act in relation to witnesses," the provisions contained in chapter 131 of the Revised Statutes, particularly sections 7 and 8, were repealed; and further, that they objected wholly to the complainant's testifying until after the respondent offered himself as a witness. The

presiding justice ruled that the case should proceed in the ordinary mode pursued in such cases prior to the passage of the act of 1856. The witness testified, and the complainant was next sworn, the respondent's counsel still claiming that she could not be a witness until after the respondent "had offered himself" as a witness, but her testimony was received.

The defendant, though objected to by complainant, was introduced and testified as a witness for himself.

The jury found a verdict in favor of the complainant.

Eastman & Leland, and Tapley, counsel for respondent.

D. Hammons, counsel for complainant.

CUTTING, J. The statute of 1856, chapter 266, entitled "An act additional in relation to witnesses," was not intended to effect any of the then existing statutes of the state, but was designed to change the rule of the common law, which excluded parties of record, and those having any interest in the event of the suit, from testifying. It was only an enlargement, as its title imports, of certain acts, admitting certain persons to give evidence in cases where by the common law, they were held incompetent, such as inhabitants of cities, towns and plantations, and members of certain corporations. The act contains no repealing section, which is usually inserted, when in conflict with a pre-existing statute. Its most ardent advocates did not mean by its provisions to exclude a person from being a witness, who was before admissible either by statute or the common law. With what propriety, then, can it be contended, that the eighth section of chapter 131 of R. S., allowing the complainant, under certain circumstances to be a witness, has been repealed? The only answer which the counsel for the respondent can give, is, that it was repealed in order to allow the putative father in all cases an opportunity to escape; and such would be the inevitable consequence; for by our decisions unless the complainant can first testify, the respondent, however guilty,

must be discharged; then no evidence, not even his confessions, are admissible against him.

But, says counsel, bastardy implies an offence against the criminal law, and a party cannot be a witness in such a suit, unless the defendant shall offer himself as a witness, and my client does not elect so to do, because, otherwise, no evidence can by any possibility be produced against him. It cannot be inferred that the legislature of 1856 entertained any such idea.

The respondent, on his own motion, was admitted to testify, and even if such admission was erroneous, he has no just cause of complaint.

As to the instructions requested by the respondent's counsel, and given or refused by the presiding judge, we perceive no evidence reported in the case upon which to base any such requests, and for aught that appears they were purely hypothetical.

Exceptions overruled, and judgment on the verdict.

INHABITANTS OF OXFORD

versus

COUNTY COMMISSIONERS OF OXFORD COUNTY.

A writ of *certiorari* is grantable only at the discretion of the court.

The hearing and determination upon a petition for a writ of *certiorari* must be had at *Nisi Prius*.

This case is presented upon a petition to the Supreme Judicial Court, next to be holden at Paris, within and for the county of Oxford; but it does not appear that the petition was there heard and determined, and no report or exceptions consequently are before this court.

J. J. Perry, counsel for plaintiffs.

S. C. Andrews, County Attorney, for defendants.

HATHAWAY, J. A writ of *certiorari* is grantable only at the discretion of the court. Cushing v. Gray et. al., 23 Maine R., 9; Inhabitants of Waterville, petitioners, 31 Maine R., 506; Rand v. Tobie, 32 Maine R., 450; Dyer v. Small et. al., 33 Maine R., 273; Inhabitants of West Bath, petitioners, 36 Maine R., 74.

The petition is improperly before us. The hearing and determination should have been at *Nisi Prius*.

It was not included in the enumeration of subjects to be considered by this court, as matters of law, in the statute of 1852, chap. 246, sec. 8, nor in the last revision of the statutes, chap. 77, sec. 17.

Dismissed from the Law Docket.

STATE *versus* FRANKLIN T. WEATHERBY.

Adultery can only be committed by parties one of whom at least, is married, and by parties not married to each other.

A decree of divorce from the bond of matrimony effectually and fully abrogates the marriage contract, and sets the parties free from their marital relations to each other.

Where the wife was divorced for the fault of the husband, and he married another, and cohabited with her without having obtained a like divorce, he does not thereby commit the crime of adultery either by the laws of this state or at common law.

The indictment charges that the defendant, on the 22d of August, 1856, at Mexico, in said county of Oxford, did commit the crime of adultery with one Catharine F. Thompson, by then and there having carnal knowledge of her body, he, the said Weatherby, being then and there a married m and then and there having a lawful wife alive, other than the said Catharine F. Thompson, and he the said Weatherby, and the said Catharine F. Thompson, not being then and there

lawfully married to each other. The indictment was found at this term of the court.

It was proved on the part of the government and admitted by the defendant that he was lawfully married to one Elizabeth Whitney, at Bath, in this state, June 15, 1837. That they lived together about nine years, and then separated. That about five years ago she was divorced from said Weatherby, on her application, by the Supreme Judicial Court of this state, and has since married again.

It was also proved on the part of the government, that the defendant and one Catharine F. Thompson, the person with whom the adultery is alleged to have been committed, were married to each other at Nashua, New Hampshire, May 14, 1854, and in June following moved into the town of Mexico, in this county, where they have since lived and cohabited together as husband and wife.

Upon this evidence it was contended for defendant that the jury would not be authorized to find the defendant guilty of adultery, and the court was requested so to instruct them. The presiding judge, intending to reserve the question for the consideration of the full court, overruled the objections, and instructed the jury that if they should find that the defendant had had sexual intercourse with said Catharine F. Thompson as alleged in the indictment, to find a general verdict of guilty, and the jury so found.

Record & Walton, counsel for defendant, argued as follows:

In the investigation of this cause four titles come under consideration: Divorce, Marriage, Bigamy, and Adultery.

1. Of the Divorce. Encyclopedia Americana, title Divorce; Bouvier's Law Dict., title Divorce; Webster's Dict., title Divorce; Holthouse's Law Dict., Divorce; 2 Kent's Com., Lect. 27; Story's conflict of Laws, chap. 7.

2. Of the capacity of the guilty party to marry again. Medway v. Needham, 16 Mass., 157; Cambridge v. Lexing-

ton, 1 Pick., 506; Putnam v. Putnam, 8 Pick., 433; Story's conflict of Laws, 2d Ed., chap. 5, sec. 123, 124.

3. Of Bigamy and Polygamy. Russell on Crimes, title Bigamy, chap. 23, p. 187; Mass. Stat. of 1784, chap. 40, sec. 2; Stat. of 1821, chap. 10, sec. 2; R. S., chap. 160, sec. 5, 6; chap. 87, sec. 4; chap. 89, sec. 1; Stat. of 1834, chap. 116, sec. 2, 3; R. S., chap. 89, sec. 2, 7th c.

4. Of Adultery. Commonwealth v. Putnam, 1 Pick., 136; 2 Greenl. on Ev., sec. 48.

The application of these authorities to the case at bar will establish the following propositions:

1. That the divorce from his first wife, although obtained upon her application, dissolved and totally severed the marriage tie, and gave the defendant the capacity to marry again, unless restrained by the laws of the place where the second marriage should take place.

2. That his second marriage having been solemnized in New Hampshire where no such restraints exist, was valid, and should be so regarded everywhere.

3. That by living and cohabiting with his second wife in this state, the defendant did not commit adultery, or any other crime; but on the contrary, Catharine F. Thompson, the woman with whom he is alleged to have committed the crime of adultery, was at the time his lawful wife.

S. C. Andrews, attorney for the state.

RICE, J. The defendant was indicted for adultery. On the trial it was proved and admitted that in 1837 the defendant was lawfully married to Elizabeth Whitney, in the town of Bath, in this state, and that they lived together as husband and wife about nine years; that some five years since she was divorced from the defendant by the Supreme Judicial Court of this state, on her own application, and that she has since that time been again married to a person other than the defendant, with whom she is now living; that the defendant and Catharine F. Thompson, the person with whom the

alleged crime was committed, were married in Nashua, New Hampshire, May 14, 1854, and in the following June moved into Mexico, in the county of Oxford, where they have since cohabited together as husband and wife.

The question now presented for our determination is, do these uncontroverted facts render the defendant amenable to the charge of adultery?

The civil law defines adultery to be the "carnal knowledge of another man's wife," and as is said in Wood's Institutes, 272, the connection of a married man with a single woman does not make him guilty of the crime of adultery.

Adultery is the carnal connection of a man with another's wife. The man may be either married or single; *but the woman must be married;* for the essence of the crime is in the adulteration of the offspring, the spuriousness of the issue. If a married man has carnal knowledge of a single woman, it is not adultery, but fornication. 2 Swift's Laws of Conn., 227. Noah Webster defines it to be the violation of the marriage bed; a crime or a civil injury which introduces or may introduce into a family a spurious offspring. Such would seem to have been the more ancient and common meaning attached to the term adultery. With us, however, the term has a more comprehensive signification, and renders both parties implicated equally liable to punishmen if either the man or woman be married. R. S., chap. 160, sec. 1.

In this state, marriage is purely a civil contract. When contracted in violation of positive prohibitions of law, as in case of the marriage of an idiot, an insane person, or of a white person and a negro, indian or mulatto, it is absolutely void; and the contract may be dissolved in other cases, at the discretion of the Supreme Judicial Court. This discretion is, however, usually exercised within the rules and for the causes heretofore prescribed by the legislature. When the power of the court has been exercised, and a divorce from the bond of matrimony has been decreed on the application of one party, for the misconduct of the other, in what

condition are the parties left? That the innocent party is absolutely absolved from all obligations created by the prior marriage contract, and is at liberty to marry again, has never been controverted. But the condition of the guilty cause of the divorce is not, in popular estimation, at least, so free from doubt. There seems also to have been an impression in the minds of the legislature that such party was not, by such decree, relieved from all obligations imposed by the former marriage. Hence it was provided in sec. 2, chap. 89, R. S., clause *seventh*, "In all cases where one party has been or shall be, divorced from the bond of matrimony, the court granting the same may, on application of the other party, grant a like divorce on such terms and conditions as such court, in the exercise of a sound discretion, may judge reasonable."

The origin of this opinion may probably be found in chap. 40, sec. 2, of the laws of 1784, providing for the punishment of adultery and polygamy. That section contains the following proviso: "That this act, or anything therein contained, shall not extend to any person that is or shall be at the time of such marriage, divorced by sentence of any court whatever, which has or may have legal jurisdiction for that purpose, unless such person is the guilty cause of such divorce."

The above provision was in substance re-enacted by the legislature of this state, chap. 10, sec. 2, laws of 1821. These acts do, by implication, restrain the party who has been the guilty cause of divorce from contracting another marriage, and in case of violation of such restraint impose the penalty prescribed for *polygamy*. There is nothing in either of these acts, affirming the continuation of the marriage contract as to either party, nor declaring that the "guilty cause of divorce" shall be deemed guilty of adultery in case of a second marriage. For reasons of public policy, it may be supposed the legislature deemed it expedient to restrain such guilty party from contracting a second marriage, by rendering them liable to punishment, as for the

crime of polygamy. This, however, is by inference only. How far it was ever binding as a formal statute we do not now inquire.

The statute of 1821 was modified by act of 1834, chap. 116, sec. 32, and by the provisions of the revised statute so as to authorize the court to grant the guilty cause of divorce a *like divorce.*

Adultery, in this state, can only be committed by parties, one of whom, at least, is married, and by parties who are not married to each other. To affirm that a person is married, and yet has no legal husband or wife, is manifestly a solecism. In the very nature of things, the marriage contract under such circumstances cannot exist. There cannot be a husband without a wife, nor a wife without a husband. The existence of one necessarily and conclusively implies the existence of the other. Husband and wife are correlative terms. Anything, therefore, which destroys that relation as to one party necessarily destroys it as to the other.

A decree of divorce from the bond of matrimony effectually and fully abrogates the marriage contract, and sets the parties free from their marital relations to each other. The People v. Hovey, 5 Barb. Sup. Court R., 117; Com. v. Putnam, 1 Pick., 136; West Cambridge v. Lexington, 1 Pick., 506.

By operation of the decree of the court, granting a divorce from the bonds of matrimony to the former wife of the defendant, he ceased to be a married man. Whether he could, therefore, legally contract a new marriage would depend upon the laws of the place where such marriage was contracted. West Cambridge v. Lexington, 1 Pick., 506. The last marriage of the defendant was contracted in New Hampshire. We are not aware of the existence of any law in that state which would restrain a party situated as the defendant was at the time of his alleged marriage with Catharine F. Thompson from entering into the marriage contract. See compiled laws of N. H., chap. 233, sec. 5 and 6.

But, however this may be, this case cannot be affected by

it. Nor can this case be affected by the existence or non-existence of a law in this state which shall make a person who has been divorced, and was the guilty cause of such divorce, who shall marry again, amenable to the punishment provided for polygamy. He is not indicted for the violation of such a statute, if any such exist. There is no law in this state which declares that such acts as have been proved against the defendant constitute the crime of *adultery*. Nor would those acts constitute that crime at the common law. This indictment cannot be sustained.

Exceptions sustained and a new trial granted.

JACOB B. LITTLEHALE *versus* NATHANIEL MABERRY.

A demand of payment, of an endorser of a promissory note, must convey information of its dishonor, and should be made before the fourth day after the last day of grace.

Reported by GOODENOW, J.

Assumpsit against defendant as endorser of a promissory note, dated Boston, November 1, 1854, payable to his order in twenty months, and by him endorsed.

The plaintiff proved that a messenger went to Boston with the note, where plaintiff was informed by the defendant the maker resided, for the purpose of making a demand upon the maker, and on the third day of July, 1856, made diligent search in the city of Boston, for Charles Carter, the maker of said note, and that then and there he ascertained that said Carter had removed from Boston, and then resided at Reading, in the state of Massachusetts, and not at Boston aforesaid; that immediately on receiving that information he proceeded to said Reading, but was unable to reach that town until the fourth day of the same July, not having ascertained his residence in season to go on the third, where he found the said Carter, at his residence in said Reading, and then

and there demanded of said Carter payment of said note, which he then had, and exhibited to said Carter, and that said Carter then and there refused to pay said note, or any part of the same; that on the eighth day of the same July payment of said note was duly demanded of said endorser, in the town of Woodstock, in the county of Oxford.

Rawson & Ludden, counsel for plaintiff.

C. W. Walton, counsel for defendant.

TENNEY, C. J. The note in suit was made in Massachusetts, and to hold the endorser thereof, the law of Massachusetts must have been complied with, in relation to demand and notice.

It is well understood, that in that commonwealth, on all promissory notes, which are negotiable, payable at a future day, grace shall be allowed. R. S. of Mass., of 1836, chap. 33, sec. 5. But whether the note in this case was presented on the day required by the laws of Massachusetts, and payment demanded, is quite immaterial, as it is very certain that the notice to the defendant was defective, in not containing information that the note had been dishonored; and it being given the fourth day after the last day of grace, it was clearly too late; and the endorser was discharged of his liability. Gilbert v. Dennis, 3 Met., 495.

Plaintiff nonsuit.

JOSEPH MATTHEWS *versus* MELZER BUCK.

Parties to a contract made in fraud of creditors may subsequently rescind such contract before the rights of creditors or purchasers have intervened and where not effected thereby.

Where such contract is voluntarily rescinded no disability will attach by reason of any previous fraud to any subsequent arrangement in regard to the same property with other persons, or between themselves when third parties have acquired no rights.

EXCEPTIONS and motion to set aside the verdict, GOODENOW, J., presiding.

This is an action of replevin for one cow and calf and one yearling heifer which plaintiff claimed to have previously hired to the defendant, and that the time for which they were hired had expired.

Defendant also claimed title to the same by virtue of bargain and sale to him by said plaintiff, and introduced testimony *tending to prove such sale, which sale was admitted by plaintiff to have been made.*

Whereupon counsel for defendant requested the presiding judge to instruct the jury that defendant having given the note for the property described in plaintiff's writ, the plaintiff is not now at liberty to deny the validity of that transaction.

That if the jury find the note was given to cover the property claimed by plaintiff, from attachment by creditors of either plaintiff or defendant, the plaintiff is estopped from claiming it in this action.

That if the jury find that the cows or steers, or cows alone came into the hands of defendant by any fraudulent agreement in relation to the rights of creditors of either, known to both at the time, the plaintiff cannot repudiate the agreement and recover in this suit.

The judge declined giving either of said instructions, but did instruct in reference to all of them, that if the plaintiff and defendant undertook to do what in itself was unlawful as against creditors, and afterwards made a valid contract in reference to the same property, the defendant would be bound by the last contract.

There was evidence tending to prove that the plaintiff and defendant made an arrangement for the purpose of defeating or delaying creditors; that the plaintiff put into the possession of the defendant a pair of steers, valued at fifteen dollars, and two cows valued at fifteen dollars each, in 1850, and took his note for $45,00.

That subsequently in 1851, the plaintiff took back the

steers and gave up the note, and then made an arrangement to let the cows to the defendant.

The court instructed the jury that the law would not aid either party in obtaining relief from such fraudulent arrangement, if it was proved to have existed. But if that arrangement was abandoned by the parties, the steers taken back and the note given up, the law would not hinder them from making an honest arrangement subsequently in relation to the cows, and if they believed from all the evidence that such arrangement was honestly made; such previous arrangement if fraudulent towards creditors, would not defeat the plaintiff's claim for what they found honestly due him under such last arrangement. The court did not give the instructions in the language requested, because it did not seem to present a full and fair view of the state of the question.

There was testimony tending to prove that the defendant had a settlement with the plaintiff in 1855, and admitted his right to the cow, calf and heifer sued for; and there was testimony conflicting with it. All the facts were submitted to the consideration of the jury. The verdict was for the plaintiff.

S. C. Andrews, counsel for plaintiff.

T. Ludden, counsel for defendant.

MAY, J. From the testimony recited in this case, so far as we are able to understand it from the bill of exceptions, it appears that some time in 1850 the plaintiff sold to the defendant a pair of steers and two cows, for which the defendant gave his note for $45; and there was testimony tending to show that this sale was fraudulent as against creditors, and that subsequently, in 1851, the plaintiff took back the steers and gave up the note; and at the same time made an arrangement to lease the cows to the defendant. There was also testimony that the parties had a settlement in 1855, when the defendant admitted the plaintiff's right to the cow, calf and heifer sued for. The instructions requested on the part

of the defendant were not given by the presiding judge in the language of the requests, but were in substance given. The jury were instructed, substantially, that the law would not aid either party in obtaining relief from an arrangement which was fraudulent as against creditors, if it was proved to have existed, but that if such arrangement was abandoned by the parties, the steers taken back, and the note given up, the law would not hinder them from making an honest arrangement subsequently, in relation to the cows; and further, that if they afterwards made a valid contract in regard to the same property, the defendant would be bound by such contract.

No reason is perceived why parties who have made a contract in fraud of the rights of creditors, should not be permitted subsequently to rescind such contract in all cases before the rights of attaching creditors or subsequent purchasers have intervened, and where such existing rights are not affected thereby. A rule of law which should prevent them from doing so would be manifestly unjust, and tend greatly to the perpetuation of such frauds. Notwithstanding such a contract is valid between the parties, still if they voluntarily rescind it, no disability will attach, by reason of any previous fraud, to any subsequent arrangement of theirs in regard to the same property, so as to render it invalid, whether such arrangement be made with other persons or between themselves, provided the rights of third parties had not then attached. The instructions given are in harmony with these principles, and, upon the facts stated in the bill of exceptions, are found to be correct.

We do not find upon examination of the evidence, as reported upon the motion to set aside the verdict, any proper ground upon which that motion can be sustained.

Exceptions and motion overruled, and judgment on the verdict.

COUNTY OF YORK.

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ROBERT W. CARLE

versus

BANGOR AND PISCATAQIS CANAL AND RAILROAD COMPANY.

At common law an action for damages by a servant for an injury occasioned by the carelessness of a fellow servant in the same service, cannot be maintained against their common employer unless there be some contributing fault on his part.

Nor is the common law upon this subject changed in its application to railroad corporations in this state by the provisions of the Revised Statutes of 1841, chap. 81, sect. 21.

This action was brought to recover damages for an injury sustained by the plaintiff while in the employ of the defendants, occasioned by the carelessness of a fellow servant in the same employ.

RICE, J., presiding, ordered a nonsuit, to which the plaintiff excepted.

Henry K. Bradbury, counsel for plaintiff.

John H. Goodenow and *Howard & Strout*, counsel for defendants, cited the following authorities: Farewell v. Boston & Worcester R. R. Co., 4 Met., 49; Hayes v. Western R. R. Co., 3 Cush., 270; Duran v. Little Miami R. R. Co., Ohio, S. C.; Skip v. Eastern Counties R. R. Co., 24 Eng. Law and Eq.; Sherman v. Rochester and Syracuse R. R. Co., 15 Barb., 574.

MAY, J. From the testimony in this case, it appears that the injury of which the plaintiff complains was occasioned

by the negligence of a fellow servant in the employ of the defendants; and there is no evidence tending to show that the defendants did not exercise ordinary care in the selection of such servant. Under such circumstances, it is now the well established common law of England, that a workman who meets with an injury from the negligence of a fellow workman, cannot recover therefor in an action against the common master. The superior does not warrant the competency of his servants, and cannot be held answerable for their neglects to another servant, if he used proper care in their selection. Tarrant v. Webb, recently decided in the English Court of Common Pleas, and cited in the American Law Reg., vol. 5, p. 306; Hutchinson v. York, Newcastle and Berwick R. R. Co., 5 W. H. and G., 343; Wigmore v. Jay, Ibid, 354. The same doctrine has also been held in New York. Brown v. Maxwell, 6 Hill, 592; Coon v. Syracuse and Utica R. R. Co., 6 Barb., 231. So it has been held, in several cases in Massachusetts, that where the relation existing between the parties was that of master and servant, no action could be maintained against the master for an injury received in the course of that service from the negligence of a fellow servant. Farwell v. the Boston and Worcester R. Corp., 4 Met., 49; Hayes v. the Western R. Corp., 3 Cush., 270; King v. the Boston and Worcester R. Corp., 9 Cush., 112.

In the present case, although the duties of the servant through whose fault the injury is said to have occurred, were in some respects different from those of the plaintiff, still, at the time of the injury, the plaintiff seems to have been employed with his fellow servant in the accomplishment of the same common enterprise, the duties of each being directed to the same end; but if it were otherwise, the rule of law would be the same. Gillshannon v. the Stony Brook R. Corp., 10 Cush., 228; Albro v. the Agawam Canal Co., 6 Cush., 75.

It is however contended that the common law upon this subject has been modified or changed by our R. S., chap. 81, sec. 21, so far as relates to railroad corporations; and that

their liabilities in cases like the present have been enlarged. By that statute it is provided that "every railroad corporation shall be liable for all damages sustained by *any person* in consequence of any neglect of the provisions of the foregoing section, *or of any other neglect of any of their servants, or by any mismanagement of their engines*, in an action on the case, by the person sustaining such damages." The general purpose of this statute seems to be to fix and establish the rights and obligations of railroad corporations as between themselves and third persons, not their servants; and the language relied on in the section cited, has reference to the liabilities of such corporations for the neglects of their agents, or servants. Notwithstanding its literal construction might entitle a negligent servant to recover for injuries sustained, through his own fault, or any servant to recover for injuries occasioned by the fault of a fellow servant, still such a construction is wholly inadmissible. Statutes, unless plainly to be otherwise construed, should receive a construction not in derogation of the common law. Considering the general design of this statute, we are of opinion that it was not the intention of the legislature to change the nature of, or the incidents connected with, any contracts between such corporations and their servants. If such had been the intention, we think it would have been more plainly or directly expressed. The words, *any person*, in that section of the statute relied on, must be limited in their application to such persons as were not the servants of the corporation, and who may have sustained damages without any contributing fault on their part; thus leaving such servants, who are presumed to have arranged their compensation with their eyes open, and to have assumed the relation with all its ordinary dangers and risks, without any remedy against the corporation for such injuries as may be incident to the service they have engaged to perform. The servant assumes the risks and perils which are incident to his service, "and as between himself and his master is supposed to have contracted on those terms." Noyes v. Smith and al., 2 Williams' Reports

of cases decided in the Supreme Court of Vermont, as published in the Amer. Law Reg., vol. 5, p. 615. Most of the cases before cited distinctly recognize and approve this principle, and some of them assert that the ordinary risks and perils assumed include those arising from the negligence of other fellow servants. Such a rule is supposed to induce greater caution on the part of servants, and thus to conduce to the general safety, and the public good, and we are satisfied with the reasons, the justice, and the policy upon which it rests. The result is that upon the evidence contained in the report of this case,

The nonsuit must stand.

JAMES ANDREWS *versus* NATHANIEL G. MARSHALL.

The fraudulent vendor or grantor parts with all his interest in the property conveyed to his vendee or grantee; the law affords him no aid, and equity no relief in reclaiming it.

Property conveyed in fraud of creditors, is not liable to be seized and disposed of by such creditors, otherwise than by authority of law; and an officer as their agent or legal representative has no greater power.

EXCEPTIONS. GOODENOW, J., presiding.

This is an action of trespass brought by the plaintiff as mortgagee to recover the value of a stock of goods attached by R. M. Lord, a deputy of the defendant, who was sheriff of York county, at the time of such attachment.

The plaintiff claimed under his mortgage duly executed and recorded, and the defendant justified under a writ Isaiah Atkins and als., v. Jacob L. Chase, and said Andrews as his trustee, contending that the mortgage to the plaintiff was fraudulent and void, as to the creditors of Jacob L. Chase, the mortgagor.

It appeared in evidence that the goods attached being a part of the same as those conveyed by the mortgage, were

sold by the deputy, Lord, partly at private sale and partly at public auction, after the writ had been returned and entered in court, before any judgment was recovered in the actions on which the goods were attached, upon which writs it appeared that Chase has since been defaulted, that no account of the goods sold at private sale was kept by the officer selling them, and that no particular return of such sale has ever been made by said officer. Rufus M. Lord testified that Chase requested him to sell at private sale.

The goods were sold before judgment on the writs on which they were attached, upon a notice to the plaintiff to replevy them.

Upon this evidence the plaintiff's counsel requested the judge to instruct the jury that the sale before judgment was unauthorized by law, and that if they believed all or any of the goods were sold by Lord at private sale, and no account kept by him of such sales, then he would be a trespasser *ab initio*, and could not justify his taking and conversion of goods.

The judge declined to give this instruction and instructed the jury that although the officer might, by his irregularities in the sale, have become a trespasser *ab initio*, as regards Chase, yet the plaintiff in this action can derive no advantage from such irregularities. If they found the mortgage was made to defraud or delay creditors, that the defendant may justify under his attachment, and contest the validity of the mortgage to the plaintiff as to Chase's creditors, in the same manner as if his proceedings had been regular and legal. That if the mortgage was fraudulent, the defendant would be answerable to Chase, and not to the plaintiff for any such irregularities.

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

T. M. Hayes and *R. P. Tapley*, counsel for plaintiff.

Paine and *Eastman*, and *Leland*, counsel for defendant.

CUTTING, J. The record discloses, *that* the plaintiff claims title to the property in controversy under a mortgage, duly executed and recorded, from one Jacob L. Chase.

That the defendant justifies the taking, and alleges, *that* as an officer he attached the property on a writ in favor of Isaiah Atkins and another against Chase, and contends *that* the mortgage was fraudulent and therefore void as against his creditors, whom he now represents.

The defendant pretends to represent creditors, and in order to sustain and continue that relation, it is contended, he must show that such affinity has been maintained throughout and not sundered by any illegal or unjustifiable act. This proposition was overruled by the presiding judge, who charged the jury "that although the officer might by his irregularities in the sale have become a trespasser *ab initio*, as regards Chase, yet the plaintiff, in this action, can derive no advantage from such irregularities. If they found that the mortgage was made to defraud or delay creditors, the defendant may justify under his attachment and contest the validity, as to Chase's creditors, of the mortgage to the plaintiff, in the same manner as if his proceedings had been regular and legal. That if the mortgage was fraudulent the defendant would be answerable to Chase, and not to the plaintiff, for any such irregularities."

This instruction is based upon the idea, that the mortgage, if fraudulent, was not only voidable by creditors, but was absolutely void even as between the contracting parties; otherwise Chase could have no remedy against a negligent or guilty officer; for he would be precluded by his own act from claiming title to the property.

In Osborne v. Moss, 7 Johns. R., 161, citing Hawes v. Leader, Cro. Jac., 270, and Yelv. 196, as also in Anderson v. Roberts, 18 Johns. R., 527, "it was decided, that if goods were conveyed to defraud creditors, the conveyance was void only as against them, but remained good as against the party, his executors and administrators." In the latter case, Spencer, C. J., in delivering the opinion, remarks, "the

error of those who assert, that a fraudulent grantee under the 13th of Eliz., takes no estate, because the deed is declared to be *utterly void*, consists in not correctly discriminating between a deed which is an absolute nullity, and one which is voidable only. No deed can be pronounced, in a legal sense, utterly void, which is valid as to some persons, but may be avoided at the election of others. In 2 Lilly's Abr., 807, and Bac. Abr., tit. Void and Voidable, we have the true distinction. A thing is void which is done against law, at the very time of doing it and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself after it is done."

So, in Drinkwater v. Drinkwater, 4 Mass., 353, Parsons, C. J., says: "A conveyance to defraud creditors is good against the grantor and his heirs, and is void only as to creditors. For neither the grantor, nor his heirs claiming under him, can avail themselves of any fraud, to which the grantor was a party, to defeat any conveyance made by him." Also, in Dyer v. Homer, 22 Pick., 257, the same doctrine is reiterated: "The statutes of the 13th and 27th of Elizabeth, are the foundation of our doctrine of fraudulent conveyances. And whether they are in affirmance of the ancient common law or not, their principles have long been adopted here, and have, both in England and America, been a text upon this subject prolific of commentary. They expressly declare fraudulent sales and conveyances to be 'utterly void, frustrate, and of none effect,' '*only* as against creditors;' plainly implying, that between the parties they are valid and operative."

The same principle is recognized in Nichols v. Patten, 18 Maine R., 231.

In Miller v. Miller, 23 Maine R., 22, this court have decided, that where a creditor calls in question a conveyance made by his debtor, upon the ground of fraud, in an action between him and the grantee, the demand of the creditors must be subject to examination, in order to see whether he

has a right, as such, to question the validity of the conveyance.

And, indeed, without further citations, we may add, that the doctrine is established beyond controversy by nearly all the authorities touching this point, that the fraudulent vendor parts with all his title, and can in no event invoke his own turpitude for the purpose of reclaiming any interest in the property so conveyed. Consequently it is difficult to perceive how the officer can become accountable to Chase, the supposed fraudulent vendor, for any "irregularities," according to the instructions of the presiding judge.

Because Chase may have conveyed in fraud of his creditors, it by no means follows, that such creditors may seize and dispose of the property so transferred, otherwise than by authority of law; and an officer as their agent or legal representative has no greater power. To whom, then, is the officer accountable for his official acts? Certainly not to the debtor, the fraudulent vendor, for we have seen that his sale forever debars him from setting up any claim, and that such a sale on being shown in defence might, as against *him*, be a sufficient protection to the officer. No authorities bearing directly on this point, except one, have been cited, and we doubt if any other exists which would, under such circumstances, sustain a suit for damages. If otherwise, the law would relieve a man from the consequences of his own fraudulent acts.

It is true that in Daggett v. Adams, 1 Maine R., 198, the judge instructed the jury, "that if the conveyance was fraudulent, the plaintiff, (the fraudulent vendee,) had no right to look into the officer's proceedings at all, and their verdict must be for the defendant," which ruling was sustained by the court in that case, *under the pleadings*, in short by the following remarks: "In cases of this description, if the officer has conducted irregularly, he stands responsible in damages to the debtor, whose property he has illegally disposed of." "In this manner the rights of the *true owner* are protected. The *fraudulent* purchaser has no

rights as against the creditors of the vendor." This decision, we apprehend, cannot be sustained by either principle or authority, and none were cited by the learned counsel who contended for, or the court who pronounced it, but was rather an act of judicial legislation, promulgated, as the court say, in order "to introduce uniformity of practice."

Let the doctrine of this statute be tested. The statute of 13th Eliz. makes no distinction between sales of real or personal estate so far as it respects the rights of attaching creditors. A. conveys to B. his farm by a deed duly executed, and for the purpose of defrauding C., his creditor, as to whom only the conveyance is void. What, under such circumstances, would be C.'s rights and remedy? The fee in the estate would be in B., for he might convey to an innocent purchaser, for a valuable consideration, ignorant of the fraud, as decided in Anderson v. Roberts, before cited, and confirmed by similar decisions in our own state. The creditors' remedy would consist, before such conveyance, in attaching the estate as the property of A., and perfecting his attachment by a judgment and a subsequent levy; and even then B. might not be divested of his possession, which must be done by a writ, either at law or in equity, against *him*, and if by the latter by a subsequent decree for a specific conveyance. Webster v. Clark, 25 Maine R., 313; same v. Withey, Ib., 326, and cases there cited. In such an event the creditor must first show that he has exhausted his remedy at law, or in other words "he must first do all which the law will enable him to do to obtain a title in the mode pointed out by the statute, and then the court will assist him and prevent his being injured by the outstanding fraudulent title." And the mode pointed out by the statute is not for the officer to be so culpable and negligent in the discharge of his duties as to become a trespasser *ab initio;* such a person in no sense could be denominated a proper representative of an honest and defrauded creditor. His return may show that he has caused interested appraisers to be appointed, who may have appraised the estate at one-third of its

value; or if an equity, may have given no legal notice of the sale, and according to the authority of Daggett v. Adams, it is of no concern to the fraudulent vendee; for such acts of the officer would lay a sufficient foundation in equity and good conscience to authorize a decree divesting him of title, although had the estate remained in the grantor, all such proceedings as to him would have been useless and absurd. And such is this whole doctrine that a trespasser *ab initio* can represent an attaching creditor. Suppose the creditor had taken possession of the property without the intervention of an officer, could he have justified as a creditor against a suit of the vendee? It was decided in Osborne v. Moss, where that question was distinctly raised, that he could not. If not, can he be aided by the illegal acts of the officer. An affirmative answer would mar the whole symmetry of the common law, which, notwithstanding all that has been said to the contrary, approaches nearer to "the perfection of reason" than many of the acts of modern legislation.

The true rule to be deduced from the act of the 13th of Eliz., and the authorities applicable thereto, is this: The fraudulent vendor or grantor parts with all his interest in the property conveyed to his vendee or grantee, the law affords him no aid, and equity no relief in reclaiming it. The fraudulent purchaser obtains a perfect title against the claims of all persons excepting creditors, and under the 27th of Eliz., subsequent purchasers. The creditor, in order to avail himself of the property or estate so conveyed, must pursue his remedy by suit at law or in equity, and in some instances, as we have observed, both processes may become requisite. The relation subsisting between the attaching creditor and the executive officer should not be sundered by such irregularities as would render void his proceedings from the beginning. In which event the purchaser representing his vendor can, in his own name and as the possessor of the property, bring both creditor and officer to account for their unwarrantable interference. And he has to all intents and purposes the

same rights and is subject to the same liabilities the debtor would have and incur, had the property never been conveyed from the one to the other.

This rule inflicts no unnecessary hardship upon the creditor or the officer; it only prevents them from committing wrong, and setting up one fraud in bar of another. The creditor has no reason for complaint—he has his remedy against the unfaithful officer, besides his *statute* remedy against the fraudulent purchaser.

Exceptions sustained.
Verdict set aside, and a new trial granted.

DAVIS, J., *dissenting.* I concur with my associates in overruling the case of Daggett v. Adams. The principle there stated, so far as it applies to *vendees in possession*, cannot be sustained.

But I must dissent from the opinion in this case, because the plaintiff was not a vendee, in the usual sense of that term. He was only a mortgagee, who had not taken possession. His rights were not those of a purchaser. They rested in contract, merely. If that contract was void, he had no rights. As to the creditors of the mortgagor, the contract was void, and the mortgagor was the owner. If, as to the creditors, the mortgagor was the owner, it was competent for him to consent that the goods might be sold on mesne process, and at private sale. He gave such consent; and the sale so made by his consent was as valid as if it had been made at public auction, on the certificate of appraisers. And the plaintiff, if the mortgage to him was fraudulent as to creditors, was not injured by such sale. He had no claim to be consulted by them in regard to the sale. As to them, the mortgagor was the only party in interest. To allow the mortgagor to maintain this action, is to give the aid of the court in enforcing a fraudulent contract against the very parties as to whom the statute pronounces the contract void.

It is said that the defendant in trespass cannot justify by pleading property in another, without showing an interest in

himself from such owner. And it is therefore argued that the defendant can justify only by showing an attachment and sale according to the provisions of law. This would have been so if the mortgagee had been *in possession.* But as he had never taken possession, it was otherwise. If a plaintiff in trespass was not in possession at the time of the taking, the defendant may plead property in another, without showing any interest in himself from such owner. 13 Johns., 276. If it were not so, he might be deprived of his defense, and still be liable to the true owner in another action. I am therefore of opinion that the rule laid down in the case of Daggett v. Adams is erroneous so far only as it applies to vendees, to whom the property has been actually delivered.

EZRA PERKINS *versus* OLIVER RAITT.

The general issue admits the tenant to be in possession of all the land not specially disclaimed.

Where the disclaimer does not extend to the *whole* of the demandant's land, the tenant is guilty of disseizin, and has no right to retain the possession of any portion of it, however minute, which is capable of admeasurement.

WRIT OF ENTRY.

REPORTED by RICE, J., presiding at *Nisi Prius.*

There was also a motion to set aside the verdict as against law and evidence, and because it established the right of the demandant to recover all that portion of the premises which the tenant has disclaimed.

The point of law raised in the report will be fully understood by the opinion of the court.

E. E. Bourne, counsel for plaintiff.

J. Dana, Jr., and *Eastman & Leland,* counsel for plaintiff.

APPLETON, J. The demandant and tenant are owners of adjacent lots, and this controversy relates to the boundary line between them.

The tenant in his disclaimer describes the line, which separates his close from that of the demandant as follows: "thence back from said road by said wall and an old fence, or where an old fence stood, to land of John and James Osborn, thence by said Osborn's to the burying-ground."

The general issue admits the tenant to be in possession of all land not specially disclaimed. Treat v. Strickland, 23 Maine R., 234.

The dispute between these parties is whether the tenant in his disclaimer described the true boundary line. The jury have found he did not, and by reference to a plan made by order of court, have in a special finding designated the true line, by which it appears that the wall and fence trench are an inch or two on the land of the demandant.

The verdict followed the issue, and is correct in form. By reference to the special finding of the jury, it is apparent that the disclaimer does not extend to the whole of the demandant's land. The tenant therefore was guilty of disseizin, and the extent of that disseizin is seen by comparing the special findings of the jury with the tenant's disclaimer. The demandant has no claim for mesne profits, and it is not readily perceived how the tenant would have been benefited by any special finding as to the disclaimer, since that does not cover the premises demanded.

The jury have found that the tenant has disseized the demandant of an inch or two of his land on the boundary line. Against this claim the counsel for the tenant invoke the maxim, "*de minimis lex non curat.*" But we know of no portion of real estate, however minute, which is capable of admeasurement, of which one has a right to disseiz another, or of which having wrongfully disseized him, he has a right to retain the possession. In Pindar v. Wardsworth, 2 East., 162, the plaintiff recovered one farthing as damages for an injury to his common. The smallness of the damages was

urged as an argument against the maintenance of the action, but remarked Lawrence, J., "the smallness of the damages can be no reason for entering a nonsuit." So here if the tenant can disseize the demandant of an inch, and he is not to receive the protection of the law, it is difficult to determine at what number of inches his legal rights will commence.

The rulings of the presiding judge have not been the subject of exception, and upon examining the facts, no cause is found why the verdict should be disturbed.

Motion overruled. Judgment on the verdict.

STATE *versus* BENJAMIN HADLOCK.

The allegations in an indictment that the defendant, not being licensed to sell intoxicating liquors, nor to keep an inn, did sell intoxicating liquors and allowed the same to be drunk within the place where the same were sold, which place was at the time under his control, necessarily import a violation of the 16th section of chapter 255 of the statute of 1856.

Defects in some of the counts of an indictment will not affect the validity of the remainder.

EXCEPTIONS at *Nisi Prius*, GOODENOW, J., presiding.

The defendant was found guilty upon both counts of the following indictment:

The jurors for said state upon their oaths present, that Benjamin Hadlock, of Saco, in said county of York, on the first day of September now last passed, and on divers other days and times, between that day and the day of the finding of this indictment, at Saco aforesaid, in the county aforesaid, not being authorized by the selectmen, treasurer, and clerk of said Saco to sell therein intoxicating liquors, and not being duly licensed by the selectmen, treasurer, and clerk aforesaid *to keep an inn*, within said Saco, then and there

did sell intoxicating liquors, and then and there allowed the same to *be drunk in the place wherein the same were sold, which said place was then and there under the control of said Benjamin Hadlock*, and the said Bejamin Hadlock did then and there, and thereby keep a drinking house and tippling shop, against the peace of the state, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present, that Benjamin Hadlock, of Saco, in the county of York, on the first day of September now last passed, and on divers other days between that day and the day of the finding of this indictment, at Saco aforesaid, in the county aforesaid, not being duly licensed by the selectmen, treasurer, and clerk of said Saco, as the keeper of an inn, in said Saco, then and there did keep a drinking house and tippling shop within said Saco, against the peace of the state, and contrary to the form of the statute in such case made and provided.

A motion in arrest of judgment was made for the following reasons:

1. Because no offence known to the law of the land is set forth in said indictment.

2. Because no valid judgment can be entered upon said indictment.

3. Because said indictment is defective in that it does not set out any offence in manner required by law, and that if any are set out, that the counts contain an allegation of two distinct offences.

4. That the allegations of the indictment may be true, and yet the defendant guilty of no offence.

The court instructed the jury that the offence of keeping a drinking house or tippling shop, consists of selling intoxicating liquors in any place except an inn, the keeper of which is duly licensed as an innholder, and authorized under the seventh section of the act, and allowing the same to be drunk in the place where sold, or any place in the vicinity thereof which is under the control of the person so selling,

and that if they found the defendant so sold, without such license, and allowed the same to be drank in said store, they would find him guilty.

That the government were not obliged to prove that the defendant was not thus licensed and authorized, that it being matter of excuse for the defendant, if he would avail himself of this defence he must show it.

R. P. Tapley, counsel for defendant.

N. D. Appleton, Attorney General, for the state.

TENNEY, C. J. The indictment in the first count alleges that the defendant, not being licensed to sell intoxicating liquors, nor to keep an inn, did sell intoxicating liquors, and allowed the same to be drank in the place where the same were sold, which place was at the time under the control of the defendant. Within the meaning of the statute, a person cannot have the control of an inn, to keep which another person has been licensed, it being a special trust reposed in the keeper authorized. The allegations in the first count necessarily import a violation of the 16th sec. of chap. 255 of the statutes of 1856.

The second count is more general in its language, and if it stood alone, might not be regarded as sufficiently specific in its allegations. Of this, however, we give no opinion. Defects in some of the counts in an indictment will not affect the validity of the remainder, for the judgment may be given against the defendant, upon those which are valid. Chit. Cr. Law, 240 and 640.

Nothing erroneous in the instructions to the jury is perceived, and the exceptions taken to the overruling of the motion in arrest of judgment and to the instructions are

Overruled.

ANDREW G. HAM AND ALS., *Petitioners for Partition, versus*

RUFUS HAM.

After interlocutory judgment for partition no costs can be taxed for the petitioner against the respondent.

PETITION FOR PARTITION.

The petition was duly served on the respondent, who appeared, and plead that he was sole seized of a portion of the land described in the petition for partition. Issue was taken upon this plea and a trial had, and the jury returned a verdict against the respondent. Commissioners were appointed to make partition, who performed the service and made their report, which was accepted, and petitioners were allowed to recover costs against the respondents. The bill of costs was taxed, and embraced travel and attendance, and the usual taxable costs, *before* and *after* the appointment of commissioners to make partition, and also including the commmissioners' fees.

The counsel for respondent objected at the hearing before the clerk, to the allowance of any costs for the petitioners *after* the term when judgment was rendered upon the verdict in favor of the petitioners, and the interlocutory judgment was entered, and especially to the taxation of the commissioners' bill for making partition. The clerk *pro forma* allowed the whole bill as taxed; and the counsel for defendfendant appealed from this decision.

This case was presented to GOODENOW, J., in vacation, who having been of counsel in the case, and as it presented a new question, by agreement of parties it was submitted to the opinion of the whole court, sitting in the eastern district, May term, 1858.

A. Lowe, counsel for petitioners, argued that they were entitled to costs for the whole time the case was upon the docket, including that of commissioners in making partition, and cited R. S., chap. 121, sec. 14, chap. 115, sec. 56.

N. D. Appleton, counsel for respondent, contended that the statute cited by petitioner's counsel referred only to the costs before interlocutory judgment, that partition be made, and not after.

CUTTING, J. Sec. 11 of the R. S., chap. 121, authorizes any person interested in the premises of which partition is prayed, to appear and defend, and show cause why the petitioner ought not to have partition, as prayed for, in whole or in part.

Sec. 13 provides that "If it shall appear that the respondent has no estate or interest in the lands, the objections to the partition shall be no further a matter of inquiry, and the petitioner shall recover of the respondent the costs *attending the trial.*"

Now, when are the costs recoverable? When "it shall appear that the respondent has no estate or interest in the lands." How does it so appear? By a decision of the issues presented at the trial, and until it shall so appear no interlocutory judgment can be entered. And in the language of Bronson, C. J., "one must wink very hard not to see" that after such an entry there can be no trial, and it is only the costs "attending the trial" which are taxable.

After judgment for partition the petitioner can no longer have an adversary in court—the judgment has expelled him. But on the notice given by the commissioners, as prescribed by the 23d sec., any person interested may appear before them, and may even follow them into court, and show cause why their report should not be accepted, and to such, even if they should succeed, the statute allows no cost, neither does it allow costs to be taxed against them in case they are unsuccessful. And because such person interested has contested the petitioner's title, and subjected himself to the payment of legal costs, it by no means follows that thereby he may not subsequently be heard with impunity, the same as though he had not originally defended against the title. Moore v. Mann, 29 Maine R., 559. No costs can be taxed

for the petitioner against the respondent, which in any way accrued after the interlocutory judgment.

ASA JELLISON AND WIFE *versus* JOHN R. GOODWIN.

In actions on the case for slander, *malice in fact* implies a desire and an intention to injure. But *malice in law* is not necessarily inconsistent with an honest or even a laudable purpose.

Malice in law is sufficient to support an action for slanderous words; and the speaking of words actionable in themselves and not privileged, is sufficient evidence of this kind of malice, which the law implies from the uttering of such words.

Actual malice may also be proved to enhance the damages.

Where it is shown that the words were spoken as privileged communications, so that there was no legal malice; it is a full justification.

Whether, upon the evidence, legal malice exists, is a question of law.

However correct an abstract legal proposition may be, there can be no good reason for giving it, on request, to the jury, if there is no evidence in the case to which it could apply.

EXCEPTIONS were taken by the defendant to the rulings and instructions of RICE, J., presiding at *Nisi Prius*.

This is an action on the case, for slanderous words alleged to have been uttered by the defendant of and concerning the female plaintiff.

The defendant admitted the utterance and publication of the words alleged, which imputed a charge of adultery, but introduced evidence for the purpose of satisfying the jury that the words were not uttered maliciously.

The counsel for the defendant requested the presiding judge to instruct the jury that the law did not recognize fixed and limited numbers and classes of privileged communications, but that the jury were authorized to decide from all the circumstances of the speaking and publication, whether the words were *maliciously* spoken, notwithstanding they may be actionable in themselves.

The judge declined giving this instruction, but instructed the jury that to rebut the presumption of malice arising from the utterance of words actionable in themselves, the defendant must have uttered them *bona fide* in the performance of some legal or moral duty, or in the conduct or discharge of his own affairs, or in answer to inquiries addressed to him by parties having an interest to inquire.

The jury returned a verdict for plaintiff.

T. M. Hayes and *R. P. Tapley*, counsel for defendant.

Emery & Loring, counsel for plaintiff.

DAVIS, J. In this case the defendant admitted the speaking and publication of the words, charging the plaintiff with the crime of adultery; but he justified on the ground that the words were not uttered maliciously. And he requested the presiding judge to instruct the jury "that the law does not recognize fixed and limited numbers and classes of privileged communications; but that the jury are authorized to decide, from all the circumstances of the speaking and publication, whether the words were maliciously spoken, notwithstanding they may be actionable in themselves." This instruction was not given.

The distinction between malice in law, and malice in fact, has not always been regarded sufficiently in judicial opinions; and some apparent conflict has resulted. Nor does the term "malice" always have the same signification in law. In actions for malicious prosecution the word has a meaning and force different from what it has in actions on the case for slander. Mitchell v. Jenkins, 5 B. and A., 588.

As understood in this latter class of actions, *malice in fact* implies a desire and an intention to injure. But *malice in law* is not necessarily inconsistent with an honest or even a laudable purpose. If one makes a false accusation against another, without knowing it to be false, but with no sufficient cause or excuse, it is *legally* malicious. Bromage v. Prosser, 4 B. and C., 247, 255. If he makes such an accusation, knowing it to be false, it is *actually* malicious. The

former is a presumption of law from certain facts proved. Whether the latter existed in any given case, is a question of fact for the jury.

Legal malice alone is sufficient to support an action for slanderous words. And if the words are actionable in themselves, and are not privileged, the speaking of them is sufficient evidence of this kind of malice. The law implies such malice from the uttering of such words; and no other evidence of malice is necessary. But the plaintiff may, if he chooses, prove *actual* malice also, to enhance the damages. True v. Plumley, 36 Maine R., 466.

If the defendant shows that the words were spoken as privileged communications, so that there was no legal malice, it is a full justification, upon which he is entitled to a verdict in his favor. But proof that there was no actual malice goes only in mitigation of damages.

The requested instructions applied to privileged communications, making no allusion to the question of damages; and they obviously had reference only to malice in law. The question whether the words spoken were privileged communications, necessarily relates to the question of legal malice, as distinguished from actual malice. But upon the proof or admission of certain facts, whether legal malice existed, is a question of law; and is not to be "decided by the jury, from the circumstances of the speaking and publication." There was no error in declining to submit this question to the jury.

The counsel for the defendant has argued at some length the correctness of the first part of the request,—"that the law does not recognize fixed and limited numbers and classes of privileged communications."

There are certain classes of communications in regard to which the law is well settled, that they are privileged. If there are or may be other classes, not yet recognized by courts, but founded upon like reasons, and of like necessity, the defendant should have proved that the words spoken by him were embraced in such other class, and then he might

properly have called for appropriate instructions. But the case does not show that any such proof was introduced or offered; nor is any intimation given as to what new kind or class of privileged commuications the court should recognize. So that, however correct the instruction might have been, as an abstract legal proposition, there being no evidence in the case to which it could apply, there was no good reason for giving it to the jury.

If by the instructions requested it was intended to assert that the question as to what kinds and classes of communications are privileged, is not a question of law to be decided by the court; but that the jury are to determine this question, and may find any kind of communications privileged, according to the circumstances of the speaking and publication, we have no hesitation in expressing the opinion that such a proposition is erroneous.

The exceptions must be overruled.

DANIEL CLEAVES *versus* DANIEL W. LORD.

A judgment rendered in the Supreme Court of Massachusetts upon a writ served on the defendant personally in that jurisdiction, and in which he appeared and pleaded to the merits, is entitled to the same faith and credit as judgments rendered within our own jurisdiction, although at the time of the service of the writ, on which there was no attachment, both the parties were and still are citizens of this state.

REPORTED by GOODENOW, J., sitting at *Nisi Prius.*

Eastman & Leland, counsel for the plaintiff, in support of the action, cited Con. U. S., art. 4, sec. 1; 17 Mass. R., Com. v. Greene, 521; 13 Pick., 53; McRea v. Mattoon, 1 Pick., 435; 12 Mass., 269; Story's Con. of Laws, 453, 457; Lovejoy v. Albee, 33 Maine R., 449; 31 Maine R., 314; 21 Pick., 535; 5 Pick., 360, 366; 9 Mass., 462; 29 Maine R., 19; 10 Maine R., 291.

E. Bourne, counsel for defendant.

DAVIS, J. The case at bar is debt on a judgment rendered by the Supreme Court of the Commonwealth of Massachusetts. Both of the parties, at the time when the original suit was commenced, were, and still are, citizens of this state. And the defendant now contends that the Supreme Court of that state had no jurisdiction of the subject matter, or of the parties; and that the judgment is therefore invalid.

Whether the judgment would have been valid if the defendant had not appeared and recognized the jurisdiction of that court, is not a question submitted to us. But though no property of the defendant was attached, it appears from the record that he was personally served with process when within that jurisdiction, that he appeared in defence, that he pleaded to the merits, and that the judgment was rendered upon the verdict of a jury, on the issue tendered by him and joined by the plaintiff. Upon these facts we are of opinion that the courts of this state are bound to give the same faith and credit to that judgment as to judgments rendered within our own jurisdiction. Hall v. Williams, 10 Maine R., 278; Middlesex Bank v. Butman, 29 Maine R., 19.

Judgment for Plaintiff.

NATHANIEL BRACKETT *versus* JAMES W. WEEKS.

Testimony collateral and irrelevant to the issue cannot properly be offered to contradict or impeach a witness.

Exceptions were taken in the case to the rulings of DAVIS, J., at *Nisi Prius*. The action was assumpsit upon a promissory note, and all the facts material to a correct understanding of the exceptions appear in the opinion of the court. The verdict was for the plaintiff, and the defendant excepted.

J. H. Goodenow and *N. Clifford*, counsel for plaintiff.

T. M. Hayes, counsel for defendant.

RICE, J. Assumpsit on a promissory note. In defence the statute of limitations was pleaded and relied upon. The note bears date December 15, 1840. The writ is dated March 17, 1851. To avoid the operation of the limitation statute the plaintiff relied upon two endorsements upon the note; one for fifty dollars, under date of July, 1846, and the other of three dollars, November 13, 1845. Under the ruling of the presiding judge upon the evidence in the case, the smaller endorsement became immaterial. The material questions in issue were, by whom and when were the fifty dollars paid.

There was much testimony upon these points; the following, however, will exhibit the questions raised by the exceptions.

The plaintiff, among other things, testified on his examination in chief, "that when he received the fifty dollars he was in Lyman, and did not have the note in suit with him, but as soon as he returned home to Cornish he endorsed that sum upon the note in suit, leaving the day of the month blank, as he had forgotten it, and that in the spring of 1851, he notified the defendant that he had made these endorsements upon the note in suit, together with an endorsement of $25,00 upon another note, and that the defendant said that the endorsements were all satisfactory, and that he, the defendant, would furnish him with the date of the fifty dollar payment, in regard to the particular day of the month, which was not stated in the endorsement on the note in suit."

The plaintiff also testified on cross examination, that the twenty-five dollar endorsement was upon a smaller note, not the one in suit, that the sum of twenty-five dollars was paid to him about the date of the endorsement thereof on said note, that he received it of Moses McDonald, Esq., to whom the defendant had paid it for him, the plaintiff; and that about the time he brought this suit he went to McDonald to inquire about the date of the payment of the twenty-five dollars on the smaller note, and that he also sent his son to call upon said McDonald for this purpose.

It will be observed that there is nothing in this testimony which shows or tends to show that the twenty-five dollars endorsed upon the small note was *paid* at the same time that the fifty dollars was *paid* on the note in suit, or that the two endorsements were made at the same time. Nor is there anything in the testimony about the twenty-five dollar endorsement that throws any light upon the time when or the person by whom the fifty dollars were paid. All the testimony, therefore, which was offered to contradict or impeach the plaintiff in relation to the payment of the twenty-five dollars was collateral and irrelevant to the issue before the jury, and properly excluded. The facts offered to be proved by McDonald, and also by the defendant, which were excluded, had nothing to do with the case, and could not have been legally admitted if objected to.

Exceptions overruled, and judgment on the verdict.

FREDERIC W. NEWTON AND ALS.

versus

FLANDERS NEWBEGIN AND ALS.

Where a creditor has done no act to excuse or waive a full compliance with the conditions of a poor debtor's bond within the six months, and where no act of God nor of the law has rendered performance impossible; the debtor must satisfy the justices that he is entitled to take, and must actually take the oath *within the six months*, in order to prevent a breach of this condition in the bond.

If the oath is not administered before a breach of the conditions of the bond the plaintiff will be entitled as damages to the whole amount due his execution, with interest and costs.

Where the jury adopted the true measure of damages when they should have been assessed by the court, the verdict will not be set aside on that account.

Newton and als. *v.* Newbegin.

EXCEPTIONS to the rulings of GOODENOW, J., presiding at *Nisi Prius.*

This was an action on a poor debtor bond, given by the defendant, Flanders Newbegin, as principal, and the other defendants as sureties, to procure the release of the said Flanders Newbegin from arrest, on an execution issued on a judgment against him in favor of the plaintiffs.

The bond was executed on the second day of November, 1854. The defendants plead performance of the conditions of the bond by citing the creditors before two justices of the peace and quorum, and submitting himself to examination before them, and taking the oath in accordance with the provisions of the 148th chapter of the Revised Statutes.

At the trial it was proved and admitted that the defendant, Newbegin, duly cited the creditors to appear before two justices of the peace and quorum, on the first day of May, A. D. 1855, to attend his examination, that at the time and place aforesaid the said Newbegin appeared and submitted himself to examination on oath before two justices of the peace and quorum duly selected for that purpose; that the plaintiffs by their attorney also appeared, and proposed interrogatories in writing to the debtor, which were answered, signed and sworn to by him; that the said examination was pursued during the said first day of May, and the day following into the afternoon of said day, when the examination was completed, and the said Newbegin signed and made oath to the truth of his disclosure.

That the justices adjourned from the second to the third day of May, 1855, at which time they met according to adjournment, and having decided that the debtor was entitled to take the oath provided for in the 28th section of the 148th chapter of the Revised Statutes, then administered to him said oath.

The judge instructed the jury that if they found that the oath provided for in said 28th section was not administered till the third day of May, being the day after the six months from the execution of the bond had expired, and then the

adjournment from the second to the third day of May was not obtained on the request, act or procurement of the plaintiffs or their attorney, then there was a breach of the condition of the bond, and the plaintiffs would be entitled to recover the full amount of their execution, with interest and costs.

The jury returned a verdict for the plaintiffs for the full amount of their execution, with interest, and found that the said adjournment, from the second to the third day of May, was not made at the instance, request or procurement of the plaintiffs or their attorney.

To these instructions and rulings of the judge the defendants except.

E. R. Wiggin, counsel for the plaintiff.

Goodwin & Fales, counsel for the defendant.

MAY, J. This is an action of debt upon a poor debtor's bond in the usual form. It appears that the debtor undertook to comply with the condition, by taking the oath as required by law; and for that purpose duly cited the creditors to attend upon his disclosure at the office of Caleb R. Ayer, on the first day of May, 1855, this being the day next before the expiration of the bond; at which time and place he submitted himself to examination on oath before two justices of the peace and quorum, duly selected for that purpose. The plaintiffs, by their attorney, appeared and proposed written interrogatories to the debtor, which were answered, and such examination continued through that day, and until the afternoon of the next, when the debtor signed and made oath to his disclosure. Thereupon, without any request, act, or procurement of the plaintiffs, as the jury have found, and without any request or assent on the part of the debtor, so far as the testimony in the case discloses, the justices adjourned until the next day, being the day after the expiration of the bond, for advisement, when they met according to adjournment, and having decided that the debtor was entitled to take the

oath provided for in the 28th sec. of the 148th chap. of the R. S., they then administered to him the said oath.

The principal question submitted to our consideration and raised by the exceptions, is, whether upon the facts aforesaid this action can be maintained. In the case of Fales and al. v. Goodhue and al., 25 Maine R., 423, it is said by C. J. Whitman that "obligors in such bonds, to avoid the penalty, are bound to comply with one of the alternatives contained in the condition, unless prevented by the obligee, or the law, or the act of God, from so doing." In Longfellow and al. v. Scammon and al., 21 Maine R., 108, it was held that to comply with the statute, the oath prescribed must be taken before the close of the six months next after the giving of the bond; and the same doctrine is affirmed in the case of Fales and al. v. Goodhue and al., just cited. It is said, however, in the case of Moore v. Bond and al., 18 Maine R., 142, that "a strict performance is, in certain cases, excused. It is so, where the law interposes and prevents it, or the obligee, by his own act, occasions it." In this case it appeared that the justices adjourned from the day on which the bond expired to the next day, "at the request of the creditor, the debtor not objecting," when the oath was administered, and these facts were held to constitute a good defence to an action on the bond.

In the case of Call v. Barker and al., 27 Maine R., 97, it is said by the court, that, "if the creditor or his attorney does not lead the debtor or the justices into any illegal course of proceeding, but merely sits in silence and allows them to pursue their own course, the rights of the creditors cannot be considered as thereby waived or forfeited."

In the case of Fales and al. v. Goodhue, the oath was not administered until more than a month after the expiration of the bond, and it clearly appeared that the justices, having in their several adjournments, (contrary to the R. S., secs. 6 and 24) exceeded three days, in the whole, exclusive of the Lord's day, then had no jurisdiction in the matter. In Longfellow and al. v. Scammon and al. no attempt was made to

take the oath within the six months, the day first appointed for that purpose being after the expiration of the bond. These cases, it will be seen, differ from the case before us. In the latter, through the fault of the debtor, there was no compliance with the bond within the time; and in the other, through the fault of the justices, the oath was without legal effect, and if willfully false no punishment could be inflicted by law for the perjury. When the oath was taken it was *coram non judice.*

In the present case the justices had jurisdiction; their adjournment, but for the expiration of the bond, would have been in conformity with the the power expressly given them by statute; the debtor was, with reference to this alternative in the bond, apparently without any intentional fault, having done everything in regard to it which a prudent foresight would ordinarily suggest; and so far as the evidence has any tendency to show, the plaintiffs obtained, within the time limited by the condition, a full disclosure, on oath, of the debtor's estate and effects, and the disposal thereof, and of his ability to pay their debt; and the justices, after advisement upon such examination, saw nothing inconsistent with his taking the oath required by the statute, and they thereupon administered the same, but not until the next day after the bond had expired.

Do these proceedings excuse the debtor so as to exonerate him and his sureties from the penalty of their bond? We are reluctantly compelled to come to the conclusion that they do not. In cases where no act of God, nor of the law, has rendered performance impossible; and where the creditor has done no act on his part to excuse or waive a full compliance with the conditions of the bond *within the six months*, we think it is the duty of the debtor to satisfy the justices *within that time* that he is entitled to the benefit of the oath. If he cannot, upon his own statements under oath, and upon such evidence as he is permitted to offer, do that, and the justices are left in doubt until the bond expires, we cannot say that he has complied with the conditions

which he has stipulated to perform, even though it appear that the justices immediately after become satisfied and admit him to take the benefit of the oath. In such a case, to avoid the penalty, if he cannot pay the debt and costs, he must resort to the other alternative in the bond by delivering himself into the custody of the keeper of the jail until he shall be released from his imprisonment in conformity to law.

Whether he would be entitled to a release from imprisonment by the administering of such oath without a new citation and notice under the 21st section of the Revised Statutes, chapter 148, it is not necessary now to determine.

The oath not having been administered prior to a breach of the conditions of the bond, this case does not come within the provisions of the statute of 1848, chap. 85, sec. 2, in relation to damages, and the plaintiffs, therefore, will be entitled to the whole amount due on their execution with interest and costs. The damages, however, should by law have been assessed by the court, but as the jury have adopted the true measure, the defendants cannot suffer, and the verdict will not be set aside on that account. Howard v. Brown and al., 21 Maine R., 385.

Exceptions overruled.

COUNTY OF FRANKLIN.

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LEWIS LOOMIS AND ALS. *versus* DAVID PINGREE AND ALS.

It may well be presumed, notwithstanding the form of words as to the attestation, that deeds were in fact delivered on the day they were acknowledged, and in such order of time as to make them effectual to carry out the intention of the parties to them.

A deed conveying the grantor's right, title, interest, and estate; and *excepting* therefrom certain public lots, and two parcels of a given number of acres, each parcel under mortgage to different individuals, should be held to convey the interest of the grantors in the lands mortgaged, and also whatever right they had in the public lots; the exception being only an exception as to all legal incumbrances.

Where one by inheritance may be entitled to a portion of an estate, but had been hopelessly insane for twenty years, and the other heirs covenant that they are solely entitled to represent said part, and that they will warrant and defend the same against all persons claiming under their ancestor, the grantees are entitled to hold the whole estate against all who do not claim under the insane heir.

The possession of one tenant in common is the possession of another, which each has a right to for himself and all others, against strangers having no title.

Where the requirements of the statute are, that the sheriff proceed to sell so much of said land as will discharge said taxes and the reasonable expenses of sale, a sale of the whole tract to the highst bidder is invalid.

Any one interested in lands sold *in solido* for the gross amount due for taxes, could tender payment for all the other cotenants as well as for himself, although entitled to redeem by the Statute of 1849, chap. 125, sec. 4, upon more favorable conditions.

An offer of payment within the time allowed by law, for the purpose of saving a forfeiture, must be regarded for that purpose as equivalent to an actual payment made at the time of the offer, and the money need not be brought into court.

Loomis and als *v.* Pingree and als.

A vendee will not be estopped to set up his title subsequently acquired, unless by doing so he be obliged to deny or contradict some fact alleged in his former conveyance.

REPORTED by RICE, J., sitting at *Nisi Prius.*

This is a real action wherein Lewis Loomis, Ebenezer Gilson and Daniel Lawrence demand against David Pingree, John E. Thayer and Nathaniel Thayer seizin and possession of Township No. 3, 3d Range, Franklin County.

Defendants plead the general issue and brief statement, claiming title in themselves.

The plaintiffs, to sustain their title, put in a deed of quitclaim:

Henry Davenport and als., heirs of Rufus Davenport, to Lewis Loomis, dated June 4, 1853.

Quitclaim deeds:

Lewis Loomis to Ebenezer Gilson; same to Daniel Lawrence, each dated June 4, 1853, acknowledged and recorded June 29, 1853, conveying one-third undivided of said premises to each.

The defendants then introduced a deed of warranty from Grenville Parker to David Pingree, date March 4, 1851, of one-third of said premises undivided.

Deed of warranty:

Tristram C. Gilman to David Pingree, dated March 3, 1851, of one-third of said premises undivided.

Deed of warranty:

Thomas Wentworth to David Pingree, date February 19, 1851, of one-third of said premises undivided.

The plaintiffs then introduced quitclaim deed:

Edward Blake, Jr., to Rufus Davenport, date October 22, 1806, of 3600 acres of said township.

Quitclaim deed:

John Peck to Rufus Davenport, date December 23, 1806, of fourteen twenty-firsts parts of said premises, say 14,000 acres.

Quitclaim deed:

John Haven and Ladd, executors, to Rufus Davenport, date December 15, 1835, of 3400 acres of said township.

Deed:

Nathaniel Coffin, Land Agent of Mass., to Rufus Davenport, date May 11, 1836, of the interest of the commonwealth, reserving 2000 acres.

(Resolves of Massachusetts, of April 1, 1836, and June 17, 1820, were cited, as in the case.)

Defendants then introduced (subject to objection) warrant of Elias Thomas to W. C. Whitney, sheriff, and return of said Whitney as to state tax of 1828.

Deed:

W. C. Whitney, Sheriff, to John Davis, date July 20, 1829.

Quitclaim deed:

John Davis to Abagail Davis, date December 20, 1834, excepting 100 acres conveyed Luke Brooks.

Quitclaim deed:

Abigail Davis to Jonathan Butterfield, date September 29, 1835, of one-half undivided of No. 3, Range 3.

Quitclaim deed:

John Davis to Jonathan Butterfield, date August 26, 1834, one-half of No. 3, 3d Range, undivided.

Quitclaim deed:

Jonathan Butterfield to Lewis Loomis, date January 25, 1839, No. 3, Range 3, same deeded by Abigail and John Davis.

Quitclaim deed:

Lewis Loomis to Thomas Wentworth, date May 7, 1843, one-half No. 3, Range 3, except 1500 acres from said half.

Quitclaim:

Abigail Davis to Thomas Wentworth, date August 24, 1843.

Quitclaim:

Thomas Wentworth to Grenville Parker, date August 26, 1843, one-sixth undivided, except 1666 acres.

Quitclaim:

Thomas Wentworth to Tristram C. Gilman, date August 26, 1843, one-sixth undivided, except 1666 acres.

Quitclaim:

John Davis to Thomas Wentworth, date August 24, 1843, all interest except deed to Abigail Davis, dated December 20, 1834.

Certified copy of W. C. Whitney, Sheriff's return of advertisement, dated May 23d, 1829.

Deed:

Samuel Corey, Land Agent, to George Pierce and Benjamin Goodrich, date April 30, 1840, No. 3, 3d Range.

Quitclaim:

George Pierce and Benjamin Goodrich to Thomas Wentworth, Grenville Parker and Tristram Gilman, date August 23, 1849.

Quitclaim:

Thomas Wentworth to Grenville Parker, date May 29, 1843, one-third of what was conveyed by Lewis Loomis.

Quitclaim:

Thomas Wentworth to Tristram Gilman, date May 29, 1843, one-third of what was conveyed by Lewis Loomis.

Record of Land Agent relative to his doings in the sale of 1849.

Quitclaim:

David Pingree to John E. Thayer and Nathaniel Thayer, date April 1, 1851, of his interest in No. 3, Range 3.

The plaintiffs then introduced

Numbers of the Portland Advertiser (state paper) of May 26, June 2, June 9, June 16, June 23, June 30, July 7, and July 14, 1829.

Copy of warrant of Treasurer of state to the sheriff of Oxford county, date March 20, 1823, and return of Sheriff on sale of No. 3, Range 3, to Simeon Cummings.

Quitclaim deed:

Simeon Cummings and al. to Thomas L. Parker, Samuel Davis and Sherman Willard, date October 5, 1824, of all their right in said premises.

Quitclaim deed:

Thomas L. Parker to Rufus Davenport, date March 10, 1826, of all right in said township.

Quitclaim deed:

Samuel Davis to Rufus Davenport, date March, 1826.

Quitclaim deed:

John Davis to Sherman Willard, date August 5, 1829, of all interest in said premises.

Copy of Treasurer's notice, published in the state paper (Eastern Argus) in 1828.

Volumes of "The Age," state paper for 1848 and 1849, and "extras" containing advertisements of taxes.

Cutler & Fuller, counsel for plaintiffs, argued that

The ancestor of the plaintiff's grantor took the title to No. 3, range 3, subject to the condition made in grants of eastern lands; that of settling thirty families within the township within a limited time. The commonwealth, to avail itself of a forfeiture, had to pass some legislative act. Little v. Watson, 32 Maine R., 214.

By resolve of April 1, 1836, the lands were declared forfeited unless the settling duties were performed or commuted, by the first of June following.

On the 4th of June, 1836, the land agent conveyed the township to Rufus Davenport, ancestor as aforesaid, two thousand acres, mortgaged back to secure the payment of nine hundred dollars, the amount of commutation.

Defendants seek to defeat this title by two tax sales.

I. Sale of Whitney (sheriff of Oxford county,) July 20, This is defective for many reasons.

1. The tax of 1828 was not properly advertised by the state treasurer; the notice contains no statement of the levy of the tax, or the year of assessment; it does not describe the tract intelligibly.

2. The advertisement in the state paper is defective in itself, and was not published "six weeks successively before the time of sale."

The state paper (Advertiser) of the July 14, does not contain the advertisement. See Statute, chap. 183, July 29, 1822. Those who assert the tax title must prove a strict compliance. Smith v. Bodfish, 27 Maine R, 289; Howe v. Russell, 36 Maine R, 115.

Defendants do not show an advertisement of the tax of 1828; they rely on the warrant and return alone.

3. This return is defective. The sheriff "exposed the township for sale," instead of selling "so much of the land as would discharge the taxes and reasonable expenses of sale." He "sold the whole township to the highest bidder."

4. The deed of John Davis to Sherman Willard, of the 5th of August, 1829, was a redemption of the tax title, and Willard had derived color of title, together with Parker and Samuel Davis, at the sale in 1823.

Parker and Samuel Davis conveyed to Rufus Davenport, who held the legal title. Willard and Davenport were co-tenants, and the redemption by Willard innured to the benefit of Davenport. John Davis' subsequent sales were void.

II. Defendants claim title through Pierce and Goodrich, purchasers at the sale of land agent, April 30, 1849.

1. Henry Davenport tendered the amount due to the assignees of Pierce and Goodrich, for himself and the other heirs of Rufus Davenport, co-tenants. Henry was administrator. White v. Mann, 26 Maine R., 361; Oatman v. Walker, 33 Maine R., 67. Statute, chap. 65, 1848, was the law under which the sale was attempted.

2. Defendants rely on the record in the land office alone. This does not state or show all that is necessary to comply with law. It does not show the assessment, advertisement, and year of the tax. The time and place of the treasurer's notice is not given, or when it was due, or that it was due, agreeably to law.

The land agent's return shows that the treasurer returned the list of tracts, &c., the 23d of March, instead of immediately after the first of March. It recites that notice was given—not *public* notice; sale was to pay taxes, *charges* and

interest—not *costs*, &c. So too, the land agent published his notice in the *Extra*—not the Age, (state paper.) James W. Clark v. Hastings Strickland and al. U. S. Circuit Court, Maine, September, 1855.

R. Goodenow and *John S. Abbott*, counsel for the defendants, argued that the plaintiffs must prove title to the *whole* of the demanded premises, or judgment must be for the defendants. That the court has no power to permit a discontinuance as to a part. That Loomis obtained no title under his deed of June 4, 1853, certainly not until June 16, when it was delivered, and therefore could convey no title on the same 4th day of June, 1853, to Lawrence and Gilson, and there being no evidence to control or modify, the date of those deeds must be taken as *prima facie* evidence of their execution and delivery on that day. Woodman v. Smith, 37 Maine R., 25.

The date of acknowledgment can be no evidence of time of delivery.

If this deed be valid what was conveyed? The grantors are described as heirs-at-law of Rufus Davenport. Four lots are excepted, and the deed recites that a portion in common and undivided is under mortgage for a sum which does not appear to be paid, and the right of redemption to which did not descend to his heirs, and they could convey no title. Neither have all the heirs conveyed.

The plaintiffs show no title to two-thirtieths of the estate. Had Rufus Davenport any title at his death? The deed of the commonwealth to Edward Blake, of 3600 acres, was conditional, and those conditions were never performed. If they have, the title to the whole township, except the 3600 acres, remains in the commonwealth.

The quitclaim deed from John Peck to Rufus Davenport conveys no title, as there is no evidence that Peck had any title or possession; and this deed is also conditional.

Neither did Davenport acquire title from Haven and Ladd.

The Land Agent of Massachusetts had no authority to

convey, neither had the commonwealth any title which he could convey if his deed to Blake was good. The title is in the defendants, by virtue of a purchase of the Sheriff, Whitney, to John Davis, although it is enough to show it out of the demandants.

Evidence to contradict the sheriff's return is not admissible.

The tax title under which plaintiffs claim is defective.

The defendants also claim under a deed from Samuel Coney, Land Agent, to Pierce and Goodrich, for non-payment of taxes.

If the tender to the grantees of Pierce and Goodrich was effective, it could not impair the title under Whitney.

But the tender by Rufus Davenport, who was tenant in common, owning only one twenty-fourth, could be made for that part only. Laws of Maine, chap. 125, sec. 4.

He has not brought the money into court, and the tender cannot effect a title until reconveyance. 4 Maine R., 116, Wilson v. Wing.

The tender should have been the amount of taxes, interest and charges, and twenty per cent. thereon. Laws of 1849, chap. 125, sec. 4.

Loomis is estopped by the covenants in his deed to Wentworth, to set up a subsequently acquired title. 29 Maine R., 183; 30 Maine R., 537.

GOODENOW, J. This is a plea of land, whereby the plaintiffs, Lewis Loomis, Ebenezer Gilson and Daniel Lawrence, demand of said Pingree, and John E. Thayer, and Nathaniel Thayer, possession of township No. 3, 3d range, in said county of Franklin.

The writ is dated July 7, 1854. The defendants plead the general issue, and by brief statement allege that the title to the demanded premises is in said John E. and Nathaniel Thayer, and deny that the plaintiffs have any title or right in or to the same. And the said Pingree alleges that all the control and occupation of the demanded premises by him

exercised, since 1851, has been under the other defendants, by virtue of their title.

By an act relating to the separation of Maine from Massachusetts, and forming the same into a separate and independent state, passed June 19, 1819, it was provided, that "all rights of action for, or entry into lands, and of actions upon bonds for the breach of the performance of the condition of settling duties, so called, which have accrued or may accrue, shall remain in this commonwealth, to be enforced, commuted, released, or otherwise disposed of, in such manner as this commonwealth may hereafter determine."

On the 4th of June, 1836, the land agent of Massachusetts, agreeably to resolves passed the 17th of June, 1820, and the first of April, 1836, conveyed the township demanded, to Rufus Davenport, ancestor of the plaintiffs' grantors, taking back a mortgage on two thousand acres of the same, to secure the payment of $900, which had been agreed upon, as the amount to be paid by way of commutation, and in lieu of a full performance of the condition in relation to "settling duties." By the original grant and conveyance of this township to Edward Blake, May 15, 1804, the grantee, his heirs and assigns, were required to perform certain "settling duties," and the deed to him from the agent of Massachusetts, was upon this condition.

By the resolve of April 1, 1836, the lands were declared forfeited, unless the settling duties were performed or commuted by the first of January following.

The plaintiffs derive their title from the heirs of Rufus Davenport, by deeds which are in the case, and are particularly noticed in the report, and to which we refer.

In answer to this, the defendants contend, first, that all the demandants must prove title; otherwise all must fail, and that judgment must be for the defendants. And that if Rufus Davenport once owned the land demanded, and is dead, and Henry Davenport and others, who executed the deed, dated June 4, 1843, to Lewis Loomis, were the heirs and only heirs of Rufus, that Loomis acquired no title, *till the*

deed was delivered, which was on the 16th of June, 1853, and that his quitclaim deeds of June 4, 1853, to Ebenezer Gilson and Daniel Lawrence conveyed no title. These deeds purport to have been acknowledged on *the 21st of June,* 1853; and, *ut res magis valeat quam pereat,* we may well presume, notwithstanding the form of words as to the attestation, that the deeds were in fact delivered on the day they were acknowledged, and in such order of time as to make them effectual to carry out the intentions of the parties to them.

William Richardson, the magistrate who took the acknowledgments, also was a witness to the execution of the deeds by Lewis Loomis only. A different person was a witness to the execution of the deeds by his wife. From this circumstance it may be presumed that they were not executed by both at the same time and place; and that they were not delivered before they were executed by the wife.

William Richardson does not state, in his deposition, that he saw the deeds *delivered.*

Second, it is contended by the defendants, that the deed of these heirs of Rufus Davenport does not purport to convey the whole township, but only their right, title, interest and estate, and excepting therefrom, four lots of three hundred and twenty acres each; and also two thousand acres, under a mortgage from said Rufus to the Commonwealth of Massachusetts; and also three thousand four hundred acres, under a mortgage to John Haven and Alexander Ladd. We are of opinion that the interest of said heirs in the lands mortgaged was conveyed, and also whatever right they had in said four public lots; and that the exception was only an exception as to all legal incumbrances.

Third, it is contended that all the heirs of Rufus Davenport have not joined in said deed, and that therefore the title of the plaintiffs fails to a portion of the premises, if not to the whole.

By the deposition of Henry Davenport, it appears that Rufus, at his decease, left as his heirs, two sisters, Catharine

and Joanna, and four children of Elijah, a deceased brother, all of whom, representing three-sixths of the estate, executed the deed. Also Robert Steele, Samuel Davenport Steele, Warren Parmenter and Priscilla S. Parmenter, wife of said Warren, in her right, being all heirs of Mrs. Patience Steele, formerly Patience Davenport, who was a sister of said Rufus, representing another undivided sixth part, executed the deed. Also Dr. Edward S. Davenport, Enos Ford and Elizabeth, his wife, in her right, Henry G. Fuller and Margaret M., his wife, in her right, and Sophia H. Davenport, being all the heirs of Samuel Davenport, deceased, who was a brother of said Rufus, and as such representing another undivided sixth part of said estate, executed the deed.

An exception is here taken to the power of attorney of Enos Ford, who executed said deed in behalf of Sophia H. Davenport. We are of opinion that the power of attorney is sufficient to confer authority to transfer the interest of Sophia H. in said estate, especially as against all persons who do not claim under her.

Another objection taken is, that Ellen Davenport, who was insane, did not execute the deed. It appears by the deposition of Henry Davenport, that she had been hopelessly insane for the last twenty years. The grantors covenant that they are solely entitled to represent said sixth part of the estate of said Rufus, and that they will warrant and defend the same to the said Loomis, against all persons claiming the same under the said Rufus.

This, in our opinion, entitles the plaintiffs to hold the right of the said Ellen against all who do not claim under her, or by a title paramount.

The same remark will apply to the objection, that Samuel Steele did not execute the deed; and to the objection, that "Sarah" Davis, named in the body of the deed, has signed it by the name of *Sally* Davis, being one of the heirs of Sarah Dunbar, who was a sister of said Rufus Davenport, and whose nine heirs, representing another sixth part of said estate, executed the deed.

Fourth. It is contended that Rufus Davenport had no title to the premises, at the time of his decease, because the settling duties were not performed by Edward Blake, from whom he claims a title to three thousand six hundred acres; Or if they were, that the whole township was conveyed to Blake, and that the title is still in him, except as to the three thousand six hundred acres; and that Rufus Davenport acquired no title by the deed of John Peck to him, because that also was upon the condition, "that said Blake before the first of January, 1801, shall have settled thirty families within said township;" or by the deeds of John Haven and Alexander Ladd, executors, who had no authority to convey the estate of his testator; and that the resolves of Massachusetts did not confer on Coffin, the land agent, authority to convey in the manner he did; or if they did, that the deed was not so drawn and executed as to comply with the authority; or that Massachusetts had no title to said township, the same being in Blake. Until the defendants show some title, either from Massachusetts or from Blake, we do not consider them as presenting themselves in a condition to raise these questions. Conditions may have been waived, or adjustments made, in which strangers have no concern. Smith and al. v. Bodfish, 27 Maine R., 289.

The resolve of April 1, 1836, and the action of the land agent of Massachusetts under it, June 4, 1836, is *prima facie* evidence that an adjustment was made in a manner satisfactory to the state.

It is for those who make the conditions to insist upon their performance.

In their brief statement the defendants deny that the demandants have *any* title; and allege title in themselves. The demandants prove title to a large part of the premises, and an incohate right under a deed of warranty to the shares of other heirs. The defendants do not claim under those heirs. They show no title. The demandants have elected to consider them as disseizors, for the purpose of trying the title; and all the facts in the case show that they

have a better right to have possesion of the premises than the defendants have to hold them. The possession of one tenant in common is the possession of another, and each has a right to possession for himself and all others, as against strangers, having no title.

Fifth. It is contended that the defendants have established title in themselves, under one or two sales for taxes.

1. By a sale by Whitney, sheriff of Oxford county, July 20, 1829. On the part of the plaintiffs, it is alleged that the tax of 1828, by virtue of which this sale was made, was not properly advertised by the state treasurer; that the notice published in the Portland Advertiser, then the state paper, does not state that a tax had been levied, or describe the tract intelligibly; that it was not published six weeks successively before the time of sale, in the state paper; that the paper of July 14, 1829, does not contain the notice or advertisement; and that the sheriff exposed the township for sale, instead of selling "so much of the land as would discharge the taxes and reasonable expenses of sale;" and that "he sold the whole township to the highest bidder."

By statute, January 29, 1822, chap. 183, it was made the duty of the sheriff, upon the receipt of a warrant from the treasurer of the state, "forthwith to proceed to sell so much of said land as will discharge said taxes, and the reasonable expenses of sale," &c.

Without noticing all these objections to the validity of the sale by Whitney, we are of opinion that the one last named is fatal.

2. The defendants claim through Pierce and Goodrich, who were purchasers at the sale of the land agent, April 30, 1849.

The testimony proves that Henry Davenport tendered the amount due to the assignees of Pierce and Goodrich, for himself and the other co-tenants, heirs of Rufus Davenport, within the time allowed by law for redeeming the lands sold. But it is contended that this tender was insufficient to defeat

the title of the defendants, acquired under the deed of the land agent of Maine.

1. Because Henry was heir of only one-twenty-fourth part of the real estate left by Rufus Davenport, and as such he had no authority to tender for the other heirs and co-tenants.

We are of a different opinion. The land was sold, *in solido*, for the gross amount due for taxes, &c. Any one interested could tender payment for all the other co-tenants, as well as for himself, although by the statute of 1849, chap. 125, sec. 4, he was not obliged to do so. This statute gave tenants in common of lands sold for non-payment of taxes, a privilege, which they had not before.

Before this statute, land owned in common by different proprietors, which had been taxed and sold at auction, *in solido*, for the payment of taxes, could be redeemed by any one of the co-tenants; and the purchaser was at liberty to refuse to receive any part, without the whole amount for which he was entitled to hold the land. Watkins and al. v. Eaton and al., 30 Maine R., 529.

2. It is said the money tendered should have been brought into court. This is not an action to recover the money. An offer of payment, within the time allowed by law, for the purpose of saving a forfeiture, must be regarded for this purpose as equivalent to an actual payment made at the time of the offer.

By the deed from the land agent the owner had a right to redeem the land within one year from the time of sale, by paying to the purchaser or assigns, the amount for which the same was sold, with interest thereon at the rate of twenty per cent. per annum, &c. The purchasers or their assigns had no right to impose upon him an additional burden or duty.

3. It is contended that if the tender was properly made, the title to said township would not thereby be revested in Rufus Davenport or his heirs without a deed from the pur-

chasers. Here are no equities to be adjusted, as in the case of estates mortgaged, where there has been an entry for condition broken. If the mortgagee be in possession of the mortgaged premises, and the condition of the mortgage be performed according to its terms, the mortgagor may maintain an action at law to recover possession. 2 Mass., 493, 495; 3 Met., 55, 58. We see no good reason why the purchasers or their assigns should be in a better condition than mortgagees. The plaintiffs, upon payment of the amount due, are by operation of law in possession, as of their former estate.

In Watkins v. Eaton, 30 Maine R., 535, it is said by SHEPLEY, C. J., "A sale for the payment of taxes is but an incumbrance upon the estate, so long as the right to redeem exists. The purchaser receives and holds the title as security for money paid; and such title is in principle a mortgage, although it does not exist in a form to be included by our statute provisions respecting mortgages." It may be greatly for the convenience of the plaintiffs to have a release from the defendants, and to have it put upon record. Before they can require this, they must pay or offer to pay, according to the statute, "the cost of reconveying the same," as well as the other amounts specified, in order to redeem the land.

Sixth. It is contended by the defendants, that by the deed from Lewis Loomis, one of the purchasers of the right acquired under the sale by sheriff Whitney, to Thomas Wentworth, one of the grantors of the defendants, on the 27th of May, 1843, and by the covenants in the same, he, the said Loomis, and those claiming under him, should be estopped from setting up or claiming under a title *subsequently acquired by him.*

It is not a deed of general warranty. It purports to sell and convey, "all his right, title and interest in and to one undivided half part of a certain township of land situated," &c. It was the title which he then had, and nothing more, which he undertook to convey. The purchasers probably knew what that title was, and took it with all its infirmities. He

did not covenant that he was seized of the premises, either by right or by wrong; or that he had good right to sell and convey the same. But he did covenant that he had not conveyed away to any other person or persons, any right or title to the premises, which he had previously held; by the stipulation, that he and his heirs "would warrant and defend the premises, &c., against the lawful claims and demands of all persons claiming by, through or under him." We do not regard this covenant as sufficient to estop him or his assigns from setting up, against the defendants, a title subsequently acquired by him.

A vendor will not be estopped to set up his title subsequently acquired, unless by doing so he be obliged to deny or contradict some fact alleged in his former conveyance. Pike v. Galwin, 29 Maine R., 183.

When one has made a conveyance of land by deed, containing no covenant of warranty, an after acquired title will not inure or be transferred to the vendee. Ibid. This case was decided in 1848, and directly overruled the doctrine asserted in the case of Fairbanks v. Williamson, 7 Greenl., 96. Mr. Justice Wells gave an able dissenting opinion, published in 30 Maine R., 539. And in conclusion says, "But if the rule, laid down in Fairbanks and al. v. Williamson, were clearly incorrect, in my judgment it would be unwise to change it without the action of the legislature. It has now remained nineteen years, many decisions have been made in conformity to it, and many titles have been acquired under it." * * "The stability of legal decisions affords a security which ought not to be impaired, unless upon the most pressing necessity."

The last decision in the case of Pike v. Galvin, having been made more than nine years, whatever may be said on the one side or the other, the interest and peace of the community require that we should abide by it.

Upon a careful examination of all the evidence in the case, and of the law appertaining to the same, we have arrived at the conclusion that the plaintiffs are entitled to recover the

land demanded in their writ; and that according to the agreement of the parties, *a default must be entered.*

MAY and DAVIS, J. J., concurred; TENNEY, C. J., and HATHAWAY, J., concurred in the result; RICE, J., concurred that there should be a default, but not for the whole tract of land.

NOTE. This case was argued in the middle district, and determined by the members of the court who held that term.

THE INHABITANTS OF WILTON

versus

THE INHABITANTS OF NEW VINEYARD.

It is competent for the Legislature in annexing a part of one town to another to provide that persons having a legal settlement therein, but absent or residing elsewhere at the time, shall thereafterwards have their settlement in the town to which such part is annexed.

By chapter 503 of the special laws of 1856, persons then having a legal settlement in that part of Strong set off to New Vineyard, absent or residing elsewhere at the time, acquired their settlement in the latter town.

The facts in this case were agreed by the parties.

This is an action of assumpsit brought by the inhabitants of said Wilton against the inhabitants of said New Vineyard for supplies furnished by said town of Wilton to one Jacob Welch and his family, paupers, who fell into distress in the town of Wilton, and in need of immediate relief, which was furnished by the inhabitants of said Wilton.

It is agreed by the parties in this action that said Jacob Welch and his family, on the 28th day of March, 1856, were paupers supported by the town of Strong, and at that time

said Welch and his family had their legal settlement in said Strong from a residence of themselves or ancestors on that portion of the territory of the town of Strong which was set off from the town of Strong to the town of New Vineyard by the legislature of this state, March 28, 1856, being an act entitled an act to set off certain lands from the town of Strong and annex the same to the town of New Vineyard.

Said Welch and family did not reside on said territory at the time of the passage of said act and had not resided there for several years, but had gained no residence elsewhere.

S. Cram, counsel for plaintiffs, argued that by the act of March 28, 1856, setting off a portion of the town of Strong to the town of New Vineyard, the legislature had rightfully determined that paupers having a settlement on that portion set off should be supported by the town of New Vineyard. Belgrade v. Dearborn, 21 Maine R., 334; Groton v. Shirley, 7 Mass., 156; Lexington v. Burlington, 19 Pick., 426.

S. Belcher, counsel for defendants, argued that the points to be determined in settling this question are identical with those decided in Starks v. New Sharon, 39 Maine R., 368. That the legislature has no power to impose such liabilities upon towns as the plaintiffs contend for, especially by acts conflicting with the general laws of the state, none of which they attempt to repeal.

DAVIS, J. By chapter 503 of the special laws of 1856, certain "territory, with the inhabitants thereon," was set off from the town of Strong and annexed to the town of New Vineyard. At the time of the passage of this act, March 28, 1856, Jacob Welch and his family were paupers residing in the town of Wilton, where they fell into distress,—but having a legal settlement in the town of Strong. Up to that time the expense of their support was paid by the inhabitants of Strong. But their settlement in that town was acquired by a residence on that portion of the territory set

off and annexed to New Vineyard; and it is contended that from that time the latter town is chargeable for their support.

By the general statute relative to the support of paupers, the annexation to one town of a part of the territory of another, transfers the settlement of no persons except those who "actually dwell and have their homes" on such territory at the time. R. S., chap. 32, sec. 1; Starks v. New Sharon, 39 Maine R., 368. But it is competent for the Legislature, in annexing a portion of one town to another, to provide that persons having a legal settlement therein, but absent or residing elsewhere at the time, shall thereafterwards have their settlement in the town to which such part is annexed. This was done in the case before us. Section third of the act annexing a portion of Strong to New Vineyard provides "that all paupers now supported by said town of Strong, or which may hereafter become chargeable to the town of Strong, by reason of a settlement gained or derived in the territory set off, shall hereafter be supported by and chargeable to said town of New Vineyard."

Jacob Welch and his family were at that time "paupers supported by the town of Strong;" and they had a "settlement gained in the territory set off." The town of New Vineyard was, therefore, from that time, liable for their support. According to the agreement of the parties, judgment must be entered for the plaintiffs for the sum of thirty-two dollars and sixty-eight cents.

GEORGE B. RAWSON *versus* INHABITANTS OF NEW SHARON.

Full costs cannot be recovered in an action that should originally have been brought before a justice of the peace or judge of a municipal or police court, notwithstanding such action is against a town, for supplies furnished a pauper of that town, where the plaintiff claims under a contract with the overseers of the poor of the town.

On EXCEPTIONS from *Nisi Prius*, TENNEY, C. J., presiding.

ASSUMPSIT upon the following account annexed.

The Inhabitants of New Sharon,

To GEORGE B. RAWSON, *Dr.*,

To medicine and attendance for Mrs. Nathaniel Hutchinson, by your request, she being a pauper of your town, $34,00.

This action was originally brought in the S. J. Court, and during the first term the defendants offered to be defaulted for a sum less than twenty dollars.

At a subsequent term the plaintiff accepted the offer and claimed full costs.

The presiding judge ordered that judgment be rendered for one quarter costs, to which plaintiff excepted.

J. W. Webster, for the plaintiff, contended that this action was brought to recover for the support of a pauper, and entitles the plaintiff to full costs. He cited statute of 1842, chap. 31, sec. 20.

O. L. Currier argued for the defendants that the claim in the writ is not for the support of a pauper, but for services rendered under a contract. R. S., chap. 151, sec. 13; stat. 1842, chap. 31, sec. 20.

MAY, J. Until the statute of 1842, chap. 31, sec. 20, provided for an amendment to the thirteenth section of chap. 151 of the revised statutes, no more than one quarter as much costs, as the debt or damage, could be recovered in any action originally brought in this, or the then District

Court, when it appeared on the rendition of judgment that the action should have been originally brought before a justice of the peace or the judge of any municipal or police court, notwithstanding such action was brought either by or against a town. By the amendment just referred to, "in all actions originally commenced in either of said courts by or against towns for the support of paupers, full costs may be taxed."

What is the true construction of the statute as amended? Notwithstanding the strict letter of it might possibly be construed as broad enough to embrace all suits brought to recover for supplies furnished or used for the support of paupers, whether under a contract or not, we are not satisfied that it was the intention of the legislature to allow full costs in actions which might properly have been brought before a justice of the peace, or in a municipal or police court, except in those cases where the settlement of a pauper was involved, and the rights of the parties depended on a liability to provide for such pauper by virtue of some statute. In such cases, the question of settlement is usually more important than the amount of damages, inasmuch as the judgment may be conclusive upon the parties in relation to future claims. This was undoubtedly the reason why the legislature thought it proper to take this class of cases out of the rule established by the Revised Statutes, as before cited. We think the amendment was not intended to apply to cases of express contract made for the support of paupers, whether written or verbal; and no reason is perceived for extending it to such cases. A different construction would enable every trader or person who should furnish the most trifling article, by direction of the overseers of the poor, for the partial relief of a pauper, to institute his suit in this court therefor, and to recover full costs. Such construction cannot be allowed.

In the present case the plaintiff does not appear to have been an inhabitant of New Sharon when his services were rendered. His demand, therefore, did not accrue under the

R. S., chap. 32, sec. 48. It appears from his writ that he claims to recover upon the ground, and only upon the ground, that his services were rendered to the pauper *at the request* of the defendants. In such a case it is well settled that he could recover only upon proof of an express contract or request. Beethuen v. Inhabitants of Lincoln, 16 Maine R., 137; Inhabitants of Windham v. Inhabitants of Portland, 23 Maine R., 410. For the reasons before stated, only quarter costs can be taxed.

Exceptions overruled.

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

JUDGES

OF THE

SUPREME JUDICIAL COURT,

WHO HEARD AND DETERMINED THE CASES

FOR THE

MIDDLE DISTRICT,

1857.

HON. JOHN S. TENNEY, CHIEF JUSTICE.
HON. RICHARD D. RICE, J.
HON. JOSHUA W. HATHAWAY, J.
HON. SETH MAY, J.
HON. DANIEL GOODENOW, J.
HON. WOODBURY DAVIS, J.

ALL OF WHOM CONCURRED IN THE OPINIONS IN THE CASES FOLLOWING, UNLESS OTHERWISE INDICATED.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1857.

———o———

COUNTY OF KENNEBEC.

———o———

WILLIAM M. HOVEY *versus* EPHRAIM MAYO.

Where an existing street or road is dug down to the injury of the owner of land adjoining, it is not an *alteration* within the meaning of the statute, which will entitle him to damage. If a surveyor of highways dig down a street or road with discretion, and not wantonly, no action can be maintained against him therefor, either at common law or by statute, when acting under legal authority.

Where a new power is given by statute, and the means of executing it prescribed therein, the power must be executed accordingly. A corporation having power to raise money for the repair of highways, may make compensation therefor in the material taken from the same in the process of making the improvement.

But whether they can do so to the injury of the owner of the adjoining land, where the record by which the power is given shows the sole purpose to be for the benefit of the individual making the removal, may well be doubted.

A corporation having the power to determine what repairs should be made in its roads and streets, may, through its officers, acting within the scope of their authority, exercise their own judgment, which cannot be set aside by a jury in a suit at law.

Hovey *v.* Mayo.

A street commissioner, or one acting under him, cannot be made liable for the *purposes* of the city council while acting under an order passed within the scope of their authority, or for his own purposes in the proper execution of the order.

EXCEPTIONS were taken to the rulings of MAY, J., presiding at *Nisi Prius*,

This is an action on the case against the defendant for digging down the street in Hallowell in front of the plaintiff's house and lot.

Thomas Hovey testified that he knew the premises where the plaintiff lives, on Water street, in Hallowell; it is about twenty rods north of Hathaway's store at the foot of Winthrop street; a story and a half or one story house, perhaps twenty by forty feet, stands four feet from the line of the road and the end to the road; the house stood up two or three feet higher than the street before the street was cut down; the access to the house was easier then than now; the defendant told the witness that Stoddard cut down the street for the benefit of the city wharf, but did not say how much it was cut down; witness thinks it was cut down two or three feet; the cutting was from eight to ten feet from the house; the plaintiff had no mode of getting to or from the house for all purposes whatsoever, except to or from Water street; that he is city clerk of Hallowell, and read from the records of the city the election of the defendant as street commissioner, March 14, 1853, and oath administered April 4th, 1853, and bond approved the same day; also the vote of the city of Hallowell ordering the grading of this street, passed July 22, 1853; also the vote of the city council assuming the defence of this action.

Plaintiff then was called as a witness, and testified. I was not at home when the grading was done, but I had a talk with defendant; I asked him what he thought they had damaged me; he did not answer distinctly; I then asked him if they had not damaged me one hundred dollars; he said yes, and more too; the second time I asked him he said he did not think it was right for him to specify the sum; he said it

was done under the authority of the town; he was authorized to give Mr. Stoddard liberty to cut down two and a half feet; I asked him if he was there all the time; he said he was not but a part of the time; he said he could not say how deep Stoddard had dug, whether deeper than the vote or not; he did not say he gave any directions about the cutting, and said nothing about supervision over the work; it was all finished when I came home; don't know how deep the cut is, but should think three feet; he said the dirt was used to build the city wharf.

Ephraim Mayo, defendant, called for defence. The city gave Stoddard a right to grade the street not exceeding two and a half feet, at the deepest cut; he did grade it about that depth; I made marks in the bank before he begun, and tested the cut afterwards by these marks, and found it two and a half feet in the deepest; there was a space of only three to five rods cut so deep as this, and then tapered off each way; I did not direct or authorize Stoddard to cut more than two and a half feet anywhere; the cut was four or five rods long, averaging two and a half feet. I told him he might cut so deep, and directed the manner in which he must leave it; told him what the city had authorized me to do, and he might cut so deep; there was no place in front of plaintiff's house more than two and a half feet deep; the dirt was carried to the city wharf.

E. K. Butler, called by defendant. There was a rise in the road between Hathaway's store and the railroad bridge, and by the grading, this rise was leveled down; before the alteration the westerly gutter was filled up, and the road was about level across from plaintiff's house towards the river.

Plaintiff offered the vote of the city council of July 2, 1853, which was rescinded by the vote of July 22, 1853, and referred to in said last vote; defendant objected to its admission, but the court admitted it.

Upon the foregoing evidence the defendant's counsel contended that there was no such remedy as the plaintiff had

pursued in this case, but he must seek his remedy under the statute of 1846, chap. 216; but the court for the purposes of this trial did not so rule, but instructed the jury as hereinafter stated.

The defendant's counsel also requested the following instructions:

1st. That if they find that the grading was in accordance with the vote of the city council, then the defendant is not liable in this action, but the plaintiff must pursue his remedy under the statute of 1846. This requested instruction was not given.

2d. That if the grading was deeper than the vote of the city council authorized, and they find that defendant did *not* authorize or direct such deeper grading, then the defendant is not liable for such deeper grading. This instruction was given as requested.

3d. If the controlling part of the purpose of the city council in ordering the grading of this street was to improve it, although they might also wish to aid in the construction of the city wharf, that vote would furnish a justification to the defendant. This instruction was given as requested.

4th. That if the city authorities see fit to reduce the grade of any part of the highway, it is not necessary that the earth taken away, and every portion thereof, shall be used in some other portion of the highway; but any part of the earth may be disposed of as may be convenient or profitable to the city. This instruction was given as requested.

The jury were instructed that if they believed, from the evidence in the case, that the defendant told Mr. Stoddard that he might cut down the street in front of the plaintiff's dwelling house, and said Stoddard, in pursuance of such permission, did cut down and grade the street under the direction and superintendence of the defendant, and the defendant knew when he gave such permission that such grading and cutting was for the purpose of enabling said Stoddard, or the owners of the city wharf, so called, to take the

earth for their benefit, and not for the purpose of improving and repairing the street, then this action may be maintained. But if the said defendant had no knowledge that the cutting and grading was to be for the benefit of the said Stoddard or the owners of the city wharf, and all that he did or consented to have done was done in the discharge of his duties as street commissioner, and for the purpose of improving or repairing the street, then this action could not be maintained.

And the jury were further instructed, that if they should find that the purpose of the defendant, as street commissioner, was to improve or repair the street, the fact that other persons were to be benefited by it, or that the earth taken from the street was to be appropriated to the building of a wharf for the benefit of individuals, would not render the defendant liable in this suit, and he would not be liable; but if, on the other hand, the purpose of cutting down the street was to enable Stoddard or other persons to cut it down for the sake of taking away the earth for their private purposes, because such digging and cutting was thought not to be injurious to the public travel or street, and the defendant gave permission to Stoddard to dig and cut it down for his own benefit, or for the benefit of others, and not for the improvement or repairing of the street, and it was done under his direction or superintendence, and such cutting and digging was to the injury and damage of the plaintiff as alleged, then the defendant is liable for the damage occasioned thereby, notwithstanding the authorities of the city of Hallowell may have authorized him by their vote to give such permission and to take the direction and superintendence of the work, and notwithstanding he did so while acting as street commissioner.

Other appropriate instructions were given, to which no exception was taken.

The jury found a verdict for plaintiff, and assessed the damages at one hundred dollars.

VOTES OF THE CITY COUNCIL.

Resolved, That the City Wharf Company be permitted, at their own expense, to grade Water street, between Winthrop street and the railroad crossing, and reduce the same to a level, provided they leave the same in as good condition and shape as it now is, to the satisfaction and acceptance of the street commissioner.

Passed July 2d, 1853.

Ordered, That Samuel Stoddard, the contractor to construct the city wharf, be allowed to grade Water street, in the vicinity of the Sager property, at his own expense, and under the direction and superintendence of the street commissioner, provided that said contractor shall indemnify the city against all claims for damages in consequence of such grading, and leave the street in as good shape and condition as it now is, and provided, also, that the greatest cut shall not exceed two and a half feet; and the order passed on this subject the second day of July, is hereby rescinded.

Passed July 22d, 1853.

A. G. Stinchfield, counsel for plaintiff.

The fee in the *locus in quo* is in the plaintiff, and the public have an easement only. Com. v. Peters, 2 Mass., 125; Fairfield v. Williams, 4 Mass., 427.

The public have no legal right to use the land for any other purpose than for mending the road. Robbins v. Bowman et. al., 1 Pick, 122.

If the soil is disturbed for any purpose other than to improve the way and to make it more convenient for public use, the owner of the fee may maintain an action for *trespass* against the person so disturbing the soil, as a wrong-doer. 21 Pick., 292.

The owner of the soil has a right to produce evidence before a jury to show the purpose of defendant in removing the soil, and to submit to them whether or not it was removed for the purpose of improving the public way and making

it convenient for public use, or otherwise. 1 Pick, 122; 21 Pick., 297; 6 Pick., 57.

If a surveyor abuse his authority by digging down or raising up where it is not necessary for the reasonable repair and amendment of the road, he is amenable to the party suffering, for damages. 1 Mass., 428.

"When land is appropriated to a highway, the right to the soil remains precisely the same as before—so much so that the owner may recover in ejectment. He has a right to the produce and all the profits above or under the ground, except only the right of passage." 2 Mass., 117, and case cited.

The common law remedy is not superceded by the statute of 1846. The statute is cumulative in its nature and the plaintiff has his choice of remedies. Gooch v. Stevenson, 13 Maine R., 371.

A verdict will not be set aside for excessive damages in cases of tort unless it clearly appears that the jury committed some gross and palpable error, or acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated. Whipple v. Cum. Man. Co., 2 Story's R., 661.

The order of July 2, 1853, was admissible, inasmuch as the same was referred to in the order of July 22d—and in order to show the purpose of the defendant in digging down the street.

J. Baker, counsel for defendants.

The verdict ought to be set aside, and a new trial granted.

I. Because prior to the statute of 1846, chap. 216, there was no remedy for such a case as this.

By right of eminent domain residing in every government, private property may be taken for public uses by that government or its officers, without any compensation, and the provision of the constitution is not the grant of a new power, but the limitation of one inherent in government itself. Cushman v. Smith, 34 Maine R., 247.

When this land was originally taken for this highway, compensation was made according to the constitution for all the damages present, prospective, and contingent, which might by possibility accrue to the owner of this estate from the right of a perpetual easement. He has received his compensation therefor long ago, and has no just cause of complaint. Callander v. Marsh, 1 Pick., 418; Brown v. Lowell, 8 Met., 172.

II. When the statute provided a remedy where none existed before, it is the only remedy which any party can have, and the court should have given the first instruction requested. Keene v. Chapman, 21 Maine R., 126; Mason v. Kennebec and Portland Railroad Company, 31 Maine R., 215–6; Bangor v. County Commissioners, 30 Maine R., 270, and cases. 1 Met., 138–9; 8 Met., 177; 12 Maine R., 385–8.

III. But it will be said that the defendant was not in the lawful exercise of his authority as street commissioner, and therefore that statute does not apply.

This we deny.

1. Because the statute is absolute, unqualified, and unlimited. Its language is broad enough to cover all cases. It has no regard to motives or purposes, but the *fact*. The fact in this case is within the scope of defendant's power. The street was defective, it needed repair, and it was repaired and improved. All the acts he did were lawful in form. They were all appropriate to an honest discharge of his official duty. By what, then, is it pretended that they are rendered unauthorized and unlawful? From a wrong purpose, an unlawful motive of the city council. The statute of 1846 contemplates no such inquiry as this. It deals with acts, not motives. To interpolate any such restriction into it is judicial legislation, a usurpation of power, and changes the plain and obvious meaning of the law.

2. Not only is such an inquiry beyond the contemplation of that statute, but it is one which this court has no right to make at all, for it involves an inquiry into the propriety and necessity of any repair or alteration in a public street. This

question is conclusively and exclusively confided by law to the city council and the street commissioner, the same as the question of public necessity and convenience in laying out a highway, is to the county commissioners; and when they have determined it, whether right or wrong, no tribunal has a right to inquire into it. The presumption of law is in favor of all public officers. City Charter of Hallowell, Special Laws of 1850, chap. 413.

Adopt the rule contended for, and what injurious consequences would grow out of it. Acts of public officers in locating or altering streets which are within the scope of their authority, and appear to be legal, would be rendered *unlawful* by the secret and inscrutable motives of the officers, and there would be no security or permanency to any street; they would be all afloat.

The instruction as a matter of law, that the defendant would be liable if he knew that the purpose of the city council was to enable Stoddard to take the earth for the city wharf, was therefore erroneous.

IV. But suppose the court should decide that the purpose of the city council was open to inquiry in this case, and that the instruction of the court was right as a matter of law, then we contend that there was no such evidence of the wrong purpose, as to authorize the jury to find such a verdict, and therefore the verdict is against evidence, and the third requested instruction of the court. The only evidence in the case on this point, is the votes of the city council. They are not sufficient alone, and arrayed against them, we have the presumption of law in favor of public officers, and the fact that the street was defective before, and was improved by the alteration.

V. But if this inquiry into motives and purposes was an open and proper one, then the court was wrong in ruling out the question to Aiken. That would have lead to the best evidence on this point.

VI. But if the grading was unlawful on account of the purpose for which it was voted by the city council, then, in-

asmuch as the defendant did nothing but consent to Stoddard's doing what that vote authorized, he was the mere channel of communication between the city council and Stoddard, and is not liable here.

If the acts done by Stoddard were unlawful, the consent of defendant to his doing them under the vote, would confer no power on Stoddard, nor render defendant liable, and therefore the instruction of the court was erroneous. Green v. Portland, 32 Maine R., 431.

The plaintiff should look to Stoddard who did the acts, or to the city council which voted them to be done, and commanded defendant what to do.

VII. The damages are excessive, and against the instructions of the court; and the ruling of the court in excluding the question put to Aiken about the value of the property, was erroneous. The same acts done to a house worth $300, would not cause so much injury as to a house worth $3000. The damage must be in *proportion* to the value. The mere description of the house would give no adequate idea of its value, which depends mainly, in a place like Hallowell, upon its location.

VIII. The ruling of the court was erroneous in excluding the proof offered relative to the application of the plaintiff to the city for damages, and the reference of the claim and the action of the referees. It shows that he had selected his tribunal; that tribunal had assumed jurisdiction of the case by consent and agreement of the parties, and he should be bound by it, and estopped to waive it and seek a new remedy.

Motion to set aside the verdict for the plaintiff:

1. Because it is against evidence and the weight of evidence.

2. Because it is against law and the instructions of the court.

3. Because the damages are unreasonable and excessive.

TENNEY, C. J. This is an action at common law, to re-

cover damages against the defendant, who at the time of the alleged acts was the street commissioner of the city of Hallowell, for digging down the street in front of the plaintiff's house and lot, to which it is admitted he had title.

The refusal of the court to give to the jury the instruction first requested for the defendant, and the general instructions given, authorize a verdict for the plaintiff in this action, upon certain findings of facts. Exceptions were taken by the defendant, the verdict being against him, for the refusal to instruct as requested, and to the instructions given unfavorable to him.

Where an existing street or road is dug down, to the injury of the owner of land adjoining, it is not an *alteration*, within the meaning of the statute, which will entitle the owner of land to damage. And if a highway surveyor or commissioner of streets dig down a street or road, with discretion, and not wantonly, no action at common law or under the general statute of the state can be maintained. Callender v. Marsh, 1 Pick., 416; R. S. of 1841, chap. 25, sec. 1, and ref.; Brown v. City of Lowell, 8 Met., 172.

It is a well established principle, that when a new power and the means of executing it are given, by statute, the power can be executed in no other way. Andover and Medford Turnpike v. Gould, 6 Mass., 40; Bangor House Proprietary v. Hinkley, 3 Fairf., 385; Boston v. Shaw, 1 Met., 130.

By the statute of 1846, chap. 216, the power is given to the owner of land, adjoining a road or street, in any city or town, to obtain damages, by reason of the road or street being raised or lowered, by any commissioner or surveyor of highways, and the mode is provided by which the damages can be recovered.

It is undoubtedly true, that this provision of the statute of 1846 does not extend to cases where the street or road has been cut down or raised by the commissioner or surveyor of highways, in a manner altogether unauthorized; but it contemplates a case where an injury is done to the proprietor of land adjoining the street or road, by the legal action of

the commissioner, &c., in cutting down or elevating the same.

No action can therefore be maintained against the defendant, for acts complained of, in causing or permitting the street in question to be graded, if these acts were caused or permitted in the exercise of an official discretion, and not wantonly. Whether they were done in the proper discharge of his duty as street commissioner, may depend in some measure upon the authority under which he may have acted. It appears from the arguments of counsel, as well as from the instructions of the judge at the trial, that the acts which were the foundation of the suit were subsequent to the votes of the city council of the 2d and the 22d of July, 1853. By the latter, the contractor to construct the city wharf had authority to grade the street, under the direction and superintendence of the street commissioner, subject to certain conditions, liabilities, and restrictions.

By sec. 4 of the city charter of Hallowell, the executive powers of said city generally, and the administration of police, with all the powers of the selectmen of Hallowell, shall be vested in the mayor and aldermen, &c. All other powers now vested in the inhabitants of said town, and all powers granted by this act, shall be vested in the mayor and aldermen and common council of said city, to be exercised by concurrent vote. By sec. 7, the exclusive power of laying out streets, &c., is given to the city council; and they shall in all other respects be governed by and be subject to the same rules and restrictions as are by law provided in this state, for the regulating of public highways and repairing streets.

By R. S. of 1841, sec. 75, towns may raise money as they may deem necessary, in making repairs upon highways and town ways, and the same shall be expended for such purposes, by the selectmen.

It follows from the provisions of the city charter and the general statute referred to, that the city council are authorized to raise money to repair streets, and to expend the same

in furtherance of that object. And the power to do so, and even to direct the street commissioner to cause streets to be graded, if done for the purpose of improvement, is not denied by the plaintiff's counsel. The city government having the power to raise money with which to repair streets and roads, it cannot well be contended, that they have not the power to make such repairs, when, instead of payment from the treasury therefor, compensation can be made from the materials taken from the street, in the very process of making the improvement.

It is insisted that the city council cannot allow earth to be removed from a street, to the injury of the owner of land adjoining, for the purpose of enabling the person making the removal to derive a benefit therefrom, and for this purpose only. It may well be doubted whether the city council have that power, when the record of the vote itself shows that such was the whole design. It has no power over the land of the street beyond that of making it in all respects what it regards as proper in a public street. But the grading of streets is often regarded as a process very material, in putting them in a condition to be safe and convenient for travelers. And in making the repairs in streets and roads, in the city of Hallowell, under its charter, the power is given to the corporation through its officers to determine what repairs shall be made; and so long as the city council therein act within the scope of its authority, its judgment cannot be set aside by a jury in a suit at law.

By the vote of July 22d, 1855, it is manifest that the city council designed that Water street should be *graded.* If the means contemplated in the order, by which this improvement was to be effected, was not illegal or beyond the power of the city government, it was obviously an order which they had authority to pass. Whether the vote shows an attempt to exceed the power conferred on the city council, is for the court to decide, from the votes themselves; and therefrom it is not perceived that it transcended its legal limits.

It is insisted that the city council had no authority to

permit Stoddard to cut down the street and to take the earth removed to the city wharf; and hence, that the defendant, in connecting himself with one without power to do the acts complained of, was a wrong doer. If the order to cause the street to be graded was passed, within the scope of the authority of the city council, it had the right to employ agents to carry it into effect; and Stoddard, being under the direction and supervision of the street commissioner could be employed as that agent as well as any other. And as we have seen, the mode of receiving compensation for his services in grading the street is no objection to his employment.

It was no part of the duty of the street commissioner, when acting under an order of the city council, passed within the scope of its authority, to judge of the object of that body, and as he found the object to be legitimate or otherwise, according to his own standard, to carry the order into effect, or to disregard it. Nor was the purpose of the street commissioner, in giving directions, and supervising the grading of the street and the removal of the earth to city wharf, to make him liable or not, where his action was confined to the execution of the order.

The conclusion is, that the instruction requested and refused, should have been given; and that the instructions unfavorable to the defendant were erroneous.

The question put to a witness, who was one of the aldermen of the city at the time of the order, as to his purpose in favoring the alteration in the street, was properly excluded. The purpose of one member of a corporation, may be a very different thing from the purpose of the corporate body, in passing an order, and the purpose of the order when passed under full authority, can have no legitimate effect upon the defendant when in the execution of the order, much less the purpose of one of the members of the board of aldermen. The question was properly excluded.

The value of the plaintiff's premises does not appear to be material in fixing the damage done to him. The trouble arising from the cutting down of the street, and the expense

of making the house and lot accessible therefrom, cannot depend upon the value of the premises. And there is nothing in the case tending to show that the injury to the premises was such that it was deemed necessary or expedient to abandon them. This question was improper.

Exceptions sustained and a new trial granted.

JOHN DUNN *versus* CALVIN SPALDING.

An extension of the time of payment for a definite period under a valid agreement between the plaintiff and the principal upon a promissory note, exonerates a surety, provided he gives no consent thereto.

REPORTED by RICE, J.

L. M. Morrill, counsel for the plaintiff.

A. G. Stinchfield, counsel for the defendant.

TENNEY, C. J. The note in suit is dated February 10, 1854, payable on demand, with interest, signed by John Otis, principal, and the defendant as surety. The defence to the present action, which is against the surety, is an extension of the time of payment, for definite periods, under a valid agreement between the plaintiff and the principal. This defence is not attempted to be controlled by any evidence, that the extension was with the knowledge and consent of the defendant, but it is denied to have been made at all. The principle is well settled that such extension of payment as is here set up in defence exonerates a surety, provided he gives no consent thereto.

The testimony of the defendant, and of one witness on the stand, and the deposition of another, introduced by the plaintiff, fully establishes the defence, notwithstanding the plaintiff testified that he did not agree with the principal to

defer the payment of the note; but that in February, 1856, he received the interest up to July next following. According to the agreement of parties,

Judgment for the defendant.

INHABITANTS OF VASSALBOROUGH

versus

SOMERSET AND KENNEBEC RAIL ROAD COMPANY.

Under an article in a warrant for a town meeting "to see if the town will relinquish their right to any part of the eight rod allowance on lot No. 63 to E. S. as a compensation for land *had of said E.* S. on said lot No. 63 for a road for a landing, or act thereon as they may think proper;" it was voted to relinquish to E. S. two rods of the eight rod allowance joining to the north line of No. 63 from the county road to the east end of the lot. In the absence of evidence showing the mode in which the town "had the land" of said E. S., the language of the warrant and votes cannot be treated as sufficient proof of title.

The right to a town or county road is but an easement for public use in which the town has legally no title or property.

REPORTED by MAY, J., presiding at *Nisi Prius*.

This is an action of trespass as alleged in the writ.

In the original location of the lots in Vassalboro', an eight rod range-way was reserved between lots sixty-three and sixty-four, in range one, from the river back one mile. From the earliest settlement, so far as the recollection of the inhabitants in the neighborhood of this range-way goes, the part of the same, leading from the county road to the river, was used as a road for the inhabitants of the town to haul wood, bark, screwed hay, and all kinds of lumber to the landing at the Kennebec river, to be floated thence to market. At the annual meeting of Vassalboro', held in April, 1802, the town voted to accept a road laid out by the selectmen, as follows:

"Laid out for the use of the town the following road and landing, viz: Beginning near the bank of the river on the south line of an eight rod road between lots No. 63 and 64, thence running south 43 deg., east 21 rods, thence south 63 deg., east 13 rods, thence south 79 deg., east 11 rods, thence north 88 deg., east 17 rods, where it intersects the south line of said eight rod road, thence E. S. E. to the county road, thence northerly on said road eight rods, thence W. N. W. to the river."

At a special meeting held on the 6th day of April, 1802, under an article "to see if the town will relinquish their right to any part of the eight rod allowance on lot No. 63 in the first range of lots, to Edward Sturgis, as a compensation for land had of said Sturgis on said lot No. 63, for a road and landing, or act thereon as they shall think proper;" the town "voted to relinquish to Edward Sturgis two rods of the eight rod allowance, joining the north line of No. 63, from the county road to the east end of said lot." The piece of land supposed to be obtained by the foregoing vote from Edward Sturgis, was an acre lying on the bank of the river adjoining on the south line of said eight rod allowance. The road aforesaid continued to be used for the purposes aforesaid, and said acre as a landing place from 1802 to 1843. At that time, in consequence of the adjoining owners having encroached upon said road and made it too narrow for convenience, the town, at the March meeting in 1843, under an article "to see if the town will accept the location of a road leading from a point in the county road near the dwelling house of James Thatcher, westerly to the Kennebec river, agreeable to minutes to be exhibited at said meeting, and act thereon as they may think proper," accepted the following new location of said road as a town road:

"Beginning at a point in the centre of the river road near the dwelling house of James Thatcher, and at the distance of one and one-half rods from the north line of an eight rod allowance for a road between lots No. 63 and 64, range one, thence north 69 deg. west on said allowance for road the dis-

tance of 38 rods, thence north 80 deg., west 62 rods, thence north 42 deg., west 37 rods, through the town landing on the aforesaid allowance to the Kennebec river, which is the termination of said road as now laid out by the selectmen of said town, said road to be three rods in width measured to the right and left of the aforesaid courses."

This road has been assigned to highway surveyors from year to year, to be kept in repair, and has been repaired from time to time as it required. There was a basin and eddy in the river adjoining this landing, which rendered the landing and road valuable to the citizens of the town.

The defendants have located their road through this landing place and across the road, as appears by the location thereof, which is referred to and made a part of the case; and in constructing the same they have dumped into the basin and eddy of the river so as to narrow and injure the same for the purposes for which it has been used, and erected an embankment along a considerable part of the line of their road through said landing and across said town road about eight or nine feet above the surface of the ground, so as to render the river inaccessible for the purposes aforesaid. Every year this road, landing and eddy have been used for hauling wood, bark and other lumber, and screwed hay, and depositing the same on the landing for market; for taking out cedar and other kinds of lumber floated down the river from above and stopped in the eddy, and for crossing on the ice in the winter with teams and sleighs to the Hutchinson landing in Sidney, directly opposite. The mode of constructing the defendants' railroad has cut off these uses, and rendered the road, landing and eddy substantially useless to the plaintiffs.

The defendants plead the general issue and file a brief statement. They also make their charter a part of the case without a copy, and refer to their records showing the location and construction of their road, the taking of land, and the doings of their directors.

J. Baker, counsel for the plaintiffs.

This is an action of trespass, and in order to maintain it the plaintiffs must show:

1. Title to the premises. The town way has existed, as the case finds, from the earliest recollection of the "oldest inhabitant," and in 1802 it was laid out and accepted as a town way in due form of law. In 1843 it was again laid out and accepted by the town, and during all this time it has been used by the citizens for various purposes, assigned to highway surveyors, and repaired. The title to the "town landing," containing one acre south of the town road, is derived by exchange with Edward Sturgis, by vote of the town in 1802, and it has been claimed, occupied and used exclusively by them ever since. This is sufficient evidence of title. R. S., chap. 81, secs. 10, 11.

2. That the defendants have obstructed these premises. The case finds that they have dumped into the basin and eddy and made it narrower; that they have run their road across the landing and road, and made an embankment eight or nine feet above the original surface, so as to render the river inaccessible for the purposes for which these premises have been used heretofore. R. S., chap. 164, sec. 1.

But it is said that the defendants by their location have shown a right to take these premises under the general law and their charter, and do the acts complained of.

This we deny. 1. The legislature having granted the right and pointed out the mode of locating town ways, they are of equal authority with a railroad — co-equal in right, the same as one railroad against another, and must depend on priority of time for their superiority of right. In this case, the town road is prior, and therefore superior to, the railroad, and it would be in the nature of a violation of contract for the legislature to grant a power to destroy the town road, just as much as to grant power to one railroad to destroy a prior railroad. 23 Pick., 236.

But in fact the legislature has not, in this case, undertaken

to grant any such power by general law or by charter, but prohibited it. R. S., chap. 81, secs. 8, 9, 10, 11, 12, 13, 14, 15.

The defendants have raised this town way without leaving it in good repair, or giving the notice required in sec. 8.

3. No compensation or tender of compensation has been made for the road, landing, or privilges, and without this, within a reasonable time, the defendants are trespassers. Cushman v. Smith, 34 Maine R., 247; statute of 1853, chap. 41, secs. 4, 5. That the statute of 1853 is applicable to this company, see Norris v. Androscoggin Railroad Company, 39 Maine R., 273; charter of same company, private laws of 1848, chap. 184, sec. 17. Defendant's charter, 1848, chap. 186, sec. 14.

Bradbury, Morrill, & Meserve, counsel for plaintiff.

TENNEY, C. J. This being an action of trespass upon land, in order to be successful therein, the plaintiffs must show either title or possession.

No paper evidence of title was introduced, and none of the ordinary character is pretended to have existed. But it appears that at a special meeting of the inhabitants of Vassalboro', holden on April 6, 1802, under an article in a warrant, to see if the town will relinquish their right to any part of the eight rod allowance, on lot No. 63, in the first range of lots, to Edward Sturgis, as a compensation for land had of said Sturgis on said lot No. 63, for a road or a landing, or act thereon, as they may think proper, it was voted to relinquish to Edward Sturgis two rods of the eight rod allowance, joining the north line of No. 63, from the county road to the east end of the lot. The case states that the piece of land supposed to have been obtained by the foregoing vote, from Edward Sturgis, was one acre, lying on the bank of the river, adjoining the south line of said eight rod allowance; and that acre has been used as a landing place from 1802 to 1843.

No evidence was introduced to show the mode in which

the town "had the land of said Sturgis;" and such language used in the warrant for a town meeting of the plaintiffs, and the vote passed thereon, cannot be treated as sufficient proof of title in them.

It is very clear upon the authority of Bethun v. Turner, 1 Greenl., 111; Littlefield v. Maxfield, 31 Maine R., 134; and State v. Wilson, Maine R. (not yet published,) and the cases therein cited, that no title has been acquired by the plaintiffs under any possession, which the case finds, to have been in them.

Another question involved is, whether this action can be maintained for the obstruction by the defendants of the passage way from the county road to the river, upon the assumption that it was legally constituted a road in 1802, and afterwards in 1843.

The title to the land covered by the road is in the original owner, his heirs or assigns, subject to the public easement, which, according to the facts relied upon by the plaintiffs, has been impaired, and perhaps for the present destroyed, by the defendants. In the case of Calais v. Dyer, 7 Greenl., 155, Mellen, C. J., in delivering the opinion of the court, says, in relation to a town road, "The town certainly owns no more than an easement; and as a town road is as much a public road as a county road is, for all the purposes of traveling and use, the consequence is, that the easement is a public one; and it cannot be considered in a legal point of view as the town's easement or property." In harmony with the principle just stated, is the case of Andover v. Sutton and als., 12 Met., 182, and also that of Freedom v. Weed, 40 Maine R., 383.

The foundation of the suit having failed, it is unnecessary to consider other questions presented in the argument.

Plaintiffs nonsuit.

JAMES NASH *versus* UNION MUTUAL INSURANCE COMPANY.

Where the by-laws of a company stipulate that the risk upon their policy shall be suspended, if the insured shall neglect for a given time, when personally called upon, to pay any assessment duly made; the defendant company cannot be considered as having waived their right to be exempted from liability for the plaintiff's loss, by their subsequent assessment and collection to cover it.

A demand made by one having a receipt in full from the proper authority in discharge of the liability, is as much a personal demand as though made by the one who signed the receipt.

The facts were agreed by the parties.

This is an action of assumpsit brought upon a policy of insurance issued by the defendants, dated May 20, 1854, running three years.

The property insured upon was entirely destroyed by fire on the night of July 3, 1855; within thirty days after said loss, the plaintiff notified the company thereof, and within that time complied in all respects with the provisions of article 14 of the by-laws of said company.

The defendants contend that they are not liable by virtue of the 12th article of their by-laws, which reads as follows: "If the insured shall neglect for the space of ten days, when personally called upon, to pay any premium or assessment upon either class of property, the risk of the company on the policy shall be suspended till the same is paid; but if the insured shall refuse to pay any assessment, the directors may terminate the same by giving notice thereof in writing, either personally or by mail, to the insured; provided such termination of the risk shall not affect the validity of the policy or note so far as respects past dues."

Some time in the month of May, 1855, one John F. Holmes, a driver of a stage between Augusta and Gardiner, called upon the plaintiff, and presented to him for payment a paper purporting to be a bill of an assessment made by the defendants upon the plaintiff, and telling him he received it from the agent at Augusta; the plaintiff said to him, he should have

some money in a few days, and then he would settle it; Holmes received said paper of one Stephen Hawes, of Augusta, who is agent of said company, and he subsequently returned it to said Hawes unpaid.

Said Hawes received the bill of the treasurer for collection.

C. Danforth, counsel for plaintiff.

Bradbury, Morrill, & Merserve, counsel for defendant.

HATHAWAY, J. The plaintiff had a right to be satisfied that Holmes was duly authorized to receive the money, before he acted upon his demand, and a refusal, upon that specific ground, would have been justifiable. Solomons v. Dawes, 1 Esp., 83; Roe v. Davis, 7 East., 363. But he did not refuse upon that ground; he made no questions concerning the authority of Holmes, or the genuineness of the receipt. The call, by Holmes, with the bill receipted in his hand, was as much a personal call upon the plaintiff, as if it had been made by the treasurer, who signed the receipt.

The defendant company cannot be considered as having waived their right to be exempted from liability for the plaintiff's loss, by their subsequent assessment and collection to cover it. The plaintiff was no party to that proceeding; he claimed that the company were liable to him for the loss, and whether or not they were liable might depend upon the uncertain result of a lawsuit. They might, very properly, have made the assessment and collection. If they were liable, they would then have funds to pay for the loss. If they were not liable, they would have a surplus, which they would, of course, be bound to appropriate, according to the legal rights of those interested therein.

Plaintiff nonsuit.

ABNER H. MCARTHUR AND AL. *versus* GEORGE STARRETT.

An *error in law* must always appear upon the record; and a memorandum filed with the papers in the case showing how the judgment was made up, is no part of the record.

An error in fact may be shown by proof of some fact not apparent upon the record, but affecting *its validity*, or the regularity of the proceeding itself.

A judgment may be reversed upon writ of error, for an error of either kind, but in either case it must be shown that it was such an error as existed without the fault, or legal capacity of the party injuriously affected by it to prevent it.

Error does not lie for the correction of errors in the taxation of costs by the clerk, when assigned as errors in fact, the proper remedy being by an appeal.

The facts in the case were agreed by the parties.

This is a writ of error to reverse a judgment for costs recovered by defendant in error against the plaintiffs, at the March term of the court, 1856, and taxed by the clerk.

Plea is "*in nullo est erratum.*"

The defendant in error formerly resided in Augusta, Maine, but had removed to Richmond, Virginia, and was temporarily in said Augusta at the time of the service of the original writ upon him, and traveled from said Richmond to Augusta for the purpose of attending the trial, as stated in his certificate on file.

The witness Hammington, traveled from Boston, Massachusetts, according to his certificate on file.

Bradbury, Morrill, & Meserve, counsel for plaintiff in error.

Samuel Titcomb, counsel for defendant.

MAY, J. The error for which a judgment may be reversed, by writ of error, may exist, either in the foundation, proceedings, judgment or execution of the suit. Howe's Prac., book 2, chap. 13, sec. 3, and the cases there cited. It may be an error in law or in fact. If it be the former, it

must always appear upon the record; if the latter, it may be shown by proof of some fact, not apparent upon the record, but affecting its validity, or the regularity of the proceeding itself; such as the death or insanity of one of the parties at the commencement of the suit; or the appearance of an infant in a personal action by an attorney, and not by guardian. In such cases and the like there is error *in fact* existing, without any fault, or legal capacity to prevent it, on the part of the party seeking to correct it. The law, therefore, deems a writ of error an appropriate remedy for the correction of such errors. Bouvier Law Dic., vol. 2, p. 501; Knapp v. Crosby, 1 Mass., 479; White v. Palmer, 4 Mass., 147; Colby's Prac., p. 338. But in cases where the facts alleged are such as do not affect the validity or regularity of the proceeding itself, and in which a party having legal capacity to act, has had a full and fair opportunity upon legal notice to avail himself of such facts, in a court having competent jurisdiction, but has voluntarily or by his own laches waived his rights in regard to any defence which might have been sustained by them, this process cannot afterward be maintained. So too where such party appears and omits to plead any matter which he might have pleaded in abatement of the suit; or where he neglects to offer any evidence which he had, material to the issue, or which, when offered, was excluded by the court; or where any other ruling was made which did not become a matter of record, as formerly under the statute of Westminster 2d, chap. 31; or where a party had a remedy by appeal and did not exercise it, having a capacity and opportunity to do so, the facts which might have been available in any of these modes, cannot afterward be assigned as error for the reversal or correction of the judgment which has been so obtained. Howard v. Hill., 31 Maine R., 420; Jewell v. Brown, 33 Maine R., 250; Gay v. Richardson, 18 Pick., 417; Riley v. Waugh, 8 Cush., 220; Campbell v. Patterson, 7 Verm., 86; Whitwell v. Atkinson, 6 Mass., 272.

In the case now before us the original defendant seeks the reversal or correction of a judgment for costs which were

taxed for the original plaintiff by the clerk. They were taxed and allowed without any notice to the defendant in the action, no notice having been given by him to the clerk, by an entry upon the docket or otherwise, of any desire on his part to be heard in the taxation. The error assigned and relied on, is the allowance to the plaintiff of $51,48, at each of three terms of this court, for his travel from Richmond, Virginia, to Augusta, Maine, he having made affidavit that he did actually so travel at each of said terms, for the purpose of attending to said suit. A memorandum exhibiting the items of cost, as taxed and filed with the papers in the case, shows such allowance. Such memorandum is no part of the record. Storer v. White, 7 Mass., 448; Kirby v. Wood, 16 Maine R., 81. In the case of Valentine v. Norton, 30 Maine R., 194, it is said by SHEPLEY, C. J., in the opinion of the court, that "nothing is presented by the writ of error to a court of errors but a transcript of the record. Papers and documents filed in the case, but not incorporated into the record, constitute no part of it." It was therefore held in that case, that "no correction of the errors alleged to have been committed in the taxation of costs could be made by an assignment of them as errors in law."

When an illegal taxation appears upon the face of the record the error is one of law, and it is decided in the case last cited, that for such an error a writ of error will lie. So also in Massachusetts, Waite v. Garland, 7 Mass., 453; Mansur v. Wilkins, 1 Met., 488. Where no error is apparent upon inspection of the record, if one exist, it is an error in fact; a fact, however, of such a nature and occurring under such circumstances, that according to the authorities before cited, a writ of error will not lie for its correction. For such irregularity in the taxation of costs by the clerk, the remedy is by appeal. Jacobs v. Potter and al., 8 Cush., 236; Day v. Berkshire Woolen Co., 1 Gray, 420. Such is the law of Massachusetts, and our rule of court providing for an appeal from the taxation of costs by the clerk being substantially like the R. S. of that state, chap. 121, sec. 28, no reason is

perceived why the law of this state, in like cases, is not the same. The plaintiff in error had the right to be heard in the taxation of the costs in the original action, and if dissatisfied therewith to appeal to a judge of this court, sitting at *Nisi Prius*, or in vacation, and if he voluntarily waived such right, and error has occurred, he cannot justly complain that the law now denies him the remedy which is sought. If the question as to the legality of the clerk's taxation, which was intended to be raised in the present case, had been presented at *Nisi Prius*, and the ruling of the presiding judge upon it had not been satisfactory, upon exceptions duly taken, the opinion of the full court might have been obtained. If there be any error in such taxation, of which we give no opinion, whether the plaintiff in error has any remedy, we are not now called upon to decide.

Judgment affirmed.

RICE, J., *dissenting.* The defendant now resides in Richmond, Va. He formerly resided in Augusta, Maine, and was temporarily in that place when the writ in the former action was served upon him. The original action was continued several times before it came to trial. The defendant's attorney resides in Augusta. For three terms of court, while the original action was pending, cost was taxed for the defendant, and allowed by the clerk, for travel from Richmond, Virginia., to Augusta, from which place he certified that he actually traveled to attend court in that action.

Fees were also taxed and allowed the defendant for a witness, for travel from Boston to Augusta, at three different terms of the court.

The plaintiff brings this writ to reverse the judgment, so far as the fees for the travel of the defendant and his witness, beyond the line of the state, constitute a part thereof, alleging that the judgment is, to that extent, at least, erroneous.

Error is a mistake in the foundation, proceeding, judgment, or execution of a suit in a court of record in matter

of law or fact; and to correct which a writ of error lies. Co. Lit., 288, b.

The jurisdiction of our Supreme Court does not extend beyond the territorial limits of the state. It has no power over the persons of parties or witnesses beyond the limits of its territorial jurisdiction. It cannot compel the attendance, at court, of such persons; nor are persons residing beyond its jurisdiction, ever in contemplation of law, in attendance upon the court as parties or witnesses. Officially, therefore, it cannot take cognizance of the fact, that parties, before it, reside beyond its jurisdiction, or of their acts while beyond the limits of the state. The cost allowed for the travel of the defendant and his witness for travel beyond the line of the state was illegal, and should not have been allowed. White v. Judd, 1 Met., 293; Melvin v. Whitney, 13 Pick., 190.

Can this illegal taxation be corrected on a writ of error?

It is contended that it cannot, because, it is said, error will not lie where a remedy may have been had by appeal. That such is the general rule is undoubtedly true. But the rule is subject to qualifications. Jewell v. Brown, 33 Maine R., 25. Among other exceptions, in this state, error may be maintained to obtain relief from an illegal taxation of costs. Valentine v. Norton, 30 Maine R., 194. The law was formerly the same in Massachusetts. Field v. Turnpike corporation, 5 Mass., 389; Wait v. Garland, 7 Mass, 453; Thomes v. Seaver, 12 Mass., 379.

In the case of Valentine v. Norton, cited above, SHEPLEY, C. J., in giving the opinion of he court, says:

"A writ of error may be maintained to obtain relief from an illegal taxation of costs. When such taxation is apparent, on inspection of the record, it is one of law. In the present case the errors respecting costs are assigned as apparent of record, yet upon inspection of record no such errors appear.

"The counsel for the plaintiff in error contends, that a memorandum exhibiting the costs taxed, and filed with the

papers in the case, is to be regarded as a part of the record. Nothing is presented by a writ of error to a court of errors but a transcript of the record. Papers and documents filed in the case, but not incorporated into the record, constitute no part of it. No correction of the errors alleged to have been committed in the taxation of costs could be made in this case by an assignment of them as errors of law."

The alleged errors, in the case at bar, are not assigned as errors of law. They are errors of fact, not appearing in the record, but come before us by agreement of the parties, substantiated by the papers filed in the original case.

The counsel for the defendant in error relies upon two cases recently decided in Massachusetts, and reported in 8 Cush., 236, and 1 Gray, 420. In those cases that court have adopted a different rule from the one formerly adopted by the same court in the cases already cited above. For this change they give no reason, except that the remedy for any irregularity in the taxation of costs by the clerk is by appeal.

No reference is made to the former decisions of that court upon similar questions.

But the true reason probably was, that the legislature of Massachusetts, in chap. 52, law of 1829, re-enacted in R. S. of 1836, chap. 121, made specific provisions for appeal by any party aggrieved in the taxation of costs by the clerk; and any questions of law arising out of the decision of any court or judge before whom such appealed question should be tried, may be carried before the full court on report or exceptions under the provisions of chap. 81, R. S. No such statute exists in this state.

The cases in Massachusetts, reported in the 5th, 7th and 12th vols. of their reports, were decided before the statutes above referred to were enacted, and while the rule of that court for the taxation of costs was in the *same words* as the rule existing in this, at the time the opinion in Valentine v. Norton was announced. It thus appears that in the absence of statute regulation, under the same rule of court, the high-

est judicial tribunals of Massachusetts and of this state, have held that a writ of error is the remedy for a mistake in the taxation of costs. The rule has been changed in Massachusetts by legislative interference. But there has been no corresponding change by legislative enactment in this state.

It may be worthy of notice, that the early decisions in Massachusetts occurred before our separation from that state, and are therefore binding upon us as the authority of our own court.

It may also be remarked, that the same rule now exists in this state for the taxation of costs which formerly existed both here and in Massachusetts, except that in the revisions of our rules in 1855, 37th Maine R., 578, in rule 32, after providing that either party dissatisfied with the taxation by the clerk, may appeal to the court, or to a judge in vacation, was added these words: "*from whose decision no appeal shall be taken.*"

Under such a rule it is submitted that the right of an effectual appeal on a question of law cannot with propriety be said to exist.

Practically this change of the rule will subject parties to much inconvenience. They must now make an entry upon the docket "to be heard in costs," and must attend before the clerk for that purpose in all cases, or they will be absolutely remediless, however great may be the errors committed by that officer in taxing costs.

In view of these facts, the recent cases in Massachusetts cannot be deemed authority in this state, even in case our court was disposed to adopt, without inquiry, every change which the eminent tribunal of our parent state may be pleased to make.

ISAAC STARBIRD *versus* PAUL R. CURTIS AND AL.

Money paid under a mutual mistake of fact may be recovered back.

An agent authorized to purchase one sixteenth part of ship at forty dollars a ton does not bind his principal by purchasing two sixteenths at forty-four dollars a ton, one sixteenth being on his own account, unless subsequently ratified.

EXCEPTIONS to the rulings of MAY, J., presiding.

This is an action of assumpsit upon the following count:

For that the said defendants, at said Harpswell, on the first day of June, A. D. 1854, in consideration that the plaintiff then and there agreed and promised the defendants to pay them at the rate of forty dollars per ton for one sixteenth part of a certain vessel which the defendants were then building, the defendants then and there, in consideration thereof, promised and agreed to sell and deliver to the plaintiff, and that the plaintiff should have, one sixteenth part of said vessel at the rate of forty dollars per ton therefor. And the plaintiff avers that in pursuance of said agreement he paid said defendants, on the first day of June, A. D. 1854, the sum of six hundred dollars, and was ready and willing to pay such other sum as said sixteenth might amount to. Yet the defendants refused to sell or let him have said portion of said vessel at said rate; but in consideration of the receipt of said six hundred dollars, agreed and promised to pay him said sum and interest thereon.

The defendants entered into a contract to build a ship at $44 per ton, of which Elisha Potter agreed to take one sixteenth part, and upon representations made by him to George Potter that the ship was under contract, at $40 per ton, said George agreed to take one sixteenth part, and the plaintiff agreed with said George Potter that he would take another sixteenth at the same price per ton, and paid six hundred dollars, which came into the hands of the defendants, by the hands of George Potter, and for which they gave their receipt on account of the ship. The contract

refered to by Elisha Potter was for the sum of forty-four dollars per ton, and the defendants refused to convey to the plaintiff one sixteenth part of said ship at forty dollars per ton, but offered to do so at forty-four dollars, according to the contract, whereupon this action is brought to recover back of the said defendants the sum of six hundred dollars.

The judge remarked to the jury that the plaintiff claimed to recover the six hundred dollars, paid to the defendants, upon the ground that it was paid under a mutual mistake of fact, alleging that he had paid it towards a contract which at the time he paid it he supposed had been made with the defendants for him for one-sixteenth of their ship, at the rate of forty dollars per ton, when in truth and in fact no such contract had been made.

The court instructed the jury, if they were satisfied that when the money was paid there was a valid, subsisting contract existing between the parties, in pursuance of which, or in part performance of which the money was paid, and that the defendants on their part have performed said contract as it then existed, or was subsequently modified by the consent of the plaintiff; or that the defendants on their part have always been ready to perform such contract according to its then existing or subsequently modified terms, and the plaintiff on his part refused to perform said contract, or if it failed of being performed by reason of his own fault or negligence, the contract not having been mutually waived, then the plaintiff cannot recover; and further, that an express contract cannot exist without the assent of both the parties in some way to it. A contract is a mutual agreement made by the parties themselves or by some authorized agent or agents in their behalf.

The jury were further instructed that if they should find there was no such contract, and the plaintiff paid the money sued for under the belief that a contract had been made by Mr. George Potter in his behalf with the defendants, for one-sixteenth of the ship at forty dollars per ton, when no such contract had in fact been made, and the defendants received

it under the belief that said Potter, as the agent of the plaintiff, had contracted, in behalf of the plaintiff, to take one-sixteenth of the ship, at forty-four dollars per ton, when in fact no such contract had been made by said Potter, or if made, was in fact unauthorized by the plaintiff, then the plaintiff would be entitled to recover the money back, as having been paid under a mutual mistake of fact.

The jury were further instructed that if they should find that George Potter did in fact contract with the defendants in behalf of the plaintiff to pay forty-four dollars per ton for one-sixteenth of the ship, and had no authority from the plaintiff to make such a contract, and the contract was not subsequently ratified by the plaintiff, then the plaintiff would not be bound by it, even though said Potter had before contracted with the defendants to purchase one-sixteenth of the ship at forty-four dollars per ton on his own account.

The judge also commented on the testimony in the case tending to show that if any contract had in fact existed between these parties it had been mutually rescinded, and upon this point in the case instructed the jury that if they were satisfied from the evidence that the parties had mutually agreed to rescind the contract, if one ever existed, and had in fact rescinded it before the commencement of this suit, and the defendants had agreed to pay back the money sued for to the plaintiff, then the plaintiff would be entitled to recover.

The counsel for defendants requested the court to instruct the jury as follows, viz.: "If the jury are satisfied that the six hundred dollars was paid to the defendants by the plaintiff, in part fulfillment of a contract made with them by George Potter, acting in behalf of the plaintiff, for one-sixteenth of their ship at forty-four dollars per ton, then the plaintiff cannot recover;" which instruction the court declined to give in that form, or any other, except so far as such requested instruction is contained in the instructions which were given as before stated.

The jury returned a verdict for the plaintiff.

Whitmore, counsel for the plaintiff.

H. P. & L. Deane, counsel for the defendants.

HATHAWAY, J. The plaintiff was not a party to the contract for building the ship. He does not appear to have signed it, or to have authorized any one to sign it for him, or even to have seen it, and all he seems to have done towards a bargain was to tell Potter he would take one sixteenth, at forty dollars per ton, which Potter told him was the price, and to request Potter to write to the defendants that he would take one sixteenth, which Potter did; and he gave Potter six huudred dollars to pay to defendants, which they received. We do not perceive how the defendants could have been aggrieved by any of the rulings of the court in the progress of the trial, or by any of the instructions given to the jury.

The instruction requested, and refused, so far as it could properly be given, was embraced in the previous instructions. Potter might have been "acting in behalf of the plaintiff" without any authority to do so. The instruction, as requested, was properly refused.

Exceptions overruled.

ISAAC MASON *versus* SAMUEL CURRIER.

Exceptions to the determination of a Judge at *Nisi Prius* in a case unconditionally submitted to him under the statute of 1852, do not lie.

This action was referred to RICE, J., presiding at *Nisi Prius*, under the provisions of the act of 1852, chap. 246, sec. 12, and judgment rendered for the plaintiff.

There was no reservation of any right to except to the determination of the judge.

J. M. Meserve, counsel for the plaintiff; to the point that

exceptions do not lie in a case like this, referred to the language of the statute and cited. 39 Maine R., 315, 367.

A. G. Stinchfield, counsel for the defendant.

DAVIS, J. This case was submitted to the presiding judge under statute of 1852, with no right to except reserved to either party.

Exceptions overruled.

AMOS G. NICHOLS

versus

SOMERSET AND KENNEBEC RAIL ROAD COMPANY.

The legislature may authorize a temporary exclusive occupation of the land of an individual, incipient to the acquisition of a title to it, or to an easement in it for a public use, without violation of art. 1, sec. 21, of the constitution of this state.

But such title must be perfected within a reasonable time after occupation of the land, by payment or tender of the required compensation, or the occupation will become unlawful.

The *time* of taking such real estate referred to in R. S., chap. 81, sec. 4, must be the time of entering into the occupation of the land.

There may be cases where a reasonable time, after a temporary occupation, will not expire before three years. The reservations in the 14th section of the charter of the Somerset and Kennebec Rail Road Company is remedial only, and contains no power to change an absolute grant to a conditional one.

Nor is the requirement of erecting and maintaining fences a condition upon which the rights granted by their charter were made to depend.

REPORTED by RICE, J.

This is an action of trespass *quare clausum.*

All the facts material to a full understanding of the points decided appear in the opinion of the court.

R. H. Vose, counsel for the plaintiff, contended that this action is maintainable by force of secs. 4 and 5 of chap. 41 of the statute of 1853.

That the land taken must first be fenced.

That this requirement does not conflict with their charter, because the legislature have expressly reserved the power to inquire into their doings and impose fines and penalties in the 14th section thereof.

That the doctrine of vested rights cannot prevail here. Charles River Bridge v. Warren Bridge, 7 Pick. R., 344.

Bradbury & Morrill, counsel for the defendants.

The action is trespass, and cannot be maintained.

The defendants do not deny the acts complained of, but justify them on the ground of license.

License or authority in law by the charter and law of the state. 2 Greenl. on Ev., secs. 627, 632; 2 Wheaton's Selwyn, 1022.

By section 1 of their charter the company has full power to locate, construct and finally complete a railroad, and to take land for this purpose. While acting within scope of the charter and law no action will lie. Stackpole and al. v. Healey, 16 Mass. R., 33; Cool v. Crommett, 13 Maine R., 250.

Having his remedy by statute provision, he is excluded from his common law remedy. Mason v. K. and P. R. R. Co., 31 Maine R., 250.

The rights of the defendants are not affected by the act of 1853, being exempt from its provisions by the 14th section of their charter.

MAY, J. This is an action of trespass *quare clausum* against the defendants for breaking and entering the plaintiff's close, situate in Vassalborough, and constructing their railroad across the same. The defendants filed a plea of not guilty, and a brief statement alleging an authority under their charter, dated August 10, 1848, for the doing of the

acts complained of; and also a written license from the plaintiff permitting the same. The alleged acts of trespass were committed August 1, 1853, and afterward, and were such as were necessary in the construction of said railroad.

By the terms of their charter the defendants are authorized and empowered to locate, construct, and finally complete, alter and keep in repair their railroad; and they are invested with all the powers, privileges and immunities necessary to carry into effect the aforesaid purposes and objects; and for that purpose have the right to purchase, or take and hold so much of the land and other real estate of private persons and corporations, along the route described in the first section of said charter, and an act of amendment passed February 5, 1853, as may be necessary for the location, construction, and convenient operation of said railroad; the land so taken not to exceed six rods in width, except where greater width is necessary for the purpose of excavation or embankment; *provided, also,* that in all cases said corporation shall pay for such lands so taken, such price as they and the owner or respective owners thereof may mutually agree on; and in case said parties shall not otherwise agree, then said corporation shall pay such damages as shall be ascertained and determined by the county commissioners where such land may be situated, in the same manner and under the same conditions and limitations as are by law provided in the case of damages by the laying out of highways. And the lands so taken by said corporation shall be held as lands taken and appropriated for highways. It is contended in defence that these provisions fully authorize the acts which have been committed.

The extent of such authority has been fully considered by this court in the case of Cushman v. Smith, 34 Maine R., 247, in reference to the charter of the Buckfield Branch Railroad Company, in which precisely the same provisions are contained as those upon which the defendants rely. That charter was passed July 22, 1847. The opinion in that

case was drawn by SHEPLEY, C. J., and discloses great legal learning and ability. The principles it contains are in our judgment decisive of the rights of the parties in this case.

In that case it was held that that provision in the declaration of rights, contained in art. 1, sec. 21, of our constitution, which declares that "private property shall not be taken for public uses without just compensation," while it prevents the acquisition of any title to land or to an easement in it, and does not permit a permanent appropriation of it, as against the owner, without the actual payment or tender of a just compensation, does not operate to prohibit the legislature from authorizing a temporary exclusive occupation of the land of an individual, as an incipient proceeding to the acquisition of a title to it, or to an easement in it, for a public use, although such occupation may be more or less injurious to the owner. Such temporary occupation, however, will become unlawful unless the party authorized to make it acquire, within a reasonable time from its commencement, a title to the land, or at least an easement in it. If the defendants would have acquired any such title or easement in the land of the plaintiff, without his consent, the burden was upon them to see to it, that the proceedings necessary to such acquisition were instituted and completed, and that the payment of compensation required by the constitution was actually made or tendered. If they have neglected to do so for an unreasonable time after entering into the exclusive occupation of the land, then the acts complained of have become unlawful, and an action may be maintained therefor. In such case the defendants may properly be regarded as trespassers from the beginning, and damages may be recovered for such acts and the unlawful occupation connected therewith. Their failure or neglect to acquire a title in pursuance of their charter within a reasonable time after taking exclusive possession of the land, if they have so failed or neglected, places the plaintiff in the same position, so far as his rights are concerned, as if no legislative authority had been conferred upon the defendants to occupy his land.

The facts in the case show that the defendants entered into the exclusive occupation of the premises on the first day of August, 1853, and kept it until the date of their writ, which is July 31, 1855, and during this period it does not appear that the defendants have instituted any proceedings, or made any payment or tender of compensation, with a view to acquire any permanent rights in the land. The plaintiff, although he might have instituted such proceedings as are provided for the recovery of damages in the case of highways, was not obliged to do so. He had the legal right to regard the defendants as the moving party, and to act accordingly.

The question then arises, whether the defendants had in fact, after taking the exclusive possession of the plaintiff's land, and prior to the inception of this suit, delayed, beyond a reasonable time, the performance of that condition upon which alone, according to the true construction of the clause in the constitution before cited, their title to the land or an easement in it can have become perfected, so that by such unreasonable delay they have forfeited their chartered rights and made the acts complained of unlawful from the beginning. What is a reasonable time, depends upon all the circumstances of the case.

The provision of the constitution before referred to, says SHEPLEY, C. J., in the same case before cited, "was evidently not intended to prevent the exercise of legislative power to prescribe the course of proceeding to be pursued to take private property and appropriate it to public use. Nor to prevent its exercise to determine the *manner* in which the value of such property should be ascertained, and payment made or tendered. The legislative power is left entirely free from embarrassment in the selection and arrangement of the measures to be adopted to take private property and appropriate it to public use, and to cause a just compensation to be made." The only constitutional restriction upon such power, is that it shall be so exercised as not to permit the owner to be deprived of his title to it or any part of it, with-

out the payment or tender of a just compensation being actually made, within a reasonable time after its first appropriation and before the title is lost. The legislature, then, had the power to authorize the defendants to do all the acts complained of with a view to the acquisition of a title to the land or an easement in it, and to fix and determine, in case of no agreement between the parties, some *mode* for ascertaining the value of the land taken, and *the time, if not unreasonable,* within which compensation should be actually made, and if not so made no permanent title can be acquired, and the preliminary acts authorized as incipient to its acquirement will become unlawful. No question is made as to the reasonableness of this mode, and the only question now to be considered is whether the time which actually elapsed after the defendants commenced their occupation, before the suit, was unreasonable.

By the R. S., chap. 81, sec. 4, no application by either party to the county commissioners to estimate the damages can be sustained, unless made within three years from the time of taking such real estate. The time of taking here referred to, must be the time of entering into the occupation of the land, and not the time of the acquisition of a perfect title, nor the taking to which reference is had in the constitution. This is apparent from the construction which the word "taken" has received in that instrument, in the case of Cushman v. Smith, before cited. Nor can it be properly understood that the statute, under all circumstances, authorizes such application to be made in all cases at any time before the expiration of the three years. The plain implication from it is, that some cases may exist where a delay, not exceeding three years, to make application, may not be so unreasonable as to prevent it being made, if made within the time. It is a legislative declaration that there may be some cases where a reasonable time after the commencement of a temporary occupation will not expire until three years have elapsed. No reason is perceived why the owner of the land may not defer it as he pleases, since he may defer it altogether

without losing his right to a compensation. But there are strong reasons why the party who is claiming to hold the land of another, without his consent, should be held to a good degree of diligence, if not promptness, in taking his steps to make compensation, if he would acquire any title as against the owner. The acquiring party, however, may be excused by the consent or acts of the owner from that promptness which might otherwise be required. A strict performance may be waived. In the present case there was but two years delay, and we cannot say, considering the acts of the parties, the attempt at a mutual agreement as to the price of the land, if such agreement were not actually made, and the fact that the plaintiff, so far as the case discloses, had taken no steps, aside from some efforts to settle, until this suit, to prompt the defendants to a more speedy action, that there had been, when this action was brought, so much delay on their part in instituting proceedings, or tendering payment of a just compensation, as to vitiate and render void the authority which the legislature, by their charter, had conferred. Two-thirds only of the longest possible time recognized by the legislature for cutting off the rights of the defendants to perfect their title to an easement in the plaintiff's land had elapsed. Their charter, in view of all the circumstances of the case, we think must be regarded as a justification, when this suit was brought, for the acts of trespass alleged. We do not perceive evidence of any acts indicative of an intention on the part of the defendants, not to make a just compensation to the plaintiff for his land, so as not to acquire a permanent interest therein. Their continued occupation implies the contrary. The view we have taken of this case renders it unnecessary to consider whether the written subscription or agreement relied on in defence, was a license authorizing the acts complained of, or not.

It was contended by the plaintiff that this action may be maintained by force of the statute of 1853, chap. 41, secs. 4 and 5. Nothing is better settled in this state than that a charter like that of the defendants, when accepted by the

corporation, becomes a contract which cannot be modified or impaired in its obligation any further than is provided in the terms of the charter, without the consent of the corporation. This is conceded by the plaintiff's counsel. But it is urged that such power was expressly reserved in the fourteenth section of the defendants' charter. By that section it is provided that the legislature shall, at all times, have the right to inquire into the doings of the corporation, and into the manner in which the privileges and franchise granted may have been used by the corporation; and to prevent all abuses of the same; and to pass any laws imposing fines and penalties, which may be necessary more effectually to compel a compliance with the provisions, liabilities, and duties imposed upon the corporation by their charter; but not to impose any other or further duties, liabilities, or obligations. It is plain that the legislative power here reserved is entirely remedial in its character. It contains no power to make or change a grant, which by its terms is absolute, into one that is conditional. It reserves no power to any subsequent legislature to lessen the time stipulated in the charter, within which the defendants had the right to perform the conditions by which alone they were to acquire the lands, or an easement in them, which were necessary for the location and construction of their railroad. By the terms of their charter, as we have seen, they were entitled to a reasonable time after entering into the exclusive occupation of such lands with a view to acquire an interest therein. The time so fixed is an essential part of the contract, and it is beyond the power of the legislature to create a forfeiture within a shorter time by imposing new duties; or to subject the defendants to an action, if they choose to avail themselves of all the time allowed them by their charter, within the limits of the constitution, for the performance of those acts upon which their essential rights may depend, and they have not attempted to exercise any such power. The provision in sec. 8, of their charter, requiring them to erect and maintain fences upon the sides of their road, where it passes through enclosed or

improved lands, was not a condition upon which the rights granted by the charter were made to depend; and upon the principles before stated, it could not by subsequent legislation be made such; nor was it competent for the legislature to prohibit the defendants from entering upon and using any real estate necessary for the location and construction of their railroad, in the manner, and for the purposes authorized by their charter subject to the conditions contained in them. No new conditions could be imposed. The rights of the plaintiff are not enlarged, nor those of the defendants diminished by sections four and five, in the act of 1853, before cited. How far it is competent for the legislature to impose the forfeiture of any of the chartered rights of the defendants, as a penalty for the non-performance of the duties required by their charter, we are not now called upon to determine, the exercise of no such power having been attempted. There being, therefore, no proof of any acts of trespass not authorized by the charter of the defendants, the plaintiff must become nonsuit.

Plaintiff Nonsuit.

DAVID GOLDER *versus* BENJAMIN FOSS.

An action upon a promissory note endorsed in blank, may be maintained in the name of any person who subsequently ratifies the act, although he has no interest in the note or knowledge of the commencement of the action or of the existence of the note, where there is no evidence of fraud, oppression, or any corrupt or improper motive.

And although he had stated to the defendant in writing, that he had no interest in the suit, and had never authorized it, he may subsequently do so, and maintain the action.

From the report of this case by MAY, J., it appears that the action was brought in the name of the plaintiff without his knowledge or consent, or any interest in the note in suit,

having never held it by delivery. That thereafter he informed the defendant in writing, that he never authorized the action upon said note and had no interest in it; but subsequently, on application of the attorney who brought the suit, authorized its prosecution to final judgment.

S. Lancaster, counsel for defendant, argued, that, before a plaintiff party can recover in a court of law, he must set forth his cause of action in his writ, and then his proof must support his declaration — otherwise he cannot recover.

In this case, every material allegation is *negatived by the proof*. The note sued was not endorsed and delivered to the plaintiff, as the declaration states. At the time the action was brought, the plaintiff was not, nor has he ever been since, the holder of the note. It was never delivered to him. He never held it. The case does not find, nor does the proof show, that *he ever saw it*. He has no interest in it or in this suit, nor was he ever a party to it in any way. This being the case, the defendant submits that the plaintiff cannot and ought not to be permitted to maintain this suit, and that no case can be found in which a plaintiff has been allowed to maintain an action on a note which he never held, to which he never was in any way a party, and in which he never had any interest.

R. M. Mills, counsel for plaintiff.

MAY, J. That no action can be maintained upon a negotiable promissory note, except by one, or under the authority of one having an interest in it, is well settled. Bragg v. Greenleaf, 14 Maine R.. 395; Franklin Bank v. Lawrence et. al., 32 Maine R., 586. It is not necessary, however, that the person in whose name such action is brought should himself have any interest in the note. It is sufficient if the suit be brought in his name by his authority or consent. By the very terms of his promise the maker is answerable to the payee *or his order*. In the case of Fisher v. Bradford, 7 Maine R., 28, it is said by WESTON, J., that " there is nothing

in the law which forbids the holder of a negotiable promissory note, after it has been endorsed, from suing it in the name of another, provided it is unattended with any circumstances of fraud or oppresion. Nor is it unlawful for another person to institute such suit in his own name with the privity and consent of the party beneficially interested."

It is contended that this action cannot be maintained, because the plaintiff never held the note; never had any interest in it; and is in no way a party to it. The case shows that White, the payee of the note, brought it to R. M. Mills, the attorney in the suit, for collection; that White's name was then endorsed upon it; that the said Mills brought this action upon it in the name of the plaintiff without his knowledge and afterward on the 6th of November, 1856, he obtained his consent to prosecute said action to final judgment and execution. The note, though endorsed, was never, in fact, delivered to the plaintiff. It further appears that the plaintiff, before the entry of the action, on the 1st day of October, 1855, stated in writing to the defendant that he had no interest in the suit, and never authorized it. The facts thus communicated, so long as they existed, furnished a good defence to the suit. The defendant made no inquiry of the plaintiff whether he would or not subsequently ratify the act of White in bringing the suit in his name; nor did the plaintiff give him any intimation that he should not do so. The law authorizing such ratification so as to authorize the maintenance of the suit, the defendant must be regarded as assuming all the risk of such ratification, especially where he sets up a defence to a note upon which he is liable to some party, and when by the payment of the note he might have avoided the costs which have accrued. That such subsequent ratification in a case where the plaintiff had no knowledge of the endorsement of the note, or the bringing of the suit at the time it was brought, is equivalent to previous authority, and that no formal delivery of the note was necessary, are points which are fully settled in the case of Marr v. Plummer, 3 Maine R., 73. We see no evidence of

fraud, oppression, or any corrupt and improper motive, sufficient to take the case out of the general rule as stated in the two cases last above cited.

The cases of Skowhegan Bank v. Baker et. al., 36 Maine R., 154, and Manufacturer's Bank v. Cole, 39 Maine R., 188, cited in defence, are wholly unlike the present case. There the notes declared on never ripened into contracts with anybody. The facts in each case show a mere attempt to make a contract, which, like a similar attempt in the case of Adams Bank v. Jones, 16 Pick., 574, proved to be an abortion.

Upon the other facts contained in the report the plaintiff is clearly entitled to prevail.

Defendant defaulted.

GRANITE BANK *versus* ALONZO ELLIS.

It is not essential to the maintenance of an action upon a negotiable promissory note, that the nominal plaintiff should have any interest in the note, if the action is prosecuted with his consent.

If the principal maker of such a note transfer it to one not the payee, for a good consideration, such *bona fide* holder may maintain an action against such maker in the name of the payee, with his consent.

But if the principal sells the note to a third person not the payee, without the express or implied consent of the sureties, they are not liable.

This is an action of assumpsit on a promissory note of which the following is a copy:

$300,00. FEBRUARY 13th, 1856.

For value received, we jointly and severally promise the President, Directors and Company of the Granite Bank to pay them, or their order, three hundred dollars in thirty days.

ALONZO ELLIS,
STEPHEN SCRUTON,
J. G. JOHNSON.

On the back of the note is the name of "H. A. Pettengill," and under his name is the word "surety."

It appears that the note was made for Ellis' accommoda-

tion, and Scruton, Johnson and Pettengill were his sureties. Ellis was defaulted the first term, and Scruton, Johnson and Pettengill defend. Said note was presented to the bank on the day of its date for discount by Ellis, which the bank declined. It was then presented by said Ellis to Samuel S. Brooks, who discounted it, and paid Ellis therefor the sum of two hundred and ninety-two dollars in cash. Before the note matured Ellis absconded, without leaving property to pay the note.

By vote of the directors of the bank, being called together for that purpose, said Brooks was authorized to use the name of the bank to collect said note, in any suit which it might be necessary for him to bring to enforce the collection thereof, and this action is now brought in the name of the bank by said Brooks for his own benefit.

J. W. North, counsel for plaintiff.

John H. Webster, counsel for Scruton, Johnson and Pettengill.

DAVIS, J. In this action Ellis has been defaulted. The other defendants were sureties for him upon the note in suit, which was made payable to the order of the Granite Bank. The directors of the Bank declining to take it, Ellis sold it to Samuel S. Brooks. The note being unpaid at maturity, Brooks sued the principal and the sureties upon it in the name of the bank—having first obtained authority for that purpose. Can the action be sustained against the sureties?

It is not essential to the maintenance of an action upon a negotiable promissory note that the nominal plaintiff should have any interest in the note, if the action is prosecuted with his consent. Marr v. Plummer, 3 Greenl., 73; Golder v. Foss, 43 Maine R., 364.

If the principal maker of such a note transfer it to one not the payee, for a good consideration, such *bona fide* holder may maintain an action against such maker, in the name of

the payee, with his consent. Lime Rock Bank v. Macomber, 29 Maine R., 564. Such is clearly the law applicable to the principal. Does the same rule apply to the sureties? Will the transfer of the note by the principal to a third person, not the payee named in the note, without the consent of the sureties, discharge them?

In several of the states it has been held that if the payee named in the note declines to take it, the principal may sell it to a third person, and that the sureties, or accommodation parties, are not thereby discharged. Bank of Natchez v. Claibourne, 5 Howard, Miss. R., 301; Bank of Chenango v. Hyde, 4 Cow., 567; Elliott v. Abbott, 12 N. H., 549; Hunt v. Aldrich, 7 Foster, 31.

In other states it has been held that if the principal sells the note to one not the payee, without the consent of the sureties, the holder cannot maintain an action upon it against them. Clinton Bank v. Ayer, 16 Ohio, 282; Adams Bank v. Jones, 16 Pick., 574.

In the only case in this state where such an action has been sustained against the sureties, the question was submitted to the jury, who found that the sureties consented that the principal might throw the note into the market to raise money upon it. Starrett v. Barber, 20 Maine R., 456.

On the whole, we believe the better opinion to be, that, if the principal sells the note to a third person not the payee, without the express or implied consent of the sureties, they are not liable upon it. There is no valid contract until the note is delivered. And if the principal deliver the note to one not the payee, without the authority of the sureties, they are not bound by it. There is no privity of contract between them and such person. They may well say, "*non haec in foedera.*" It is not the contract which they proposed to make, and to which alone they assented.

There are no facts reported in this case from which we can infer that the sureties consented that Ellis should sell the note to Brooks.

Plaintiff Nonsuit.

ELI FRENCH AND AL. *versus* WILLIAM J. MOULTON.

The implied contract to pay for labor and materials furnished for the repair of a mill which a minor was operating, and continued to operate after he became of age, is not a contract for real estate within the proviso of the statute of 1845, chap. 166.

This is an action of assumpsit against the defendant, and is presented to the full court on the following statement of facts:

The plaintiff, in the summer of 1852, performed blacksmith's work upon a mill which the defendant was operating. The plaintiff's labor and materials were incorporated into the mill in the repairs of the same, and became a part of the mill, and the defendant used and occupied said mill in the manufacture of lumber, from the summer of 1852 to September 9th, 1854, when it was burned.

The defendant was a minor at the time the plaintiff's cause of action accrued, and pleads his minority in the case.

R. H. Vose, attorney for plaintiff.

N. M. Whitmore, attorney for defendant.

TENNEY, C. J. This action is brought to recover compensation for blacksmith work done on and for a mill, which the defendant was carrying on; the plaintiff's labor and materials were incorporated into the mill by way of repairs thereon, the defendant occupied the mill in the manufacture of lumber for some time after he became of age, though the labor was done and materials furnished before that time. The defence is infancy. The question is, whether the implied contract of the defendant to pay for the plaintiff's services and materials was for real estate, so as to come within the proviso in the statute of 1845, chap. 166. It is very manifest that this question must be answered in the negative.

Plaintiff nonsuit.

EBENEZER SHAW, *in Equity, versus* ABIAL W. ERSKINE.

Mortgages of real estate include not only those made in the usual form, in which the condition is set forth in the deed, but also those made by a conveyance appearing on its face to be absolute with a separate instrument of defeasance of the same date and executed at the same time.

A defeasance is a collateral deed, and to be valid must be made between the same persons who were parties to the first deed.

Bill in equity, in which the complainant alleges that on the 12th day of March, 1847, Martin Greely, being owner of certain real estate, conveyed the same in mortgage to said Erskine, and that afterwards on the third day of January, 1848, said Greely conveyed his remaining interest in said real estate to said Erskine, and that on said third day of January said Erskine executed and delivered to said Greely a certain bond in which he agreed to convey said premises to one R. L. Keene upon the payment by Keene or Greely of certain notes, which said bond was part and parcel of the contract of sale of said real estate, and was executed for the benefit of said Greely, and said Keene had no interest in it, and paid no consideration for it. That said Erskine has entered upon said premises and is in possession, and has entered to foreclose his said mortgage, and claims to hold said estate. That certain creditors of Greely attached his right and interest to redeem said estate, and recovered judgment against him, and execution, upon which he seized and sold his said right and interest, which the plaintiff now represents.

That he was desirous of paying said notes, and to redeem said estate according to the conditions of said bond; that he called upon said Erskine to pay him and demanded of said Erskine the true amount of the sum due him on said mortgage, which he has neglected and refused to render. That he is now desirous of paying the sum due, and to redeem said premises; is wishing and hereby offers to pay such sum as

shall by this court be found to be due, and to perform such matters and things as this court may require. He therefore prays that said Erskine may be compelled to answer and account in equity, and prays that the title and possession may be restored to him.

And said Erskine answering, says, that it is true, the conveyances were made as stated in the complainant's bill, and that at the time of the last conveyance it was distinctly understood and agreed between him and the said Greely that unless the sum of two hundred and fourteen dollars, and two hundred and ten dollars should be paid to him within one year from date, the estate so conveyed should become absolute in the defendant.

That the same was nearly equal to the value of said estate, and that the bond was made to R. L. Keene, and not to Greely, in order that said transaction should not constitute a mortgage, and he denies that said transaction should constitute a mortgage, or that subsequent to January third, 1849, Greely or any person, had any right to redeem said premises. That suits having been commenced against Greely, and disputes having arisen as to Greely's rights, for his greater security he did enter and take possession as set out in the bill, and to foreclose the mortgage on the nineteenth day of April, 1849, and has been in possession ever since, but without meaning or intending thereby to waive his rights under the deed aforesaid.

And he denies that said Shaw ever demanded the amount due upon the mortgage or bond, or either, at a proper time or place, and has never tendered or paid, or offered to pay any amount whatever, or produced any money in court for that purpose. Wherefore he prays judgment whether he shall be held to answer further.

TENNEY, C. J. Mortgages of real estate include not only those made in the usual form, in which the condition is set forth in the deed, but also those made by a conveyance,

appearing on its face to be absolute, with a separate instrument of defeasance of the same date, and executed at the same time. R. S. of 1841, chap. 125, sec. 1.

As in other cases, we resort to the common law, in order to know with precision the definition of the term "defeasance." "A defeasance is a collateral deed, made at the same time with a feoffment or grant, containing certain conditions, upon the performance of which, the estate created by such feoffment or grant, may be defeated. The word is derived from the French, *defaire*, to defeat or undo, *infectum reddere quod factum est.* 4 Cruise Dig., 82. The foregoing definition does not embrace the case of a bond of the grantee in an absolute deed of conveyance of real estate, given to convey the estate to a stranger, or third party. This would be quite a different transaction from that in which the absolute conveyance would be simply defeated. And it has so been held by elementary writers.

To make a good defeasance, it must be by deed. It must recite the deed it relates to, or at least the most material part thereof. It is to be made between the same persons that were parties to the first deed. It must be made at the time, or after the first deed, and not before. It ought to be made of a thing defeasible. 1 Inst., 236, 237; 2 Black., 342; 3 Lev., 237; 2 Jac. Law Dic., 230.

In Treat v. Strickland, 23 Maine R., 234, the court say, "The court do not consider that the deed from Samuel Smith to Pierce and Treat, and their bond to Edward and Samuel Smith, constitute a mortgage of the estate."

It is very clear that the deed of Martin Greely to the defendant, and the bond of the latter to Reuben L. Keene, recited in the bill, and among the exhibits of the case cannot be regarded as a mortgage; and therefore there is no foundation for the complaint and the relief sought thereby.

Other objections to the maintenance of the suit are presented and argued, but their consideration is unnecessary in enabling us to make a final disposition of the case.

Bill dismissed, with costs.

BUCKFIELD BRANCH RAILROAD COMPANY, *in Error,*

versus

SAMUEL P. BENSON.

The general appearance of an attorney, without seasonable objection, is a waiver of any defect or want of service of the writ.

Notes filed in a case constitute no part of the record, and although not corresponding with those described in the declaration, cannot be regarded as error.

The facts in this case were agreed by the parties, and appear in the opinion of the court. The action is brought to reverse a judgment recovered in 1851 against the present plaintiffs.

T. Ludden, counsel for the plaintiffs.

J. O'Donnell and *Bradbury & Morrill,* counsel for the defendant.

CUTTING, J. So far as we can ascertain from the arguments of counsel, not having been furnished with a copy of the errors assigned, the plaintiff in error seeks to reverse the original judgment for certain defects apparent upon the record, from which it appears that the writ was issued on the twelfth day of May, 1851, and entered in court, and judgment rendered upon a default, on the thirteenth day of the same month. It further appears that Mr. Parris, purporting to act as the president and attorney of the company, acknowledged service of the writ by his endorsement thereon, and thereby "waived all objections to service by a competent and proper officer," and further of record that he appeared and answered to the action.

To say nothing respecting the impropriety of the party by himself or his attorney acknowledging service of a writ, as has sometimes been practiced, we think that the general appearance of the attorney without seasonable objection to the legal pendency of the process, was a sufficient waiver of

any defect or want of a sufficient service. Maine Bank v. Hervey, 21 Maine R., 45, and cases cited. If such appearance should be unauthorized or fraudulent, the guilty party might be liable to respond in damages, and the injured party would be entitled to his writ of review. But such an act cannot be assigned as an error in law to contradict or impeach the validity of the record, for otherwise a suit might become interminable.

Another error assigned and relied upon is, that the notes filed in the case do not correspond in every particular with those described in the declaration. And on inspection, it does appear that the note of May 12, 1851, for $38,73 was not legally negotiable, although alleged to be such, and transferred to the original plaintiff. But this court, in another case, when considering this very question with reference to these same notes, upon the authority of Storer v. White, 7 Mass., 448, and Pierce v. Adams, 8 Mass., 383, have settled *that*, "the notes or other proof used as evidence in ascertaining damages, constitute no part of the record, and cannot be regarded in case error should be brought to reverse the judgment in which they were offered." Came v. Brigham, 39 Maine R., 38.

The other errors assigned are of less magnitude, and if of any importance, come within the principle already considered. The judgment must therefore be affirmed, with costs for the defendant in error.

JOHN STEVENS *versus* MOSES WHITTIER.

The record of a mortgage is sufficient, if, over the signature of the clerk of the proper town, the writing shows a substantial compliance with the statute.

A mortgagee of a stock of goods agreed with a creditor of a mortgagor, that he might attach and sell the goods, upon condition that the mortgage debt be first paid from the proceeds of the sale. The goods being attached, and sold by an officer, it was held that an action of assumpsit by the mortgagee against him, to the amount of the debt, could be maintained.

REPORTED by CUTTING, J., presiding at *Nisi Prius*.

The plaintiff held a mortgage of a stock of goods from Horace Stevens to him, which were attached on a writ by a creditor of said mortgagor, and sold thereon by consent, in pursuance of an agreement between said creditor and the mortgagee, the plaintiff in this action, that his debt, secured by the mortgage, should first be paid from the proceeds of the sale of the goods. The money was demanded of the officer by the plaintiff, and this action is brought to recover the amount of the mortgage debt.

J. M. Meserve, counsel for plaintiff.

E. O. Bean, counsel for defendant.

TENNEY, C. J. It is not denied that the mortgage of the goods from Horace Stevens to the plaintiff was *bona fide*, and designed to secure a debt actually due from the mortgagor to the mortgagee. But it is insisted, that the same was not recorded according to the provision in sections 32 and 33 of chap. 125 of R. S.

It is sufficient, if over the signature of the town clerk of the proper town, the writing shows a substantial compliance with the statute. Upon this mortgage is the following: "East Livermore, Aug. 13, 8 P. M. Received 8 P. M., August 13, 1853. Book 1st, page 158 and 159. Attest, A. Barton, Town Clerk. Fees, 29, paid."

It cannot be doubted that this shows that the mortgage

was entered upon the records of the town in which it is stated therein, the mortgager resided. There is but one date, which must refer both to the time of the receipt of the paper, and the recording of the contents of the same, and it was unnecessary to note upon the book in which the record was made, the time when the mortgage was received. Head v. Goodwin, 37 Maine R., 181.

The goods secured by the mortgage were attached by the defendant, on a writ in favor of James S. Fillebrown and al., against Horace Stevens, and afterwards sold thereon, by consent of the parties to the same, according to R. S., chap. 114, sec. 52. The money received by the defendant from the sale, was demanded before the institution of this suit, for the recovery thereof, and was in his hands, as we infer from his refusal to pay it, on account of having been forbidden to do so, by Fillebrown.

Before the attachment, and while the key of the store in which the goods were, was in the hands of the defendant by the permission of Horace Stevens, that they might not be exposed to removal in his absence, he went with Fillebrown's attorney to the plaintiff, and a writing was prepared by the attorney, and signed by the plaintiff, in which, for a consideration paid by said James S. Fillebrown and al., he consented that the goods might be attached on any claim which said Fillebrown and al. had against Horace Stevens, waiving the right which he had to the possession of the same, and the claim of payment or the tender of the mortgage debt, before attachment could be made, and further consenting and agreeing that the officer having the writ, might make sale of the goods on the same, upon the condition that the debt which the plaintiff had against said Horace Stevens, legally secured by mortgage as aforesaid, should be first paid and canceled from the proceeds of the sale of said goods, after deducting the necessary expense and costs of sale, provided the amount of the sale should be sufficient therefor. The defendant then went to East Livermore and took possession of the store and goods, under this agreement, and made

return of the attachment of the goods on the writ, as before stated.

By the contract which the plaintiff entered into, he did not release Fillebrown and al. from the necessity of paying or tendering the sum for the security of which the mortgage was given, in order to make the attachment of the goods, upon the *promise* that they would pay upon the plaintiff's claim, such amount as should be equal to the net avails of the sale of the property, but upon the *condition*, that the plaintiff's debt should be first paid and canceled from the *proceeds* of the sale, &c. Fillebrown and al. were parties to this contract, and consented that the money itself, received on the sale of the goods, after paying necessary expenses and costs of sale, should be applied to the purpose of discharging the mortgage debt. The property was that of the plaintiff, subject to be redeemed. He gave it up to be attached, not absolutely, but on the condition that instead of the property in *specie*, he should hold that which should be received therefor, immediately on its transfer to the purchasers, to the extent of his debt, after deducting, expenses, &c. The avails of the sale was pledged to the plaintiff, when it should be received by the defendant. The excess, after the mortgage should be extinguished by payment, was to be applied to the debt of the attaching creditors. The net amount necessary for the payment of the mortgage was never intended to be under the control of these creditors. It never became theirs. The attachment and sale did not alter the previous ownership of the property. All that was not needed for satisfaction of the mortgagee's claim, would remain the property of the mortgager till applied upon a judgment according to law; and at the time of the sale no judgment had been obtained. The defendant knew all the facts touching this contract; he attached, and took possession of the goods, as the agent of the attaching creditors, as well as an officer of the law, and under that very contract, and must be treated therefore as assenting to all its conditions and provisions. He became the holder of the money under the contract; assumed

voluntarily the duty of a trustee for the plaintiff, in taking the goods, on the condition that the first proceeds of the sale should be paid to him in the execution of the trust. He held that money at the time it was demanded of him, and is liable in this action.

If the defendant was a stranger to the agreement between the plaintiff and the attaching creditors, he would stand in no better condition. The latter, by receiving the agreement, consented to the condition therein. They had no claim to the proceeds of the sale before judgment against Horace Stevens. Until such judgment there was no evidence on which the defendant could have relied that he was their debtor. The proceeds of the sale was by that agreement to be the property of the plaintiff, so far as it was needed to pay his debt; the defendant was under no liability to the attaching creditor, after judgment, for the amount so appropriated, and he would not be liable for the same amount to the mortgager, who had consented to the sale of the goods. The defendant then held money which belonged to the plaintiff, which he ought to have paid on demand, and upon well established principles he is liable in an action for money had and received.

The objection to the maintenance of the action on the ground that the notes had not become mature at the time of the attachment by the defendant, is not supported. If there had been no agreement between the plaintiff and the attaching creditors, without the payment or tender of payment of the mortgage debt, the defendant was a trespasser upon his rights, notwithstanding the mortgager was not entitled to possession of the goods, until the maturity of one of the notes named in the condition of the mortgage. And an action of trespass can be maintained for an injury to the reversionary interest of a mortgagee in personal property, when he has no right to immediate possession. Welch v. Whitman, 25 Maine, 86. And when he holds the proceeds of the sale of the same goods under an agreement that they are to be

applied upon the mortgage, he can be no less liable in an action of assumpsit.

The commencement of the trustee process in this case, and the summoning of the plaintiff as trustee therein, cannot defeat this action. The very property from which the fund in controversy arose, was by consent of the plaintiff attached by the defendant, and taken into his possession, and could not be holden under a foreign attachment. If it were supposed that the plaintiff was indebted to the debtor, Horace Stevens, on any other account, it is not perceived how this suit could in any manner interfere with his supposed liability as trustee.

Defendant defaulted.

COUNTY OF SAGADAHOC.

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STEPHEN SPRINGER *versus* JOHN TOOTHAKER.

Whatever will discharge a *surety* in equity will be a good defence in law.

A creditor who holds the personal contract of his debtor, with a surety, and has or receives subsequently property from the principal as security for his debt, must appropriate it fairly for the payment of the debt, or he will lose his claim against the surety to the amount of the property.

In a suit against the principal upon a promissory note, where property is attached, the plaintiff has no equitable or legal right to surrender or abandon it, to the injury of the surety, without his consent.

REPORTED by MAY, J.

This action is against a surety upon a note of hand. An action had been brought and judgment recovered against the principal debtor; property attached upon the writ had been seized by virtue of an execution upon that judgment, advertised for sale and abandoned by order of the plaintiff, and without consent of this defendant, whereupon this action is brought to recover the amount of the note against the surety.

Whitmore, counsel for plaintiff.

Clay and Evans, counsel for defendant.

Argument of Clay:

When the holder agrees with the principal for a sufficient consideration to extend or enlarge the time of payment without the consent of the surety, the surety is thereby discharged. Mariner's Bank v. Abbott, 28 Maine R., 280; Lime Rock Bank v. Mallett, 34 Maine R., 547; Chute et. al., executors, v. Pattee et. als., 37 Maine R., 102; Johnson v. Mills et. als., 10 Cush., 503.

"There is no clearer rule in equity than that when the creditor has the *means* of satisfaction in his own hands and chooses not to retain it, but suffers it to pass into the hands of the principal, the *surety* cannot be called upon."

"Where the creditor has or takes the property of the principal for his debt, he is bound to hold it fairly and impartially for the benefit of the *surety* as well as himself, and if he parts with it without the consent of the surety, the surety is discharged." Commonwealth v. Miller, 8 Sergeant and Rawles Penn. R., 452; Baker v. Briggs, 8 Pick. R., 121; Savings Bank v. Colcord, 15 N. H. R., 119; Perrine v. Firemen's Ins. Co., 22 Ala., 575: Commonwealth v. Haas, 16 Sergeant and Rawles, 252.

"The voluntary surrender of a specific lien upon the property of the principal, by a creditor, is a discharge of the surety." Ferguson v. Turner, 7 Miss., 820.

"An attachment is a lien and security, and such a lien is to be preserved for the benefit of the surety as well as the principal." Edgerly v. Emerson, 3d Foster's N. H. R., 555.

"The lien of the judgment and the levy of the execution upon the property of the principal debtor was a security in the hands of the creditor, available for the relief of the surety. To relinquish that security was to injure the surety by the direct act of the creditor." Hubbell v. Carpenter, 5 Barb. N. Y. R., 520.

"Any act of the creditor which increases the risk of the surety discharges the surety.

"When the creditor does an act injurious to the surety, or omits to do an act which equity and his duty enjoined upon him to do and which act or omission results in an injury to the surety, the surety is discharged." Brown v. Riggins, 3d Kelley, Geo. R., 505; Lang, adm'r, v. Brevane et. al., 3 Strohkart, S. C. Eq. R., 59; Hubbell v. Carpenter, 5 Barb., N. Y. R., 520.

If the creditor releases or negligently loses any security which he holds of the principal, without the consent of the surety, the surety is thereby released. Manchester Bank v.

Bartlett, 13 Vermont R., 315; 9 Watts and Sergeant, Penn. R., 36.

When a lien is created upon the property of the principal by the execution in the hands of an officer, and such lien is lost or waived by the act of the creditor, the surety is exonerated. Glass v. Thompson, 9 Monroe, Kentucky R., 235.

Where an execution has been levied upon the property of the principal debtor, and is returned by order of the plaintiff and the property released, the surety is discharged. Glass v. Thompson, 9 Monroe 235; Curon v. Colbert, 3 Kelly, Geo. R., 239; State Bank v. Edwards, 20 Ala., 512.

The creditor is bound to use all the means of saving the surety which the law puts into his hands and which a prudent man would adopt to save himself. Wetzel v. Spensler, 18 Penn. R., (6 Harris,) 460; Lang, adm'r, v. Brevane et. al., 3 Strohkart, S. C. Eq. R., 59; Dixon v. Ewing, 3 Hammond, Ohio R., 280.

The surety will be discharged in all cases in which the creditor relinquishes the hold which he has obtained on the property of the principal, without making it effectual for the payment of the debt. American Leading Cases, vol. 2, p. 258, et. sec.

Additional authorities, cited by G. Evans, who was associated with Mr. Clay in the defence of this action:

2 Pick., 223; 2 Swanston, 193; 13 Sergeant and Rawles, 157; 4 Vesey, 829; 6 Swedes and Marshall, 24; 9 Barb., 21 and 275; Adams' Eqr. J., 604; Burge on Sureties, p. 206; 7 Howe, 612; 2 Story's R., 376; 5 Barb., 580.

HATHAWAY, J. The note upon which this action was brought, was signed by the defendant and H. P. Toothaker, who were legally holden thereon as joint and several promissors.

The defendant, however, was in fact, only the surety of H. P. Toothaker, and that was known by the plaintiff. Hence the defendant is entitled to all the benefits belonging to the character of a surety.

The evidence reported does not authorize the conclusion that there was any such agreement between the plaintiff and H. P. Toothaker, to enlarge the time of payment, as would operate as a discharge of the defendant from his liability as surety on the note. The defendant offered to prove that after the note became due, the plaintiff commenced a suit thereon, against H. P. Toothaker, the principal debtor, and attached as his, a large amount of personal property, and certain interests in real estate; that he prosecuted the suit to final judgment, on which he duly obtained execution, which he neglected to levy on the personal property attached, and ordered the officer in possession, by virtue of the attachment, to surrender it, which he did; that the equity of redemption attached, was, by the plaintiff's direction, siezed on the execution, by the officer holding it, for collection, and duly advertised for sale, at a time and place named, but that it was not exposed for sale; that the sale was postponed from time to time, and the attachment lost and abandoned, by the plaintiff's order, and without the defendant's consent, and that the equity of redemption was worth six hundred dollars, and would have sold for that sum, if it had been exposed for sale; all of which testimony offered was excluded by the presiding judge, and the question presented to the court is, whether or not it was properly excluded.

The defendant, the surety, is sued *alone*, and whatever would discharge the surety in equity, will be a good defence in law. Baker v. Briggs, 8 Pick., 128–9, and authorities there cited.

The contract of suretyship imports entire good faith and confidence in the whole transaction. In equity, a creditor who has the personal contract of his debtor, with a surety, and has, also, or takes afterwards, property from the principal, as security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as for himself, and if he parts with it without the knowledge, or against the will of the surety, he shall lose his claim against the surety, to the amount of the property so surrendered.

The People v. Janson, 7 Johns., 337; Rees v. Berrington, 2 Vesey, Jr., 542; Law v. E. I. Co., 4 Vesey, 849; Baker v. Briggs, 8 Pick., 122, second ed.; 1 Story's Eq., sections 324–5–6.

When the plaintiff had recovered judgment against the principal debtor, his right had attached absolutely, to the property, which he had taken on the writ, and remained a fixed and permanent lien, for thirty days. In the matter of Cook, 2 Story's R., 376, R. S., chap. 114, sec. 32—and if he, voluntarily surrendered it without the defendant's consent, he did so at the peril of discharging the defendant as surety for the amount thus surrendered.

Although the plaintiff was not legally bound to use active diligence in collecting the debt of the principal, and the surety would not be discharged by reason of his delay in the matter, and though the plaintiff might have discontinued *proceedings* against the principal debtor, which he need not have instituted, yet, it would be clearly inequitable to allow him to abandon an absolute lien or security upon the property of the principal, which he had obtained as the *result* of those proceedings, and to retain his hold upon the security for the whole debt. 2 Am. Leading Cases, 256.

The plaintiff was not bound at his own risk and expense, to seize and sell on the execution, the personal property attached when the title might be doubtful. Page v. Webster, 15 Maine R., 249.

But, as to the equity of redemption, the testimony offered and excluded, presents it as the property of the principal debtor, upon which the plaintiff had obtained an absolute lien for the payment of the debt, and which, without any risk or expense to the plaintiff, would have been sold for six hundred dollars, and appropriated for that purpose, unless e had interfered and prevented the sale.

He had no equitable or legal right, *to the injury of the surety*, (the defendant,) thus to surrender and abandon such security.

The testimony excluded was legally admissible, and should have been received.

In addition to the numerous authorities cited in argument, see Edgerly v. Emerson, 3 Foster, N. H. R., 555; Adams' Eq., 269 and 270, and the opinion of TENNEY, J., in Fuller v. Loring, 42 Maine R.

As agreed by the parties, the action must stand for trial.

COUNTY OF LINCOLN.

—o—

FIRST PARISH IN BOOTHBAY *versus* ISAAC WYLIE AND ALS.

While a town constitutes but one parish it may administer its municipal and parochial affairs under one organization, and while acting in this double capacity may appropriate any of its property to objects of a parochial or municipal character; which, after the dissolution of that union, by the constitution of a new parish, cannot be changed by one alone.

Such appropriation, when distinctly made, is equivalent to a grant of the property to a specific use.

And where no such appropriation is made of the whole estate the residue belongs to the town, and the parish can have title to no more than has been appropriated to their use.

This is an action of trespass *quare clausum*, and comes forward on REPORT of the evidence for the decision of the full court. The *locus* described in the writ contains between eight and nine acres of land in Boothbay, title to which the plaintiffs claim to have acquired by appropriation for parochial purposes, by votes of said town, and user by them for more than twenty years. The trespass alleged is the digging of a foundation and erection of a meeting-house by the defendants, who justify as servants of the Freewill Baptist society, under a license from the town of Boothbay. The evidence material to the issue is fully recited in the opinion of the court.

H. Ingalls, counsel for plaintiffs.

W. Hubbard, counsel for defendants.

TENNEY, C. J. From the evidence in the case, it appears that prior to the year 1768, a Congregational meeting-house

was erected in Boothbay, when the town consisted of one parish only; and that the two corporations so existed till a Baptist society was incorporated in the town, on February 23, 1809.

By the statute of Massachusetts, passed in 1786, chap. 10, sec. 4, the remaining part of the town became the principal or first parish, and the estate of the town consisting in lands appropriated to the benefit of the parish or religious society, by whatever description incorporated, remained with the residue of the original parish or society, and was not in any manner transferred or distributed by the separation. Brown v. Porter, 10 Mass, 93; First Parish in Brunswick v. Dunning and al., 7 Mass., 445. A poll parish has been held to be within the provision of this statute. First Parish in Sutton v. Cole, 8 Mass., 96. Property held by the town in its municipal capacity, remains still that of the town after the separation of the parish. Lahin v. Ames and al., 10 Cush., 198. The constitution of this state, in art. 10, sec. 3, provides, that all laws now in force in this state, and not repugnant to the constitution, shall remain and be in force, until altered or repealed by the legislature. No repeal has ever been made of the statute of 1786, referred to, and it is in force. Richardson v. Brown, 6 Greenl., 355.

From certain town records, and certificates of surveys made and recorded upon the town books of Boothbay, to be referred to, it appears that the town, at an early day in its corporate existence, claimed to be the owner of a tract of land in the town, of nearly one hundred acres, upon a part of which the meeting-house aforesaid was situated. The origin of this claim is not shown by any evidence in the case, and may not be susceptible of proof; but it not being denied to have been made originally by the town, and being accompanied by undisturbed possession till the incorporation of the Baptist society, a legal presumption of a grant in fee simple coextensive with the claim and possession, arises, and is sustained by well settled principles of law.

In the year 1767, the records of the town of Boothbay

show, that the selectmen were chosen a committee to build a pound and make stocks. In the year 1768, the selectmen were chosen a committee to lay out a ministerial lot and burying ground.

It appears from the certificate of Thomas Boyd, as sworn surveyor of the court, as recorded in the town books, that on March 30, 1768, a lot of land was surveyed for Rev. Mr. John Murray, to the westward and north west of Boothbay meeting-house, bounded, &c., containing ninety-five acres and one hundred and twenty-five poles; and a plan of the land surveyed was annexed to the certificate, and recorded therewith.

On April 2, 1788, Robert Randall, sworn surveyor of land, as appears from his recorded certificate upon the books of the town, including a plan surveyed for the town of Boothbay, a lot of land lying therein, called the meeting-house or common lot, bounded, &c., containing eleven acres and thirty-two poles. Upon this lot was situated the meeting-house before mentioned, and northerly thereof was and still is, a grave yard, and near the north eastern corner of the lot surveyed by Randall was built about the year 1796 a parsonage house. South of the meeting-house and near thereto, running east and west, was a road; and from it in a southerly direction upon the same lot were two other roads, one of which was called the old road, and was easterly of the other. The lot surveyed by Randall was a part of the tract surveyed by Boyd for Rev. Mr. John Murray, and was called the "meeting-house lot," "the common," and "the town's commons" upon the records of the town, in votes appertaining thereto, but more recently these terms have been often restricted to the portion lying south of the east and west road.

The acts complained of as the trespass in this suit were upon the ground where the Baptist meeting-house was afterwards erected, and near the western side of the common, and at a considerable distance south of the east and west road, and a part of the lot surveyed by Randall.

Prior to the year 1809, the town voted at different times to rebuild the pound, to fence the grave-yard, and to repair the fence of the same; to repair the meeting-house, and to allow individuals to build horse-sheds upon the lot north of the meeting-house, within certain prescribed limits. In the year 1787 the town voted, that one Patrick Herrin have a lease of the commons, except the grave-yard, highways and training field, for three years, on condition the lessee should pay to the town one bushel of potatoes a year, if demanded. The surveyors of highways, from time to time, before the year 1809, took materials from the common, to repair roads.

It is in evidence, that a part of the commons were prepared for a military parade, by permission of the town, previous to the time when the town and the parish were separated. This parade was on a part of the common near to the east and west road, and on the south side thereof in front of the meeting-house. Military duty was done on this parade and in the road contiguous; and on one occasion a battalion paraded upon the common. In the year 1798, it was "voted that the commons be enclosed, leaving the whole pound on the parade."

Of the tract of land surveyed for Rev. Mr. John Murray, in March, 1768, it is in evidence, that the portion near the parsonage house was sometimes called the land "near, adjoining the ministerial house," and is understood to be north of the east and west road; and "the ministerial lot," which is not a part of the parcel surveyed by Randall. The proof in the case is, that the latter has always been treated as parish property.

In the year 1796, the town voted Rev. Peletiah Chapin, as ministerial settlement, in the town, the use of a convenient dwelling-house, and the use and improvement of the land known by the name of the ministerial lot, and of about six acres of the meeting-house lot, so called, during said Mr. Chapin's ministry in said town. It does not appear that Mr. Chapin accepted the invitation, for in 1797, at a legal meeting of the inhabitants of Boothbay, holden on November 20,

it was voted, the Rev. John Sawyer as ministerial settlement in this town, a dwelling-house, known by the name of the ministerial house, and the improvements of all the land known by the name of the ministerial lot, and also about six acres of the meeting-house lot, so called, during the time the said Rev. John Sawyer shall continue in the work of the ministry in said town.

After the year 1809, when the Baptist society was incorporated, the town continued to pass votes as such for several years, touching the settlement and support of ministers, the repair of the meeting-house, grave-yard fence, &c. This may have been from an erroneous opinion of their rights and duties. But from the year 1816, it appears that such matters were transacted by the parish, and that records of their doings were kept distinct from those of the town.

In the year 1847, a town-house was erected upon the commons, south of the east and west road, at the expense of the whole town, under a corporate vote, and the same has been occupied as a town-house to the present time.

The defendants justify the acts complained of under an authority of the town of Boothbay; and it is admitted by the plaintiffs that if the town had the power to grant the license alleged, the acts were not illegal as against them.

While the town of Boothbay constituted but one parish, it administered its municipal and parochial concerns under one organization, and sometimes the same votes embraced matters pertaining to both; for example, to repair the meeting-house, and to do other things clearly of a municipal character. And during this entire period, it does not appear that the town ever had any meeting, or passed any vote, as a parish *eo nomene*. It was competent for the inhabitants to transact their business as town and parish in this united mode, and it is not contended by either party, that any adverse enjoyment by one corporation could ripen into any rights against the other. While acting in this double capacity, the town could appropriate by vote any of its property to objects of a parochial or municipal character, and at pleas-

ure withdraw or modify that appropriation. When the two corporations were disunited, their respective rights could not be changed by one alone. In the language of the court, in Lahin v. Ames, 10 Cush., 198, "an appropriation to a municipal or parochial use during the union, would determine whether it was town or parochial property, at the time of the formation of a new parish, and the consequent separation of the town and the original parish into two distinct corporations. Such appropriation, when distinctly made, would be equivalent to a grant of the property to a specific use. It might be made as it usually was in such cases, by a vote of the united corporations, which, if *in force* at the time of the separation, would be decisive of the title to the property so appropriated, or it might be shown by the erection of structures of a permanent character made during the union, and so long continued, as to indicate clearly the dedication of the land to some particular purpose. If, for instance, a town-house or school-house were thus built, it would be an appropriation of the land on which they stood with that which was appurtenant and necessary for its enjoyment, to the town; but the erection of a meeting-house, a vestry or horse sheds near the meeting-house, would be an appropriation of the land, &c., to purposes exclusively parochial."

In this case no appropriation of the land embracing the *locus in quo* was made by the town for the use of the ministry generally; nor had the land been purchased by the town for its use, as a perpetual parsonage; and hence it does not fall within the provisions of the provincial statute of 28 Geo., 2, and the statutes of Massachusetts Bay of 1786, chap. 51, which was an enactment thereof, on which rest the right of ministers to hold parsonage lands in succession, as sole corporations; and whose rights and remedies are clearly defined by the common law, they standing on the same foundation, as to their parsonages, with all other sole corporations, holding lands in succession at common law. Ministers hold parsonage lands in fee simple in right of their parishes or churches. On their resignation or death the fee is in

abeyance till there be successors, the parishes or churches, during the vacancy, having the custody, and are entitled to the profits of the parsonage. Weston v. Hunt, 2 Mass., 500; First Parish in Brunswick v. Dunning, 7 Mass., 445; Brown v. Porter, 10 Mass., 93. But this case, in relation to the question whether the fee of the land in controversy is not in the minister, to hold in succession, bears a resemblance to that of Emerson v. Wyley, 10 Pick, 319. The right of the minister to hold as a sole corporation was denied in that case.

The town of Boothbay at no time set apart the land, on which the Baptist meeting-house stands, to the use of the ministry, in the true sense of the statute of 1786, chap. 51, but allowed Mr. Sawyer to occupy it during his ministry in the town, clearly retaining the power to make any other appropriation, after the contract with him personally should be fulfilled.

It does not appear in the case that Mr. Murray was settled as the minister in Boothbay, or that he became entitled to the land, in fee or otherwise, surveyed by Mr. Boyd. Neither of the parties before us make any claim under an appropriation to him. Certain appropriations made of parts of the lot surveyed by Randall were for uses not of a parochial character; such as the grave-yard, notwithstanding the parish, after the year 1809, treated it, by certain votes, as being under their supervision; the sites for pounds were set apart for a use clearly municipal. The right of the militia of the town to use portions of the lot for a training field was conferred by the town in its municipal capacity. But the erection of a meeting-house, and keeping it in repair, the building of the parsonage house, and the permission given to certain persons to erect horse-sheds, were acts of a parochial nature. But after taking from the lot the land of these several appropriations, including all which was necessary for the use of the same as incident thereto, a large portion of the entire lot still remained. This could be used for other objects and not interfere in any manner with the use of the parts so designated.

This case is not analagous to one where the town and parish in their united capacity purchase land on which to build a meeting-house, and the land so purchased is greater in extent than is necessary, or is actually used in connection with the building. In the latter, by the very terms used, the whole lot is parish property, and not designed for a different object. It will so continue till the town in the same capacity change the intention first entertained. First Parish in Medford v. Medford, 21 Pick., 199. In the case under consideration, when the lot was surveyed by Randall for the town of Boothbay, the meeting-house and parsonage-house were standing thereon, and the grave-yard had long been used for purposes of sepulture. Nothing in the case indicates that there was not a sufficiency of land connected with all these for the convenient use thereof. These were all separated from the residue of the lot by a road, and the southern portion is not satisfactorily shown to have been at that time designed for parochial use. It is true that the surveyors' certificate states the whole lot conveyed "is called the meeting-house or common lot." This may have been designed as merely indicative of its location, in reference to the meeting-house, which stood upon it. It is certainly insufficient proof, without other facts, that it was set apart for parish use exclusively. The pound was upon this portion of the lot, and was allowed to continue thereon, by vote of the town, after Randall's survey. Parts were used as a military parade afterwards, as before, without any interference on the part of the town, showing that there was no express design to change the previous appropriation.

It having been settled by the application of common law principles, as well as by a proper construction of the statute of 1786, chap. 10, sec. 4, in the case of Brown v. Porter, already cited, that the estate in lands, appropriated to the benefit of a parish or religious society, remains with the residue of the parish, it is certainly implied that without that appropriation the estate is held by the town, after the separation. Indeed this proposition, thus implied, is so obvi-

ously true of itself, that it seems to need no argument in its support. If a town, being also a parish, becomes the owner of a parcel of real estate, without anything to indicate its present or future use, before a separation of the two corporations, by the formation of a parish therein, upon the happening of that event, it cannot be doubted that the town, and not the residue of the parish, will continue to hold the title.

We now come to the votes upon which the plaintiffs rely, to show that upon the separation of the town and parish, on February 23, 1809, the land embracing the *locus in quo*, was appropriated to a parochial object. It not appearing that Mr. Chapin was ever settled in the town of Boothbay, the only vote deemed important upon this point, is that which was passed prior to the settlement of Mr. Sawyer. He commenced preaching there in October, 1797, and went to New Hampshire, and remained a short time, and returned in March, 1798; and it appears that he then entered upon his professional duties, and continued to exercise them in connection with the people of his charge in Boothbay for about eight years. The case furnishes no evidence that any other succeeded him, till after the separation of the town and parish. But it does appear that I. P. Fisher came to Boothbay in the year 1808, and was installed in June, 1809, over the people of the first parish in Boothbay. In May of that year, the town voted his salary and the use of certain lands. The vote passed by the town, after the separation, in relation to the settlement of the minister, are not deemed important to the questions in controversy.

The relation between Mr. Sawyer and his people terminated several years before the town and parish became different and distinct corporations. At the time of the dissolution of this relation, the vote of 1797, giving him the use of "six acres of the meeting-house lot, so called," during the time he should "continue in the work of the ministry of said town," had fully discharged its office, and could have afterwards of itself no greater effect than such a vote for a single year

would have. This vote was not in force at the time the town and parish were disunited. This appropriation by the town had ceased, and the condition of the land in respect to its use, as it was, immediately before the vote, was restored. If, at the time of the separation, Mr. Sawyer had been in the active discharge of his contract under the vote, this would be decisive, that the land was appropriated to parish uses, and the title afterwards would be fixed in the plaintiffs beyond the power of revocation by the town. But the fact that it was voted to the minister in part payment of his salary so long as he continued in the work of his profession in Boothbay, could not impress upon it a parochial character after he ceased to perform that work entirely, when the connection between town and parish continued.

Do the facts in the case show that the plaintiffs have obtained a title to the land, on which they allege the trespass to have been committed, by a disseizin of the town, continued without being purged, for the term of twenty years prior to the commencement of this suit?

Upon a careful examination of the records introduced, bearing upon this point, and of all the evidence reported in the case, it is not proved that the plaintiffs have had such an open, notorious, adverse, and exclusive possession of the land in controversy, as would constitute a title by disseizin. And the title having been originally in the town of Boothbay, and this title having so continued, till the institution of this suit, the defendants were justified in the acts, under its license to perform them.

Plaintiffs nonsuit.

GEORGE W. GLEASON *versus* ROBERT WALSH AND ALS.

Where parties have not entered into any express and specific contract, a presumption arises that they intended to contract according to the general usage, practice and understanding in relation to the subject matter.

A usage may be general and still confined to a particular city, town or village.

When men are hired and no special agreement made as to the time they are to work, evidence of what usage in that particular employment is, as to time, is proper for the consideration of the jury.

This is an action of assumpsit for one month and sixteen days' labor.

It appeared that the defendants hired the plaintiff at Thomaston to work for them in Virginia in the lumber business and paid him twenty dollars to get out with, but no specific time for which he should labor was named in the agreement. The plaintiff had been employed in the same business before, and there was evidence tending to show that he had committed an offence against the laws of Virginia, and left on that account the service of the defendants at this time, and from no ill-treatment, fault or consent of theirs.

The defendants offered evidence tending to show that the *usage* at Thomaston required men employed in the Virginia lumber business to stay and work during the timber cutting season, usually about six months, and contended that the plaintiff was bound by that usage as by a special contract for that time.

MAY, J., presiding, excluded certain questions and answers contaieed in depositions, and instructed the jury, if there was an agreement between plaintiff and defendants that he should work during the season, he was bound to remain and work through the season unless he had some reasonable or justifiable excuse for leaving, or unless the defendant in some way waived the performance of the con-

tract, and if he left without any such excuse or waiver he could not recover; but if there was no such special contract or agreement on his part to stay and work during the season, understood and assented to by the parties, he might be entitled to recover a reasonable compensation for his labor, taking into consideration *all the circumstances* of the case, and that the *burden of proof to show* such contract was on the defendants who set it up; *that if plaintiff, from what was said and done by the defendant, Moody, rightfully understood when he left, that he had Moody's authority for leaving, and that he was to be paid for what work he had done, he may recover even if he did agree to stay the season, and whether he did rightfully so understand or not, was a question* for the jury to determine from what took place between him and the defendant, Moody, and from the other facts in the case.

The verdict was for the plaintiff.

A. P. Gould, counsel for defendant.

Peter Thacher, counsel for plaintiff.

CUTTING, J. The plaintiff states, that at the time he engaged to go to Virginia to labor, "there was nothing said about the wages, nor whether he should work one month, one day or one year," and on cross examination that "it has been the usage in that business for the employer to pay the expenses of men out, and that *Walsh* paid him twenty dollars to get out with," that he went to Virginia and worked one month and sixteen days, and then quit. It was contended in defence that the plaintiff agreed to work during the season for getting out ship timber, and without justifiable cause violated his contract and consequently forfeited his wages, and the principal question raised at the trial was as to the terms of the agreement. The defendants offered evidence tending to show a general usage at that time existing in *Thomaston*, the place of the negotiation, which required men, who hired out under such circumstances, to remain during the lumber season; but the testimony was excluded.

There would seem from the plaintiff's own statement to be some inconsistency in the defendant's advancing him the expenses of the journey according to the usage in such cases, (as he admits,) if he was at liberty to return the next day after his arrival at the place of destination, and that something more must be implied than was expressed verbally to complete the contract so as to render a mutuality of benefits; and the proof of the usage was only wanting to perfect the intention of the parties.

Eminent jurists have regretted the necessity of resorting to usage in the construction of contracts, and have been more or less liberal in restricting or extending such as a rule of law. Many learned and elaborate decisions have been pronounced embracing that subject, to which it is only necessary to refer, without a useless repetition of the principles therein so ably discussed, and the almost unanimous conclusion arrived at, which is expressed by Starkie:— "Where parties have not entered into any express and specific contract, a presumption nevertheless arises that they meant to contract and to deal according to the general usage, practice and understanding, if any such exists, in relation to the subject matter." And he further remarks, that such usage may have been recent and "existed but for a year." 2 Stark. Ev., 453.

The authorities are abundant that a usage may be general and still confined to a particular city, district, town or village. Van Ness v. Packard, 2 Peters, 148; Clark v. Baker, 11 Met., 188; Williams v. Gilman, 3 Maine R., 276; Emmons v. Lord, 18 Maine R., 351; Perkins v. Jordan, 35 Maine R., 23; Thompson v. Hamilton, 12 Pick, 426. And as to the law relating to usage, 1 Smith's Lead. Ca., (ed. of 1844,) 414, where the authorities are collected. In this case, however, most of the evidence offered was properly ruled to be inadmissible, since it could only tend to prove a particular usage as to the mode of making *special* contracts; and we presume that the judge, who presided at the trial, *only* intended to exclude testimony of that charater; but certain

other questions were asked and answers given, (which probably escaped his particular attention,) embraced in that portion of the evidence offered and rejected, which had relation to the period of time persons employed to labor were expected to remain at work in Virginia, where no special agreement *as to time* was made by the parties.

Some of the evidence, therefore, which was excluded, was admissible to go to the jury, and in the language of Judge Story, in Van Ness v. Packard, "whether it was such as ought to have satisfied their minds on the matter of fact was solely for their consideration."

Although it may not be necessary to refer to the motion, inasmuch as a new trial must be granted, yet we think the evidence, as reported, has a strong tendency to show a special contract to labor during the season, which was not performed by the plaintiff solely through fear of the local criminal law, and not by consent of the defendants. And if under all these circumstances the plaintiff should think proper to present his claim again to the consideration of the jury, probably the charge will be more definite, and on that account less objectionable to the defendant's counsel.

Verdict set aside, and a new trial granted.

JOHN P. COLE *versus* OLIVER R. BUTLER.

Although the service of a writ may not conform to the requirements of the statute, the judgment based thereon is to be deemed valid and binding upon all parties and privies thereto until reversed.

A corporation creditor who first moves in conformity to law, acquires a *priority* of right to recover against a stockholder, under the provisions of the R. S. of 1841, chap. 76, secs. 18, 19, and 20, with which no other creditor subsequently moving, can rightly interfere.

Nor can the rights of the first be affected, although the second may, by pursuing the shorter remedy, first obtain satisfaction of his judgment.

Any payment made to such subsequently moving creditor by such stockholder must be regarded as a payment in his own wrong.

The stockholder is liable only for the amount of his stock; and interest is not to be allowed thereon.

The parties submit this case to the court upon the following statement of facts:

The Georges Canal Company was duly incorporated in 1846, and is still existing as a corporation under the laws of this state, and its stockholders subject to the liabilities of chap. 76, R. S. The defendant owns two shares of stock in said corporation, of fifty dollars each, and has owned the same ever since its organization, which was in 1846.

The plaintiff was a creditor of the corporation, and brought his action against the same, and recovered his judgment for the sum of $150, and execution duly issued thereon, on the same day said execution was put into the hands of a deputy sheriff for Lincoln county, who on that day returned thereon, that having made diligent search for corporate property and estate of the Georges Canal Company, he was unable to find any. On the 4th day of the same month, said execution was put into the hands of a deputy sheriff for Waldo county, who made the same return thereon. On the 5th day of May, A. D. 1851, said officer still holding the execution, as deputy sheriff for Waldo county, for collection, made a demand upon

the defendant, who then resided in Waldo county, in due form.

At the October term of the Supreme Judicial Court, Waldo county, A. D., 1852, one Paul Metcalf and James L. Moody severally recovered judgments against said Georges Canal Company, for more than one hundred dollars, and sued out their executions thereon, and delivered them to a deputy sheriff for said county of Waldo for service, who collected one hundred dollars of the same of said Butler, as stockholder of said Georges Canal Company.

A. P. Gould, counsel for the plaintiff.

Peter Thacher, and *Hanley & Crosby*, counsel for the defendant.

MAY, J. The liability of the defendant in this action under the provisions of the R. S. of 1841, chap. 76, sects. 18, 19, 20, in force when the suit was brought, is conceded by the learned counsel in defence, unless the facts hereinafter stated, upon which he relies, shall lead to a different conclusion. The facts relied on, it is contended, furnish two distinct and sufficient grounds of defence. We will look at them and their legal effect, not in the order in which they have been presented in the argument, but as they occurred in point of time.

It is said then, in the first place, that there was no legal service of the plaintiff's writ against the Georges Canal Company, and that, for that reason, the defendant may now avoid the effect of the judgment obtained in that suit, so far as relates to his liability to pay any part of the execution which issued thereon. Upon an examination of that writ, which is a part of the case, it does not appear to have been in the hands of an officer at all. The only evidence of service consists in the following certificate bearing even date with, and found upon the back of the writ: "January 25, 1851. Legal and due service upon me this day, one of the directors

of the within named Georges Canal Company, is hereby acknowledged," signed or purporting to have been signed by "John Miller." It does not appear whether the action was answered to in court, or the judgment rendered upon default. Upon the authority of Came v. Bridgham, 39 Maine R., 35, and the cases there cited, we are satisfied that if the evidence of service or the service itself is defective, no advantage can be taken of it in this suit. The judgment, notwithstanding the service of the writ may not be in conformity with the requirements of the statute, is to be deemed valid and binding upon all the parties and privies to it until it is reversed.

The other ground of defence consists in the fact that the defendant, after all the preliminary proceedings and contingencies necessary to fix his liability to the plaintiff, had occurred, has been again called upon by other judgment creditors of the corporation in conformity with the statute, and that the defendant, to save his property from seizure upon their executions or to prevent the institution of new suits against him, has paid to such creditors in part satisfaction of their judgments, a sum equal to the amount of his stock. These subsequently moving creditors do not appear to have instituted their suits against the corporation until long after the commencement of this suit.

The general purpose of the particular provisions of the statute under consideration, was to give additional security to the creditors of the corporations to which they apply, by making the stockholders, who were such when the debts were contracted, and their property, liable by due proceedings, for the payment of such debts in all cases where there should be a failure to obtain the amount from corporate property. The legislative intention to give to a creditor, who should bring his case within the provisions of the statute, security for his debt in either of the modes, at his election, which the statute provides cannot be doubted; and the statute, if susceptible of it, should receive a construction which will effectuate this intent. To allow one creditor,

after another by a compliance with the statute, had laid the foundation of his right to recover of any particular stockholder to the amount of his stock, to step in, and by electing the shorter remedy provided by the statute, thereby to defeat a pending action, which the same statute had clearly authorized, would be inconsistent with the general purpose to give security before stated, and not in harmony with the general principle running through all our statutes, which is to give to the more vigilant party, when moving in conformity to the law, the fruit appropriate to his effort. We therefore think that a creditor who first moves and proceeds so far as to establish his right to seize the property of a stockholder, or to bring his suit, obtains a priority of right in the fund which the statute has in effect, set apart for the payment of his debt. By such proceedings and the institution of a suit within the period fixed by the statute, he acquires a right to recover against the stockholder to the amount of his stock, with which no other creditor subsequently moving, can rightfully interfere; and any payment made to any such subsequently moving creditor by such stockholder, must be regarded as a payment in his own wrong.

It is contended that the defendant in this case, is to be justified in making a subsequent payment to other creditors upon the ground that his property was liable to seizure under the 18th and 19th sections of the statute. We are not satisfied that any such seizure could be lawfully made. If the construction of the statute to which we have arrived is correct then no other creditor, after the defendant's liability to the plaintiff had become fixed, could rightfully seize the defendant's property upon any other execution against the corporation, so long as the plaintiff's right to the fund arising out of the defendant's liability continued, and the rights of such subsequently moving creditors must be subject to those of the plaintiff until his rights are either lost or abandoned. In our judgment, therefore, the plaintiff may properly have judgment for the amount of the fund which the statute impliedly at least, has set apart for the payment

of his debt, notwithstanding the subsequent proceedings on which the defendant relies.

This construction is in accordance with the familiar maxim, *Nemo debet lis vexari, si constet curiae quod sit pro una et eadem causa*, which has often been applied to actions upon penal statutes in which no priority of right was expressly given. In such actions it has been often held that the plaintiff first moving attaches a right in himself to the penalty of which he cannot be deprived by a subsequent suit in the name of another informer, though judgment be first recovered in the latter suit. Beadleston v. Sprague, 6 Johns., 101; Pike v. Madbury, 12 N. H., 262. So, too, where a statute authorized an action *qui tam* or an indictment for taking usurous interest, it was held that the pendency of an action for the same cause, might well be pleaded in abatement of a subsequent indictment. Commonwealth v. Churchell, 5 Mass., 174.

The rights of these parties being as is conceded unaffected by the repeal or modification of the statute on which this action was brought, by reason of a saving clause as to actions then pending, the plaintiff, by the provisions of section 20, is entitled to recover an amount not exceeding the amount of the defendant's stock. That amount is one hundred dollars. No provision is made for his recovering any more as debt or damages, not even by the addition of interest from the date of the writ; but as the prevailing party he will be entitled to recover his costs. Gross v. Hill, 36 Maine, 22.

Defendant to be defaulted.

INHABITANTS OF WARREN *versus* INHABITANTS OF THOMASTON.

To establish a residence within the meaning of the statute there must be personal presence without any present intention to depart; and to break up such residence when once established there must be departure with intention to abandon.

The fact of abandonment depends upon the intention of the pauper when he departs; and whether his anticipations of business fail so that he returns sooner or later is wholly immaterial.

The word domicile is synonymous with residence and home, and a different meaning is unauthorized.

To acquire and maintain a residence or home it is not necessary that a person be at all times personally present in such place or have a particular house to which he may resort as matter of right.

This action is assumpsit for the support of a pauper, and comes before the full court upon exceptions to the rulings of MAY, J., and on motion. The exceptions only are considered in the opinion of the court. The action was brought March 29, 1855, and the question is whether the pauper gained a settlement in the defendant town by a continued residence of five years. It was admitted that he had received no supplies as a pauper from any town other than those sued for in this action.

The verdict being for the plaintiffs the defendants excepted to the instructions of the presiding judge.

It appeared from the evidence that the pauper first went to Thomaston in the spring of 1838 and worked six months for Jeremiah Gilman, when he left for Massachusetts and staid a short time, worked for Gilman again six months in the summer of the ten following years, except 1841, and in the winter of 1847–'8 and 1848–'9, when he worked for his board. He was in different towns during the winter seasons, but it did not appear that he had any fixed place of residence or engaged in any permanent business during the winter months.

The pauper testified that he always intended to return to

Thomaston when he left at the end of his summers' engagements; and several witnesses testified to declarations when in the act of leaving Gilman's; that he did *not* intend to return there or to any other place in Thomaston.

The judge instructed the jury, among other appropriate instructions, to which no exception is taken, that persons who are unstable or restless in their character, and somewhat migratory in their habits, may and do acquire a *domicile* wherever they establish themselves for the time being with an intention to remain until inducement may arise to remove. Such persons, if so established in a place and removing there without any intention of *returning to the place from whence they came* or of *removing to any other place* will have a *domicile* in the place where they are so established.

If the jury are satisfied that the pauper acquired such a *domicile* in Thomaston it will continue until it is abandoned or lost, and it will not be abandoned or lost by merely forming an intention to remove to some other place unless such intention is actually carried into effect. Nor will it be abandoned or lost by occasional absences for mere temporary purposes.

If the pauper left his *domicile* at Gilman's in the fall with an intention of returning to *live there again in the following spring, such leaving of his domicile is not an abandonment of it; it will be regarded by law as continuing during his absence, although he might not have had an actual home, by consent or contract,* or any right to reside in any particular family in the town where his *domicile* was during such residence, and if under such circumstances he did return in the spring to his place of domicile in accordance with his intention and expectation when he left, his *domicile* will have continued during his absence, and the time he was thus absent may be computed by the jury as a part of the five years in the same manner as if he had not left.

If the pauper left with an intention not to return again under any circumstances, and so at the time he left had an

intention to abandon his domicile in Thomaston, if he had any there, and did so abandon it, such abandonment will interrupt the running of the five years, even though he had no design to establish himself elsewhere. *But if when he left he had an expectation or intention of remaining somewhere else in case he could find some other place to suit him, (or in pursuance of some previous arrangement,)* and failing to find any such place, *(or being unable to complete his expected arrangement, did soon afterwards return, then his domicile might not be interrupted thereby,)* and if from all the facts in the case the jury are satisfied that when he left he intended to return if he failed in the object for which he left, then his *domicile* may be regarded as being in Thomaston during such absence.

The court was requested to instruct the jury, that,

1. In order to *commence* such a *residence* as the statute contemplates, the pauper must have gone to Thomaston with the intention of making that town his residence *permanently*, or for an *indefinite period* of time. And that if his purpose was simply to remain *six months*, and he had no fixed purpose or arrangement to remain after the six months expired, his continuance at that place during those six months was not a "*residence*" within the meaning of the statute.

2. That if he did go to Thomaston more than five successive summers, and at the close of each, he intended to return there the next spring, and work the next summer for a definite period, and he did in fact engage to work, and work six months or any other definite period each year, such acts would not constitute a "*residence*" for five years within the meaning of the statute.

3. That whether the pauper had a residence in this state or not, (if he had none in Thomaston,) if he only went to Thomaston with the purpose of staying a definite time, six months or any other fixed period, a stay there during such time is not "residence" within the meaning of the statute.

4. That he must have had such a residence in Thomaston

during all the year five consecutive years to entitle the plaintiffs to prevail, and if his residence did not continue during the winter season as well as the summer, they cannot prevail.

5. That when he went away from Thomaston, even if he did intend to return, if that intention was to return for a specified term of time only, as for a summer's work, his residence did not *continue*, even if he can be said to have one during the summer at Thomaston.

6. That if he had no residence *anywhere*, and went to Thomaston simply for the purpose of doing a summer's work, and with the intention of remaining a *fixed period*, and did work or stay a *fixed* period, such a remaining or stay in Thomaston was not a *residence* within the statute.

7. That he could have no residence or home at Mr. Gilman's without Mr. Gilman's consent, and that he had no power to continue his home or residence there in the winter when he was personally absent, without Mr. Gilman's consent.

8. If it does not appear that the pauper had a design to make the town of Thomaston, *as such*, his domicile, but simply to return to and reside at Mr. Gilman's, and make that his home, it must appear that he had a *right* to return to his, Gilman's, house, or else his domicile did not continue during his personal absence.

9. That the right to have and continue his residence at Gilman's involves both a voluntary intention on the part of Lawrence to go back and reside, and the voluntary consent of Gilman that he should do so, and the same rule applies to the winter seasons, when he was personally absent.

The first instruction requested was given.

The second was given with this qualification, ("*Providing that if when he left Gilman's he did intend to go back to some other place where he had a domicile;*") the jury were further instructed that if he had no other place to return to, but was at Gilman's without intention of returning when he had finished his summer's work, then they might find his *domicile*

in Thomaston if they were satisfied the evidence warranted it upon the instructions given.

The third requested instruction was given, but the jury in determining the question of *domicile* were left, so far as this request is concerned, to the general instructions in connection with this instruction, given as requested.

The fourth request was refused. The judge said he must have a domicile, but need not *reside* there in person, but must intend to return while away; he must have a *domicile*, but need not have a *home* there.

The fifth request was given with the further instruction, that if he had a *domicile* in Thomaston, and an intention when he left to return the next season, and did return, and had no *residence* or *home* elsewhere to go to, his *domicile* thereby would continue.

The sixth request was refused with the instruction to the jury that they would judge from the evidence whether he intended to remain there or not after such period had expired, that the fact of his hiring for six months was evidence which they would consider in connection with the fact that he intended to return when he left, and did return, if they should find such to be the facts from the evidence in determining whether he had a *domicile* in Thomaston or not, and whether it continued during his absence or not.

The seventh request was given, and the court instructed the jury that the pauper might have a *domicile* in a town in which he had no right to return to any particular place or family, even though he may have intended to return to a particular place or family in that town, when he had no previous consent so to return to such family, and that he may have a domicile in a town without a right to a home in any particular family.

The eighth request was given with the further instruction: but if satisfied when he left that he intended to return to Gilman's and work in the spring, and he did in fact so return, his domicile in Thomaston, if he had any, may be

regarded as continuing in Thomaston, notwithstanding nothing was said to or by Mr. Gilman about his right to return and make his house his *home*, if they were satisfied such were the facts. His domicile in a town would depend upon his own *intention* and not upon Mr. Gilman's.

The ninth was given, with the instruction that the pauper's domicile in the town of Thomaston, if he had any, might continue without Gilman being willing to have him reside at his house, even though he might intend to return to Gilman's. He might under such circumstances have a domicile in the town, without a right to return to, or reside at, Gilman's house.

The jury were further instructed in reference to the case, that the pauper's domicile depended on his *residence* and *intention*, and not necessarily upon any single fact in the case, and they would determine from all the facts in the case whether the pauper had a domicile in Thomaston for five successive years without receiving, directly or indirectly, any support or supplies as a pauper before the furnishing of the supplies sued for in this writ, and if he had such domicile the plaintiffs would be entitled to recover.

A. P. Gould, counsel for the defendants, submitted an able argument in support of the exceptions, contending that the pauper, in order to have a residence in Thomaston, within the meaning of the statute, must have gone there with the intention of remaining an *indefinite period of time*, and in order to gain a *settlement* must have continued that residence five years. This he never did. He always *went* there to work for a definite, fixed period, and so continued during the whole time.

The first request is said to have been given, but it is so qualified, restricted, and *contradicted* in the other instructions, as to destroy its force and effect upon the minds of the jury.

There is but one mode in which the plaintiffs undertake to prove the settlement of the pauper in Thomaston, *i.e.*, by

showing that he *resided* there five years, the *sixth* mode, under our present statute.

Several terms have been employed by the courts in their discussion of the pauper laws. *Residence, dwelling-place,* and *home,* have been used as synonymous terms. And sometimes the term *domicile* is used as meaning the same thing, but not with entire accuracy, and its use perhaps tends to mislead. One may have a *home* or residence where he has no *settlement;* and so he may have a settlement where he has no *home* or residence, as in case of a *derivative* settlement. But when it is sought to prove that a pauper has acquired a *settlement* in a particular place, by *five years' residence,* it must appear that his residence was of such a character as to constitute that place his *home* during *all that period,* the word "*reside*" in our statute, is used in the same sense as the word "dwell, and has his *home*" in Stat., 1821, chap. 122, sec. 2.

By this term the legislature meant to designate some *permanent* abode, or residence, with an *intention to remain.* Turner v. Buckfield, 3 Maine R., 229, 231; Jefferson v. Washington, 19 Maine R., 293, 301. In the last case the court held that the terms *residence, dwelling-place* and *home,* have a more "*precise and local* application," when spoken of "as being requisite to establish the settlement of paupers," than the word *domicile.* But the latter term is in very common use in connection with the pauper laws; and when so used is to be understood in the sense of *residence,* or *home,* and not in the technical sense, as in cases arising under international law, and kindred cases.

The second request should have been given without qualification. This is the substance of it: "If the pauper went to Thomaston for the sole purpose of remaining a definite period, and *did in fact* work six months each year for five years, such acts would not constitute a five years' residence, so as to create a *settlement* there. Even though at the end of each summer's work, when he left Thomaston, he intended to

return there the next year, and work *another fixed period.*" There can be no doubt about the accuracy of this proposition. It cannot be pretended that *going* to Thomaston with *such* intentions, and continuing there six months, with such intentions, was a *removal to that place "with a design of making it his home for an indefinite period of time;"* or of making it "*a permanent place of abode,*" which numerous cases show is necessary. But it was not given except with the qualification "if when he left Gilman's, he did not intend to go back to some other place, where he *had a domicile.* It was entirely immaterial *where* the pauper intended to go, if when he *left,* he did not design to return to Thomaston, to remain for an *indefinite period.* It is indeed, of no consequence, whether he had *any home,* in this state, or if having one, whether he intended to *visit it,* or to *wander about.* We are examining his residence *in Thomaston,* to see whether it was of such a character as to create a *settlement* for him there, and this can in no respect depend upon the question whether he had a *settlement, home, domicile* or *residence* any where else. See Jefferson v. Washington, 19 Maine R., 293, 302; Phillips v. Kingfield, 19 Maine R., 375, 381.

The jury were further instructed in reply to the same request, that if the pauper had no other place to return to, but was at Gilman's without the intention of returning, (to some domicile,) then they might consider his domicile as established at Thomaston. Thus making his domicile or home, in Thomaston, depend, *not upon his being there with the intention of remaining permanently,* but upon the fact of his having a domicile *somewhere else to which he intended to return,* when he had done work in Thomaston; that is, he could have a *domicile* or statute *residence* in Thomaston, without the *animo manendi.*

If that be so, that place where a vagrant, having no home, stops over night, is his home, and he resides there, within the meaning of the statute.

The third request is said to have been given, "but the jury

were left so far as this request is concerned, to the general instructions," which are entirely inconsistent with the law of the request. So that it in effect was refused. What he had just said to them, in reply to the second request, was an improper restriction upon it, and was contradictory to it.

Subsequent instructions were also inconsistent with it, as we shall see.

The fourth request was refused. It should most clearly have been given. The request was that he must have had such a residence during all the year," &c., i. e., such a residence as had been spoken of in the previous requests: "residence within the meaning of the statute," as stated in the previous request—home, place of abode, *animo manendi.*

He says, "he must have a domicile, but need not reside there," &c.; "he must have a domicile, but need not have a *home there.*" He does not explain to the jury what meaning he attaches to the word *domicile,* or how it differs from home or residence. If he used it in a different sense from those two words, then he was in error; for it is *only* in the sense of those words that it is proper to use it, in a pauper case.

In Jefferson v. Washington, 19 Maine R., 381, the court say, "It is expressly decided that the words dwelling-place, and home, mean some permanent abode or residence, with the intention to remain," and on the same page they say, "Some confusion may have arisen from having seemingly confounded dwelling-place and home with domicile, in international law." In Phillips v. Kingfield, 19 Maine R., 381, residence and home are used as synonymous.

In Kennebunkport v. Buxton, 26 Maine R., 61, 67, and 68, in commenting upon the sixth and seventh modes of obtaining a settlement under our statute, the court say, "It is manifest that being "resident," and "having his home" as mentioned in the seventh mode of gaining a settlement, mean the same thing." "And where residence is mentioned in the preceding mode of gaining a settlement, (i. e., the sixth,) it

was intended to have the same force as dwelling and having his home."

So again in Brewer v. Linneus, 36 Maine R., 228, 230, it is said "the residence required by the statute means the same thing as having his home there."

The fifth request should have been given without the qualification. The qualification involves the same error as the answer to the second. The instruction taken with the request, amounts to this, that, if when the pauper left Thomaston, "he intended to return for a specified time only, his domicile would thereby be continued while he was away from Thomaston, if he had no residence or home elsewhere to go to." The comments upon the second request are equally applicable here.

The reply to the fifth request, made the sixth request necessary. This was refused, and the refusal presents distinctly the error.

We have then, in this refusal, the distinct denial of the proposition, that if the pauper had *no residence anywhere, i. e.*, if he was a vagrant, and went to Thomaston simply for the purpose of doing a summer's work, and with the intention of remaining a fixed period, and did work or stay a fixed period, such remaining or stay in Thomaston did not constitute a *residence* within the statute.

It has been held in this state, that a man may abandon his home, *and thereupon cease to have any home.*" Exeter v. Brighton, 15 Maine R., 58. (See further 19 Maine R., 302.)

To allege that a person, thus *without* a home, would *acquire one*, and become a *resident* in the sense of the statute, by *engaging to work at a place for six months*, without intending to remain longer than that, *at such place*, is taking ground that is not tenable.

In all the cases in the reports, where the residence, which, when continued five years, constitutes *settlement*, is spoken of, it is spoken of as residence *animo manendi*, and this not *temporarily*, but *permanently* or *indefinitely*.

Second. The 7th, 8th and 9th requests present another

difficulty in the way of the pauper's gaining a settlement in Thomaston.

It is clearly laid down in Corinth v. Lincoln, 34 Maine R., 311, that in order to have a residence or *home* in a particular family, a person must have such family's *consent.* It is true that a person may have a home in a certain town without having a *house* there, or a place of *fixed abode.* But this can only be the case where the pauper intends to make the *town, as such,* his home.

The *seventh* request is said to have been given; but it is immediately contradicted by what follows. The jury are told that "the pauper might have a domicile in a town in which he had no right to return to any particular place, or family in that town, even though he may have intended to return to a particular place or family in that town, when he had no previous consent so to return to such family.

Thereupon the eighth request was made, distinctly presenting the difficulty in the case, arising upon the evidence. "If it does not appear that the pauper designed to make the town of Thomaston as such his domicile, (using that term at the request of the judge,) but simply to return to, and reside at Mr. Gilman's, and make that his home, it must appear that he had a right to his, Mr. Gilman's house, or else his domicile did not continue during his personal absence."

This request appears to have been given also, and to have been contradicted in the qualification. The judge tells the jury, "But if satisfied when he left, that he intended to return to Gilman's, and work in the spring, his domicile in Thomaston may be regarded as continuing, notwithstanding nothing was said to or by Mr. Gilman about his right to return and make his house his home." His domicile in town would depend upon *his own* intention, and not upon Mr. Gilman's." It is to be remembered that this was in answer to the distinct presentation of the difficulty arising upon the fact that the pauper had no intention to return to the town, as such.

The ninth request is in the very language of the court in

Corinth v. Lincoln, referring back to the state of facts presented in the eighth, thus connecting them together.

If Corinth v. Lincoln is law, then this is not.

In the case of Wiscasset v. Boothbay, 3 Maine R., 354, the judge instructed the jury that "the pauper being of age and emancipated by his father, the question whether the house of the latter was to be considered the pauper's home, *would depend upon the will of the father, who might refuse to grant him this privilege.*" And this ruling seems to have been sustained by the full court.

M. H. Smith, counsel for plaintiff.

RICE, J. The case comes up on motion and exceptions. The motion is based upon several specifications, which may, however, be reduced to two general propositions. First, that the verdict is against the evidence in the case. Second, that it is against law. The first proposition may properly be discussed under the motion; the second under the exceptions.

The question at issue was the legal settlement of a pauper by the name of Lawrence. It appears from the case that the original derivative settlement of the pauper was in Warren. The proposition to be established by the plaintiffs was, that he had lost that settlement and gained one in Thomaston, in his own right. If such change has been effected it was under the sixth mode of R. S., sec. 1, chap. 32, which provides, that any person of the age of twenty-one years, who shall hereafter reside in any town within this state, for the term of five years together, and shall not, during that term, receive, directly nor indirectly, any supplies or support as a pauper, from any town, shall thereby gain a settlement in such town."

The rights of the parties, in this case, depend very much upon the meaning which is attached to the word "*reside,*" as used in the statute provision above cited.

To reside is to dwell permanently, or for a length of time; to have a settled abode for a time. Web. Dict. The word

residence is synonymous with the words *dwelling-place* or *home*. Drew v. Drew, 37 Maine R., 389. Dwelling-place and home mean some permanent abode or residence with intention to remain. Turner v. Buckfield, 3 Maine R. 229; Jefferson v. Whitefield, 19 Maine R., 293.

In our pauper law the terms residence, dwelling-place, home, have a different meaning from the word settlement. The place of one's settlement is a place where such person has a legal right to support as a pauper. It may be in a place other than the one where such pauper has his dwelling-place, home, or residence. Thus a person may have a settlement in a place where he has never had a residence, as by derivation. So, too, a person may have a residence or home different from their settlement.

Residence in a given place does not necessarily involve continued personal presence in that place. A person may be temporarily absent, and remain from home, without a change of residence. Drew v. Drew, 37 Maine R., 389.

When, however, a person voluntarily takes up his abode in a given place, with intention to remain permanently, or for an indefinite period of time; or, to speak more accurately, when a person takes up his abode in a given place, without any present intention to remove therefrom, such place of abode becomes his residence or home, and will continue to be his residence or home, notwithstanding temporary personal absences, until he shall depart with intention to abandon such home.

Thus to establish a "residence," within the meaning of the statute, there must be personal presence without any present intention to depart. And to break up such residence, when once established, there must be departure with intention to abandon.

In the discussions in our books upon the pauper laws the term *domicile* is frequently used. This term is not found in the statute, but has been interpolated upon it by the courts. Its introduction has, at times, it is feared, tended to confuse and mislead, rather than to simplify and aid in the trial of

this class of causes. In its ordinary sense, as used by legal writers, it has not the same restricted meaning as the words residence, dwelling-place, and home have in the statute under consideration. Story's Con. Law, 39. See, also, as to change of domicile. Ib., p. 47, sec. 47.

The term domicile, therefore, not being used in the statute to indicate any particular status of the pauper, as to habitation, can only be used properly as strictly synonymous with the term residence, dwelling-place or home. In any other sense its use would be erroneous and tend to mislead. Whether the judge, at the trial, in his frequent use of this word, thus limited its signification, is not certain. In presenting a cause to a jury it is of great importance that the terms used should be distinctly and clearly defined, and that the legal propositions involved should be so arranged and presented as to be easily understood. Otherwise confusion and uncertainty will be likely to follow.

In his general charge to the jury the judge says: "But if when he (the pauper) left he had an expectation or intention of removing somewhere else, in case he could find some other place to suit him, or in pursuance of some previous arrangement, and failing to find such place, or being unable to complete his expected arrangement, did soon afterwards return, then his domicile might not be interrupted thereby." This was evidently based upon the hypothesis that the jury should have found that the pauper had before taken up his residence in Thomaston. As a distinct legal proposition it is incorrect. If Lawrence had made arrangements for business elsewhere, and when he left Thomaston to engage in that business did so with the intention not to return, such departure would be an abandonment of his residence in that town, and whether he found his expected business as he had anticipated or not would be wholly immaterial. The fact of abandonment, or not, depended upon the intention of the pauper when he departed. But it may be said, if there is any defect in this proposition, it was fully remedied in the instructions which immediately follow, wherein the judge

says, "And if from all the facts in the case, the jury are satisfied that when he left he intended to return, if he failed in the object for which he left, then his domicile may be regarded as being in Thomaston during such absence." The infirmity in the instruction, when taken as a whole, is the uncertainty in which the jury were left. Distinct legal propositions are announced by the court, apparently conflicting, and so left as not clearly to indicate to the jury the precise rule by which they are to be governed.

The second request was, "That if he did go to Thomaston more than five successive summers, and at the close of each, he intended to return there the next spring, and work the next summer for a definite period, and he did in fact engage to work, and work six months, or any other definite period each year, such acts would not constitute a *residence* for five years, within the meaning of the statute."

This request was given with qualification, "Providing that if when he left Gilman's, he did intend to go back to some other place where he had a domicile." This limitation or qualification is clearly improper. The true question to be decided was not whether he intended to return to any particular place when he should leave Gilman's, but whether he was at Gilman's for a specific purpose, and for a definite period of time, intending to leave when that purpose had been accomplished and that time had expired. It was entirely immaterial whether he intended to return to a place from whence he came, or where he had a domicile, or to go to some other place in search of a new home. In further qualification of the second request, the jury were also instructed "that if he had no other place to return to, but was at Gilman's without intention of returning when he had finished his summer's work, then they might find his domicile in Thomaston, if they were satisfied the evidence warranted it upon the instructions given."

Here again is uncertainty or manifest error. It is not distinctly perceived how he could have intended to return to a place, if he had no place to return to. But as already re-

marked, it is immaterial whether he had or had not a particular place in view to which he intended to return. Did he intend to make Gilman's or Thomaston his home? Was he in that town intending to remain an indefinite period of time, or rather without any intention to go elsewhere? If so, then he was *residing* in Thomaston, within the meaning of the statute. If not, he was a temporary sojourner, not a resident. The qualification leaves this point in uncertainty.

The fourth was refused. It was as follows: "That he must have had such a residence in Thomaston *during all the year*, five consecutive years, to entitle the plaintiffs to prevail, and if his residence did not continue during the winter season as well as the summer, they could not prevail."

In refusing this request, the judge said, "he must have a domicile, but need not reside there in person, but must intend to return while he was away; he must have a domicile, but need not have a home there."

Here perplexing uncertainty arises by the introduction of the word *domicile*, a word not found in the statute, and apparently attaching to it a meaning different from *residence* or *home*, which are the words of the statute. Thus the statute provides that any person of the age of twenty-one years who shall *reside* in any town in this state, &c., shall gain a settlement. The court say he must have a domicile, but need *not reside* there in person—he must have a domicile, but need *not* have a *home* there.

If the judge intended to use the word *domicile* as synonymous with *residence* and *home*, the language used is repugnant and contradictory. If he intended to use the word as having a meaning different from *residence* or *home*, such use would be unauthorized. But if he intended to use the word domicile as strictly synonymous with *residence* or *home*, and only intended to say that to acquire and maintain such a residence or home, it was not necessary that a person should be at all times personally present in such place, or should have a particular house to which he could resort as matter of right, the principle intended to be enunciated would be

correct. But the difficulty is, the language used as reported, is not appropriate to convey such idea. The jury could not have so understood it.

There are other objections to the instruction of the court in this case, which have been argued at considerable length, but being of opinion, for reasons already suggested, that the case should be again presented to a jury, it is not deemed important to give them further consideration at this time. Nor is it necessary to examine the questions raised by the motion.

Exceptions sustained and a new trial granted.

COUNTY OF SOMERSET.

BERNARD KENNEDY *versus* MOSES H. PIKE.

The certificate of appraisers of property attached on *mesne* process, upon the back of a writ, and adopted by the officer as a part of his return, together with the latter, are both competent evidence as to the disposition of the property sold.

This is an action of trespass, brought against the defendant as sheriff of this county, for taking and carrying away certain personal property. It appeared in evidence that a writ, dated 25th October, 1855, in favor of Ebenezer S. Page and al., and against Matthew Kennedy and als., was on that day delivered to the defendant for service, and the property in controversy was attached by the defendant and the writ returned and entered at the December term of this court, Somerset county, 1855, and is still pending. The officer's returns on that writ were offered and received, in evidence, though objected to, on the ground that it is not competent for appraisers to certify and make their certificate evidence; and also that the return of the sheriff is not competent evidence to show the doings of the appraisers; and also that the returns contained recitals of other facts not competent for him to return. There was evidence tending to prove that the property in controversy belonged to said Matthew Kennedy and others, on and prior to the 23d of April, 1855, and was on that day conveyed by mortgage bill of sale to the plaintiff, Bernard Kennedy, under which he took and retained possession; that on that day, and before, said Page and al. were, and ever since have been, creditors of said Matthew Kennedy and als. There was evidence tending to

show that the conveyance of the 23d of April, 1855, was fraudulent, and intended by the parties to protect the same from attachment. Thereupon by agreement the case was withdrawn from the jury, and submitted to the full court, upon the following conditions:

1. If the said officer's return as to the disposition of all the property, or, the appraisers' return is competent evidence, and both returns together show a proper disposition of all the property, final judgment is to be rendered for the defendant, and no further action is to be brought for the cause or any part thereof.

2. If, in the opinion of the court, the fraudulent vendee of property (who has the same in possession) conveyed to prevent it from attachment, is not at liberty to contest the regularity of the proceedings of the sheriff, as to his disposition of the property after the attachment, in such a case as this, then the action is to be disposed of as before stated; otherwise the case is to stand for trial.

John H. Webster, counsel for plaintiff.

J. S. Abbott and *Snell*, counsel for defendant.

TENNEY, C. J. A question involved in this case is, whether the officer's return, as to the disposition of the property, which is the subject matter of the suit; or the appraisers' return, is competent evidence; and whether both returns together show a proper disposition of all the goods.

Where property attached is of certain descriptions, or in certain conditions, and held on *mesne* process, if the parties shall not consent to a sale thereof, at the request of either party therein interested, it may be examined and appraised by three disinterested persons, acquainted with the nature and value of such goods, to be appointed in the manner prescribed in the statute, and duly sworn. If the appraisers, upon the examination of the property attached, shall be of the opinion that the same, or any part of it, is liable to perish, to waste, or be greatly reduced in value by keeping,

or be kept at great expense, they shall proceed to appraise the same, according to their best judgment, at the value thereof in money; and the goods shall thereupon be sold by the officer, and the sale shall be made, and the proceeds thereof disposed of, in the manner required, in case of sale on execution. R. S. of 1841, chap. 114, secs. 52 to 56 inclusive.

The determination of the appraisers that the property is such, or so conditioned, as to be the subject of sale under the statute, is made conclusive, and the officer is bound, after the appraisal, to make sale thereof, in the discharge of a ministerial duty. Hence, if the goods are sold in the mode required, and the proper evidence thereof exhibited, the officer is in no peril, notwithstanding the judgment of the appraisers may have been erroneous. Crocker v. Baker and trustees, 18 Pick, 407.

The officer, being thus bound to sell the property, it is necessary that he should have full and precise knowledge of the articles attached, of which he is required to make the sale. If the certificate of the appraisers is to be regarded as the proper source of information, it would be analagous to other cases of appraisement, such as that of an extent upon real estate taken in execution. R. S., chap. 94, sec. 6. In the case last referred to, however, the certificate of appraisal is expressly required, and upon the one now under consideration the statute is silent in that respect.

Upon request made to the officer, holding the goods on *mesne* process for an examination and appraisal, all the subsequent proceedings, to the time when the appraisers shall have performed their whole duty, seem to be required to be in the presence and under the authority of the officer. The goods are supposed to be in his custody; he is responsible for their safe keeping; in the notices to the parties interested, and in the selection of the appraisers, he is charged with important duties. And whatever the appraisers make known as their judgment in the premises, he is presumed to be advised of so fully as to become responsible.

If the certificate of the appraisers that they have found the property such that it is the subject of sale, and have appraised the same, is not information upon which it is his duty to proceed, no reason is perceived for holding the return of the officer insufficient evidence of the adjudication, and of his authority to proceed in the discharge of his duty, under the statute. Where he cannot omit to make sale, in exercise of any discretion, it would be absurd to hold, that neither the certificate of the appraisers, nor the return made by himself, all being under oath, should not be evidence of a defence to a suit brought against the latter for a trespasss upon the property; but that he should be obliged to resort to parol proof of facts for his protection, years after those facts transpired, which, at best, must be attended with uncertainty, or perhaps be lost entirely.

It is not denied that sales of property upon *mesne* process, under the provision of the statute, which we are considering, like those made upon executions, are to be shown by the return of the officer who made them upon the writ in each case. In the sale upon execution it is a principle too familiar to require the citations of authority, that the return must show affirmatively that all the steps required by the statute in making the sale have been taken. Without this the officer may be treated as a trespasser *ab initio*. The right to sell property upon *mesne* process, without consent of parties, must depend upon the proceedings required by the statute. If the examination made by the appraisers, and their appraisal, is not stated in the return or certificate, it is manifest that evidence is absolutely wanting of an authority in the officer to make sale, and he must be treated as a trespasser.

In the case before us, the certificate of the appraisers, signed by them and endorsed upon the writ, contained all the facts which the statute requires to authorize a sale. The same facts stated therein appear also in the officer's return as having become known to him at the time of the examination and appraisal. In addition, he expressly states

in his return that he adopts their certificate as a part thereof.

We cannot doubt that, the certificate of the appraisers being upon the back of the writ, and adopted by the officer as a part of his return, together with the latter, are both of them competent evidence; and that the two in connection show a proper disposition of all the property sold.

According to the agreement of the parties, judgment must be entered for the defendant.

STATE *versus* INHABITANTS OF CORNVILLE.

It cannot be said that a road has been "opened" when nothing has been done to a larger portion of it, and the remainder was a road open and used as such before.

Neither is it necessary in order to prevent the discontinuance of a highway by operation of the statute, chap. 25, sec. 42, that it should be in such a state of repair as not to be subject to indictment.

But a highway located, and no work done on a large portion thereof, and put to no use as a way for more than six years after it should have been made passable, cannot be be treated as opened.

This is an indictment charging the respondents with neglecting to keep in repair a certain highway in said town.

REPORTED by MAY, J.

The facts necessary to a full understanding of the case appear in the opinion of the court.

N. D. Appleton, Attorney General for the State.

J. S. Abbott, counsel for the defendants.

TENNEY, C. J. The highway described in the indictment is about two miles in length. Before its location, about half a mile thereof, near the westerly end, commencing at its junction with another road, had been used as a road. After the location, the sum of twenty-five dollars had been appro-

priated by the town, and expended; and other small sums at other times were laid out by order of the selectmen, all upon the portion last described. The remainder of the highway complained of has never been used or worked upon as a road, and a part of it passes through woods.

The defence is, that this highway has been discontinued by operation of the R. S., chap. 25, sec. 42. And it is not denied, that the statute would have the effect insisted on, were it not for the expenditures made by the town upon the part at the western extremity.

It cannot be said with propriety, that the road has been "opened," as a whole, when nothing at all has been done to that entire portion which constitutes three-fourths of it, and the remainder was a road open and used before, as such.

The case is essentially distinguished from that of Baker v. Runnels, 3 Fairf., 235. A considerable portion of the road referred to therein had been opened and used; and upon the residue the trees were moved, and the road made passable for foot passengers, by the surveyor, to whom it had been assigned; the road was held to have been opened, in this part, by the official acts of the one who cut and removed the trees, in the discharge of his appropriate duty.

To prevent the discontinuance of a highway by operation of the statute invoked in defence, it is not made necessary that it should be put in such repair, as not to be subject to indictment, under R. S., chap. 25, sec. 57. What must be done to constitute an opening of the road within the meaning of the statute, is not precisely defined therein. But a highway located, and a large portion thereof so neglected that no work has been done thereon, and put to no use as a way, for more than six years after it should have been opened and made passable, cannot be treated as "opened," so that the whole can be constructed, by a fine imposed under the statute, upon indictment and conviction.

According to the agreement of the prosecuting officer, and the counsel for the defendants, the indictment is dismissed.

HENRY WARREN, *in Equity, versus* SAMUEL SHAW AND ALS.

A bill in equity will not be dismissed for want of prosecution, where the delay occurs after the appointment of a master to take the testimony, and before his report, when the party complaining has made no effort to obtain an earlier publication of the proofs.

During such time the case is suspended in court, and if the master improperly delays to report, it is no more the fault of the plaintiff than of the defendant.

This action is a bill in equity, and the opinion of the court clearly recites the whole facts in the case.

J. H. Webster, counsel for plaintiff.

E. Hutchingson, counsel for defendant.

TENNEY, C. J. It is shown by the bill, answers, and proof, that on July 14, 1834, one James Seco conveyed in mortgage the premises described in the bill, to Ebenezer Weston, who, on January 25, 1842, took legal possession thereof, for condition broken, and to foreclose the mortgage; that said Weston on April 26, 1842, duly assigned the mortgage to the the original defendants in this suit, and transferred the notes secured thereby; that the latter on the same day took possession of the premises, and have received the rents and profits thereof; that on October 13, 1837, said Seco conveyed the premises to one Sewall, excepting the north hundred acres thereof, and Sewall, on September 7, 1844, conveyed them to the plaintiff, who in October next following, duly requested the assignees of the mortgage, to render a true account of the sum due upon the notes, which the mortgage was given to secure, and an account of the rents and profits, or the fair value of the use of the premises; which accounts they neglected to render, and within three years from the time of the request and neglect aforesaid, this bill was duly filed.

A master was appointed at a term of the Supreme Judicial Court, begun and holden at Norridgewock in and for the

county of Somerset, on the Tuesday second after the fourth Tuesday of May, A. D. 1848, to take the testimony in the case, and to report the same. The master took the testimony on July 12th and 13th, 1848, and made report of the same at March term of said court, 1855, in the county of Somerset.

On August 8, 1855, the plaintiff filed in the clerk's office his bill of revivor, alleging among other things the death of the defendant, Wood, and that the same took place between the appointment of the master and the taking of the testimony by him, and the time of the report of the same to the court; and that the said Shaw, the other defendant in the original bill, was appointed administrator of the goods and estate of the said Wood deceased, and took upon himself the duty of administering the same, and became seized of the mortgaged premises, in trust for the widow and heirs of said Wood. And the said widow and heirs were made parties to the original bill, under said bill of revivor, which, with a subpœna to each, was duly served; but not appearing, they were defaulted at the Supreme Judicial Court holden on the third Tuesday of March, 1856.

It appears that the defendants, on February 6, 1855, filed with the clerk a rule to show cause at the next term of the court, why the bill should not be dismissed for want of prosecution, and gave due notice thereof to the plaintiff. This is a point presented to the court, sitting as a court of law and equity, on the ground that it was a matter of adjudication by an agreement of counsel. Assuming that this is a question before the court, which we do not intend to admit, it may well be doubted whether the prosecution of the suit, having been continued after the filing of the rule, without objection on the part of the defendants, there has not been a waiver of all right to be heard upon this matter, before the law court, or a court held in the county for the trial of jury cases. But the neglect complained of was after the appointment of the master, and before his report. During this time, the cause must be treated as suspended in court, for the tak-

ing and publishing of the proofs. If the master delayed improperly to make his report at an earlier time, it was no more the fault of the plaintiff than that of the defendants.

From the examination of the bill, answers and proof in the case, it is satisfactorily shown that the plaintiff is entitled to redeem the premises from the mortgage aforesaid, by paying such sum as shall be equitably due, by virtue thereof, if any, and the decree of the court is to be in accordance with the result of this opinion. R. S., chap. 125, sections 6, 16 and18.

A master must be appointed to determine the amount equitably due from the plaintiff to the defendants; the amount of such sum as shall be found due from the defendants for rents and profits over and above the sums reasonably expended in repairing and increasing the value of the estate redeemed. R. S., chap. 125, sec. 22.

WATERVILLE IRON MANUFACTURING COMPANY

versus

DANIEL GOODWIN.

No action will lie on a judgment of a justice of the peace, the record of which does not show that the defendant was served with process, without proof of such service.

This action, which is debt on a judgment of a justice of the peace, comes before the full court on REPORT by the CHIEF JUSTICE, and all the facts fully appear in the opinion of the court.

Wm. Folsome, counsel for the plaintiffs.

D. D. Stewart, counsel for the defendant.

APPLETON, J. This is an action of debt upon a judgment of a justice of the peace. In the record of that judgment

there is no reference to the writ in the action, nor does it appear therein that there was any service on or appearance by the defendant. The plaintiff has not produced a copy of the original writ, nor shown service upon the defendant, nor has he moved for leave for the magistrate before whom the default was entered, to amend his record, so that the fact of service, if it existed, might appear of record. Now no principle of law is better settled than that no presumptions are to be made in favor of courts of limited jurisdiction. In Rosseler v. Peck, 3 Gray, 538, it was held that "no action will lie on a judgment of a justice of the peace, the record of which does not show that the defendant was served with process, without proof of such process."

It in no way appearing that there was ever any service made upon the defendant in the action, the judgment in which is now sought to be enforced, the plaintiff fails to make out his case.

By the agreement of parties, a nonsuit must be entered.

Plaintiff Nonsuit.

EBENEZER S. COE *versus* PERSONS UNKNOWN.

A conveyance of all the right, title and interest which the grantor has in and to the land described in his deed conveys *only* the right, title and interest which he actually has at the time of the conveyance.

Such a grant in a deed does not convey the land itself or any paaticular estate in it, but the grantor's right, title and interest in it alone.

The covenants in a deed are qualified and limited by the grant and cannot enlarge it.

PETITION FOR PARRTITION.

REPORTED by MAY, J.

The petitioner in this case claims to have four thousand acres in township number one, in the third range, west of Moosehead Lake, in this county, set off to him in sever-

alty; alleging ownership in common and undivided with persons unknown.

After the usual order of notice and a compliance with the same, Robert Bradley appeared in defence.

The petitioner introduced a copy of a deed Commonwealth of Massachusetts to the proprietors of the Middlesex Canal. The proprietors of Middlesex Canal to Samuel A. Bradley. Samuel A. Bradley to George Evans; and the original deed of George Evans to himself.

The defendant introduced a mortgage deed Samuel A. Bradley to Robert and Richard Bradley, and the notes therein described.

An attested copy of a foreclosure of the mortgage.

Deed Samuel A. Bradley to Mary Ann Bradley and others.

And copy of a mortgage deed Samuel A. Bradley to James Rundlet, and notes therein described; and an assignment of the mortgage last named and notes therein described to Robert Bradley, dated June 29, 1844.

For the purposes of this trial it is admitted that the public lots in said township have been duly set out.

Also, that Mary Ann Bradley was the daughter of Robert Bradley, and died intestate, without issue, in July, 1841; and that Samuel A. Bradley died prior to December, 1852.

John S. Abbott, counsel for petitioner.

The court will have occasion to consider this legal proposition, viz: When one conveys a part of a township distinctly, and by warranty deed, and afterwards quitclaims "all the right, title and interest which he then had to the township," if the last deed should be first recorded, which party has the better title to what is included in the first deed?

The court will be pleased not to overlook the fact, which is deemed very important, that the two deeds now under consideration were executed before the Revised Statutes of 1841 took effect—the deed to Mr. Evans being dated Octo-

ber 18, 1836, and the one to Robert and Richard Bradley May 19, 1841.

Nor will the court omit to note carefully the exact language in this last mortgage deed: "All the right, title and interest which I, the said Samuel A. Bradley, *have*."

Upon this point I would cite Brown v. Jackson, 3 Wheaton R., 449.

As this case is deemed analagous and conclusive, it will, of course, be carefully examined, unless distinctly in the mind of the court.

In the opinion of the court it is said, "The material question * * is whether * * the deed of Henry Lee to Henry Banks, which was executed *after* but recorded *before* the deed of Lee to Craig has a priority over the latter. * * A conveyance of the right, title and interest in land is certainly sufficient to pass the land itself, if the party conveying has an estate therein at the time of the conveyance; but it passes no estate which was not *then* possessed by the party."

And so it was decided in effect that the first deed, though not recorded till after the second, would be operative. That is, in *this* case, that the quitclaim to Robert and Richard of all the right, title and interest which Samuel A. Bradley *then* had, could not pass that part of the land which he had previously conveyed to Mr. Evans, though the deed to Evans had not then been recorded.

The case of Brown v. Jackson was decided in Kentucky in 1818, and though the opinion of the court was delivered by Mr. Justice Todd, who was perhaps not so highly distinguished as some other members of the court, it was the opinion of the court, containing among other distinguished jurists, Chief Justice Marshall and Judge Story.

The registry laws in Kentucky at that time were quite similar to ours before the revised statutes went into effect, there being, it is believed, no substantial difference, and the language in the quitclaim similar to the one now before the court.

If the court should feel constrained to decide this case against the petitioner, it is believed it will give the *first* decision against the law in Brown v. Jackson.

It is not conceded that any court has yet given any intimation against that case, or even raised a *quære* as to its soundness. But, on the other hand, it has been cited with approbation.

In Blanchard v. Brooks, 12 Pick. R., 67, the case of Brown v. Jackson is cited with approbation, though the volume of Wheaton is inaccurately printed nine instead of three. And I would invite the attention of the court to pages 66 and 67 of the same case. (Blanchard v. Brooks, 12 Pick. R.) See Comstock v. Smith, 13 Pick. R., 119; Wright and al. v. Shaw, 5 Cush. R., 64; Oliver v. Pratt, 3 How. U. S., 337; Blethen v. Dwinal, 35 Maine R., 559; Merrill v. Ireland, 40 Maine R., 569.

The cases above cited present a perfect answer to any argument which may be founded upon the covenants of warranty in said mortgage deed.

Strong confidence is felt in the positions taken for the petitioner; but if they should be found to be erroneous, it will be borne in mind that unless the petitioner is entitled to judgment—judgment for "partition as prayed for,"—the case is to stand for trial.

Coburn & Wyman, counsel for the defendants.

HATHAWAY, J. The petitioner represents that he is tenant in common with other persons unknown to him, of township number one, in the third range, west of Moosehead Lake, in the county of Somerset, and that his part of the land in said township is four thousand acres, and he prays for partition.

Robert Bradley appears, claiming title, and defends.

Samuel A. Bradley owned the township, and by deed of October 18, 1836, recorded January 4, 1849, conveyed the land claimed by the petitioner to George Evans, who, by deed of November 24, 1850, recorded December 6, 1852, conveyed the same to the petitioner.

By mortgage deed of May 19, 1841, recorded June 12, 1844, Samuel A. Bradley conveyed to Robert and Richard Bradley all his right, title and interest in and to said township, subject to a mortgage of the same, before that time, made by him, to James Rundlet.

The mortgage to Rundlet conveyed eighteen thousand acres, in common and undivided, and was dated July 1, 1837, and recorded July 10, 1837, and was assigned to Robert Bradley, October 29, 1849. Samuel A. Bradley, also, by deed of July 25, 1839, which was recorded December 22, 1854, conveyed to Mary Ann Bradley and others all his right, title and interest in and to six thousand acres, in common and undivided, of the same township. Robert Bradley was sole heir at law of Mary Ann Bradley, who died in July, 1841.

The deed to George Evans, of October 18, 1836, was not recorded until after the execution and record of the mortgage to Robert and Richard Bradley, by which mortgage the mortgager conveyed all his right, title and interest in and to the township described therein, with covenants of general warranty. The conveyance to Mary Ann Bradley was of the "right, title and interest" of the grantor, but there were no covenants.

A conveyance of all the right, title and interest which the grantor has in and to the land described in his deed, conveys *only* the right, title and interest, which he actually has, at the time of the conveyance. It assumes to convey no more. The grant, in the deed, is of all his right, title and interest in the land, and not of the land itself, or any particular estate in the land. It passes no estate, which is not then possessed by the party.

When a grantee takes, by so indefinite description as the right, title and interest, which the grantor has, he must take the risk of the grantor's right, title and interest, and the covenants, in the deed, are qualified and limited by the grant; they cannot enlarge it. Blanchard v. Brooks, 12 Pick., 47; Brown v. Jackson, 3 Wheaton, 449; Adams v. Cuddy, 13

Pick., 460; Allen v. Holton, 20 Pick., 458; Sweet v. Brown, 12 Met., 175; Pike v. Galvin, 29 Maine R., 183; Partridge v. Patten, 33 Maine R., 483; opinion of TENNEY, C. J., in Merrill v. Ireland, 40 Maine R., 569; Oliver v. Pratt, 3 Howard, 332; Clarke v. Strickland, 2 Curtis, C. C. U. S. Rep., 439.

It has been decided, in this State, that an attachment of "all the debtor's right, title and interest in and to any real estate, in the county of Penobscot," is valid, and sufficient to hold, subject to the attachment, all his real estate, in that county, against the title of one claiming under a prior, unrecorded deed from the debtor. And reasons why the words, "all the right, title and interest," when used by an officer in his return of an attachment of real estate, should have a meaning and an effect different from, and more enlarged than that which they have when used by a grantor, in a deed of conveyance, are stated by the court, in Roberts v. Bourne, 23 Maine R., 165.

The deed to George Evans, whether registered or not, gave a good title against the grantor and his heirs. This, therefore, he had legally parted with, and it did not come within the general description of the estate conveyed to Robert and Richard Bradley.

And besides, upon another ground, the petitioner's title is maintained.

Samuel A. Bradley did not convey, or attempt to convey, to Robert and Richard Bradley any right, title or interest in and to the four thousand acres of land which he had previously conveyed to George Evans. The description, in the mortgage to them, of the estate conveyed thereby, excludes that land.

When he mortgaged to them, there appears to have been no conveyance from him, on record, of any portion of that township, except the mortgage, of eighteen thousand acres, to Rundlet.

The township contained twenty-two thousand and eighty acres, besides the reserved lots. He mortgaged to Robert

and Richard Bradley "all the right, title and interest which I, the said Samuel A. Bradley, have in and to the township, &c., subject to a mortgage of *the same*, heretofore made by me to James Rundlet." This language described and defined the right, title and interest which he had, and which he conveyed to them, as being in and to the same land which he had mortgaged to Rundlet. He therefore conveyed to them only his equity of redemption of the eighteen thousand acres mortgaged to Rundlet.

The petitioner is entitled to judgment for partition.

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

JUDGES

OF THE

SUPREME JUDICIAL COURT,

WHO HEARD AND DETERMINED THE CASES

FOR THE

EASTERN DISTRICT,

1857.

———o———

HON. JOHN S. TENNEY, CHIEF JUSTICE.
HON. RICHARD D. RICE, J.
HON. JOSHUA W. HATHAWAY, J.
HON. JOHN APPLETON, J.
HON. JONAS CUTTING, J.
HON. DANIEL GOODENOW, J.

ALL OF WHOM CONCURRED IN THE OPINIONS IN THE CASES FOLLOWING, UNLESS OTHERWISE INDICATED.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1857.

—o—

COUNTY OF HANCOCK.

—o—

AUGUSTUS STEVENS

versus

SETH K. HINCKLEY, AND HASKELL W. HINCKLEY, *Trustee.*

A transfer of real and personal property absolute in terms in consideration of a pre-existing debt and for security of the payment of other notes of the grantor upon which the grantee was liable as surety, and for other debts of the grantor which the grantee promised to pay, may be a valid transaction if not designed by the principal to defraud or delay his creditors, or if it was so designed, and the trustee afforded no aid in carrying out the intention of the principal.

The trustee in this case disclosed that he purchased and took a deed of the principal defendant, who is his brother, of his homestead and wood lot, and a bill of sale of personal property, for all which he paid him, part in his own notes which he then held, and another sum for which he had signed notes for him as his surety, and two other sums, being the amount of debts due from said defendant to other individuals which he promised to pay, and another sum due him from

said defendant on account. And that the value of the whole property conveyed to him did not, in his opinion, exceed the consideration paid. That he was induced to purchase said property to secure himself for what was due him from the defendant, and for his liabilities to others for him, upon payment of which he would readily transfer the whole property to defendant's creditors.

Upon this disclosure, CUTTING, J., presiding, adjudged the trustee discharged, to which adjudication the plaintiff excepted.

B. W. Hinckley, counsel for the plaintiff, argued that the facts disclosed show a fraudulent intent between the defendant and trustee, and therefore the sale was void as to creditors, and cited Gorham v. Herrick, 2 Greenl., 87; Webb v. Peel, 7 Pick., 257; Jewett v. Barnard and trustee, 6 Maine R., 381.

T. Robinson, counsel of trustee, cited Dearborn v. Parks, 5 Greenl., 81; Hilton v. Dinsmore, 20 Maine R., 410; Rose v. Whittier, 20 Maine R., 545.

TENNEY, C. J. The disclosure shows that the principal defendant was indebted to the supposed trustee to a considerable amount, and had procured him to become his surety on notes, which were outstanding, at the time he was about to move to the state of Iowa. The trustee wished to secure himself for his own claims, and for his liabilities, and it appears that he made the purchase of real estate and certain articles of personal property, not only in form, absolute, but so in reality, in consideration of his own claims, which were canceled, and the agreement to pay the notes, on which he was surety; and also to pay certain debts to others, who were informed thereof.

If the transfer was not designed by the principal to defraud or delay his creditors, or if it was so designed, and the trustee afforded no aid in carrying out the intention of the principal, it was a valid transaction. The consideration was actually paid to the extent of the notes of the principal to

the trustee, and the agreement of the latter, to become absolutely responsible to the holders of the notes on which he was surety, was, as between the parties to this agreement, a binding contract. The contract to pay Seth Johnson and John Snow, being in consideration of property received by the trustee, for that purpose, did not come within the statute of frauds. Hilton v. Dinsmore, 21 Maine R., 410. If these creditors should receive payment from their original debtor, instead of the trustee, the latter will be liable to the principal for that amount, unless he should be exonerated by some technical rule of law.

This case is distinguished from that of Gorham v. Herrick, 2 Greenl., 87, where the surety on a probate bond took an absolute conveyance of property for his security, where no breach of the bond had taken place, and where he assumed no liability in addition to that of his original suretyship.

The case of Jewett v. Barnard and trustees, was not an absolute sale of the property, but an assignment by an insolvent debtor for the benefit of his creditors. And the plaintiff therein, who resorted to the remedy by foreign attachment, was allowed to succeed, there being property in the hands of the assignees, beyond the amount of claims of the creditors, who had become parties to the assignment before the attachment. The case cited from 7 Pick., is unlike the one at bar.

The liability of the trustee must be determined by his own disclosure, as there is no other evidence in the case. From the facts disclosed, we cannot conclude that the purchase of the property by the trustee was for the purpose of aiding the principal in any fraudulent design.

Exceptions overruled.

GEORGE W. BROWN *versus* GEORGE N. BLACK.

The free enjoyment of a stream of water, navigable in its natural state for logs and lumber, is a public right; and the continuance of an obstruction for a great length of time will not of itself operate to bar the right to such navigation.

The occupation of a navigable river with logs can give no rights against the riparian proprietors when such occupation was of no injury to them.

Action on the case which comes before the full court on exceptions to the ruling of HATHAWAY, J., at *Nisi Prius*.

One count was for obstructing Union river with logs, to the detriment of the plaintiff in navigating *his* logs.

Another count was for maintaining a dam upon said river, obstructing a passage for the plaintiff's lumber from his mills above.

The *locus* was above the flow and fall of the tide. There was testimony tending to show that the defendant and those under whom he claims, had maintained a dam there longer than the memory of man. One witness testified that he worked upon the same sixty-eight years ago, and it was an old dam then.

The court ruled that if the stream was navigable for logs and other lumber in its natural state, no length of time in which the dam had been maintained would of itself operate to bar plaintiff's right to navigate it with his logs and lumber, the right of navigating being a public right, of which the plaintiff or any other part of the public could not be deprived.

Defendant's dam is the lowest dam on Union river, at the head of the tide. Plaintiff's dam is next above, about one-third of a mile distant, and was erected in 1845. Defendant offered evidence tending to show, that for more than twenty years prior to the erection of plaintiff's dam and mill, the stock of logs for his mills, when they came down in the spring freshet, filled up the river above the line of his land, and over and above the site of plaintiff's dam, and that the

river at the site of plaintiff's dam thus continued full until the logs settled down in consequence of room being made for them in the pond below, by manufacturing them; that the manufacturing season continued for about six months after the logs came down, and that about half the logs were manufactured before the summer drouth.

The court ruled that such occupation of the river gave no rights against the riparian proprietors, unless such occupation during its continuance was of some injury or damage to them.

The verdict on both counts was for the plaintiff.

Robinson & Peters, counsel for the defendant, argued in support of the exceptions.

Rowe & Bartlett, counsel for the plaintiff, argued that no length of time can ripen a nuisance into a legal erection, and cited Comyn's D., title Prescription (F 2), 10 Mass., 75, 76; Inhabitants of Arundel v. McCulloch, 9 Wend., 315, 316; Mills v. Hall and al., Thomas v. Marsfield, 13 Pick., 249.

In support of the second point, they cited Donnell v. Clark, 19 Maine R., 174, 180; Tinkham v. Arnold, 3 Maine R., 120; Thomas v. Marshfield, 13 Pick., 240, 248.

GOODENOW, J. No motion having been brought up or argued by counsel, and the rulings of the presiding judge being in accordance with the law of the case, the motion and exceptions are overruled.

Judgment on the verdict.

JONAH HOLT AND ALS. *versus* JOSEPH WESTCOTT AND ALS.

In all cases where goods are shipped by a consignor under a contract or for his benefit he is originally liable for freight.

The insertion in a bill of lading of a provision that the goods are to be delivered to the consignee, "he or they paying freight," will not necessarily relieve the consignor from liability. If he were the owner of the goods, he may, notwithstanding, be liable.

REPORTED by HATHAWAY, J.

The facts contained in the report appear clearly in the opinion of the court.

B. W. Hinckley, counsel for the plaintiff.

In Abbott on Shipping, page 414, the author says, "It is often provided in charter parties, that the goods shall be delivered agreeably to bills of lading to be signed by the master; and the master, upon receiving the goods, signs bills of lading for delivery on payment of freight, or words of similar import, giving him a right to refuse to make delivery to the person designated by the bill of lading, without payment of freight. And as it sometimes happened that the master has not insisted upon the exercise of this right, it has been much questioned whether the merchant-charterer was answerable for the freight, and it has been decided that he is answerable."

It would appear that, when the question was first started in Penrose v. Wilks, sitting after Hilary term, 1790, Lord Kenyon was of opinion that he was not answerable, but the case going to the full bench, his opinion was overruled, and the law so settled ever since in England. Tapley v. Martens, 8 T. R., 451; Marsh v. Pedder, 4 Campb., 257; Christie v. Row, 1 Taunt., 300; Domet v. Bickford, 5 B. and Ald., 521; Shepard v. DeBernales, 13 East., 565; Strong v. Hart, 6 B. and C., 160.

In Shepard v. DeBernales, Lord Ellenborough in delivering the judgment of the court, stated the question to be

whether the clause in the bill of lading was introduced for the consignor's security, in which case the master would have no right to deliver to the consignee without first receiving the freight; or whether it was introduced for the master's benefit only, and merely to give him the option, if he should think to insist upon receiving the freight abroad, before he would deliver the goods, in which case he might waive the benefit of this provision in his favor, and might deliver them without first receiving payment, and would not be thereby precluded from having resort to the consignor afterwards; and the court held the latter to be the true construction of the contract.

Such is the law in England. This question has been before the courts in several of the states, and has been decided in the same manner as in the English courts.

In New York was the case of Baker v. Havens, 17 Johns., 234. A shipped goods on board of B's vessel, to be carried from C to D, and there delivered to E, the consignee, he "paying freight for the same, with primage and average accustomed," according to the bill of lading, signed by the master. The master delivered the goods to the consignee without demanding the freight, which was afterwards refused. Held that B might maintain an action for the freight against A.

In South Carolina it was held that "a consignor is liable to the carrier for the freight; he is not the less liable because the consignee is also liable." Howard v. Middleton, 3 McCord, 121.

In Kentucky it was held that "a person freighting goods may waive his lien on the goods, and resort to his action." Shortzell v. Hart, 2 A. K. Marshall, 191.

In North Carolina it was held that "Where goods were shipped on board of a vessel for freight, the master of the vessel on his arrival at the port of delivery, has a right to retain the goods until the freight is paid by the consignee; but if he delivers the goods to the consignee without receiving the freight, the shipper of the goods, if he is also the

owner, and the consignee merely his agent, is liable for the freight, notwithstanding the clause in the bill of lading, "to be delivered to the consignee or his assigns, he or they paying freight for the same." Spencer v. White, 1 Iredell, 236.

Judge Story, in his treatise on Bailments, sec. 589, uses this language in respect to this subject. The consignor or shipper is ordinarily bound to the carrier for the bill or freight of the goods. But whenever the consignee engages to pay it, he also may become responsible. It is usual for bills of lading to state that the goods are to be delivered to the consignee, or to his assigns, he or they paying freight; in which case the consignee and his assigns, by accepting the goods, become by implication bound to pay the freight. And the fact that the consignor is also liable to pay freight, will not in such case make any difference.

The shipper is *prima facie* liable for the freight. To exonerate him, there must be something in the contract expressly to that effect. Moore v. Wilson, 1 T. R., 639; Dougal v. Kimball, 3 Bing. R., 383; Moorsom v. Kymer, 2 M. & Sel., 303, and cases before cited.

The plaintiffs having shown the shipment on the part of the defendants, the burden of proof was on them to avoid their liability, and therefore the nonsuit was not warranted.

Some of the authorities would seem to imply that where the goods were the property of the consignee, the consignor might not be liable, as where he was merely an agent. But the current of authorities do not allow of this distinction, for if he would protect himself from liability, he could ship them in the name of his principle, as well as consign them to him. However this may be, the inference from the testimony is, that Wescott & Co. were the owners of the cargo; that it was shipped for their benefit, and to fill their contract, and therefore they were liable.

T. Robinson, counsel for the defendants.

Rice, J. The question presented by this report is whether in a case where a ship owner, by charter party, contracts

with a shipper to carry a cargo at a stipulated price, and subsequently signs a bill of lading, in which he stipulates to deliver such cargo to the consignee of the shipper, or his assignee, in good order, &c., dangers of the sea only excepted, *he or they paying freight,* at the rate stipulated in the charter party, the owner is thereby bound to look only to the consignee for his freight, and is concluded from demanding it from the shipper, in case he shall fail to collect it of the consignee.

It is often provided in charter parties, that the goods shall be delivered agreeable to bills of lading, to be signed by the master; and the master, upon receiving the goods, signs bills of lading, agreeing to deliver them on the payment of freight, or with words of similar import, giving him a right to refuse to make delivery to the person designated by the bill of lading, without payment of freight. And as it has sometimes happened that the master has not insisted upon the exercise of this right, it has been much questioned whether the merchant charterer was answerable for the freight; and it has been determined that he is answerable. Abbott on Ship., 141.

It was once held that if the master parted with the goods to the consignee without securing his freight he was deprived of all recourse to the consignor; but it is now decided otherwise. If the master cannot recover the freight from the consignee to whom he has delivered the goods without receiving the freight, he still has his remedy over on the charter party against the shipper, and the condition precedent to the delivery inserted in the bill of lading was intended only for the master's benefit. 3 Kent's Com., 4th ed., 222.

Such is the settled law in England, though at one time Lord Kenyon, at *Nisi Prius,* ruled differently. The case was, however, carried to the King's Bench, and the ruling of Lord Kenyon overruled by the full bench, and subsequently, in the case of Shepard v. DeBernales, 13 East., 565, the question was again before the King's Bench, and the

English authorities fully reviewed by Lord Ellenborough, and the decision was that the provision "he or they paying the freight" usually inserted in bills of lading, was for the benefit of the master or owners, which provision they might waive if they saw fit and fall back upon the consignor for payment.

In Barker v. Stevens, 17 Johns., 234, the same rule is adopted. In giving the opinion of the court, Spencer, C. J., remarked, that the effect of the clause "he or they paying freight," has been repeatedly before the English Courts, and the decision has been uniform in both the King's Bench and Common Pleas. But, he continues, quoting the language of Lord Ellenborough, I should be clearly of the opinion, that if it appeared that the goods were not owned by the consignor, and were not shipped on his account and for his benefit, the carrier would not be entitled to call on the consignor for freight; and I should be inclined to the opinion that in all cases the captain ought to endeavor to get the freight of the consignee.

Parsons, in his recent work on Mercantile Law, 352, thus states the rule: "If the bill of lading requires delivery to the consignee or his assignees, 'he or they paying freight,' which is usual, and the master delivers the goods without receiving freight, which the consignee fails to pay, the master or owner cannot, in the absence of an express contract, fall back on the consignor and make him liable unless he can show that the consignor actually owned the goods; in which case the bill of lading, in this respect, is nothing more than an order by a principal upon an agent to pay money due from the principal."

In Spencer v. White, 1 Iredell, 236, the defendant shipped on board a vessel belonging to the plaintiff, then lying at Elizabeth City, a cargo of corn, for which the captain signed bills of lading, that the cargo was to be delivered to John Williams, at Charleston, in South Carolina, or to his assigns, "he or they paying freight for the same." The consignee received the cargo and paid the freight, except the sum of

one hundred dollars, and for that balance the action was brought.

The hundred dollars was withheld on account of the damaged state of the corn. At the trial the defendants contended that it was the duty of the plaintiff to have collected the freight of the consignee, and also that the corn was damaged by the negligence of the plaintiff. The evidence showed, however, that the damage was occasioned by the dangers of the sea, and the court held the plaintiff was entitled to recover, and was not obliged to look solely to the consignee.

The same doctrine was held in Howard v. Middleton, 3 McCord, 121.

Grant and al. v. Wood, 1 Zabrisker, 292, was an action by the owners against the consignor of a quantity of lumber for a balance due for freight, the consignee having paid in part only. There was no charter party; but a bill of lading with the usual clause as to payment of freight by the consignee. The claim was resisted by the consignee, who was the owner of the lumber, on the ground that the consignee alone was liable, after the delivery of the lumber. The court, however, after a careful examination of the authorities, held the defendant to be liable; and that the fact that the consignee had also made himself liable by a reception of the lumber, did not relieve the consignor from his original liability; that the right of the master to retain the goods until freight is paid is an dditional security for his benefit.

The same rule prevailed in Domet v. Bickford, 5 B. & Ald., 521.

Kent, C. J., in announcing the opinion of the court in Griswold v. N. Y. Ins. Co., 3 Johns., 322, remarked, that the lien which the ship owner has on the goods conveyed is only an additional security for the freight. This lien is not incompatible with the personal responsibility of the shipper, and does not extinguish it. The consideration for the freight is the carriage of the articles shipped on board, and the state or condition of the articles at the end of the voyage

has nothing to do with the contract. It requires a special agreement to limit the remedy of the carrier for his lien to the goods conveyed.

The cases in which this question has been before the courts in this country and England are numerous, and the circumstances attending those cases, of course, various. Without further citations, we think the general rule deducible from them to be, that in all cases where goods are shipped by a consignor under a contract, or for his benefit, he is originally liable for freight, and that the insertion in a bill of lading of a provision that the goods are to be delivered to the consignee, &c., "he or they paying freight," will not, of itself, relieve him from that liability; that provision being designed for the benefit of the carrier, he may waive it if he choose so to do, and resort to his employer, the consignor, for his freight, unless there is some special stipulation by which that employer is to be exonerated.

The action must stand for trial.

J. D. WHITTEN AND ALS. *versus* SETH TISDALE.

Although the master of a ship in a foreign port has authority to procure all supplies and repairs necessary for the safety of the ship and the due performance of the voyage, on the credit of the owner, he must be restricted to such repairs and supplies as are in a just sense necessary for the ship *under the actual circumstances of the voyage*, and a suit against the owner for their value cannot be maintained without proof that such repairs and supplies were *necessary*.

This is an action of assumpsit brought to recover the amount of a bill of ship chandlery, and the following facts are agreed between the parties.

1. At the time said bill was contracted the defendant was sole owner of the schooner Roanoke, and the articles in said bill were furnished and delivered in Boston by the plaintiffs,

as alleged, to one Edward Mullen, then master of said schooner, who ordered the goods and directed them charged to "schooner Roanoke and owners," but without the knowledge or assent of the defendant.

2. That said Mullen was then sailing the said schooner on shares, and had the possession and control of her, there being a verbal agreement between said Mullen and defendant that Mullen should victual, man and sail the schooner, and pay the defendant one-half of the proceeds, according to the general custom in this state.

3. And it is further agreed that said articles so furnished were such as were convenient, necessary, and ordinarily used in vessels of the class of the Roanoke, and that said schooner, on her return voyage from the West Indies, a few months after these supplies were furnished, was lost, together with the master and crew. If in the opinion of the court this action is maintainable, judgment is to be rendered for the amount claimed in the annexed bill. Otherwise plaintiffs are to be nonsuited.

Charles Lowell, counsel for the plaintiff.

A. F. Drinkwater, counsel for the defendant.

TENNEY, C. J. In England, a ship owner is liable for necessary repairs done to a ship by the master's order, in a foreign port; and the word *necessary* means such as are fit and proper for the vessel upon her voyage, and such as a prudent man, himself the owner, if present, would order. Webster and al. v. Seekamp, 4 Barn. and Ald., 352.

In this respect the law of this country is the same. The master of a ship in a foreign port, has authority to procure all supplies and repairs necessary for the safety of the ship, and the due performance of the voyage. Ship Fortitude, 3 Mason, 228. In this case Judge Story says, "It is agreed on all sides, that the master is to be treated as the general agent of the owner and employer of the ship, as to procuring repairs and supplies for the ship in a foreign port, in the ab-

sence of the owner and employer. And it is equally agreed, that this power is not unlimited, but is restricted to such repairs and supplies as are in a just sense necessary for the ship, *under the actual circumstances of the voyage.*"

The master's agency, in ordering repairs, extends no farther than to cases of necessity in the sense spoken of. If the repairs are not such as a prudent owner would order, he being present, and having charge of the vessel in the condition in which she actually is found, the order of the master is not that of the owner, and the latter is not holden for the repairs made thereunder.

If the means of making the repairs are furnished to the master of the vessel, while in a foreign port, in a case which makes the repairs necessary, the law does not impose upon the party providing these means, the duty to see that they are applied to the object, at the risk of losing his claim against the owner. After they have passed from him into the hands of the master, they are no longer subject to his control; the master is the agent of the owner, and if he wrongfully omits to appropriate them in furtherance of the object for which they were delivered, the loss must fall upon the owner. The captain of a vessel, as the agent of the owner, has a general authority to act for him; and the latter ought to appoint a man upon whose compliance with his orders and upon whose prudence and discretion he can rely; and such he is held out by him to the world. Webster and al. v. Seekamp, before cited. Per Bagley, J.

In the case at bar, the vessel was lost, with all on board, soon after the articles in question were furnished by the plaintiffs, and delivered to the master. The plaintiffs being thus unable to produce full evidence of all the facts connected with the condition of the vessel, and her wants at the time of the supply, are obliged to rely upon such meagre evidence as the defendant, from his belief of the actual state of the case, is willing to admit.

In the agreed statement it is admitted, that the articles furnished by the plaintiffs were such as were convenient,

necessary, and ordinarily used in vessels of the class of the one for which they were provided. But there is nothing from which the actual state of this vessel, and the necessity of the supplies, for the safety and due performance of the voyage in contemplation, can be known or reasonably inferred. No statement is found in the case tending to show that this vessel was wanting in any of the articles, the value of which is the alleged cause of action in this suit. Without proof or admission that the supplies were necessary for the vessel, under the actual circumstances in which she was placed, the suit cannot be maintained.

Plaintiffs nonsuit.

GOODENOW, J., did not concur.

COUNTY OF WALDO.

ORR CUNNINGHAM *versus* MOSES BUCK.

In order to secure a lien upon logs by one who performed labor in cutting them, in pursuance of the statute of 1848, chap. 72, the attachment must be made by virtue of a legal precept conferring the requisite authority upon the officer acting under it.

A declaration in common form on an account containing no allegation of any claim upon the logs or authority to attach them only as the goods or estate of the debtor, judgment and execution corresponding, will not authorize a sale of the logs upon such execution to satisfy a lien claim.

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

This action is brought against the defendant as a deputy sheriff for negligently keeping and not delivering the property attached on a writ Orr Cunningham v. James J. Twombly, which action was assumpsit in common form, upon an account for labor upon logs, which the plaintiff claims to hold as a lien for payment of his labor.

The defendant attached a quantity of logs, upon said writ, in the Penobscot boom, as the same upon which the plaintiff labored, but did not state whose property they were.

Judgment was recovered against Twombly and execution issued against his goods, chattels, and lands, upon which another officer demanded the logs of this defendant, in default of which this action is brought against him.

The character of the instructions to which exceptions are taken appear in the opinion of the court.

N. Abbott, counsel for the plaintiff.

C. P. Brown, counsel for the defendant.

HATHAWAY, J. The plaintiff labored, cutting and hauling logs, for James J. Twombly, and sued him for his wages,

intending to secure his statute lien upon the logs on which he had wrought.

The defendant, a deputy sheriff, to whom the plaintiff's writ against Twombly was delivered for service, attached the logs thereon November 23, 1853.

The plaintiff recovered judgment against Twombly, on which execution was duly issued, January 18, 1855, and delivered to John H. Wilson, a deputy sheriff, for collection, who duly demanded the logs attached, which the defendant did not deliver, and hence this action was commenced against him.

By statute of 1848, chap. 72, entitled "an act giving to laborers on lumber a lien thereon," it is provided in sec. 2 that "any person having a lien as aforesaid may secure the same by attachment, &c." It is obvious that such attachment must be made by virtue of a legal precept, in some form conferring the requisite authority upon the officer acting under it.

The writ against Twombly, upon which the logs were attached, commanded the officer (the defendant) "to attach the goods or estate of James J. Twombly, and particularly a quantity of logs lying in Penobscot river, (describing, by their marks the logs upon which the plaintiff had worked,) upon which the plaintiff claims to have a lien, by virtue of a statute entitled "an act to secure to laborers on timber a lien thereon."

The declaration was in the common form, on an account against Twombly, annexed, and contained no allegations of any claim upon the logs; nor did the precept authorize the defendant to attach the logs only, as "the goods or estate of Twombly."

The plaintiff's execution, upon which Wilson demanded the logs, was against the goods, chattels, and lands of Twombly, and for want thereof against his body. It neither commanded or authorized the officer to take the property of any other person than the judgment debtor.

It does not appear that Twombly ever owned the logs, or

had any interest in them, except as an operator under another person or persons, and there was evidence in the case that he had received his pay for hauling them, and had sold and conveyed whatever interest he had in them, to Leadbetter, before they were attached by the defendant, by whose return upon the writ, it appears that they were not attached as Twombly's property.

To render the defendant liable in this suit, the attachment of the logs must have been authorized by his precept against Twombly. It must have been a valid attachment, which, when made, he would have been bound to preserve, and the demand made by Wilson must have been for property attached, which he could lawfully dispose of, and appropriate the proceeds thereof, in payment of the execution in his hands, and which the defendant was under legal obligations to deliver to him for that purpose.

The instructions of the presiding judge, to which exceptions were taken, assumed that the precept against Twombly authorized the attachment, and that the attachment was valid, and that the execution authorized the demand, upon which the defendant was bound to deliver the logs attached.

They held the defendant liable, without any regard to the question whether or not Twombly had any interest in the logs at the time of the attachment, or at any other time.

There was error in the instruction given, and as agreed by the parties, the default must be taken off, and the action stand for trial.

FRANCIS WHITMORE *versus* OTIS WHITCOMB.

Minors under the age of fourteen years may be bound as apprentices until that age, without their consent, by their father, if living; and if not by their mother or legal guardian; and above that age *in the same manner*, with their consent.

The indentures should be made by the father or mother, the minor, if above the age of fourteen years, consenting, and not by the latter with the consent of the former.

ON REPORT by APPLETON, J.

The facts of the case are clearly stated in the opinion of the court.

L. W. Howes, counsel for the plaintiff.

J. G. Dickerson, counsel for the defendant.

APPLETON, J. This is an action brought by the plaintiff to recover for the services of Hollis Wentworth, his indented apprentice, as he alleges.

The defence is that the indentures not being in pursuance of the requirements of R. S., chap. 90, are void.

The parts of the indenture material to be considered in the determination of this case, are as follows:

"This indenture witnesseth, that Hollis Wentworth, aged about fifteen years, of Belfast, in the County of Waldo, and State of Maine, *by and with the consent of Ruth Wentworth*, his widowed mother, hath voluntarily and *of his own free will and accord put and bound himself* to Francis Whitmore, of Waldo, in said county, to serve him from the date hereof for and until he shall arrive at the age of twenty-one years, during which time said Hollis shall faithfully, honestly and industriously serve him, and all his lawful commands everywhere, readily obey," &c.

Then follow mutual covenants on the part of the minor and the master, which are of no importance in the view we have taken of the case.

The indenture then concludes as follows:

"In witness whereof, the parties aforesaid, with the said Ruth Wentworth, *who hereby gives her assent and sanction to said covenant and agreement,* have hereunto set our hands and seals, this seventh day of April, Anno Domini one thousand eight hundred and fifty-four.

FRANCIS WHITMORE, L. S.

HER
RUTH ⋈ WENTWORTH, L. S.
MARK.

HIS
HOLLIS ⋈ WENTWORTH, L. S."
MARK.

It will be perceived that by this indenture the minor binds himself, and the mother gives her consent thereto, not in any manner binding herself.

By R. S., chap. 90, sec. 1, "children *under* the age of fourteen years may be bound as apprentices or servants *until* that age, *without their consent,* by their father, if living; and if not, *by their mother* or legal guardian," &c.

By sec. 2, "minors *above* the age of fourteen years may be bound *in the same manner* with their consent, which shall be expressed in the indenture and testified by their signing the same," &c.

The binding in both cases is to be "in the same manner." The contract is to be by the father, mother or guardian, as the case may be. The covenants are between one or the other of them and the master. The miner being under age cannot contract for himself. He is not, therefore, to be one of the contracting parties. No suit could be maintained against him for the non-performance of the covenants of the indenture. The only difference in the indentures arising from the age of the minor, is, that when under fourteen years his consent is not required, and when above that age, it is.

In the present case the provisions of the statute have been reversed, the boy binding out himself and the mother

consenting thereto, instead of the mother binding out the son and he expressing his consent, as is required by sec. 2.

The indentures being void, by the agreement of parties a nonsuit must be entered.

Plaintiff Nonsuit.

ISRAEL DECROW AND ALS. *versus* WALDO MUT. INS. CO.

Where a policy of insurance upon a vessel provides that the insurers shall not be answerable for any loss which may arise in consequence of seizure for or on account of illicit or prohibited trade, or trade in articles contraband of war, but the judgment of a foreign colonial court shall not be conclusive of those facts; such judgment is *prima facie* evidence of the facts, and must be held conclusive in the absence of proof to impeach it.

An *attempt* to trade in violation of law is within the provisions of such policy.

ON FACTS AGREED.

This is an action brought upon a policy of insurance effected upon the bark Georgiana.

The parties agree that plaintiffs, at the time when said policy was effected, and when said bark was captured and condemned, were the owners of her. That she sailed from New Orleans on or about the 25th of April, 1850, was seized by a Spanish vessel of war on or about the 18th of May following, carried to Havana, and there, in the month of July following, by a legal tribunal of the country, condemned, upon the ground that she was employed in the "Lopez Expedition," so called, against the island of Cuba. She was sold under the decree of said tribunal, and passed beyond the control of plaintiffs and defendants, and that neither have ever regained possession of her.

It is further agreed that on the 17th of September following plaintiffs abandoned said bark to defendants, and on the 22d of November following furnished to defendants a state-

ment of the circumstances attending her capture and condemnation.

The writ, policy, depositions of Joseph A. Graffam, Edward Watts, Albert Sleeper, and Henry Dockham, make a part of the case.

Judgment is to be rendered by the Law Court according to the legal rights of the parties.

W. G. Crosby, counsel for the plaintiffs.

H. O. Alden, counsel for the defendants.

HATHAWAY, J. By the policy upon which this action was brought, "It is agreed that the insurers shall not be answerable for any loss which may arise in consequence of seizure for or on account of illicit or prohibited trade, or trade in articles contraband of war, but the judgment of a foreign colonial court shall not be conclusive upon the parties as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations."

The United States were at peace with Spain, of which Cuba was a colony, and by the facts agreed, it appears that the bark Georgiana was seized by a Spanish vessel of war, carried to Havana, and there, by a legal tribunal of the country, condemned, upon the ground that she was employed in the "Lopez Expedition," so called, against the island of Cuba; that she was sold under a decree of said tribunal, and passed beyond the control of the plaintiffs, and that she was subsequently abandoned to the defendant company.

Cuba being a colony of Spain, and the tribunal by which the judgment was rendered being a colonial tribunal, by the terms of the policy, the judgment by which the bark was condemned was not conclusive upon the parties, of the facts which would render her liable to condemnation. But although not conclusive, it was *prima facie* evidence of those facts, and must be held conclusive in the absence of proof to impeach it.

If the Georgiana sailed on an unlawful expedition against Cuba, and being prevented by adversary winds and currents from entirely accomplishing the object designed, had forwarded by the Creole the men and munitions of war, in pursuance of the original purpose, the facts that at the time of the seizure by the Spanish vessel of war, there were no men on board her who were engaged in the contemplated invasion, and that there were no arms, or ammunition *then* on board, would constitute no sufficient grounds for her release from liability to seizure and condemnation for what she had already done in the illicit enterprise, under the direction of the master then having charge of her.

She had performed the outward voyage to the extent of her immediate ability as a sailing vessel, at least, so far that the use of the more certain speed produced by the power of steam, was deemed expedient to complete it, which was probably originally anticipated, for the mate, Graffam, testified that she had on board about a thousand barrels of coal, which the steamer Creole received with the passengers and arms; and the case discloses no other purpose for which the coal was destined.

It was sufficient that "an attempt" to trade, &c., in violation of the laws of nations, should have been proved. The attempt was made, and partially accomplished by the Georgiana, and was in progress towards completion by the aid of another agent, the steamer *Creole*, to which the bark had furnished the coal convenient or necessary to enable the steamer to finish what the bark had commenced and partly performed. The two vessels apparently were acting in concert, for the accomplishment of the common purpose.

The plaintiffs cannot avail themselves of their ignorance "that the passengers, &c., were destined for the invasion of Cuba," as their counsel contends. Their agent, the master of the bark was one of the owners, and is one of the plaintiffs. Their ignorance of the hazardous character of the voyage for which he chartered her, could have no effect upon her liability to seizure and condemnation in a foreign

port, for a violation of the laws of nations, and therefore could have no effect upon the legal rights or liabilities of the parties in this suit. But the evidence contained in the depositions of Graffam, Sleeper and Watts, leaves no reasonable doubt that the master, when he chartered the bark in New Orleans, was well aware of the character of the business in which she was to be employed. His repentance came too late, when, as Graffam testified, he "tried to induce a majority of those on board to agree to return to New Orleans."

The enterprise had been commenced, and was in progress —the risk had been incurred.

He had advanced so far in his transgression that his repentance, *then*, could not save the bark.

The testimony contained in the depositions confirms the correctness of the decision by which the bark was condemned.

Plaintiff nonsuit.

PETER C. LAKEMAN *versus* JOSEPH W. POLLARD AND ALS.

If the performance of a contract becomes impossible by sickness or similar disability, the contractor may recover on a *quantum meruit* for what he did perform.

When the laborer has adequate cause to justify an omission to fulfill his contract, he cannot be regarded in fault.

Where from the prevalence of a fatal disease in the vicinity of the place where one had contracted to labor for a specified time, the danger was such as to render it unsafe and unreasonable for men of ordinary care and common prudence to remain there, it is sufficient cause for not fulfilling the contract.

EXCEPTIONS were taken by the defendant to the rulings of MAY, J., in this case, which is an action of assumpsit for three months' labor, at thirty dollars per month from May 1 to August 1, 1854.

The defendants relied upon their brief statement that the plaintiff agreed to work during the sawing season of A. D. 1854, and had left before the season expired without the leave or consent of the defendants, and without any justifiable cause.

It was proved that the said sawing season commenced May 1st and ended the last of November, that year, A. D. 1854, and that plaintiff left July 29th or 30th.

It was proved that the plaintiff was in the defendants' employ from May 1st to July 29th or 30th, and one of the plaintiff's witnesses testified that the plaintiff did extra work —a day or two—within that time.

The plaintiff called Enoch Bagley, who testified, in answer to questions of plaintiff's counsel, and subject to objections made thereto by defendants' attorney, that he (the witness) worked there at the same time and place the plaintiff did, and that he (the witness) *was not hired* for the season, but *only* so long as he should think fit.

Valentine Nute and Alvin Stone, both likewise introduced by plaintiff, testified that they also worked there for defendants, at the same time and place, and were not hired by the season, but only to remain there so long as they pleased.

This testimony was admitted, the defendants' counsel objecting.

The witnesses all testified that it was healthy at the mills up to the time the plaintiff left, and at the boarding house, and that it continued healthy there all the season.

The testimony was, that it was reported there was cholera at St. Johns, also in Portland near the city, also a few cases at Boar's Head, and that there was alarm and excitement at the mills on account of it, and that from seventy-five to eighty persons passed the mills daily fleeing from the city on account of the cholera, and were seen from the shore of the bay waiting for conveyance over.

At the request of the defendants' counsel the court allowed the following questions to be proposed to the jury, and answered by them, to wit:

1. Was the plaintiff hired by the defendants to work for the sawing season of A. D. 1854?

Ans. by the Jury. "The jury disagree as to the first question as to a special contract."

2. Did the plaintiff leave the defendants' employ before the expiration of the season?

Answered in the affirmative.

3. Did the plaintiff quit the defendants' employ without their leave or consent, before the expiration of the time for which he was hired?

Answered in the affirmative.

4. Was the plaintiff, while in the defendants' employ, unsafe by reason of cholera or any other sickness, or would he have been unsafe if he had remained and worked to the end of his contract?

Ans. "The jury decide that he might have been considered unsafe at the time he left."

The next question was put at the suggestion of the judge presiding.

5. Would a man of ordinary care and prudence have been justified in leaving at the time the plaintiff did, under all the circumstances?

Answered in the affirmative.

Defendants' counsel requested the judge presiding to instruct the jury, as follows:

1. That what is a reasonable excuse for non-fulfillment of a contract is simply a *question of law.*

2. And the prevalence of an epidemic sickness nearly in the vicinity, but no instance of which had occurred at the place where the contract has to be fulfilled, would not, in law, be a sufficient excuse for the non-fulfillment, in law.

The judge did not give the instructions in the words requested, but did instruct the jury that if they were satisfied that the work done by the plaintiff was performed under a special contract, and that the plaintiff did not fulfill his contract, but left the defendants' employ before the term he had hired for had expired, without the consent of the defendants,

he could not reeover, unless the plaintiff had satisfied them from the proof in the case that he had good and sufficient cause for so leaving, and that they would determine from the evidence in the case whether there was or not such a prevailing and dangerous epidemic or sickness in the vicinity of the mill when the plaintiff left as to render it dangerous for him to remain at work there, and also that if the danger was such as to render it unsafe and unreasonable for men of ordinary care and common prudence to remain there, that danger would be a sufficient cause for leaving, and not fulfilling his contract.

The verdict was for the plaintiff.

N. Abbott, counsel for the plaintiff.

C. P. Brown, counsel for the defendant.

HATHAWAY, J. The plaintiff labored for the defendants at their mills in St. Johns, and by this action claims to recover his wages.

The defence is, that the labor was performed under a contract, on his part, to work for the defendants during the sawing season of 1854, which he did not fulfill.

The testimony of Bagley, Nute and Stone that "they were not hired by the season, but only to remain there as long as they pleased," could have no legitimate effect upon the rights of the parties in this suit, and was improperly admitted. That testimony was introduced by the plaintiff as tending to show that *he* was not hired for a specified time. But the jury found that he was so hired. Else they could not have found, as they did, specially, that "he quit the dedefendants' employ, without their leave or consent, before the expiration of the time for which he was hired." The defendants were not aggrieved by the admission of that testimony, for the special findings of the jury show that it produced no effect.

The plaintiff contends that he was excused from the performance of his contract, and justified in quitting when he

did, by reason of the alarm and danger occasioned by the prevalence of the cholera in the vicinity of the mills, and that he is entitled to a reasonable compensation for the labor performed. If the fulfillment of the plaintiff's contract became impossible by the act of God, the obligation to perform it was discharged. If he was prevented by sickness or similar inability he may recover for wha the did, on a *quantum meruit.* 1 Parsons on Contracts, 524.

The plaintiff was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so dangerous in its character that a man of ordinary care and prudence, in the exercise of those qualities, would have been justified in leaving by reason of it, nor does it make any difference that the men who remained there at work after the plaintiff left were healthy, and continued to be so. He could not *then* have had any certain knowledge of the extent of his danger. He might have been in imminent peril, or he might have been influenced by unreasonable apprehensions. He must, necessarily, have acted at his peril, under the guidance of his judgment.

The propriety of his conduct in leaving his work at that time must be determined by examining the state of facts as *then* existing. When the laborer has adequate cause to justify an omission to fulfill his contract, such omission cannot be regarded as his fault. Whether or not the plaintiff had such cause was a question of fact, to be determined by the jury, upon the evidence.

"Where there are conflicting proofs, or some necessary facts are to be inferred from others which are proved, then it is the province of the jury to decide the cause, under instructions from the judge, as to the principles of law which should govern them." Sherwood v. Maverick, 5 Maine R., 295.

The question was rightly submitted to the jury, and with appropriate instructions.

No question is presented by the exceptions concerning the rulings of the court upon the subject of damages, or the amount, if any, recoverable for wages.

A report of the whole evidence, *signed by* the presiding judge, as the law requires, has not been furnished to the court. Therefore the motion for a new trial cannot be entertained.*

Exceptions and motion overruled.
Judgment on the verdict.

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

GOODENOW, J., concurred in the result only.

MAY, J., concurred, remarking that the testimony of Bagley, Nute and Stone was admitted as contradictory of other witnesses introduced by the defendant, and not upon the main question; and for such purpose was clearly admissible.

REUEL STANLEY *versus* MARK L. DRINKWATER.

Where a vessel was attached upon a writ, and the officer did not take and retain the possession of it, but took a receipt therefor, the attachment was held to be dissolved thereby.

So, too, the purchase of the property by the attaching creditor taking a bill of sale of it from the debtor, operates as a dissolution of the attachment.

Where property is attached on execution, and the officer in his return states that the service, or further service of the execution, is suspended by reason of a former attachment, when no such attachment is in force; and afterwards takes a receipt for such property, to be re-delivered on demand, or within thirty days from the rendition of judgment in the first suit, no action can be maintained on such receipt.

If an attachment be dissolved by the acts of the parties, without the knowledge of the officer who made it, and he makes a subsequent attachment upon execution, subject to the first, and suspends further service of the execution for that cause, no rights will be secured to the creditor under the R. S. of 1841, chap. 117, secs. 33 and 34, beyond those which would have existed if the officer had known, when he made the second attachment, that the prior one had been dissolved.

* This, and the following case of Stanley v. Drinkwater, were entered in the Law Court in 1856, to be argued in writing, and were decided by the members who held the term for that year, although they were not argued till 1857.

Stanley *v.* Drinkwater.

This action comes before the full court upon REPORT by MAY, J., and the facts in the case are clearly stated in their opinion.

A. P. Palmer, counsel for the plaintiff.

N. Abbott, counsel for the defendant, argued as follows:

On February 2d, 1855, the plaintiff, then a deputy sheriff, attached one eighth of the schooner Flying Arrow, on a writ, Gilmore Sylvester v. Alvan Elwell, and took a *receipt*, and left the property in the hands of Elwell, the defendant.

On the 12th day of February, 1855, the plaintiff seized the same property on an execution in favor of H. M. Lancaster v. said Elwell.

On the 8th day of March, 1855, said Elwell sold by bill of sale the same property to Gilmore Sylvester.

On the 10th day of March, 1855, the receipt in suit was taken. On the 10th day of March, when the receipt in suit was taken, the property did not belong to Elwell, the debtor, but to Gilmore Sylvester, under his bill of sale of the 8th; hence, the action on the receipt must fail. 8 Maine, 122; 19 Maine, 49; 14 Maine, 414.

But the plaintiff claims to recover on the ground of his *seizure* of the property on Lancaster's execution, the 12th day of February. This he cannot do. That seizure was *void*, he not having *sold* the property within *four* days from the seizure, as the statute requires. But the plaintiff says he had a right, under the statute, to *suspend* and put off the *sale* beyond the four days, on the ground of a *prior* attachment, to wit, the attachment made February 2, in favor of Gilmore Sylvester. That attachment did not exist at the time of the *seizure* on the execution, the 12th. It had been *dissolved*. The plaintiff admits in his testimony that at the time he made said attachment he took a *receipt* for the property, and that he had no possession or control of the property after he took the receipt. The taking of that receipt *dissolved* the attachment. 37 Maine, 326. Hence there was no *attachment* on the property at the time of the *seizure* on Lancaster's exe-

cution; and hence there could be no *suspension* of the sale. All rights by virtue of the seizure were lost at the end of four days from the seizure. The attachment made on the 2d of February being *dissolved* by the officer's taking a *receipt*, all rights being *lost* by virtue of the seizure on the execution, on the 12th, by neglecting to sell within the four days, there was no claim on the property on the 8th of March, when Elwell sold it to Gilmore Sylvester; and hence on the 10th of March, when the receipt in suit was taken, Elwell had no property in the schooner; and if so, this action must fail. There are other grounds of defence, as the court will see by an examination of the case, but as I think the one named fatal to the action, I will omit the presentation of them.

MAY, J. This is an action upon a receipt, dated March 10th, 1855, given by the defendants to the plaintiff, as a deputy sheriff, wherein they promise and agree to re-deliver to the plaintiff one eighth part of the schooner called the Flying Arrow, with all her tackle and appurtenances, the same having been taken as the property of one Alvan Elwell, upon an execution against him in favor of one James Lancaster, subject, however, to a previous attachment upon a writ in favor of Gilmore Sylvester against said Elwell. By the terms of the receipt the property was to be re-delivered to the plaintiff, or his successor in office, on demand; and in case no demand should be made, then to be re-delivered within thirty days from the rendition of judgment in the action aforesaid.

The writ in said action was returnable to this court, at the May term, 1855, but was not entered; and the plaintiff thereupon, on the eighth day of said May, made a demand of said property upon his said receipt, and the defendant neglected to re-deliver the same. It further appears that the plaintiff in that suit, had on the eighth day of the preceding March, become the purchaser of said eighth part of said schooner, her tackle and appurtenaces, and that said Elwell on that day

had conveyed the same to him by a bill of sale in due form, and recorded at the custom-house in accordance with the statute requirements of the United States. This sale appears to have been made upon good consideration; and there is no testimony in the case tending to impeach it on the ground of fraud. By it the purchaser took all Elwell's interest in the schooner, subject only to such attachments as then existed upon it. Weston v. Dorr, 25 Maine, 176.

The attachment on Lancaster's execution appears to have been made on the twelfth of February preceding, and the officer's return thereon, states that "*said* attachment by reason of said prior attachment is suspended." The plaintiff testifies that subsequently he learned that the defendant, Drinkwater, had bought a part of the schooner, and was going to sea in her, and that he then took the receipt on which this action is founded. At this time he appears to have been ignorant of the sale from Elwell to Sylvester; and neither he or Lancaster had any knowledge of any settlement of Sylvester's suit, or of the dissolution of his attachment, if it had then been dissolved.

The plaintiff does not appear to have taken at the time of his attachment of the schooner upon Lancaster's execution, any steps to secure the benefit of such attachment, other than to notify the receiptor for the property upon Sylvester's writ of the fact of such subsequent attachment, and of the suspension of further service by reason of the prior one. He did not seize and retain possession of the schooner when the first attachment was made. He therefore must have relied upon his receipt, and not upon a continued attachment. Under such circumstances it was competent for Elwell to sell the schooner, and the purchaser would acquire a good title. Weston v. Dorr, 25 Maine R., 176, before cited. The taking of the first receipt operated as a dissolution of the first attachment, and subjected the property to a second attachment free from the first. Waterhouse v. Bird, 37 Maine R., 236.

At the time, therefore, when the attachment upon the exe-

cution was made, there was no such cause existing as to justify the suspension of further service, under the statute, as is now contended for. The sale by the officer should have been made in the same manner as if no prior attachment had been made.

It follows also that when the plaintiff took the receipt in suit, Elwell, the debtor in the execution, had no attachable interest in the schooner. He had parted with all his interest before. That such fact is a good defence to an action upon the receipt, is too well settled to require the citation of authorities to sustain it. If, however, we could regard the first attachment as subsisting when the second was made, and the suspension of further service as justified by the Revised Statutes of 1841, chap. 117, secs. 33 and 34, still it is difficult to perceive any ground upon which the plaintiff can prevail. By the provisions of this statute the last attachment upon the execution was continued only thirty days after the first attachment should be dissolved. Assuming that the officer's return shows *a suspension of the further service of said execution* by reason of the prior attachment, and *not an entire suspension of the attachment itself*, as the language of the return seems to indicate, of which we give no opinion, it then becomes necessary to determine when the attachment upon Sylvester's writ was dissolved, so that the plaintiff in this suit would no longer be responsible to the creditor for the property returned upon that writ. Does not the evidence in the case show such a dissolution more than thirty days before the demand relied upon in this suit? We think it does. We cannot doubt that Sylvester's attachment was in fact dissolved on the eighth day of March, 1855, when he took his bill of sale. By that act the officer would be relieved from all further obligation to detain the property. The fact of the purchase, as well as the language of the covenants contained in the bill of sale, which must have been known to the creditor, is altogether inconsistent with any other idea than that the parties to that bill of sale must have intended that the attachment should then be dis-

solved. Such mutual intention then took effect. The fact that the action was not entered renders it probable that the bill of sale was made for the purpose of paying Sylvester his debt, then in suit. Such dissolution of his attachment, and the consequent discharge of the officer from all liability to keep and detain the property, deprived the officer of all right to reclaim the property from the debtor by virtue of that attachment, or upon his first receipt, and left the property open to a levy upon Lancaster's execution; but the property not having been seized or demanded within thirty days from such dissolution, all benefit of his attachment was thereby lost. Pearsons v. Tinker, 36 Maine, 384.

It is contended that the prior attachment ought not to be regarded as dissolved until the final adjournment of the court to which the writ was returnable. It is said that the action might by law be entered at any time during the term, and that until the term had expired neither the officer nor the execution creditor, could have had, and that they in fact did not have, any certain knowledge of the dissolution of the attachment. The statute clearly contains no such provision; and if such provision is desirable, it belongs to the legislature, and not to the court, to make it. By the statute as it now stands it is the fact of the dissolution of the attachment, and not the time when it becomes known by which we are to determine when the thirty days during which it continued, actually commenced. In view of all the facts, the attachment having been lost when the demand was made, the plaintiff must become nonsuit.

Plaintiffs nonsuit.

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

DAVID W. EDWARDS *versus* JABEZ S. CURRIER.

A party plaintiff, purchaser of goods alleged to have been made in fraud of creditors, being a witness, may well testify concerning his motives and purposes in reference to the purchase of the goods.

Where the facts and circumstances attending the sale of goods are of such a character as to leave little doubt that the sale set up was invalid in law, and the court have good reason to believe the jury must have misapprehended the evidence or disregarded their duty, a new trial will be granted.

The plaintiff in this case sued out his writ upon a demand of $700 against Edwards & Goddard, and by an officer attached their goods in store and the next day purchased the same and surrendered the notes. An account of stock was taken and the amount found to be, nominally, eleven or twelve hundred dollars. These goods were subsequently attached by other creditors and this suit is brought against the officer, this defendant, for the value of the same.

EXCEPTIONS were taken to the rulings of HATHAWAY, J., and the evidence is reported on a motion for a new trial.

The verdict was for the plaintiff.

N. Abbott, counsel for the plaintiff.

This is an action of trespass against an officer for taking and selling goods on a writ. The plaintiff claims the goods by virtue of a bill of sale from the defendants in the writ. The bill of sale and delivery of the goods under it were *prior* to the attachment by the officer.

The defence set up is *fraud.*

The jury have found that there was no fraud, and the court will not disturb the verdict unless they shall perceive, from the evidence, that the jury clearly erred.

One of the badges of fraud relied upon is that the goods were sold without an account of stock being taken. Such is not unfrequently the case in a sale to secure a creditor, or rather to *pay* a creditor when the debtor is in failing circumstances, and the goods are insufficient to pay the debt.

Besides the plaintiff had, the night before the sale, attached all of the goods to secure his claim, and believing that he could not make out of the *whole* more than enough to satisfy his claim, he refused to relinquish his attachment unless he could have a bill of sale of the *whole*. By the consent of both parties he took a bill of sale for the *whole*, and gave up notes to the amount of seven hundred dollars.

The second badge of fraud relied upon, is that the goods are worth much more than the sum paid for them, to wit: seven hundred dollars. Defendant's own testimony shows that they were worth much less. Defendant says he sold them to the best advantage he could and all he got was three hundred and seventy-five dollars, and the net proceeds only amounted to two hundred and eighty-nine dollars, after deducting the expenses of sale.

But the defendant contends that between the date of the bill of sale and the attachment by the defendant the plaintiff *secretly abstracted* a portion of the goods. He testifies that he did not, and several witnesses testified that they noticed no change in the goods. Besides, the plaintiff could have no motive in secretly abstracting his *own* goods. They were his by absolute bill of sale, and he had left an agent, Miss Sawyer, to sell them out. If any goods were abstracted after the sale and before the attachment by defendant, they were abstracted by the defendants in interest. They were about the premises, while the plaintiff was at home in Liberty.

But if goods were abstracted by the plaintiff, or by the defendant in interest, or by any other person, still it is apparent from the testimony that the sum of seven hundred dollars could not have been realized from the *whole* goods sold under the bill of sale. They were *millinery* goods, many of them old and shop worn. They were variously estimated by witnesses from eleven to thirteen hundred dollars, *nominal* value. The goods which defendant admits he took and sold were estimated, even by the defendant's witnesses, at eight or nine hundred dollars, estimating them at

cost prices. Yet the defendant only realized from the proceeds of the sale two hundred and eighty-nine dollars, less than one-third of the *nominal* value. When a failure takes place *such* goods cannot be sold for anything like their nominal value. The evidence shows that he paid too much for the goods. She says the goods sold her by defendant at Boston prices amounted to eight hundred dollars.

Third badge of fraud relied upon is that plaintiff's vendors, or one of them, acted *fraudulently*. I need not argue the question whether they did or not, as there is no evidence in the case tending to show that the plaintiff took any part in it, or even was cognizant of it, even if such were the fact.

The instructions were all given as requested, and only *one* legal question arises in the case, and that is a question of the admissibility of evidence. The plaintiff's counsel offered to prove by the plaintiff himself that in the purchase of said goods he acted in good faith, and had no intention of defrauding creditors. Defendant's counsel objected, but the court overruled the objection.

It has been settled by this court that a witness may testify as to his *purpose* or *intention*, when he did an *act* which is subsequently brought into question. Thus a pauper may testify with what *intention* he left a town and took up his residence in another town. So overseers of the poor may testify with what *intention* they furnished supplies to a pauper. Corinna v. Exeter, 13 Maine R., 321. It would be a very singular rule of evidence that would preclude a witness from testifying to his intention in doing a certain act when the point in issue involves his *intentions* at the time of doing the act.

A. P. Gould, counsel for the defendant.

Such are the facts in this case that it is impossible to avoid the conclusion that the jury misapprehended the evidence and the instructions of the court.

The law relating to fraudulent sales of property is not quite as simple and as readily understood by a jury, as that of most other cases.

I know the reluctance of the court to set aside verdicts, as against evidence, and agree that in a balanced case, or one where the preponderance of evidence is not manifestly disregarded, the opinion of the jury should stand; but this court sits to correct the errors, at trials, and to see that no party suffers from the mistakes of the court, or the impulses of prejudice and passion, or the inattention of the jury; and it is as important to the administration of justice, that the mistakes of the jury should be corrected, as those of the court. This is of the class of cases in which the losing party would have been entitled to a second jury trial, under our former judicial system, by appeal; and I submit that under the present system, there should be less hesitation to set aside a verdict where there has been but one jury trial.

Fears as to the superiority of the present over the old order of things, have been sometimes quieted by the assurance that the *court* would see to it that parties did not suffer by the errors of a *first trial.*

In Wells v. Waterhouse, 22 Maine R., 131, this court held that if the verdict was clearly against the weight of evidence, they would set it aside.

In Goddard v. Cutts, 11 Maine R., 440, 443, the court held that "when called upon to decide whether the verdict is or is not against the weight of evidence, it must be weighed according to the rules established by law."

This may be an important consideration in looking at the evidence in this case.

I do not propose to examine very minutely the evidence. It cannot be necessary. There are certain facts undisputed, which, when allowed their proper legal effect, render the sale of Misses Edwards & Goddard voidable by their creditors.

There are several things in the case which arrest the attention.

Edwards was the *brother* of one and *cousin* of the other girl. He had kept close watch of them during the sixteen or seventeen months in which they were in trade, and knew

as much about their affairs as they knew themselves. He knew that they were largely insolvent; this he confesses.

His demands against them were less than seven hundred dollars, while their other indebtedness was nearly three thousand dollars. All the property they had was about seventeen hundred dollars' worth of goods in the store, about one hundred dollars in cash, and a lot of goods which were secreted with his knowledge, if not under his advice, two months before the sale to him; the value of which we failed to prove. They were afterwards clandestinely carried away from Augusta by plaintiff, and secretly taken to Newburyport, and there sold, at a sacrifice, by his sister.

Being sent for by his sister, and informed that the girls' creditors are pressing them, he goes down, and instead of taking security on their property, leaving the balance for honest creditors, he allows the girls to keep the money which they had, and the secreted goods, which he knew the creditors would not find, and takes an absolute conveyance of all the goods, furniture, and everything attachable in the shop. The value of which was not less than seventeen hundred dollars. He claims that they were worth about that in his writ; and the other proof shows conclusively, that the goods were worth from fourteen hundred to two thousand dollars, the witnesses varying. He thereupon took possession, and resisted the claims of creditors, claiming an absolute title to the whole property.

Lastly, and most important, he made an agreement to pay back to the girls the excess of the value of the goods, over his demands, *secretly*, or did and said what was tantamount to it.

Conscious that the possession of so large an amount of property would be evidence of a fraud upon the creditors, he secretly carried away a portion of the goods, after he got possession, and before the defendant went in, as an attaching officer.

These facts are all either undenied or are established by the weight of evidence.

Now what are the legal rights of the defendant under such circumstances. He justifies as an officer holding the writ of Palmer & Co., and other *bona fide* creditors of the firm of Misses Edwards & Goddard.

"If there is mingled in the contract an attempt to delay or hinder other creditors, or to protect the property from them, beyond what may be necessary for the security of the mortgagee, the contract will be deemed to be fraudulent and void," is the language of this court in Brinley v. Spring, 7 Maine R., 241, 252.

A fortiori, if such intent was shown, in case of a sale, absolute on its face, and held up to other creditors as such.

If one has an *honest* claim against an insolvent person, and undertakes to get security for a much larger amount, he thereby renders his security *void* as to that part of the claim which *is* honest, as against *bona fide* creditors. "*The fraud corrupts and destroys the whole.*" Fairfield v. Baldwin, 12 Pick. R., 388, 398.

And upon the same principle, the plaintiff, by his act of taking a much larger amount of goods than was sufficient to pay his debt, rendered the sale to him void, without taking into view the fact of a *secret trust.*

The law requires a man who has a claim against a person whom he *knows* to be insolvent to deal fairly and *honestly* by the other creditors, and will not permit him to take *all* the property of the insolvent, (if it is more than enough to pay his debt) whether it be by way of *security* or *satisfaction.* And if he does so it is a *fraud* upon the others, and the sale may be avoided by them.

It was contended by the plaintiff's counsel at the argument to the jury that the sale ought to be sustained to the amount of plaintiff's demand, even if he did procure a much larger amount of goods than was necessary to secure it; and I am inclined to think the jury acted upon the suggestion. But this would be holding out a strong inducement to fraudulent concealment or covering of the property of insolvent

persons; giving the party the chance to gain without the liability to loss, even if detected. The law is directly the reverse. It offers no such temptation to fraud.

In Holland v. Crafts, 20 Pick., 321, 338, it is held that "at law a conveyance cannot be held good in part and bad in part."

That was a case of fraudulent conveyance where a good consideration in *part* had been paid. The court held that the intent to defraud *in part* rendered the contract voidable.

Even "if a conveyance is made by one insolvent upon a good and *sufficient* consideration advanced to him, but not *bona fide*, and the purchaser is conversant thereof, it is void against creditors. How v. Ward, 4 Maine R., 207. See 2 Starkie's Ev., 616, et. seq. (4 Am. ed.)

"Where there is no dispute about the facts whether a conveyance is fraudulent or not is for the court." Jackson v. Mather, 7 Cow., 301. And, as I contend, there are facts *not disputed* in this case which render the sale void. Rea v. Alexander, 5 Iredell, 644.

"If a debtor, unable to pay his debts, in contemplation of approaching death, makes provision for his wife by the sale of a portion of his property for that purpose; though the purchaser agrees to pay *bona fide* debts with a part of the consideration, such sale is illegal and void as to creditors." Welcome v. Batchelder, 23 Maine R., 85.

WHITMAN, C. J., in that case, p. 89, remarks: "His agreeing to pay *bona fide* creditors with a part of it cannot alter the character of the transaction. If he had been content to purchase *simply enough* to indemnify himself for the liabilities he was under for his brother (the debtor) and for that purpose *solely*, it would have been otherwise."

If a man at the point of death may not make a sale of part of his property and receive part of the consideration *down*, or in the payment of a prior indebtedness to the vendee, and agree that the other part shall be paid to his widow after his death; if such a sale be declared void by this court,

will it uphold the plaintiff in procuring from the debtors in this case a sale of all their visible property, being twice enough to pay his debt, when it is proved by *undisputed* evidence that, whatever he realized from the goods which he was to protect from attachment, over the amount of his debt he would *refund to them?* And when he held himself out to the creditors of his vendors as the *bona fide* owner for full value, and that the girls had no interest in them? Would one who makes a secret provision for himself, at the expense of his creditors, stand any better in the eye of the law than one who made a provision for his widow? Let not the law be thus reproached.

It has been held in New Hampshire that "A bill of sale, absolute on its face, but attended with a secret trust, is fraudulent and void as against subsequent creditors even; and that the trust being admitted or proved, the fraud is an *inference of law,* which the court is bound to pronounce." Paul v. Crooker, 8 N. H. R., 288.

So, also, a conveyance *absolute* on its face, accompanied with a verbal agreement that it shall be *reconveyed* on payment of the purchase money, is void as against creditors. Winkley v. Hill, 9 N. H., 31; Tifft v. Walker, 10 N. H., 150.

Is a verbal agreement, made at the time of a sale of goods, absolute on its face, that they shall be disposed of by the vendee, and the proceeds, after satisfying the demand of the vendee, be paid over to the vendor, any less fraudulent?

See, also, Smith v. Lovell, 6 N. H., 67.

If in any way it is so arranged between vendor and vendee that the excess of value shall go to the vendor, it is a fraud upon his creditors. So all the cases upon this subject show. And although in this state it is a question of fact for the jury whether there is a secret trust; that fact being ound, or admitted, the law declares the sale void. 5 Maine R., 295; 23 Maine R., 221, 228.

It cannot be claimed for plaintiff, in the case at bar, that the sale to him was a mortgage, for he claimed an absolute

title to them, not simply an interest in them to the extent of his demand.

In Whittaker v. Sumner, 20 Pick., 399, 404, "where a debtor gave his creditor a note for the amount due, and delivered to him goods and a bill of sale for a larger amount as security for the note, it was held that the bill of sale was fraudulent, as a transfer of the property against creditors."

In Shaffer v. Watkins, 7 Watts and Serg., 219, it is held that "A transfer of personal property which creates a trust, whether *secret* or *avowed*, in favor of the grantor, renders the transaction fraudulent and void, in legal contemplation, even though there may be mingled with it provisions in favor of creditors."

So in Jackson v. Bush, 20 Johns., 6, court held that "a conveyance by a person indebted at the time, absolute *on its face*, but intended to enable the grantee to sell the land and pay the debts of the grantor, *rendering the surplus, if any, to him*, is void as against his creditors."

In Clark v. French, 23 Maine R., 221, WHITMAN, C. J., p. 228, "If a deed be not *absolute in fact*, though in *form* it may be so, and a secret trust and confidence exist for the benefit of the vendor, in such case it should not only be held void against precedent, but *subsequent* creditors." This recognizes a secret trust as conclusively establishing the *mala fides* of the contract.

As to the duty of the *court* in these cases, see, also, Sherwood v. Maverick, 5 Greenl., 295, 297.

TENNEY, C. J. It is not in controversy that on June 11, 1855, R. G. Edwards and H. E. Goddard, who were in trade in the city of Augusta, were indebted on notes of hand, to the plaintiff to the amount of about the sum of seven hundred dollars; that on the evening of that day Joshua L. Heath, an officer, attached the goods of the debtors in their store, upon a writ in favor of the plaintiff and by his direction, and closed the store and took the key; that early the succeeding

morning the officer was in the store with the plaintiff and Edwards and Goddard; an account of the goods were represented as having been taken by the latter, amounting nominally to the sum of eleven or twelve hundred dollars, and they were transferred and delivered to the plaintiff without any particular examination on his part, of the quantity and quality, by a bill of sale, absolute in its form, and as consideration therefor, he surrendered his notes.

Subsequently the goods sold to the plaintiff were attached on writs in favor of creditors of Edwards & Goddard, who are not denied to be such in reality, and the officer took the same into his possession. The present action is trespass against the defendant, for taking the goods in favor of the plaintiff. The right to recover is resisted on the ground that the sale to the plaintiff was made by the vendors for the purpose of delaying and defrauding their creditors, and the plaintiff, knowing this purpose, aided them in carrying it into execution.

Much evidence was introduced at the trial on the question as to what was the purpose of the parties to the sale. The plaintiff being a witness, it was proposed by his counsel to ask him, if his intentions and purposes were simply to get security. The defendant's counsel objected to his testifying to his motives, and contended that he could only be permitted, like any other witness, to testify to acts done, and not to the operations of his mind. The judge overruled the objection, so far as to allow the plaintiff's counsel to ask him the following question: "Had you any other purpose or design, in instituting that suit, and taking the bill of sale, except to obtain payment of the notes which you held against the company?" Against the defendant's objection, he answered, "I had not. I had no other purpose or motive than to secure my debt."

The sale of the goods was so perfected that as between the parties to it, it was valid. The property having been delivered to the plaintiff, whether it was effectual to defeat he claim thereto, of attaching creditors, must depend upon

the motives of the parties to the transaction. Of these motives the plaintiff and his vendors alone had full and perfect knowledge. Under the law as it was, where parties to the suit were incompetent as witnesses, in such a case as the present, the vendor was allowed to testify, on the ground that his interest was balanced. And it was common practice to interrogate him touching his purpose in making the sale. That purpose being a material matter, it was proper to ascertain it, in any manner suited to show it. One not a party to the sale could not know the motives of those who were parties, and such question to him was improper; he could testify to facts within his own knowledge, having a tendency to expose the designs of those who participated in the transaction. No good reason is perceived for excluding absolute knowledge of those who possess it, and permit the same to be inferred from acts in some measure suited to disclose it. The plaintiff was a competent witness, under existing laws, and he was properly allowed to state the design which he had in becoming a purchaser of the goods in controversy.

The defendant relies upon his motion to set aside the verdict, as against the evidence introduced. The facts and circumstances attending the sale of the goods, shown by the testimony generally, is of a character which may well awaken a suspicion that the transaction was fraudulent against the creditors of the vendors. These facts and circumstances, so far as they tend to indicate the motives of the parties to the sale, come from a source where actual knowledge of their designs must have existed, and leaves so little doubt that the sale set up was invalid in law, that we think the jury must have misapprehended the evidence, or disregarded their duty.

Exceptions overruled, Motion sustained,
Verdict set aside, and new trial granted.

CYRUS TRUE *versus* FREEMAN MCGILVERY.

When the defendant was master and part owner of a vessel, and the plaintiff part owner of the cargo, he may maintain an action against the defendant for his share of the proceeds of the sales of the cargo.

Where one performs labor for the benefit of another under his oversight and direction, the one who receives the benefit of the labor should pay for it, and a promise to do so may be inferred.

EXCEPTIONS were taken to the rulings of Hathaway, J., who tried the cause at *Nisi Prius*, by the defendant, the verdict being for the plaintiff.

This is an action of the case to recover for certain labor, and for one eighth of the proceeds of the sale of a cargo of lumber and other articles shipped on board of the bark J. Merithew, the defendant being master and part owner of the said bark J. Merithew.

It was proved that the plaintiff went out to California in the bark, that he owned one eighth of the cargo, the defendant one eighth, and that the balance was owned by several other owners; and that he performed certain labor or services in discharging the cargo at California.

The defendant's counsel requested the court to instruct the jury that if they should find that the cargo was owned by the plaintiff and defendant, and others as part owners of the same, and that the accounts between the part owners relative to the sales of said cargo, had never been adjusted, and a balance struck of the amount due from the defendant to the plaintiff, then this action could not be maintained in its present form, to recover his part of what might be due from the sales of the cargo.

The court declined so to instruct the jury, and instructed them that if they should find that the defendant had not accounted to the plaintiff for all of his share of the proceeds of the sales of said cargo, then they would find for the plaintiff for such sum as they should find due and unpaid. The

defendant's counsel also requested the court to instruct the jury that if they should find that the said master was hired and sailed said bark by the month, then he would not be liable to the plaintiff for any labor or services rendered in discharging said cargo, beyond his share in the cargo, unless he had agreed so to do.

In answer to this request the judge instructed the jury, that for whatever services the plaintiff rendered in discharging the cargo over and above his part thereof, the defendant would be liable in this action for the full amount of what these services were reasonably worth, provided such labor or services were rendered by defendant's request. That it was not necessary to prove an express request and promise to pay. That such labor or service might have been performed under circumstances from which such promise might be inferred. And if the proofs concerning acts, condition and conduct of the parties at the time where the labor or services were performed, and the whole evidence in the case satisfied the jury that the labor or service was performed under circumstances from which a promise to pay should be implied, such implied promise would have the same effect in this case as an express promise.

The plaintiff owned no part of the bark J. Merithew.

N. Abbott, counsel for the defendant, submitted the following argument in support of the exceptions:

The action is assumpsit to recover the plaintiff's share of the proceeds of a cargo of lumber, owned by *plaintiff* and *defendant* and *others*, as *tenants in common*; and for labor performed in discharging said lumber, at the port of discharge, the defendant being master of the vessel as well as part owner of the lumber.

The defendant's counsel requested the court to instruct the jury that if they should find that the cargo was owned by the plaintiff and defendant and others, as *part owners* of the same, and that the accounts between the part owners relative to the sales of said cargo had never been adjusted,

and a balance struck of the amount due from the defendant to the plaintiff, then this action could not be maintained in its present form to recover the plaintiff's *part* of what might be due from the sales of the cargo. The court declined to give said instruction, and instructed the jury that the action could be maintained by the plaintiff for his share of the proceeds of the sales of the lumber.

This was erroneous. It has been repeatedly decided by this court, that *assumpsit* is not the proper action in such a case; that the action of *account* is the proper remedy.

The court also erred in declining to give the requested instruction relative to the defendant's liability to pay the plaintiff for his services in discharging cargo. The labor which plaintiff performed in discharging the cargo, was performed for the owners. The defendant, not running the vessel on shares, but being hired by the month, as master, is only liable, if liable at all, for his share, unless he has made himself liable by special agreement, or in some way requested plaintiff to perform the labor. The plaintiff being a part owner himself of the lumber he aided in discharging, surely the law will not *imply* a promise on the part of another part owner to pay him for his services, and especially the *whole* amount of his services.

White & Palmer, counsel for the plaintiff.

HATHAWAY, J. The bark J. Merithew was owned by the defendant and others. The defendant was master, and sold her cargo, one eighth part of which was owned by the plaintiff.

The defendant rendered an account of the sales of the cargo, to the owners of the bark, showing a balance, in his hands, due to the plaintiff, for which, if it were not paid, either he was liable or all the owners were jointly liable to the plaintiff, and upon the pleadings in the case, it is immaterial whether the defendant alone was liable, or the owners were jointly liable, for the defendant, being master, and one

of the owners, was sued alone, and pleaded the general issue and payment.

The plaintiff had no interest in the bark, and had no occasion for further account. After the cargo had been converted into money, his part of the net proceeds of the sales was mere matter of computation.

Concerning the second request of the defendant's counsel: When one man works, as a servant, for another, and for his benefit, and under his oversight or direction, he who receives the benefit of the labor should pay for it; and in the absence of proof of a special request or promise to pay, such request or promise may be inferred. 2 Greenl. Ev., sec. 108, 6th ed.

Exceptions overruled.

GOODENOW, J., *dissenting.* In my opinion, the second requested instruction should have been given. The labor performed by the plaintiff in discharging the cargo was for himself and all the other owners. He could only call on each for a contribution, according to his interest in the cargo. The obligation was several and not joint, the plaintiff being himself a part owner. He could not sue all, himself included.

The instructions given were not equivalent to those requested. They were not sufficiently specific. They do not state what the evidence was or the circumstances, from which the jury could imply that the defendant promised to pay the plaintiff, not only for himself, but for all the other part owners; I think the exceptions should be sustained.

CLARINDA GRANT *versus* ANNANIAH DODGE.

The wife shall not be endowed when the husband is seized but for an instant, though a continued seizin, however short, entitles her to dower.

If the tenant would defeat the demandant's claim of dower the burden is upon him to prove that the deed and mortgage relied on constituted one transaction.

This is an action of DOWER.

The facts in the case were agreed by the parties, from which it appears that,

The premises in which dower is claimed were conveyed to Willam Grant, then the husband of plaintiff, December 24, 1847, by one Michael Walton, and that said Grant *reconveyed the same to said Walton in mortgage, on the same day, to secure the payment of a note for forty-seven dollars eighty cents, papable January* 1, 1849.

William Grant conveyed the premises by deed of quit claim to defendant, August 27, 1851, and on the same day one Barzilla Hopkins paid and took up the note secured by the aforesaid mortgage, Grant to Walton, and Sophronia Walton on the same day gave to defendant a quit claim deed of the premises, and on August 25, 1851, Barzilla Hopkins gave the defendant a warrantee deed of the premises. William Grant gave Barzilla Hopkins a deed of the premises, January 3, 1851. The plaintiff did not release her dower in any of the deeds. William Grant died, and the plaintiff seasonably demanded her dower. If in the opinion of the court the action is maintainable upon the foregoing statement, defendant is to be defaulted and plaintiff have judgment, otherwise plaintiff is to be nonsuit.

N. H. Hubbard, counsel for the plaintiff.

C. H. Pierce, counsel for the defendant.

HATHAWAY, J. When the husband is seized, for an instant, of this seizin the wife shall not be endowed, but if he con-

tinue seized, for any portion of time, however short, the wife is entitled to dower. The seizin for an instant is where the husband, by the same act, or by the same conveyance, by which he acquires the seizin, parts with it. Holbrook v. Phinney, 4 Maine R., 566; Stanwood v. Dunning, 14 Maine R., 290; Gammon v. Freeman, 31 Maine R., 243.

The demandant's husband, William Grant, became seized, by virtue of his deed from Walton. On the same day that he received his deed, he reconveyed the premises, in mortgage, to secure the payment of a note, which may have been for the purchase money, or for something else.

The mortgage may have been executed when he purchased the land and received his deed, or subsequently.

If the tenant would defeat the demandant's claim of dower, the burden is upon him to prove that the deed and mortgage constituted one transaction, which the facts agreed do not show, and when a case is presented on facts agreed, any fact which might be pertinent to the question submitted, and does not appear, is presumed not to exist.

Tenant defaulted.

TENNEY, C. J., and RICE, J., concurred; CUTTING, J., and GOODENOW, J., concurred in the result; APPLETON, J., did not concur.

WILLIAM THOMPSON *versus* WILLIAM MANSFIELD.

A *partial* failure alone of title to land conveyed constitutes no defence to a note given in payment of it.

This is an action of assumpsit upon a promissory note, and comes before the full court upon REPORT by APPLETON, J.

The facts contained in the report are very clearly recited in the opinion of the court, and a more extended statement is unnecessary for a full understanding of the case.

N. H. Hubbard, counsel for the plaintiff.

J. G. Dickerson, counsel for the defendant.

RICE, J. Assumpsit on a promissory note, the execution of which is admitted.

The defence is a failure of consideration.

The parties are coterminous proprietors, having derived their title to their respective lots from the same original source; the defendant's grant having been first made by the original proprietor. The plaintiff claims that the defendant had encroached upon his lot, and was then in the occupation of a portion of his land. The matter was referred by parol, and the referees found that the defendant had encroached upon the plaintiff, and for the land which he thus had in possession claimed by the plaintiff the note in suit was given, the plaintiff giving the defendant a warranty deed of the same. The defendant now alleges that he acted under a mistake of fact as to the location of the divisional line; that he, in fact, had none of the plaintiff's land in his possession, and therefore the note in suit was wholly without consideration.

The defendant's lot is sixty feet wide upon the street, and one hundred feet deep. Two surveys of the line in dispute have been made; one by Mr. Treat, by which the settlement was made out of which the note originated; the other by A. P. Palmer, Esq., by order of court. Jones' corner seems to have been assumed as a starting point by both surveyors, and the different results to which they arrive was manifestly occasioned by the different point at which they located that corner. Mr. Treat found that corner by surveying the side lines of the lots in that vicinity; Mr. Palmer by having it pointed out to him by Mr. Jones. Treat's survey brought the dividing line between the parties about five feet further south than Palmer's. The evidence reported does not show very clearly which of these surveys is entitled to preference. But there is another piece of testimony which conclusively settles the rights of the parties so far as this case is concerned.

The defendant testified that he occupied the south-east corner of his lot by putting a building on the same immediately after he purchased it; that when he put another story upon this building the old stake in that corner was standing, and the top of it was crowded south-easterly by the building, possibly an inch or two; that a Mr. Grant, who put this story on the old building, measured from this corner to the stake in the north-east corner of the lot, on the road, and found it to be sixty feet, and that the part of the building which stands upon the land in controversy, was put up about eighteen years ago.

Mr. Palmer testified that the defendant's building is sixty feet, four and a half inches long on the road. Now assuming that the south-east corner of the original building and the stake, of which the defendant testifies, were in the south-east corner of his lot, or even an inch or two over it, which the plaintiff does not concede, his building will then extend upon the land of the plaintiff by from two and a half to four inches. This is decisive of the case, because the failure of title would not be total; it being the settled law of this state that a partial failure alone of title to land conveyed constitutes no defence to a note given in payment of it. Morrison v. Jewell, 34 Maine R., 146; Jenness v. Parker, 289.

Defendant defaulted.

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

ROBERT DICKEY AND WIFE *versus* MAINE TELEGRAPH CO.

An accident having occurred by contact with a telegraphic wire across a highway, the plaintiff must not only prove that the injury was occasioned by the fault of the defendant, but that there was no neglect or want of ordinary care contributing to the injury on his part.

This is an action on the case to recover damages sustained by the female plaintiff, by reason of an obstruction placed in

the highway by the defendants, and comes before the full court upon exceptions and motion to set aside the verdict, which was for the plaintiffs.

The evidence is reported by APPLETON, J. The exceptions to the rulings of the judge who tried the cause, are not considered by the full court, the case being decided upon the motion.

N. Abbott, counsel for the plaintiffs.

A. W. Paine, counsel for the defendants, upon the motion for a new trial, argued, that,

The facts detailed by the driver, and which are undisputed, afford an abundant defence to plaintiff's right to recover, and entitle defendant to a new trial. The testimony referred to shows that the driver,

1. Knew before he approached the obstruction that the obstruction existed, and that it was a dangerous one.

2. That he heedlessly rushed upon it.

3. That after having encountered it, he *rashly* and *maliciously* continued to press his stage upon it, and thus caused the accident complained of.

That these propositions are true, follows most conclusively from the facts detailed, viz.:

That he knew for several days before that the wire did so hang down as to catch his stage; that he was accustomed during that time, at every passing, to lift the wire to let him pass; that he had sent word up to the operator six or seven times, to fix the wire; that on this occasion he comes in contact with the wire, lifts it up, and sees it fall back before the stage, lets it remain; sees the ineffectual efforts of a passenger lady to clear the stage from it, but does not assist, but lets it still remain in front of the stage; that he gets off the stage and delivers the mail, awaits its being overhauled, and helps in other passengers; that he then remounts the box and awaits the delivery of the mail bag from the post office; that he permits the bag to be thrown on the box, while the wire is still in contact with the stage, though he knows the

horses take that as a sign for starting as well as they would a blow from the whip.

These facts show a most conclusive case of heedlessness and carelessness entirely incompatible with the right of plaintiff to recover.

But we go further and allege a *willfulness* on the part of the driver, and a *maliciousness* which was the cause of the accident.

This is plainly shown by the facts already cited, and is made conclusive by the threat which he admits he made to the operator the evening before, *that unless the wire was fixed he would break it.*

The operator not coming according to direction, the next morning being the time of the accident, he proceeded to carry his threat into execution. This was the whole cause of the catastrophe. Why otherwise did he permit the wire to remain as it did?

These facts are infinitely stronger and more impressive than those in Raymond v. Lowell, 6 Cush., 535-6, where the court were impelled to grant a new trial on a similar motion.

Here then is no contradiction about the facts, and a plain question of what is due care is presented. That, under such circumstances, we say is a case where the court are justified and authorized to order a nonsuit, or to instruct a verdict for defendant.

Hence we say not only the *motion* but the *exception* also lies.

In the matter of this motion the following principles of law are relied upon.

1. If the party *contributed* to produce the accident, he cannot recover, and the burden of proving that he did not is on the plaintiff. Kennard v. Burton, 25 Maine R., 39, 49; Morse v. Abbot, 32 Maine R., 46; Farrar v. Green, 32 Maine R., 574; Raymond v. Lowell, 6 Cush., 535-6.

2. If the accident was the combined effect of an accident and obstruction, and the damage could not have been suffered but for the defect, yet the defendant is not liable, if

the accident be one against which common prudence and sagacity could have foreseen and provided. Palmer v. Andover, 2 Cush., 608–9.

3. "If the parties own negligence or rashness or want of ordinary care *concurred* in producing the injury, he cannot recover." Raymond v. Lowell, 6 Cush., 535.

5. The degree of care which a driver is bound to exercise in all cases must be in proportion to the risk or danger which he knows is in his way, or which he is about to encounter. Jacobs v. Bangor, 16 Maine R., 187.

6. And he is bound to exercise that degree of watchfulness and *caution* which prudent men are accustomed to exercise under the circumstances. Jacobs v. Bangor, 16 Maine R., 187.

7. So long as there is *any doubt* whether the fault was exclusively the towns or not, the plaintiff cannot recover. Libby v. Greenbush, 20 Maine R., 47.

No subject is less correctly understood by the community generally, than this of the care required of a driver in meeting obstructions in a highway, and especially on the part of drivers of the United States mail. "The mail must go," *maugre* all obstructions, is the common doctrine, and whatever impediments may be presented, the driver has a right to ride over them, at the expense of the town. That is the idea so generally prevalent, and that doctrine was the basis of the verdict against which we complain. This sentiment it is the duty of the court to correct, and that it may be so by a lesson promulgated on this occasion, is respectfully urged by the defendant company.

HATHAWAY, J. In May, A. D. 1854, a stage-coach, in which the female plaintiff was traveling, on a highway in Northport, in the county of Waldo, came in contact with a telegraph wire extending across the way, and was overset, and she was injured thereby.

The wire was owned and placed there by the defendant company, and "became slack, and drooped so low" that the carriage could not pass under it.

The plaintiffs brought this action to recover pay for the damages sustained.

The case is presented on the defendant's motion for a new trial, on the ground that the verdict against them, was against the evidence, and also upon exceptions.

It was not sufficient for the plaintiffs to prove that the defendants were in fault. To entitle themselves to a verdict, the plaintiffs were bound to show that there was no neglect, or want of ordinary care, contributing to the injury, on the part of the female plaintiff. She was required to exercise due and proper care to protect herself from injury. If her own negligence, or rashness, or want of ordinary care, concurred in producing the injury of which they complain, the plaintiffs ought not to have recovered damages for it, against the defendant company.

The burden of proof was on the plaintiffs to show, affirmatively, the exercise of such due and proper care and vigilance, on her part; and the defendant company allege that the verdict was against the evidence on this point. If the driver was guilty of neglect or want of ordinary care, the plaintiffs would be equally affected thereby, as if the female plaintiff were the driver. To prove the manner in which the accident, causing the injury, happened, the plaintiffs introduced as a witness, the driver of the carriage, David Harding, and the deposition of Henry Brown. The testimony of Harding, *as reported* in the case, not only fails to show that he used ordinary care and prudence, as a driver, at the time of the accident, but it contains plenary evidence of gross negligence and carelessness, or rashness, on his part, which manifestly contributed to the accident and the injury; and the deposition of Brown in no manner relieves the case from the effect of Harding's testimony. We think the verdict is very plainly against the evidence. It is not necessary to consider the exceptions.

Motion sustained.

Verdict set aside, and new trial granted.

ROYAL HERRIMAN, JR., *versus* NATHANIEL STOWERS AND ALS.

The provisions of the statute, chap. 14, sec. 56, afford no protection to assessors of a corporation in assessing a tax which they were not obliged by law to assess.

Where assessors were legally chosen and the tax legally assessed in form, but against an inhabitant of another town, they have no jurisdiction, and are not protected by their own personal faithfulness and integrity.

REPORTED by HATHWAY, J.

This is an action of trespass against the defendants as assessors of the town of Prospect. The assessors were legally chosen, and made their assessment in due form. The plaintiff was arrested, and paid the tax, under protest, to relieve himself from imprisonment. The presiding judge, being of opinion that the statute was a sufficient protection to the defendants, and that upon the evidence the action could not be maintained, directed the jury to find their verdict for the defendants, and to find specially whether on the first day of May, 1852, the year for which the tax was assessed, the plaintiff resided in Prospect or Searsport.

The jury returned a verdict of not guilty, in accordance with the direction of the court, and found specially that the plaintiff, on the first day of May, 1852, was a resident of Searsport.

N. Abbott, counsel for the plaintiff.

The jury have found that the plaintiff, at the time the tax was assessed, was a resident of Searsport, and not liable to taxation in Prospect. The judge, being of the opinion that the assessors were exonerated from all liability by virtue of chap. 14, sec. 56, of the Revised Statutes, instructed the jury that the action could not be maintained, and that they must render their verdict for the defendant; but at the request of counsel the jury were permitted to settle the question of residence; and they have settled it in favor of the plaintiff. The only question in this case is, will *trespass* lie against the

assessors of a town for assessing a tax against a citizen of another town, who is *not* liable to taxation by them, and who has been arrested by the collector and compelled to pay the tax to save himself from imprisonment. The statute does not exonerate assessors for the assessment of a tax against a citizen of another town, or state, or country, who is not liable to taxation by them. It only exonerates them from all liability on account of the *assessment* of any tax *which they are by law required to assess.* The language of the statute is, "the assessors of towns, plantations, parishes, and religious societies, shall not be made responsible for the assessment of any tax which they are by law required to assess; but the liability shall rest solely with said corporations; and the assessors shall be responsible only for their own personal faithfulness and integrity."

Are assessors *required by law* to assess a tax against citizens of other towns, who have no property in the town where the assessors live, and who are not liable to be assessed? If so, then they are required by law to assess citizens of other states and nations. But the last clause in section 56, referred to, says, "the assessors shall be responsible only for their own personal faithfulness and integrity." That is a part of the whole section, and is qualified by what precedes it. It simply means that the assessors shall be responsible only for their own personal faithfulness and integrity for the assessment of a tax which they are by law required to assess.

Such is evidently the proper construction of the statute. The Supreme Court of Massachusetts have given such a construction to a statute precisely like our own, which that state passed in 1823. See chap. 138, sec. 5, of the statutes of Mass.

In 4 Pick., 399, the court say, that "the assessors of a religious society are liable in trespass for the assessment of a tax on a person who is not a member, and that they do not come within the provisions of the act of 1823, making them responsible only for their integrity and fidelity."

In 5 Pick., 498, the court say, that where the assessors assess a tax against a person *not liable to assessment*, he may maintain trespass against the assessors, or he may sue the town or society for the money.

J. G. Dickerson, counsel for the defendant, relied upon R. S., chap. 14, secs. 17, 18, 19, 20, 21, and cited Stickney v. Bangor, 30 Maine R., 410; R. S., chap. 6, sec. 62; Trafton v. Alfred, 15 Maine R., 262; Tucker v. Wentworth, 35 Maine R., 396; Mosier v. Roby, 11 Maine R., 135; Greene v. Bailey, 12 Maine R., 254; Withington v. Eveleth, 7 Pick. R., 106.

RICE, J. Sec. 56 of chap. 14, R. S., provides, that the assessors of towns, plantations, parishes and religious societies shall not be made responsible for the assessment of any tax which they are by law required to assess; but the liability shall rest solely with said corporations; and the assessors shall be responsible only for their own personal faithfulness and integrity. By the act of amendment, these provisions are extended so as to include school districts.

It is admitted that the defendants were legal assessors, and that the tax against the plaintiff was legally assessed.

The case also shows that the plaintiff was arrested on a warrant duly issued to the collector, and that to procure his discharge from arrest he was compelled to pay this tax, which he did under protest. The jury found that the plaintiff, at the time the tax was levied and assessed, resided in Searsport.

Without statute protection, under the facts as they exist in this case, the defendants are manifestly liable. Does the statute protect them? Was the tax against the defendant one which they were by law required to assess? Clearly not. They could only assess the inhabitants of their town, and the property within it. Beyond this, as assessors, they have no jurisdiction. This provision, therefore, does not protect them. Gage v. Currier, 4 Pick., 399; Ingraham v. Daggett, 5 Pick., 451; Inglee v. Bosworth, 5 Pick., 498;

Withington v. Eveleth, 7 Pick., 106; Freeman v. Kenney, 15 Pick., 44; Mosier v. Robie, 2 Fairf., 135.

The remedy by application to the assessors for an abatement applies only where there has been over taxation, where there was authority to tax, and not where the whole tax was unauthorized and illegal. Howe v. Boston, 7 Cush., 273.

The provisions of sec. 62, chap. 6, R. S., were manifestly intended to apply to elections, and do not include the case at bar. Trafton v. Alfred, 15 Maine R., 258.

The case must stand for trial.

COUNTY OF WASHINGTON.

LUCIUS L. KEITH *versus* VASSAL D. PINKHAM.

Common carriers by stage are responsible for the safety of their passengers, where an injury occurs by their neglect, such passenger being in the exercise of ordinary care, and in no way contributing to the injury.

If an agent of a stage line requests a passenger to take an inside seat at his peril, this does not excuse the driver from the exercise of ordinary care.

Such passenger assumes only the peculiar risk of his exposed situation, but not those resulting from the negligence of the driver.

EXCEPTIONS were taken to the rulings of HATHAWAY, J., at *Nisi Prius.*

This is an action brought by the plaintiff to recover damages for injuries sustained by the overturning of a stage-coach, the defendant being a common carrier for passengers for hire.

There was evidence in the case tending to show that Nathaniel Crocker was agent of the defendant, and directed the loading of the coach on the night of the accident; that he, while so employed, requested the plaintiff to take an inside seat in the coach, there being one, but that he declined to do so, and remained upon the top of the coach, and that Crocker then informed him that if he continued in his seat outside, he must keep it at his own risk. There was also evidence tending to prove that said Crocker was in the employ of the defendant as a stage driver, on the route between Cherryfield and Bangor, but not on the route where the accident happened, that *Robert D.* Crocker was the stage agent, but had requested his brother Nathaniel to look after defendant's interest while he, Robert, was absent, and said Nathaniel happened to be at Machias on the night of the accident.

There was no evidence that plaintiff knew that Nathaniel was an agent or claimed to be an agent of the defendant; and there was evidence tending to prove that the plaintiff occupied the seat which he was directed to take by *Withee*, the *driver* of the stage-coach which was overturned. There was evidence tending to show that Keith, the plaintiff, was acquainted with Nathaniel Crocker, and that the defendant had agreed to the employment of Nathaniel Crocker by his brother to act as his agent in the absence of R. D. Crocker. The defendant's counsel requested the presiding judge to instruct the jury that if Nathaniel Crocker, who claimed to be the agent of the defendant, requested the plaintiff to take an inside seat, there being a seat for him inside, and the plaintiff declined to take it, and the said Crocker informed him that if he remained in his seat he must do it at his own risk, that the plaintiff can recover no damages in this action.

But the judge declined giving the requested instruction.

There was also evidence in the case tending to prove that there was want of skill, and negligence in the treatment of the plaintiff's arm, and malpractice by the surgeon who had charge of the case, and of neglect on the part of the defendant in the care of his arm, which was broken, and for the breaking of which the principal damages were claimed. But there was evidence the other way, and evidence tending to prove that the surgeon employed was a well educated physician in the regular practice of his profession; and was at the time of his employment in the case the family physician of the plaintiff.

The presiding judge instructed the jury that if their verdict should be for the plaintiff he would be entitled to re-recover damages for the actual injury occasioned by the defendant's negligence; and that in estimating the damages they should take into consideration the natural and ordinary consequences of the injury received by the plaintiff, such as the loss of time, his necessary expenses for medical aid and his pain and suffering, if any, occasioned by the injury, and also if they were satisfied by the evidence that the injury

received caused a permanent disability they should consider that also as an element in estimating damages, that it was the duty of the plaintiff to have used ordinary care in the employment of a suitable physician, and following his instructions and taking proper care of himself; and if he did so, if by any malpractice of the physician, which would render him liable to the plaintiff for damages, the injury was increased and rendered permanent, that the defendant would not be liable to the plaintiff for any such additional injury caused by such malpractice of the physician; but that the defendant would not be relieved from his liability for the whole damages sustained by reason of any mistake or error of judgment of the physician, unless the mistake or error was such as would enable the plaintiff to sustain an action against the physician for malpractice.

J. A. Lowell, counsel for the plaintiff.

Bion Bradbury, counsel for the defendant.

APPLETON, J. The plaintiff to entitle him to recover, was bound to satisfy the jury that the injury for which he seeks to recover compensation occurred without fault on his part, and through the neglect or want of ordinary care and prudence on the part of the defendant or his servants.

No exceptions have been taken to the instructions given, which relate to the relative duties and obligations of the plaintiff and the defendant. They may thus be assumed to be correct.

The plaintiff, it seems, was riding on the outside of the defendant's coach when the injury in question was sustained. The counsel for the defendant requested the presiding judge to instruct the jury, "that if Nathaniel Crocker, who claimed to be an agent of the defendant, requested the plaintiff to take an inside seat, there being a seat for him inside, and the plaintiff declined to take it, and the said Crocker informed him if he remained in his seat he must do it at his own risk, that the plaintiff can recover no damages in this action."

This requested instruction was declined, and, as we think, correctly. It may be true that the plaintiff, by riding outside, incurred the peculiar risks, if any there were, arising from his exposed situation. But that is all. He did not assume those resulting from the negligence of the defendant or those in his employ. He or they would not be exonerated from their duties, and if the plaintiff was injured through his or their neglect, he being in the exercise of ordinary and common care, in no way contributing to the injury by his position, he might well maintain this suit. The fact that the plaintiff took his position outside, was a circumstance proper for the consideration of the jury in determining whether his negligence contributed in any way to the production of the injury. But the requested instructions took from the jury all inquiries as to the defendant's negligence, and they were rightfully withheld.

The instructions as to damages were correct. If the defendant had desired them to be more explicit or definite in any aspect of the case, he should have made his requests to that end. Being correct so far as given, it is no cause of complaint that supposed instructions, but not requested, might have been given, which would have been correct.

Exceptions overruled.

HIRAM G. WATERMAN *versus* WALTER S. VOSE AND AL.

Where the jury were instructed that if they should find that, by the description of the note in a notice to the endorsers of its dishonor, that the endorsers might reasonably be presumed to know it referred to the note in suit; they might find the notice to be sufficient; such instructions were held to be correct.

The alteration of a note of hand by the maker after it is endorsed, by adding the words "with interest," is material, and if made without the consent of the endorser he is not liable as such, although the alteration be made before delivery.

Waterman *v.* Vose and al.

This action is assumpsit against the defendants as endorsers of a note of hand, the history of which is fully stated in the opinion.

The verdict was for the plaintiff, and

EXCEPTIONS were taken to the instructions of the court by defendants, DAVIS, J., presiding.

Aaron Hayden, counsel for the defendants, in support of the exceptions, argued

1. That the notice being in writing, it was the duty of the court to decide whether it was sufficient, and not leave the question to the jury.

"If it was a point to be settled on inspection of the paper alone, it was more proper that it should have been settled by the presiding judge." Carter v. Bradley, 19 Maine R., 62.

"The endorser stipulating to be responsible *only* on the condition of due presentment and due notice, may insist upon critical proof." Warren v. Gilman, 15 Maine R., 70. And in that case the court held that the judge should have instructed the jury that *seasonable notice had not been given*.

2. The notice was not sufficient, and the judge should so have instructed the jury. "A notice must, by express terms or by natural and *necessary* implication from the language used, contain in substance a true description of the bill, an assertion of due presentment and dishonor of the bill, and that the holder or other person looks to the party to whom the notice is sent for indemnity and reimbursement." Story on Bills, 456. The circumstances of this case furnish the most conclusive argument *against* the sufficiency of the notice.

The note had been altered by adding the words, "*with interest.*" These words are omitted in the notice. How could a jury be allowed to infer that defendants knew they were called upon to pay a note "with interest," when the alteration was made without their knowledge.

In the nature of things they could have no such knowledge. They did not know that there was any note "with

interest," in existence with their endorsement on it, and the notice gave them no information on the subject.

3. The alteration was material, and varied the contract of the endorser, and this discharged them.

The adding interest to the bill for the time it had to run, made a difference of $9,23 in the amount, and the alteration is as material as if the $260 had been altered to $269,23, and if it could be altered to that it could be altered to any sum Nash pleased.

A bill of exchange was held void, *even as against acceptors*, by an alteration in the date, although there was a count in the declaration describing it by the right date, and the bill had been demanded on the day when by the original date it was due, as well as on the day it was due by the altered date, and although it was found to have been altered before it came into the hands of the plaintiffs, who were *bona fide* holders, without any other notice than the appearance of the bill gave. Masters v. Miller, 4 Tenn. R., 320.

Our case is much stronger, for here are endorsers—a contingent liability, and the alteration was made by the maker of the note, at the request and with the knowledge of the plaintiff.

Chitty on Con., 608, 4 Am. ed.; Newell v. Maybery, 3 Leigh., 250; Bayley on Bills, 184; Tidmont v. Given, 1 M. and S., 735; 4 Barn. and Ald., 197; Goodman v. Eastman, 4 N. H., 455; Onthwaite v. Jantly, 4 Camp., 179; Hall v. Wallis, 11 Mass., 309; Bank of America v. Wadsworth, 19 John., 391; Hatch v. Hatch, 9 Mass., 307; Gooch v. Bryant, 13 Maine R., 386; Carlton v. Clark, 20 Maine R., 337; Adams v. Frye, 3 Metcalf, 103.

4. It would make no difference that the alteration was made before Nash signed, even if that were the case. Putnam v. Sullivan, 4 Mass., 45.

By writing the note and then endorsing it, the defendants declared the liability they were content to assume, and it cannot be changed without their consent.

It differs entirely from an endorsement of a blank paper,

for that gives an implied authority to fill it up. Here it was already filled up.

5. The fact that plaintiff knew when the alteration was made, and that it was not made in the presence and with the consent of defendant, take from him all claim for consideration as an innocent holder without notice.

The note being filled up and endorsed the presumption was that defendant's contract was expressed therein, and plaintiff had no right to infer authority in Nash to make the alteration. And there being now no proof of such authority, plaintiff is bound by the legal presumption.

Putnam v. Sullivan, 4 Mass., 45, gives the reason why a man may be held by a note written over his blank signature.

There can never be a right to alter the contract of another without his consent, and such alteration, if material, makes it void.

The only question is, who shall suffer, and this depends on notice.

No man has a right to the benefit of an alteration he knew to be wrongly made.

6. The question of fraud does not necessarily arise in the case, and there was no propriety in the court alluding to it. The ground of avoiding an altered contract is that the *contract sued* is not the *contract made.*

As to fraud, the note and the proof of the alteration, without the knowledge of the defendants, should have gone to the jury for them to draw such inferences as would naturally come from these facts. Defendants neither charged direct fraud, nor did they admit there was no fraud; they simply put in the facts, to have such weight as they were legally entitled to.

6. The instructions in relation to defendants' knowledge of the purpose for which the note was to be used, as affecting this case, were wrong.

All the conversation about the oxen was before the note was made, and when the note was written by Vose and de-

livered, he thereby, *in writing*, defined the liability which they were content to assume, *and nobody, without their consent, had a right to change it.*

Besides, it is clear that Vose & Joyce agreed to *endorse* a note to pay for oxen which could be bought on seven months, without interest. Nash must have told them these were the terms, for it is evident he thought so at the time.

Suppose he had raised the price to four or five hundred dollars, or changed the time to three months; could the defendants be holden.

An alteration of the date of a note discharges the endorser unless *proved* to be made with his consent. His offer to renew the note, without proof of his knowledge of the alteration, will not bind him, and such an offer has no tendency to prove such knowledge. Kennedy v. Lancaster Co. Bank, 18 Penn. R., 347.

Simpson v. Stockham, 9 Penn. R., 186; Hacker v. Jamison, 2 Watts and Serg., 438; Hills v. Barnes, 11 N. H., 395, are to the same effect.

The true question is, whether the contract attempted to be enforced in this action is the one defendants made.

Bion Bradbury, counsel for the plaintiff.

The first request was properly refused. The demand and notice were proved if the notice sufficiently described the note. The question of identity was properly left to the jury.

2. The second request was given, except upon one point. The court declined to instruct the jury that there was no evidence in the case from which the jury could infer the consent of the defendants to the alteration of the note, but did instruct them that whether such alteration was made, and if so, when made, and whether the defendants consented, the jury might determine from the evidence in the case.

3. The instructions of the presiding judge upon the two last requests was correct.

The alteration of the note made by Nash before the delivery to Waterman, under the circumstances of this case, would not render the note void as to the defendants.

1. The presumption of law is that, if an alteration be made in a note before it is issued, it is made with the consent of the parties to the note. Eddy v. Bond, 19 Maine R., 466; Hall v. Russ, 1 Maine R. 338.

2. From the agency and confidence reposed in Nash by the defendants, the consent of the latter to the alteration is to be inferred. Hall v. Russ, 1 Maine R., 338.

3. The alteration of the note, being made to make it conform to the original intent and terms of the contract between the parties, it is not void.

It is an alteration to correct a mistake, which may always be done.

This alteration is clearly not fraudulent on the part of the holder; striking out those words would leave the liability of defendants, just as they allege it should be.

Nevins v. DeGrand, 15 Mass. R., 436, is an authority to this point. There the court permitted the plaintiffs to restore what they had erased. Parker, C. J., says, "It being clear that the words now moved to be restored were stricken out with honest intentions, and that the acceptor has in no way been prejudiced thereby or can be in any way injured by the restoration, justice requires and the law allows it to be done."

TENNEY, C. J. The note in suit for the accommodation of Amaziah Nash, the maker, was written by Vose, one of the firm of "Vose & Joyce," and signed by him with the name of the firm, without the words "with interest." In pursuance of a previous arrangement between Nash and the plaintiff, it was offered by Nash in payment of a yoke of oxen which he had agreed to purchase of the plaintiff; the latter insisting that the note should be on interest, these words were added by Nash in the presence of the plaintiff without the knowledge or consent of the defendants. Whether Nash

signed the note at the time of its endorsement by the defendants, or afterwards, was a question on which Nash and Vose did not agree; and under the instructions it was not a material question.

It was contended that the description of the note in the written notice of its dishonor, was so defective, the words "with interest" being omitted, that the liability of the endorsers never became fixed. The jury were instructed that if they should find that the defendants, by said notice, might be presumed to know it referred to the note in suit, they might find it to be sufficient. This instruction was correct, on the authority of the case of Smith v. Whitney, 12 Mass., 6, in which a question similar in principle was submitted to the jury.

If this question was for the court instead of the jury, we are satisfied it was correctly settled, and the defendants were not prejudiced.

The jury were instructed, that the addition of the words "with interest," to the note, after it was endorsed by the defendants, was a material alteration. But they were also instructed, substantially, that if the words were added without fraud, and without the knowledge of the defendants, before the note was delivered to the plaintiff, whether the maker signed his name at the time it was endorsed, or at the time the note was delivered, the alteration did not discharge the defendant's liability.

These instructions when applied to an alteration in an accommodation note or bill, made by the consent of the parties to be affected by it, are correct; but not so, when the alteration is not made with the knowledge and consent of such parties. In the case of Master v. Miller, 4 D. and E., 320, it was decided that the alteration of the date of the note avoids it, or a bill of exchange, by which the payment was accelerated, and after acceptance, and so effectually that even an innocent holder for a valuable consideration, cannot support an action upon it.

In 1 Greenl. Ev., sec. 565, it is said, "the grounds of this

doctrine is two-fold. The first is, that of public policy to prevent fraud, by not permitting a man to take the chance of committing a fraud without running the risk of losing by the event, when it is detected. The other is to ensure the identity of the instrument, and prevent the substitution of another, without the privity of the party concerned. The instrument derives its legal virtue from its being the sole repository of the agreement of the parties, solemnly adopted as such, and attested by the signature of the party engaging to perform it."

The law carefully guards the rights of sureties upon an instrument, whether the relation to the principal is shown by his being surety in the technical sense of the term, endorser or otherwise. A promissory note, signed by principal and surety, or a note or bill endorsed for the accommodation of another party thereto, defines the liability intended to be assumed, and any alteration changing this liability without his consent will discharge him; such as the change of the date, the amount, the time or place of payment.

It was held in Miller v. Stewart, 9 Wheat., 680, that the contract of surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms. Judge Story, in delivering the opinion of the court in this case, says, "nothing can be clearer, both upon principle and authority, than the doctrine that the liability of the surety is not to be extended beyond the terms of his contract. To the extent and in the manner, and under the circumstances pointed out in the obligation, he is bound, and no farther. It is not sufficient that he sustain no injury by a change in the contract, or that it may be even for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal. This doctrine certainly does not fail to apply to a contract which has been altered materially, after it has passed from the hands of the surety or endorser, though it has not been delivered to the party authorized to treat it as available. After a material alteration, it is not the contract the

party signed, and a negotiation first made after the alteration cannot make it his contract. The distinction in the instructions has no foundation in reason or in law.

When a person puts his name to paper, which is full in form, for a certain sum payable at a certain time and place, for the accommodation of another, who is to become a party to the same, when it shall be negotiated, his liability is limited by the precise terms of that paper. An alteration afterwards, which is material, without his consent, will make it a contract which he never executed, and which it is manifest he never intended to execute, and it is a new contract, to which he can in no sense be treated as a party, and he cannot be bound by it. It bears no analogy to the case where one signs or endorses blank notes or bills, to be filled by the party to be accommodated, according to his discretion and supposed necessities.

In England, under the stamp acts, a note or bill materially altered, even by consent of parties, without a new stamp, is void. And it has been said in English elementary treatises, that "an accommodation bill is not issued so as to be incapable of alteration, until it comes into the hands of one entitled to treat it as an available security." 2 Stark. Ev., 295, note (g.) This note, in the abstract, would seem to support the instructions which we are now considering. But the authority cited by Mr. Starkie will show that the alteration was by the consent of the party attempted to be charged; and the defence, that the contract was void, was upon the ground that every bill shall have a stamp, which was not upon the one in question after the alteration. But the court held that the bill not having become effectual before the alteration, it was not thereby a new contract.

In this case the defendants assumed a liability for the sum of two hundred and sixty dollars, at the end of seven months, and no other. The alteration made the note for a larger sum at the same time. The instructions were not based upon the hypothesis that the alteration was with the consent of the defendants, and were unauthorized in law.

If the court should be of the opinion that the alteration in the note in suit renders it void, it is proposed that the interest thereon should be remitted, so far as it accrued previous to the maturity of the note, and the plaintiff be allowed to strike from the same the added words. It is sufficient for this court, sitting as a Court of Law, to decide the questions of law raised at the trial, to say, that such a motion is not before it, and cannot be entertained. But it may not be improper to remark, that by the authorities referred to, the general proposition is, that written instruments, which are *altered,* in the legal sense of that term, are *thereby made void,* and to allow the note to be placed in the condition in which it was when endorsed, would annul one of the foundations on which the principle rests, to wit, "*public policy,*" to prevent fraud, by not permitting a man to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected.

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

STEPHEN REYNOLDS *versus* CHANDLER RIVER COMPANY.

Trespass is the proper form of action to recover damages arising from the building of a dam, whereby the plaintiff's hay was injured.

When damage is caused by the flow of water from a dam, the owners thereof are liable to the full amount of the injury, where there is no negligence on the part of the plaintiff, notwithstanding the injury might have been prevented by an expenditure less than the amount of the damage.

ON REPORT by APPLETON, J.

This was an action of trespass for building a dam across Chandler's river, whereby the plaintiff's hay, which he had left, as was customary, upon his meadow lands, was destroyed by the rise of water in the river.

The defendants moved a nonsuit, on the ground that the form of action was misconceived, and that it should have been case, if any action for this injury is maintainable.

The motion was overruled.

The dam was erected in the summer of 1852, by virtue of an act of the Legislature. There was evidence tending to show that the dam caused the flow of back water, and that the loss complained of was caused by such back water.

The judge instructed the jury if they found the dam the cause of the loss or injury of the plaintiff's hay, to render a verdict for the value of the hay so destroyed in consequence of the defendants' dam. The jury found the damage to the hay $172,21.

The jury further found that by the expenditure of $60 over and above what was usual or necessary before the dam was erected the plaintiff might have preserved his hay.

If the nonsuit was improperly refused, or the instructions given are erroneous, the verdict is to be set aside. Otherwise judgment is to be rendered for the damage to the hay, or the lesser sum found by the jury, as the legal rights of the parties may require.

George F. Talbot, counsel for the plaintiff.

The declaration is as well in *trespass* as trespass on the case. The statute has abolished the distinction. The variance is in the form of declaring only, and nowise affects the substance or controls the proof.

Judge TENNEY says, "It is obvious that the design of the legislature was to abolish the distinction between the two classes of cases in the form only of declaring in the writ, so that proof which should make out a case of one class should not fail of effect on account of the writ being appropriate to the other class. Sawyer v. Goodwin, 34 Maine R., 420. In that case the proof did not amount to trespass *quare clausum,* and therefore to change trespass simple to trespass on the case, or *vice versa,* in no wise affects the pleadings, the jurisdiction, or the name of the action.

2. The instruction to the jury was correct; if the dam was not the sole cause of the injury to plaintiff's hay, then it was not the cause, because it alone would not have produced the injury, and therefore the plain meaning of the question submitted to the jury was, in fact, was the dam the *sole cause?* Besides, the fact that there were other causes would not exonerate the defendant unless the plaintiff's acts or negligence produced those causes.

The report of the case is very brief and does not disclose the extent to which the investigation of the facts were pursued. The defendants ask a new trial for the purpose of putting in the same defence they have already unsuccessfully used, and trying the same issues over again which the jury have determined against them. Under the law as given to the jury in the trial, the defendants had the benefit of every possible conjecture or fact of other causes than the erection of the dam and its maintenance having caused the injury to the plaintiff's hay. This was the whole issue tried. The question submitted to the jury with reference to the amount the plaintiff might have expended to prevent the injury shows that the consideration of other and co-operating causes were before the jury. In the case of Inhabitants of China v. Southwick, referred to by the counsel for defendant, the jury found the main fact that "the head of water caused by the defendant's dam was *not* high enough to flow the plaintiffs' bridge or do damage thereto." In this case they have found precisely the reverse—that the head of water caused by defendant's dam *was* high enough to destroy plaintiff's hay. The principle of that case requires this verdict to be sustained.

The case of 35 Maine R., 422, is where it was the province of the court, upon a statement of acts done, to infer, or not to infer, responsibility. In this case that inference was left to and has been positively drawn by the jury.

3. The plaintiff's damages are the amount of the regular verdict, *i. e.*, the value of the hay destroyed by the act of the

defendant. For if the damages might have been lessened by acts of the plaintiff, such acts were or were not required by ordinary care and prudence. If they were not required by ordinary care and prudence plaintiff should not suffer loss by omitting them. If they were required by ordinary care and prudence, plaintiff was careless in omitting them, and as his carelessness contributed to the injury, defendants are not liable at all. If the plaintiff was entitled to recover he was entitled to recover the amount of his loss. It would hardly be claimed in case of a man who had proved the loss of his horse by a defect in a bridge, that the town sued for the damage might have the sum that it would cost the plaintiff to have gone round by another road and crossed a ferry, estimated as the real measure of his compensation. In this case the court will hardly undertake to determine the plaintiff's rights, by assigning him the jury's estimate of what it would have cost him over and above what was usual or necessary before the dam was erected, to expend to preserve his hay. The dam was several miles from the plaintiff's meadow; he could not know that any such expenditures would become necessary the first year certainly, and it was proved that he took what he deemed necessary and proper precautions to save his hay the subsequent years, by building his staddles higher than he had built them the year before. The question submitted to the jury was a purely hypothetical one, and defendants can have no advantage from it, unless the case had shown that plaintiff had it in his knowledge and in his power to do the acts that he possibly otherwise might have done to diminish his loss. It is to be presumed that he did what it was his interest to do to save his property, using his best discretion, and not that he aggravated his own loss, with the design of getting indemnity by a suit.

George Walker, counsel for the defendant.

The damages in this case were consequential from the re-

lation of the dam; in such cases trespass on the case, and not trespass, is the proper form of action. Sawyer v. Goodwin, 34 Maine R., 419.

The instructions to the jury were too broad. The dam might have been the cause of injury to the plaintiff's hay, but not the sole cause; it might have been the cause with other causes, which would have excused the defendants. The instructions excluded the jury from any inquiry for other causes.

The dam might have been instrumental in injuring the plaintiff's hay, or if the dam had not been there, the hay would not have been injured; in either of which cases the dam would have been the cause of the injury. Yet it by no means follows that the defendants would be liable.

The plaintiff might not have exercised due care in securing his hay; in that case the defendants would not be liable. Waldron v. Portland, Saco and Portsmouth Railroad Company, 35 Maine R., 422.

Or to the head raised by the dam, natural causes superadded might have occasioned the injury, such as violent winds, that should drive the water on to the meadow, or extraordinary floods, in which case defendants would not be liable. China v. Southwick et. al., 12 Maine R., 238.

If plaintiff is entitled to any damages, it is only such sum as it would have been necessary to expend to get his property to a place of safety. Miller v. Mariner's Church, 7 Greenl., 51.

Goodenow, J. This is an action of *trespass* to recover damages arising from the building of a dam across Chandler's river, whereby the plaintiff's hay, which he had left as was customary upon his meadow land, was destroyed by the rise of the water in the river.

The defendants moved a nonsuit on the ground that the form of action was misconceived.

We are of opinion that this motion was properly overruled. At common law, the proper remedy for such an al-

leged injury would have been, by an *action on the case.* The Revised Statutes provide that in all actions of trespass, and trespass on the case, the declaration shall be deemed equally good and valid, to all intents and purposes, whether the same shall be in form a declaration in trespass, or trespass on the case. The case of Sawyer v. Goodwin, 34 Maine R., 420, referred to by the defendants' counsel, was an action of *trespass quare clausum,* and does not sustain the position taken by him in this case.

The presiding judge instructed the jury that "if they found the dam the cause of the loss or injury of the plaintiff's hay, to render a verdict for the value of the plaintiff's hay so destroyed in consequence of the defendants' dam." The jury found the damage to the hay $172,21. This case comes before us on a report, and not by exceptions. We are therefore to presume that the plaintiff exercised ordinary care in securing his hay, and that the instructions of the presiding judge were unexceptionable upon this point. "The jury further found that by the expenditure of $60, over and above what was usual and necessary before the dam was erected, the plaintiff might have preserved his hay." We do not regard this as equivalent to finding negligence, or a want of ordinary care and prudence on the part of the plaintiff. He might not know or have good reason to expect that any such expenditure would become necessary, by building the staddles on which his hay rested, higher than he had built them before the dam was erected. If the defendants entertained such an opinion, they should have given him notice, and have offered to defray the expense of such additional structures. They knew better than the plaintiff, as to the height and tightness of their dam, and how and when they should use it, and what sluices they would have by which to let off the water.

Judgment on the verdict for $172,21 damages, and interest on the same.

RUFUS K. PORTER, *Adm'r, versus* SOLOMON C. SEVEY.

Upon the question whether a deed unrecorded, should take precedence of a deed recorded, the judge having instructed the jury in the language of the statute, that the tenant must have *actual notice* of such prior conveyance, he may well decline a request to instruct that the notice must be such as men would usually act upon in the ordinary affairs of life.

Such notice should be so express and satisfactory to the party, that it would be a fraud in him subsequently to purchase, attach, or levy upon the land to the prejudice of the first grantee. The Revised Statute, chap. 91, sec. 26, controls the construction that the possession of the grantee alone, if open, continued and exclusive, would be sufficient inference in law, of notice.

The evidence, from all the circumstances, must be such as to give the jury reasonable satisfaction that the second purchaser had notice of the prior deed before he purchased.

EXCEPTIONS were taken to the rulings of HATHAWAY, J., and the evidence was reported on a motion for a new trial.

This was a writ of entry, wherein the demandant claims the western half of a certain farm in Whiting.

The presiding justice instructed the jury that the deeds put into the case by the defendant, of Samuel Ackley to Ralph Ackley, dated December 13th, 1839, and that of Ralph Ackley to the defendant, dated October 3d, 1849, make a record title in the defendant which must prevail, unless the deed from Samuel Ackley to Ralph Ackley is shown to be fraudulent and void, and the defendant was a party to, or had knowledge of the fraudulent transactions. If the jury should be satisfied from the evidence that at the time said deed was executed and delivered, Samuel Ackley was indebted to a larger amount than he could pay, and that the deed was a voluntary conveyance without any consideration, designed to delay or defeat creditors, it would be void as against creditors of the defendant having a knowledge of the situation of the grantee, and the fraudulent purpose of the conveyance, and he could stand in no better condition than the

grantee of Samuel Ackley, and could not claim against the creditors of Samuel Ackley or subsequent *bona fide* purchasers for a valuable consideration, or unless there was a reconveyance from Ralph Ackley to Samuel Ackley of the demanded premises and the defendant had actual notice of such reconveyance prior to the time of taking his deed from Ralph Ackley. The plaintiff requested the presiding judge to instruct the jury that if the conveyance from Samuel Ackley to Ralph Ackley was *bona fide* and valid, and there was a reconveyance of the western half of the farm from Ralph to his father on May 7, 1842, and Sevey had such notice of its existence as men would usually act upon in the ordinary affairs of life, the mortgage would be good and Sevey's deed could not prevail against it; but the presiding judge declined to give this instruction.

A verdict was returned for the tenant.

J. Granger, counsel of the demandant.

Exceptions and motion to set aside verdict.

1. The presiding judge should have given the instruction requested by demandant's counsel; at least some instruction should have been given to guide the jury in their deliberations upon the point of "*actual notice*" by the tenant of the deed, Ralph Ackley to his father.

Actual notice may be inferred from circumstances as well as any fact, however important, not required by law to be in writing, and circumstances are often more cogent than the positive testimony of a witness.

The language of the instruction requested was taken from the instruction given in the case, Curtis v. Mundy, 3 Met., 405, under a similar statute in Mass., which instruction was in that case held to be correct.

The circumstances shown in the case at bar, from which a jury might infer actual notice to the tenant of the deed in question, were very strong. There can be scarcely a doubt that the jury understood from the instruction given, that they must find the actual presence of the defendant at the execu-

tion of the deed at Lowell & Dunn's office, and that he actually saw it executed and delivered. For want of instructions sufficiently explicit, the court will grant a new trial, if it be seen that there is good reason to believe that justice has not been done by the verdict.

2. The instructions given as to the record title in the case, were erroneous; for the tenant instead of exhibiting a perfect defence to the *prima facie* case made out by the demandant, failed to show any legal defence for the following reasons:

Samuel, after his deed of general warranty to Joseph Cutler, of May 7th, 1842, recorded May 9th, 1842, was estopped to deny that he was seized at that time of the demanded premises, and that *that* deed conveyed a good title; and the grantor, being and continuing in possession became the tenant at will of Cutler. Currier v. Earl, 13 Maine R., 216; White v. Patten, 24 Pick, 324. And Sevey, (the tenant) coming into possession under a deed of general warranty from Samuel Ackley, dated July 1, 1842, is privy in estate, and equally estopped. By this deed Sevey acquired Samuel Ackley's right in equity to redeem the mortgaged premises of Cutler, and became Cutler's tenant at will. White v. Patten, before cited; Treviman v. Lawrence and al., 1 Salk., 276; Coe v. Talcott, 5 Day 58; Fairbanks v. Williams, 7 Greenl., 97; Carson v. Astor, 4 Peters, 83; Hamblin v. Bank of Cumberland, 19 Maine R., 66; Haines v. Gardner, 10 Maine R., 383; Hill v. West, 8 Ham, 222; Pike v. Galvin, 29 Maine R., 183.

A party cannot set up a title adverse to that under which he acquired the possession. Charles v. Jones, 4 Dana, 479; Mellen v. Shackleford, Ib., 264; Jackson v. Walker, 7 Cow., 637; Mosher v. Reding, 12 Maine R. 198.

So long as the conveyance exists, and the grantee is not evicted from the land, he is precluded from disputing the title of his grantor. Bliss v. Smith, 1 Ala., 273; 1 Sup. U. S. Dig., 652, pp. 28, 29, 30.

The tenant (Sevey) had actual as well as constructive

notice of the mortgage under which the demandant claims. If the demandant had instituted this action at any time after the assignment of the mortgage to him, and prior to October 3, 1849, the date of the deed from Ralph Ackley to the tenant, there would not have been the slightest pretence of any defence to the action.

The estoppel is not affected by that deed. Ralph Ackley was also estopped to dispute Sevey's and demandant's title. Sevey's, by permitting his father to sell the land to Sevey, and the land to go into his possession without objection from him. Hatch v. Kimball, 16 Maine R., 146.

The tenant had enjoyed quiet and undisturbed possession of the land for seven years under his deed, knowing the existence of the mortgage before he purchased, having from Mr. Porter seventy dollars to stop the sale of the equity of redemption only seven days prior to the date of his deed from Samuel Ackley. Ralph Ackley set up no claim to the land and was estopped as above said.

The tenant sought him to purchase, for a nominal sum, (as may be inferred from the circumstances,) for the evident purpose of defeating the demandant's claim.

The instruction requiring the jury to find that Samuel Ackley "was *owing debts more than he could pay*," in order to make his deed to his son Ralph, if without consideration, fraudulent and void, was erroneous. This farm was all the property he had, not by law exempted from attachment. He took the poor debtor's oath and disclosed no property. Nor did it appear that in the mean time he had sold any. If there was an intention to hinder, delay and defeat creditors, the conveyance was fraudulent, notwithstanding the grantor might not have owed more than he could pay without resorting to the land. It was surely fraudulent if the conveyance was a voluntary one, without consideration, although the farm might be worth double the amount of his debts, unless he had property enough to pay his debts, exclusive of the farm. But the farm was all that he had not exempted.

B. Bradbury, counsel for the defendant.

The demandant claims to recover in this action by virtue of a mortgage deed (dated May 7, 1842, recorded May 9, 1842,) from Samuel Ackley to Joseph Cutler, and by Cutler assigned to him on the 26th of March, 1846.

But at the time of the execution of the mortgage and assignment, the record title to the premises was in Ralph Ackley, to whom Samuel Ackley had conveyed on the 13th of December, 1839.

The tenant claims title under a deed from Ralph Ackley to him dated October 3d, 1849, duly recorded.

This makes a perfect record title in the tenant, and so the presiding judge instructed the jury.

To avoid the effect of this title the demandant contended that the deed from Samuel Ackley to Ralph Ackley was fraudulent as against creditors, and that the tenant was a party to or had knowledge of the fraud, and so could not avail himself of his title under Ralph Ackley.

This question was submitted to the jury under proper instructions from the judge, and decided in favor of the tenant.

The demandant further contended that there had been a reconveyance of the premises from Ralph Ackley to Samuel Ackley, prior to the mortgage to Cutler, and that the tenant had notice of such reconveyance before his purchase of Ralph Ackley, and so was precluded from availing himself of his title under Ralph. But there was no record of any deed from Ralph to Samuel, nor was any deed produced.

Upon this point the presiding judge instructed the jury that such a position could not be successfully maintained unless the tenant had *actual notice* of such reconveyance prior to the taking his deed from Ralph Ackley.

The instruction was given in the language of the statute, R. S., chap. 9, sec. 26.

It should have been more strongly stated for the defendant, because the judge might have added consistently with

legal principles that the burthen of proof was upon the demandant to show such notice to the tenant.

The demandant must show actual notice.

In the case of Pomroy v. Stevens, 11 Met., 244, the court say that it is not sufficient to prove facts that would reasonably put him on inquiry. He is not bound to inquire, but a party relying upon an unregistered deed against a subsequent purchaser, an attaching creditor must prove that the latter had *actual notice or knowledge of such deed.*"

This case is cited by WELLS, J., in the case of Spofford v. Norton, 29 Maine R., 146, and adopted as the true construction of the statute of this state.

In the case of Hanley v. Morse, 32 Maine R., 289, the same construction is reasserted.

The authorities are uniform in the cases decided by this court, in the use of the language, that there must be actual notice or knowledge of the existence of an unregistered deed, in order to affect a subsequent record title.

The terms notice and knowledge, as here used, are synonymous; knowledge of the existence of a deed is actual notice, and there can be no actual notice without knowledge.

The question as to what state of facts would establish actual notice, was for the jury to determine, and was determined by them in favor of the defendant.

This instruction was correct, but less favorable to the tenant than it might legally have been made.

2. But the demandant's counsel requested the presiding judge to instruct the jury, *that actual notice is such notice as men would naturally act upon in the affairs of life.* When the language of the presiding judge is plain, clear and explicit, following the words of the statute, which are equally plain, clear and explicit, he cannot be properly called upon to go any further by way of illustration or supposition of cases.

Now what can be plainer than the meaning of the words "actual notice?" The language of the requested instruction does not change the meaning of those words, nor does it elucidate their meaning.

A judge *may* illustrate a principle of law in his charge to a jury, but he is not required to do so, if the principle be clearly stated to the jury. This request was made upon the strength of the case of Curtis v. Munday, 3 Met., 405. In that case, the presiding judge, in charging the jury, illustrated his views of the law by examples, which were made the grounds of exception, and the court sustained the verdict, because the evidence was plenary of "actual notice."

It is one thing to sustain a verdict under such instructions, quite another to set aside a verdict because the presiding judge saw fit to state the law, without the illustrations given in another case by another judge.

But in the latter case of Pomroy v. Stevens, the court say there must be *actual notice or knowledge of the deed*, and such is the law of this state.

The request was properly refused for another reason. There was no evidence in the case to form a basis for the request. The defendant testifies distinctly that he had no knowledge of the reconveyance, if there was such a deed from Ralph Ackley to Samuel Ackley, when he took his deed from Ralph, nor for a long time after. The existence of such a deed is not a fact beyond dispute. There is no testimony to disturb the positive statement of Sevey. The most that can be said as to the plaintiff's evidence, is, that it tends to establish certain facts, from which *if Sevey had had any knowledge of them*, an inference might be drawn that he had actual notice of the deed. But this knowledge is in no way carried home to Sevey.

But in any event, the demandant can complain of nothing except that the presiding judge left it to the jury to determine what was actual notice, instead of stating to them his own ideas of the meaning of these terms.

If the presiding judge saw fit to leave the question to the jury, and they have decided it properly, the verdict will not be disturbed. Copeland v. Wadleigh, 7 Maine R., 141; Pike v. Warren, 15 Maine R., 390; Hathaway v. Crosby, 17 Maine

R., 448. That they did decide it properly there can be no doubt.

GOODENOW, J. This is a writ of entry, by which the demandant claims to recover the western half of a farm in Whitney, by virtue of a mortgage deed, dated May 7, 1842, and recorded May 9, 1842, from Samuel Ackley to Joseph Cutler, and by Cutler assigned to his intestate on the 26th of March, 1846.

At the time of the execution of said mortgage and assignment, the record title to the premises was in Ralph Ackley, to whom Samuel Ackley had conveyed on the 13th of December, 1839.

The tenant claims title under a deed from Ralph Ackley to him dated October 3, 1849, duly recorded.

To avoid the effect of this title, the demandant contended that the deed from Samuel Ackley to Ralph Ackley was fraudulent as against creditors of Samuel Ackley, and that the tenant was a party to and had knowledge of the fraud, and for this reason could not avail himself of his title under Ralph Ackley.

This question was submitted to the jury, and their verdict was in favor of the tenant.

The demandant further contended that there had been a reconveyance of the premises from Ralph Ackley to Samuel, prior to the mortgage to Cutler, and that the tenant had notice of such reconveyance before his purchase of Ralph Ackley, and was therefore precluded from availing himself of his title under Ralph. There was no record of any deed of reconveyance from Ralph to Samuel, nor was any such deed produced. The plaintiff requested the judge to instruct the jury, "that if the conveyance from Samuel to Ralph Ackley was *bona fide* and valid, and there was a reconveyance of the western half of the farm from Ralph to Samuel on May 7, 1842, and Sevey had such notice of its existence as men would usually act upon in the ordinary

affairs of life, the mortgage would be good, and Sevey's deed could not prevail against it." But the judge declined to give this instruction. He had previously instructed the jury to the effect that such a position could not be successfully maintained unless the tenant had *actual notice* of such reconveyance prior to the taking of his deed from Ralph Ackley.

We are of opinion that the law did not require that the presiding justice should have given the instructions to the jury in the language requested. The instruction given was in the language of the statute. If any judge should undertake to define precisely what is *actual knowledge,* within the statute, and what shall and what shall not be evidence of actual knowledge, for the consideration of the jury, guided by the conflicting opinions which have been heretofore given, he might only "darken counsel, by words without knowledge."

In Curtis v. Mundy, 3 Met.. 405, Putnam, J., when considering the statute of Mass., which is identical with that of Maine, says, "The clause relating to persons having actual notice thereof was substantially to confirm the decisions which had been made theretofore, and which had placed such persons in the same condition as if they had had the notice which was to be given by the registry. And the instruction of Morton, J., to the jury, "that it was not necessary, in order to enable the tenant to hold under his deed that he should prove that the demandant had positive and certain knowledge of its existence; that it was not necessary that the demandant should have such knowledge as he would acquire from having seen the deed, or being told thereof by the grantor; but that the notice was sufficient if it was such as men in the ordinary affairs of life usually act upon," upon exceptions taken to it was held not to be erroneous. The court say, "Something less than positive personal knowledge of the fact of the conveyance would be sufficient to constitute actual notice, within the true intent and meaning of the statute." "It is exceedingly difficult, if not impossible, to

define beforehand what information shall or shall not be sufficient. But if it were given by those persons who, (as in the case at bar) knew the party, and much of his transactions, and who spake not vaguely; especially if the party himself, who was to be affected by the notice, was so well satisfied of its truth as again and again to acknowledge the fact—it must be sufficient. No honest man, after such notice, could undertake, or if he did, should be permitted to acquire title to the land which, from information given on certain knowledge, he believed had been conveyed. We think the notice should be so express and satisfactory to the party as that it would be a fraud in him subsequently to purchase, attach, or levy upon the land, to the prejudice of the first grantee. In the language of Lord Hardwicke, as adopted by Mr. Justice Story in his book upon Equity Jurisprudence, sec. 397, "the taking a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser. This is a species of fraud, and *dolus malus* itself." 3 Atk., 654. By the statute of 1821, deeds of real estates were required to be signed, sealed, acknowledged and recorded; and to be of no effect unless recorded, against any, except the grantors and their heirs. There is no exception in the statute as to persons having knowledge of their existence. The common law, as applied by the judges in analagous cases, made the exception as to persons having notice of their existence. It was considered that such persons could not purchase honestly when the title was in this condition, and thereby overreach a prior purchaser, whose deed remained unregistered. Judge Trowbridge says, "If the second purchaser had notice of the first conveyance, before he purchased, no estate would pass to him by the second deed, though recorded before the first, because it is *fraudulent.*" Readings in 3 Mass., 573. Now it seems to us that what was *fraud* before the Revised Statutes, is fraud now. The courts may have gone too far in deciding that "the visible possession of an improved estate by a grantee, under his deed, is in all cases implied notice of the sale to subsequent purchasers, although his deed has not

been recorded." Under our statute a disseizee may convey, if he has a right of entry.

The R. S., chap. 91, sec. 26, requiring *actual* notice, was intended to control the construction which had been given by the courts that the possession of the grantee alone, if open, continued and exclusive, would be sufficient foundation in law from which to infer notice to subsequent purchasers. It was not intended to change the moral bearings of the question or the rules of the common law, by making a transaction honest which was before fraudulent. It was to prevent a legal inference from inadequate premises; to repudiate a course of inconclusive reasoning. The subsequent purchaser might not know the fact, if it existed, that a prior purchaser was in possession; or if he did, that he claimed to hold the fee, &c. He might suppose that he was only a tenant holding over; or a disseizor of his grantor, who had a right of entry. If he was acting in good faith he might well suppose that his grantor would not undertake to sell to him an estate which he did not own, or had previously conveyed.

In Pomroy v. Stevens, 11 Met., 244, Shaw, C. J., held that evidence of open occupation, possession and cultivation of land, and fencing it, by a party who has an unrecorded deed thereof, is not sufficient to warrant the inference that a third person had notice of such deed, and his ruling was confirmed by the full court. Wilde, J., in delivering the opinion of the court, said: "Whether the demandant had notice of the defendant's title, or not, was a question of fact for the jury to decide. But the competency and sufficiency of the evidence to prove the fact were within the province of the court to decide."

In Spofford v. Weston, 29 Maine R., 140, the court adopt the construction given in the case last named, "and say that the Revised Statutes made an essential alteration of the law in this respect," but do not decide what shall and what shall not be proof of "actual notice."

We are of opinion that it may be proved by circumstances like any other fact. Such circumstances as those before

alluded to by Putnam, J. And that possession and improvement by the first purchaser is one circumstance proper, with others, for the consideration of the jury, though not alone sufficient. The evidence from all the circumstances must be such as to give the jury reasonable satisfaction that the second purchaser had notice of the prior deed, before his purchase. In the case at bar all the circumstances tending to establish the fact of notice, were submitted to the jury.

We can perceive no error in the instruction which was actually given.

It would be difficult for us to imagine a chain of circumstances which would satisfy a jury that the defendant had actual notice of the existence of a prior deed, when he swears positively that he had not.

Exceptions and motion overruled.
Judgment on the verdict.

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

WM. H. TAYLOR AND ALS. *versus* WALDO T. PIERCE AND ALS.

A. B. and C., tenants in common of timber lands, in consideration of a permit to D. and E. to cut timber thereon, received severally the notes of said D. and E., each in proportion to his interest in the land.

D. and E. brought an action against A., B. and C., jointly alleging a partial failure of consideration of the notes, and claiming to recover back a portion of the amount.

Held that such *joint* action could not be maintained.

Where, by the fault of the plaintiffs, they failed to obtain timber enough to pay the notes they cannot set up the deficiency against the payment of the notes or recover it on the money counts, either jointly or severally.

A lien upon the timber cut, being stipulated for to secure the payment of the notes, no action for money had and received can be maintained while the notes remain unpaid in the hands of the payee.

Taylor and als. *v.* Pierce and als.

EXCEPTIONS were taken to the rulings of APPLETON, J., at *Nisi Prius.*

This was an action of assumpsit on account annexed for $4000,00, being the amount of the three notes hereafter described, the stumpage on the timber cut being credited with a count for money had and received, and a special count on a permit to cut timber, given by the defendants to the plaintiffs, dated December 10, 1853, and extended, and the receipt of said notes acknowledged by writing on the back, dated July 1, 1854.

The plea was the general issue, with a brief statement disclaiming joint liability. The verdict was for plaintiffs, for $2249,78. The plaintiffs failed to go on to the premises in the winter of 1854. It appeared in evidence, that the plaintiffs went on to the premises described in the permit in August, 1854, and cut about eight hundred logs, and took off their team and worked on the adjoining township till January 6, 1855, when they again went on to these permitted premises with two four ox teams, and stayed there till February 8, when they again finally left, alleging that they had hauled all the timber, and went back on to the Hemenway township, where they worked till March 20. There was evidence by the plaintiffs, tending to show that they went on as early as they could, and the contrary, and that there was no timber left on the premises, which by the contract the plaintiffs were required to haul, and also on the part of the defendants, tending to show that they left on said premises a large quantity of such timber as should have been hauled, estimated by the witnesses, called by the defendants at from 490,000 feet to 4,500,000 feet. It appeared that on the 10th of October, 1855, a few days after said notes fell due, the plaintiffs paid on that one which was taken by said Prentiss, and which he still held, five hundred twenty-five dollars, and which was endorsed on said note; on that one which was taken by said Pierce, and which he still held, the same amount, and on that one for two thousand dollars which was taken by said Jenness, and which he had endorsed and trans-

ferred, before it was due to Hinkley & Egery, the sum of eleven hundred dollars; which several sums were the amount of the stumpage cut on said premises, with interest from the date of the extension on the back of said permit. It also appeared that said Hinkley & Egery had sued the said two thousand dollar note, and recovered execution against said Taylor thereon for the balance due on it in October, 1856, after this suit was brought and the said Taylor in said October paid the execution. It also appeared that said Prentiss sued the said Taylor in September, 1856, after this writ was served on him, upon the said one thousand dollar note which he took, and that said Pierce still retained his one thousand dollar note, and had not sued it. That the township of which the premises permitted formed a part, were at the time of said permit and its extension, owned as tenants in common and undivided, one fourth by said Prentiss, one fourth by said Pierce, one fourth by said Jenness by deed, and the title of the other fourth is in said Pierce, and that said Jenness managed one half; that said notes were owned severally, each by the man who took it; that said Jenness was insolvent when said notes were given, and had since so remained.

It was in evidence, that about the first of December, 1856, the defendant Prentiss called on the plaintiff Taylor, and said to him that the scaler of the lumber cut under said permit should be sent on to estimate the timber left on the premises, and asked if he would send a man with him, and that said Taylor did send such man, it being agreed that Prentiss should pay the wages of the scaler, and Taylor of the man he sent with him, and that the expenses of the two should be borne jointly by Prentiss and Taylor; that said scaler then examined the premises, and made his report in writing to the proprietors. At the trial the defendants offered this report in evidence, and contended that it was conclusive, and objected to the admission of any other evidence of those matters, but the objection was overruled, and the report excluded by the court, on the ground that the examination was

not seasonably made, but it was received as part of the scaler's deposition. Taylor testified that before paying the stumpage he asked Pierce how he should pay it, and that said Pierce told him to pay it on the three notes in the manner that he did pay it, as before stated.

The defendants contended that their receipt on the back of the permit for the notes were several, and not joint, and therefore the action could not be maintained; that the notes were given as a consideration for the extension of the permit, which could not be procured without, and because the plaintiffs had failed to operate the previous year; that the extension was a consideration for the notes, which were to be paid whether timber enough was in the permit or not, or was hauled or not, and that therefore the action could not be maintained. Also that the suit could not be maintained, because at the date of the writ the plaintiffs had paid nothing on the notes, but the amount of the stumpage on the timber cut, and which they had credited in their account annexed. But all these points, though seasonably presented on a motion for nonsuit, were all overruled by the court, for the purposes of the trial merely, and the jury were instructed adverse to them all. The defendants also contended, that if there was timber enough on the premises of the quality named in the permit, to pay the notes at the rates of stumpage agreed on, and that the plaintiffs, by putting and keeping on the teams and using the diligence required by the permit, might have hauled it, that the notes must be paid, and that the plaintiffs could set up no defence, unless they had done all the contract required, to haul the timber to pay the notes; but the court overruled the position, and instructed the jury that if there was timber left on the premises which the permit required to be hauled, and which the plaintiffs, by putting and keeping on the teams and using the diligence required by the permit, might have hauled, that was only a matter of damages to be allowed the defendants, in offset to the plaintiffs' claim, and that the rule of damages was the difference between the contract price of the timber so left

and the present value of it, and that if the timber so left was worth as much now as the contract price, there would be no damages, but interest on the same; or if there was no timber left, there would be no damages. The court also instructed the jury not to allow the defendants the stipulated damages of five hundred dollars provided for in the close of the permit; that they could not have this five hundred dollars, over and above the actual damage, but they were to allow the defendants the actual damages. The defendants requested the court to instruct the jury that to the damages which they might find under the above instructions, they would add interest, from the first day of July, 1854, the date of the notes, (which were on interest,) on the value of the contract price of all the timber left, which would and might have been hauled to the amount of $2,060,63, being the balance of the $4000,00 notes over the stumpage paid, and which interest would continue up to such time as the stumpage would become due under a similar permit, to be given as soon as the jury might find that a lumbering operation could now be commenced, but the court refused to give the instructions, but did instruct the jury to allow interest on the damages found from July, 1854, to the time of the trial. The defendants also requested the court to instruct the jury to add to the damages such sum as they might find just for insurance against fire on the timber left on said premises, which ought to have been and might have been hauled, from the time it was left till the date of the writ. Also to add such sum as the defendants would have to pay for commissions to an agent, to permit the timber so left, superintend the operation, and collect the stumpage. Also to add to the damages the expenses to defendants occasioned by the plaintiffs not having hauled such timber as they should and might have hauled, including all the expenses of defending this suit, if they found that this suit was occasioned by the plaintiffs not hauling such timber. These three last requested instructions were withheld, and the jury instructed not to allow any damages on either of said

grounds. To the above rulings and instructions, and refusals to instruct, and the admission and rejection of evidence, the defendants excepted.

LEASE.

This memorandum of an agreement and conditional license, made and executed this tenth day of December, A. D. 1853, by and between Henry E. Prentiss, W. T. & H. Pierce and Horace Jenness, of Bangor, in the County of Penobscot and State of Maine, of the one part, and William Hemenway and William H. Taylor, of ———, in the County of ——— and State of ———, of the other part, witnesseth, that the said Pierce, Jenness and Prentiss hereby grant the said Hemenway and Taylor possession during the ensuing logging season only, on the conditions and restrictions hereinafter mentioned, to enter with two six ox teams, upon lots numbered five and six, range first, and the south part of lots five and six, range second, in township forty-one, according to a survey and plan of said township, no lumber to be hauled that will interfere with the teams hauling into Gasabeas lake, and cut and remove therefrom white and Norway pine timber suitable for logs, which conditions and restrictions are that said grantees shall go upon said premises with two six ox teams, as aforesaid, at the usual season, said teams to be well manned and furnished, and remain there during the usual logging season, in diligent and active employment. Said logs to be driven to the Machias boom by said grantees, as early as practicable after cut. Said lumber to be landed in a suitable place and manner for scaling, and notice to be given the scaler by said grantees of such place and landing; and before the said logs are moved from said landing each and every stick or log within the compass of his location as he progresses, without waste or leaving such timber on the premises as would make number four boards, Bangor survey, which may be cut down. All lumber cut under this license shall be scaled by some person to be appointed by said grantors, who shall make deductions for all cavities, rots and

shakes only, and shall return to said grantors the quantity cut under this license, which return shall be final, binding and conclusive between the parties hereto, in the settlement of the stumpage. Said grantees shall pay to the said grantors four dollars per thousand for all white pine, two dollars and twenty-fine cents per thousand for all Norway pine stumpage, payable by satisfactory paper payable in fifteen months from July 1, 1854, with interest. The scaler is to be boarded at the expense of said grantees, and the scale bill to be paid by said grantors. It shall be the privilege of the scaler to point out to the said grantees, whenever he may have time and deems it proper, whenever he thinks said grantees fail to comply with the foregoing conditions and restrictions; but said scaler shall not be bound to point out to said grantees such failure, or examine the premises until the cutting and hauling is completed, at which time he shall examine the premises cut on and report to said grantors such timber as should have been cut and removed agreeable to the foregoing conditions; also, what sum said grantees shall pay as damage, which report shall be binding and conclusive between the parties hereto, in the settlement of claims under the agreement. And said grantees hereby agree that the said grantors shall reserve and retain full and complete ownership and control of all lumber which shall be cut and removed from the aforementioned premises, wherever and however it may be situated, until all matters and things appertaining to, or connected with, this license, shall be settled and adjusted, and the sum or sums due or to become due for the stumpage shall be fully paid, and all the paper given for it paid, and any and all damage for non-performance of any of the agreements or stipulations herein expressed shall be liquidated and paid. And the said grantees hereby further agree, that in cutting and managing said lumber while in possession they will act openly, honestly and fairly, that they will not directly or indirectly conceal from the scaler, or dispose of without the consent of said grantors in writing, otherwise they shall forfeit the whole lumber cut under this

contract. And if any sum of money shall have become due by any of the stipulations or agreements hereinbefore expressed, and shall not be paid or secured in some of the modes herein expressed, within ten days thereafter, then in such case said grantors shall have full power and authority to take all or any part of said lumber, wherever or however situated, and to sell and dispose of the same either at private or public sale, for cash, and after deducting their reasonable expenses and commissions, and all sums which may then be due or may become due, for any cause whatever, as herein expressed, the balance, if any there may be, they shall pay over on demand to said grantees, after a reasonable time for ascertaining and liquidating all amounts due, or which may become due either as stumpage or damages.

And the said grantees hereby agree with the said grantors to go upon the premises with the said two six ox teams, well manned and furnished, in due and proper season, and cut and remove timber as aforesaid, and truly and faithfully do and perform each and every condition and stipulation expressed in this license and agreement, hereby binding themselves in the full and liquidated sum of four hundred dollars, well and truly to be paid the said grantors on demand, over and above the actual damage which said grantors may sustain, by the non-performance of any agreement herein before contained. In witness whereof the parties have hereunto interchangeably subscribed their names, this tenth day of December, A. D. 1853.

WM. H. TAYLOR,
W. T. & H. PIERCE,
HORACE JENNESS,
W. H. HEMENWAY,
H. E. PRENTISS.

BANGOR, July 1, 1854.

The within permit is extended for the next ensuing lumbering season, with the following alterations, viz: said Hemenway is not to cut on that part of lot No. 6, range 2, which lies west of Machias river, but may cut on that part of No.

6, range 3, which is east of that river; twenty-five cents per thousand is to be added to the stumpage of the Norway. We have received the note of Wm. H. Hemenway and Hemenway & Hersey, running to Wm. H. Taylor, and by him endorsed, dated July 1, 1854, and payable with interest in fifteen months, for the sum of two thousand dollars, which is taken by said Jenness, a similar note for one thousand dollars, which is taken by said W. T. & H. Pierce, and a similar note of one thousand dollars, taken by said H. E. Prentiss, which *notes when paid are to be in payment of four thousand dollars, of the above stumpage*, and the balance is to be paid according to the permit, by satisfactory paper, in fifteen months from July 1, 1855, with interest, which paper is to be given by July 1. The owners' lien on the timber to continue till all the papers are paid.

HENRY E. PRENTISS,
W. T. & H. PIERCE,
HORACE JENNESS.

This case was argued with great ability by *George Walker* and *Henry E. Prentiss*, counsel for the defendants, each submitting able arguments in support of the exceptions.

And by *B. Bradbury and A. Hayden*, counsel for the plaintiffs.

GOODENOW, J. This case comes before us on a motion to set aside the verdict, which was for the plaintiffs; and also on exceptions. We have no full report of the evidence, and therefore cannot consider and act upon the merits of the motion.

The first exception is, that the presiding justice did not order a nonsuit, upon the plaintiff's own testimony, upon the ground that if the defendants were liable at all to the plaintiffs, they were liable *severally* for the damages claimed in this action, and not liable *jointly*.

It appears from the report of the evidence, so far as it goes, that on the tenth of December, 1853, the defendants, Waldo T. & H. Pierce, Henry E. Prentiss and Horace Jen-

ness, gave a "permit," to be noticed more particularly hereafter, to the plaintiffs in this case, to cut timber on certain lands upon certain terms and conditions therein set forth. That the firm of Waldo T. & H. Pierce owned one fourth, said Prentiss one fourth, and said Jenness one half of said lands, in common and undivided. This "permit" was in writing, and signed by the plaintiffs, W. H. Taylor and W. H. Hemenway, and by the defendants, with mutual agreements and stipulations, which need not now be noticed. The plaintiff's omitted or neglected to perform the agreement on their part within the time stipulated, whereby they became liable to pay the defendants the sum of four hundred dollars as liquidated damages, over and above the actual damages, according to the terms of said permit. On the first day of July, 1854, by an endorsement on the same, the permit was extended for the next lumbering season, with the following alterations, viz.: "The said Hemenway is not to cut on that part of the lot No. 6, range 2, which lies west of Machias river, but may cut on that part of lot No. 6, range 3, which is east of that river; twenty-five cents per thousand is to be added to the stumpage of the Norway. We have received the note of William H. Hemenway and Hemenway & Hersey running to William H. Taylor, and by him endorsed, dated July 1, 1854, and payable with interest in fifteen months for the sum of two thousand dollars, which is taken by said Jenness; a similar note of one thousand dollars, which is taken by said Waldo T. & H. Pierce, and a similar note of one thousand dollars, taken by said H. E. Prentiss, which notes *when paid*, are to be in payment of four thousand dollars of the above stumpage, and the balance to be paid according to the permit, by satisfactory paper, in fifteen months from July 1, 1855, with interest, which paper is to be given July 1. The owners' lien to continue on the timber till all the papers are paid." Which extension and alteration of the permit was signed by the defendants in this suit. The case finds that the plaintiffs failed to go on to the premises in the winter of 1854.

There was evidence by plaintiffs tending to show that

they went on as early as they could in 1855, and the contrary. And there was evidence that there was no timber left on the premises, which, by the contract, the plaintiffs were required to haul, and also on the part of defendants tending to show that the plaintiffs left on said premises a large quantity of such timber as should have been hauled. A few days after said notes fell due, October 10th, 1855, the plaintiffs paid on that one which was taken by said Prentiss, and which he still held, $525, which was endorsed on said note; on that which was taken by said W. T. & H. Pierce, and which they still held, the same amount; and on that one for $2000, which was taken by said Jenness, which he had endorsed and transferred before it was due, to Hinkley & Egrey, the sum of $1100, which several sums were the amount of the stumpage cut on said premises, with interest, from the date of the extension on the back of said permit. The case finds that said notes were owned severally, each by the man who took it, and that said Jenness was insolvent when said notes were given, and had since so remained.

We are not prepared to say that if the defendants had, in any way, by selling the land or otherwise, prevented the plaintiffs from entering upon the premises to which the permit related, and cutting according to the terms of the permit, that an action could not have been maintained by the plaintiffs against them jointly, to recover such damages as the plaintiffs might thereby have sustained. The defendants were under no obligation to extend the permit. They were at liberty to exact new terms and conditions upon granting such extension. From reading the original contract, we are led to the conclusion that the defendants were desirous not only to contract, but to be certain that the contract should be fully performed by the defendants. To make certain the sale of stumpage to the amount contracted for, and within the time specified. The timber was exposed to fires and trespassers, and they no doubt wished to convert it into money or other property less exposed to deterioration or loss. Hence they had a stipulation for a forfeiture on the

part of the plaintiffs, if they failed to perform on their part, as well as for the payment of the actual damages. It seems that all this was not sufficient to secure a performance. By the terms of the extension, it seems to have been understood that the operation for the next year should make the stumpage amount to at least $1000, and for this purpose the plaintiffs were required to give notes for that sum; and they did give notes to the defendants, severally, according to their respective interests in the lands to be cut upon. No question seems to have been made or doubt entertained by either party, at that time, that timber enough could be found of the specified kind, quality and dimensions, to furnish that amount of stumpage. For aught that appears, the plaintiffs knew as much about the lands and the timber as the defendants did. They had had ample time to inquire and examine. By the endorsement on the permit, the plaintiffs were to pay *severally* to the defendants, so far as the notes were payment, the amount which belonged to each tenant in common, according to his interest in the land. It is not uncommon in contracts, to find some stipulations which are *joint*, while there are others which are *several*. Cleaves v. Lord, 3 Gray.

This action is founded upon a partial failure of the consideration of each of those notes. To whom have the plaintiffs made these payments, if they have made them at all, or had made them before this suit was commenced? Not to the defendants *jointly*, but to each one *severally*. If any action can be maintained for a partial failure of consideration, it should be an action against each one to recover money which he has received, more than he is justly and equitably entitled to hold.

We are of opinion that if the presiding justice should not have ordered a nonsuit upon this point, and we do not decide that he was bound to do so, he should have instructed the jury that, from the whole evidence, the plaintiffs had failed to prove a joint promise on the part of the defendants. For this cause we think the exceptions should be sustained,

and a new trial granted. We might stop here. But it may be advantageous to the parties to know our opinion upon some other points.

The defendants contended, that if there was timber enough on the premises of the quality named in the permit, *to pay the notes*, at the rates of stumpage agreed on, and that the plaintiffs, by putting on and keeping on teams, and using the diligence required by the permit, might have hauled; that the notes must be paid, and that the plaintiffs could set up no defence, unless they had done all the contract required, to haul the timber to pay the notes; but the court overruled the position, and instructed the jury that "if there was timber left on the premises, which the permit required to be hauled, and which the plaintiffs, by putting and keeping on the teams and using the diligence required by the permit, might have hauled, that was only a matter of damages to be allowed the defendants, in offset to the plaintiffs' claim, and that the rule of damages was the difference between the contract price of the timber so left and the present value of it; and that if the timber so left was worth as much now as the contract price, there would be no damages but interest on the same; or if there was no timber left, there would be no damages."

We are of opinion that this was erroneous. If the plaintiffs failed, by their own fault or neglect, to obtain timber enough to pay the $4000, they cannot set it up as a defence to the notes, or either of them, or make it the foundation of a suit for money had and received against the defendants, either jointly or severally.

The judge was requested to instruct the jury that the suit could not be maintained, because, at the date of the writ, the plaintiffs had paid nothing on the notes, but the amount of stumpage on the timber cut, and which they had credited in their account annexed. He declined to do so.

In this case we do not regard the notes, *per se*, as money in the hands of the defendants. They were not taken as cash. A lien was stipulated for, on all the timber cut, to

secure their payment. The notes taken by Prentiss and by the Pierces still remained in their hands as unpaid, except so much as was admitted by the plaintiffs to be due for stumpage on timber cut after July 1, 1854. Neither of these two defendants, therefore, could be said to have received any money from the plaintiffs, at the time the suit was commenced, which they were not entitled to hold. As to Jenness, it may be and probably is different. He had disposed of his note and received the value of it in money. An action may be maintained against him alone, if it shall prove to be the fact that the consideration of the note which he had and disposed of, has failed, in part, without any fault of the plaintiffs.

For these reasons the exceptions must be sustained.

Verdict set aside, and new trial granted.

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

RICE, J. The action was prematurely brought, and for *that* reason there must be a new trial. A nonsuit could *not* have been ordered by the presiding judge, *in view of the whole evidence*, it being offered on both sides. 32 Maine R., 576. The action is properly *joint*. The permit is *joint*, and the receipt of the notes is *joint*. The recital of the distribution of the notes by the defendants *inter se se* is wholly immaterial, and cannot affect the plaintiffs.

The measure of damages as agreed in the permit is "the full and liquidated sum of four hundred dollars * * over and above the actual damage which the grantors may sustain." The actual damages were such only as "were the immediate and necessary result of the breach of the contract by the plaintiffs." Bridges v. Stickney, 32 Maine R., 361.

I concur in the result.

APPLETON, J. According to the terms of the receipt given by the defendants, "the notes *when paid* are to be in payment of four thousand dollars of the above stumpage," and

"the *owner's lien* on the timber to continue till all the papers are paid." The notes were therefore not to be regarded as payment, for if so, there could be no lien. The notes not having been paid, the action is prematurely brought.

The exceptions therefore must, for this reason, be sustained.

RUFUS GATES *versus* EDWIN PARKER.

Authority given to an agent to arrange an unsettled affair, and draw on his principal for such sums as were necessary, is a virtual acceptance of a draft made with the knowledge and assent of such agent.

But such draft cannot be substituted for another, payable to the order of a different person, without the knowledge or consent of the principal or his agent.

REPORTED by APPLETON, J.

Assumpsit for money had and received, and money paid, and also against the defendant as acceptor of a draft drawn upon him by one McNeil & Vose, in favor of Charles Day, and endorsed by said Day.

The plaintiffs introduced the draft sued, and a letter from the defendant to McNeil & Vose, dated October 27, 1854, and also the writ in the case now pending, of Edwin Parker v. W. R. McNeil and al., dated November 6, 1854, with the account annexed to the writ, and the additional account specifying the draft paid, and served on the same day.

It was admitted that at the time the draft sued for was drawn, the defendant had a mortgage on the bark Pilot Fish, to secure him for advances to McNeil and Vose.

F. A. Pike, counsel for the plaintiff.

The defendant, by his letter of October 27, 1854, fully authorized McNeil & Vose to draw on him to pay the lien claims on the "Pilot Fish," and constituted Manson his agent to fix upon amounts, and to transact the business.

The draft sued was given for a full consideration, moving from the plaintiff to the defendant through Day.

The defendant had a mortgage upon the Pilot Fish for more than she was worth, and whatever discharge there was of any of the lien claims upon her, relieved them to that extent. They were obliged to pay the lien claims in order to obtain the property.

By the solicitation of defendant's agent, aided by defendant's letter to McNeil & Vose, Day took the draft of McNeil & Vose, and discharged his claim upon the vessel. The plaintiff, in consequence of Manson's previous requests, and the defendant's letter, took the draft of Day and paid him the money for it.

In this way the plaintiff in effect paid Day's lien claim upon the vessel, and the defendant received the benefit of the payment.

The direction to draw for a particular purpose, amounts to an acceptance of the draft, and parties taking the draft in consequence of the promise to accept, can maintain an action against the drawee as acceptor. Coolidge v. Payson, 2 Wheaton, bb.; McEvers v. Mason, 10 John., 207; Goodrich v. Gordon, 15 Johns., 6; Banorgee v. Hovey, 5 Mass., 38; Storer v. Logan, 9 Mass., 55–58; Wilson v. Clements, 3 Mass., 1; Carnegie and al. v. Morrison and al., 2 Met., 381.

Here was a general letter of credit, embracing all lien claims, and then a particular designation of this amount of Day's, and the time upon which the draft was to be drawn by Manson, the defendant's agent. This designation of the agent fixed the liability to this debt.

If Day could maintain an action against the defendant, then the plaintiff could. There is the same privity between the drawee and the subsequent holders who take the paper upon the strength of the drawee's promise, that there is between the original parties. Goodrich v. Gordon, above cited.

It makes no difference in the liability of a party, whether he agrees to accept a bill already drawn, or one about to be

drawn. Carnegie v. Morrison, above cited; Coolidge v. Payson, above cited.

This case presents strongly the point insisted on in Mason v. Hunt, Douglass, 297, and in Pierson v. Dunlop, Cowper, 591—that the holder of the paper should take it on the strength of the drawee's promise. This is also a leading point in McEvers v. Mason.

Nor does the exchange of drafts make any difference.

1. Manson's request to Day, to take a draft for his bill pertained to the amount of the bill and the time of payment, and not to a particular piece of paper.

2. It cannot possibly make any difference to Parker, as the amount and time of payment are the same.

3. Parker is not liable on the draft destroyed. Nobody could maintain an action on that draft after this was paid.

4. The objection pertaining to a change of drafts is merely technical, and Parker waived it when called upon by Day, and he said the reason he did not pay was because it was not presented at once, and because he had lost enough by Vose & McNeil.

The plaintiff, by his arrangement with Day, and his payment to Day, actually paid the original draft, which was accepted by the defendant, and should now prevail on the money counts for money paid for the defendant's benefit.

Bion Bradbury, counsel for the defendant.

This is an action brought by the plaintiff to recover the amount of a bill of exchange, drawn by Messrs. McNeil & Vose upon the defendant, in favor of Charles Day, and by him endorsed to the plaintiff.

The plaintiff alleges that the defendant accepted this bill by virtue of a letter written by him to McNeil & Vose, (the drawers,) or by virtue of a parol acceptance made through T. B. Manson, his agent and clerk, or rather that by one or the other of these modes he agreed to *accept* the bill, and is therefore liable as acceptor.

This bill *was not in existence* when the alleged promise to accept was made.

Was there a written promise to accept this bill?

The only writing produced in the case is the letter of defendant to plaintiff of October 27, 1854. The language used by the defendant is: "The bearer of this, my clerk, Mr. T. B. Manson, is authorized to confer with you about the matter, and arrange with you to draw on me at sight, or on short time, for such sums as may appear needful."

This is merely an authority to Manson to confer with McNeil & Vose, and *arrange* with them to draw, &c., for such sums as may appear needful. They did confer. What arrangement was made? That Vose & McNeil should draw at their discretion? Not at all. There is no evidence of any arrangement. Manson remained there, settled the claims himself, and wrote the draft.

If the promise to accept be in writing, the paper containing the promise should describe the bill to be drawn, so as to identify and distinguish it from all others. Story on Bills of Exchange, 249; 3 Kent's Com., p. 84; 2 Wheaton's R., 66.

Now this letter describes no particular bill so as to identify and distinguish it from all others. It describes no specific bill so as to identify and distinguish it from all others. It describes no specific bill. It only refers to such bills as, upon a conference with McNeil & Vose, Manson might direct to be drawn. It is not a promise to accept the bills that might be drawn, except inferentially. An arrangement is to be made by Manson for McNeil & Vose to draw upon Parker.

Nor is it a promise to accept generally. But if it were a promise to accept generally, *without pointing to any specific bill*, an action could not be sustained against the defendant as on an acceptance. Boyce v. Edwards. 4 Peters, 111; Riggs v. Lindsay, 7 Cranch, 500. The letter, then, is merely evidence of Manson's authority to confer and arrange with McNeil & Vose.

It cannot be pretended that Manson, acting under this

authority, ever gave any written promise of acceptance for Parker.

The only evidence of what Manson did, is to be found in the deposition of Charles Day, introduced by the defendant.

Neither Manson, nor McNeil & Vose are offered to vary the evidence of Day.

If McNeil & Vose had any authority from Parker, through Manson, to draw upon Parker without the consent of Manson, or his knowledge, they would have been present to testify.

Day testifies, "I saw Manson here in November. I went to Mr. Vose's house and *saw Mr. Manson there settling up claims on the bark. He said to me he was authorized to settle the claims for Mr. Parker.* He showed me the letter from Parker to Vose & McNeil. Manson wanted me to take a draft on thirty days.

"*I took a draft on thirty days, payable to the order of J. H. Cox,* for the balance due me on the suit of sails."

"I think Mr. Manson wrote the first draft. It was signed by McNeil & Vose, the same as this. *Manson said it would be accepted and paid.* In consideration of this draft I think I receipted my bill. There is no doubt I receipted my bill when I took the first draft." In cross examination he said, "I think I did not say anything to Gates about the first draft. I think I did not say anything to Manson about the second draft. Mr. Manson never said to me that the second draft should be accepted and paid."

Manson was defendant's agent, and could do no more than Parker could do, if present. Now supposing Parker to have been present, there could have been but a *parol promise* to accept the particular draft drawn by Vose & McNeil in favor of Cox, which is not the draft in suit.

The second bill was not then drawn, nor was the drawing such a bill contemplated, when Manson said the first bi l should be accepted and paid.

A parol promise to accept a non-existing bill would not amount to an acceptance. 2 Peters' U. S. R., 170; 3 Kent's Com., 85.

The bill in suit was drawn after the first draft had been made — after Day had receipted his bill — after Manson had said the particular draft would be accepted and paid — and drawn, too, without the authority, consent or knowledge of Manson or Parker. The transaction was finished and complete.

Day afterwards proposes to McNeil & Vose to take up the first draft and give a new one, payable to him and not to Cox. But McNeil & Vose had no authority to make the exchange. They had no power to draw, except as directed by Manson. Day says that Manson told him, that *he* (Manson) was settling the claims on the bark. He never authorized the exchange.

But it is necessary, also, that the holder of the draft should take it upon the faith of the promise of the drawee to pay it, in order to maintain this action.

The plaintiff undoubtedly took the draft upon the faith of Day's representation to him, as to the agreement to accept.

But Day did not represent the matter truly to the plaintiff. He omitted a very important fact — the drawing of the first draft. He says he stated the same thing to the plaintiff as he has stated in his deposition; *but he says he did not tell Gates* (the plaintiff) about the first draft.

He (Day) says, "I took the draft upon the strength of Manson's representations to me, and the letter of Parker."

Now the letter contains no promise to accept generally, nor any specific draft; what, then, were Manson's representations to Day? Simply that he was authorized to settle the claims upon the bark, and was Parker's agent for that purpose, and that this particular draft would be accepted and paid; but not that any other one would be, or that McNeil & Vose had any authority to draw without his knowledge and consent.

Day gave the plaintiff to understand that there was but one draft. He made no inquiry of McNeil & Vose, or of Manson, as to the draft. He took it entirely upon Day's representations, which were not correct.

The plaintiff is not aided in this case by the fact, that defendant had a mortgage upon the vessel to secure his advances.

Because (1) the mortgage was only security for what he had *actually paid.* (2) The mortgaged property was not sufficient security for the debt—the vessel selling for several thousand dollars less than the defendant claims. (3) If he had not promised to accept the draft so as to be legally liable for it, his mortgage did not cover it. Nor is the plaintiff aided by the writ and accounts in the suit of Parker against McNeil & Vose, put into the case as evidence, because this draft is not included in that account. The draft was dated November 6,—the credit in the account referred to is under date of November 4, before this draft was drawn. And further, the account made up by Parker, after the sale of the vessel (which is made a part of this case) contains no charge of this draft.

Indeed, the draft did not come to hand until after the accounts between Parker and McNeil & Vose had been closed. It was not presented until after it matured. And the only evidence of any presentment is from Day, who says that Parker told him it had been presented. There was gross negligence on the part of the plaintiff in not sending the bill forward to know whether it would be accepted or not.

But the whole case turns upon this question. An account having been settled by the parties interested, and paid by a bill of exchange, which bill an agent of the drawee had said should be accepted and paid, can the drawer, without any authority from the drawee or his agent, take up that draft and substitute a new draft for it in favor of another payee, and the drawee be held as an acceptor of the new draft upon an alleged promise to accept the first draft.

It seems to me very clear upon legal principles that the drawee cannot be held as acceptor under such circumstances.

CUTTING, J. The defendant is sued as the acceptor of a draft, drawn on him by McNeil & Vose, on November 26, 1854, payable to the order of Charles Day, and by him endorsed to the plaintiff, and if he is legally liable in this action, it can only be by reason of his alleged acceptance.

It seems that the defendant, at the date of the draft, was interested as mortgagee in a bark, then or about to be launched, on which Day had a lien claim for a suit of sails; that the defendant sent Manson, his clerk, with his letter to McNeil & Vose, the builders and mortgagers of the bark, authorizing the former to confer with the latter respecting the claims on the bark, and the latter to draw on him for such sums as might be needful. Under these circumstances Day presented his demand, and received from McNeil & Vose a drafton the defendant, pay able to the order of James W. Cox for the balance due him, who thereupon receipted his account. This transaction was with the knowledge and consent of Manson, and being in accordance with the tenor of the letter, would render it obligatory on the defendant to accept the draft, and in legal contemplation it was accepted at its inception, and the defendant's writing thereon to that effect would not have rendered the acceptance more obligatory on him. Both Manson and the letter had then fulfilled their respective missions, and Day's claim for a valuable consideration had been discharged. It would be the introduction of a new element into the commercial law, for this court now to decide, as contended for by the plaintiff's counsel, that such draft could be substituted for another payable to the order of a different person, without the knowledge or consent of the defendant or his agent. We recognize the law as embraced in the decisions cited, but among them discover none, which in this particular, sustains the plaintiff's proposition. As to the draft in suit the defendant may truly say, *non haec in foedera veni.* According to the agreement of the parties, the plaintiff must become

Nonsuit.

WILLIAM PATTERSON *versus* WALTER S. VOSE.

In declaring upon a note payable at a particular time and place, whether on demand or not, no averment or proof of demand is necessary, to enable the holder to maintain an action upon it.

The statute of 1848, chap. 218, applies only to notes payable at a place certain, on demand at or after the expiration of a time specified.

Parol evidence is admissible to show a waiver of demand and notice at the time of the endorsement of the note, and such waiver may be inferred from the facts and circumstances of the transaction.

REPORTED by HATHAWAY, J., presiding at *Nisi Prius*.

The action is brought upon a promissory note of the following tenor.

$180,00. "ROBBINSTON, November 29, 1855.

"Three months after date, I promise to pay Vose & Joyce or order, one hundred and eighty dollars with interest, at the Calais Bank, value received.

"AMAZIAH NASH."

With an endorsement on the back,

"Pay to the order of William Patterson.

"VOSE & JOYCE."

William Patterson, the plaintiff, a ship carpenter, testified that he worked for Amaziah Nash in building the bark Lapine, and that he had a lien claim upon the bark for the sum of $380, and that he put the vessel into the hands of Vose & Joyce; that Nash paid him a part of his claim and gave him a note for the balance; that said note was payable to him, and that the names of said Nash, and Vose & Joyce were upon the note; that when this note became due he called upon Nash to pay it, and he and Nash went together to see Vose; that Vose offered to give him a six months draft on New York, in payment of the note, but he declined it; that Vose then told him he would give him a three months note, payable at the Calais Bank; that he could carry it to the bank and get it cashed, and he would pay it by a draft on New York on

three months, which would give him six months. He then gave up the note, and took the one now in suit in this action. He presented the note to the bank for discount, but could not get the money. Three or four days after he had a conversation with Vose, and told him the note had become due, and demanded the money. He said he could not pay it at that present time, but he would see Capt. Nash and have it settled immediately, and wished me not to sue the note until he saw me again. I presented the note for payment fifteen days after to Vose, and he declined to pay.

Amaziah Nash, called by the plaintiff, testified that he built the bark Lapine; that the plaintiff worked upon the bark, and held a lien claim against her for his labor, which amounted to $380; that he paid him a part in cash and gave him a note signed by himself and Vose & Joyce for the balance; that this note was payable to the order of William Patterson; that Vose & Joyce had agreed to pay this note and other notes for labor on the vessel, and were to have the proceeds of the sale of the vessel; that he was present when plaintiff presented this note to Vose for payment. Vose offered to give him a six months draft on New York, in order to get time, which plaintiff declined. Vose then told him he would give him a note payable at the Calais Bank, and he could get the money on it there, and he would take the note up at maturity by a three months draft on New York. When he built the bark Lapine he made arrangements with Vose & Joyce to endorse notes to pay the men.

B. Bradbury, counsel for the plaintiff.

In this case the plaintiff held the joint note of the defendants and one Nash for labor upon the bark Lapine.

On the 29th of November, 1855, he surrendered it and took the note in suit signed by Nash and endorsed by the defendants.

There was neither a demand upon the maker nor notice to the endorsers when the note matured.

Amaziah Nash testifies that when the note was given to

the plaintiff "Vose (one of the plaintiffs) told him (defendant) he could give him a note payable at the Calais Bank and he could get the money on it there, and he would take it up at maturity by a three months draft on New York."

Is this evidence admissible? It is because it does not vary the written contract, but is merely evidence of a waiver of demand and notice. Fuller v. McDonald, 8 Maine R., 213; Sanborn v. Southard, 25 Maine R., 409.

To establish such waiver it is not necessary that it should be "direct and positive." "It may result by implication from usage or from any understanding between the parties, which is of a character to satisfy the mind that a waiver was intended." Fuller v. McDonald, above cited.

The language used by Vose to the plaintiff is a waiver of demand and notice. Vose promises to pay the note at maturity, to take it up by a draft on New York. In Fuller v. McDonald, McDonald (the endorser) said if Tucker (the maker) did not pay the note "he would pay it the first time he came to the city." This was held to be a waiver of demand and notice.

In the case of Sanborn v. Southard the endorser promised to pay the note under the same circumstances as in the last cited case.

To take up the note at maturity by a three months draft, which Vose promised to do, would be to pay it, bringing this case within the rule of the two cases before cited.

This case is stronger because the promise here is absolute.

Patterson (the plaintiff,) testifies to the same fact substantially.

Vose was absolutely liable for the debt. The time and mode of payment were for his accommodation. The parties understood that there was a waiver of demand and notice.

That this was so is fully confirmed by the statements of Vose when plaintiff called upon him for payment. He did not pretend that he had not been notified, and, therefore, should not pay. He said "he could not pay it at that present time, but he would see Capt. Nash and have it settled imme-

diately, and for me not to sue the note until he saw me again."

This is not only a waiver of demand and notice, *but an absolute promise to pay the note.* So that he is liable either way, and this action must be defaulted.

A. Hayden, counsel for the defendants.

1. The defendants cannot be held as endorsers of the note in suit, because there has been neither demand on the maker nor notice to the defendants as endorsers.

On this point there is no doubt whatever in fact, nor can there be any doubt that in law the contract of an endorser is conditional, his liability depending on seasonable and legal demand on the maker, and seasonable notice to the endorser.

All the pretence of notice is on the 29th of February, three days before the note was due—of demand, the proof entirely negatives it. Story on Bills of Exchange, 122; Baily on Bills, 217, 368, 369; Chitty on Bills, 264–267; Warren v. Gilman, 15 Maine R., 76; Moor v. Cross. Law Reporter, April, 1857.

2. All the evidence introduced by plaintiffs of the conversation when the note was given, is inadmissible, as tending, if it has any weight at all, to vary the written contract of the defendant.

The whole evidence shows that the conversation was *before* the note in suit was given, and by the testimony of Patterson it related to a proposition of Vose to give their *own* draft on New York at six months, *which was declined;* then to give their *own* note at three months, payable at the Calais Bank, saying that when that note became due they would get the Calais Bank to take their draft to pay it, and thus get the six months; this also was declined, at any rate it was not acted upon, for it appears that then the note in suit was taken, which is not defendants' note, but Nash's note endorsed by defendants.

The same is the testimony of Nash, as to the conversation,

though he says nothing about the note in suit being given then.

It is also inadmissible as evidence of an independent contract, for whatever was Vose & Joyce's proposition, it was never accepted by Patterson, but instead thereof Nash's note with defendants' endorsement, was taken.

It is clear from all the evidence in the case the defendants never intended to assume anything but a conditional liability for bills against the bark. Nash says "I made arrangements with Vose & Joyce to endorse notes to pay the same." The first note, although by the construction of our courts it might be held to denote a liability of Vose & Joyce as makers, in consequence of their not being payees of the note, yet it is evident from the place where they write their names that they thought they were assuming an endorser's liability only, that note having been given up when the note in suit was given, of course their liability on that note cannot be evidence to vary their liability on this note.

It may be remarked, however, that in a recent case in New York, in a well revised opinion, it is decided that the signature of a party *not payee* on the back of the note, the note at the time being in the hands of the payee, only fixes him with an endorser's liability, and he is entitled to the same demand and notice as any other endorser, though he has no claim even against the payee, but is liable to him as if he were first endorser on the paper. Moor v. Cross. Law Reporter, April, 1857.

The importance of adhering strictly to the law excluding parol evidence to vary or control written contracts, is enhanced by the recent change in the law, so as to admit parties to suits as witnesses. A law which, although it has a large preponderance of benefit in its favor, is not entirely free from the charge that it offers temptations to misstatements, which should be guarded against by holding parties offered as witnesses, to the strict rules as to the competency of witnesses. 1 Greenl. on Ev., 315, 316, 319.

3. There is no proof of a waiver by defendants of their right to a demand and notice. All the evidence on this point is from the plaintiff, relating to the conversation on the 29th of February. All he says is, "that Vose said he could not pay it at that present time, but he would see Captain Nash, and have it settled immediately, and for me not to sue the note until he saw me again, and when he did see him again, he declined to pay the note."

Nothing can be inferred from this except Vose meant to try to get Nash to pay the note, and to ascertain his own liability. That he did not mean to admit an absolute liability on his part to pay the note is shown by the fact that he did not ask him absolutely to refrain from suing it, but not to sue it till he saw him again, evidently contemplating the contingency that he might defend against the note, but wishing time to ascertain his liability. What he did when plaintiff called again, shows that all Vose meant to do was to try to get Nash to pay it. May v. Coffin, 4 Mass., 341, is precisely parallel.

But even if that could be construed as a promise to pay, it would be void.

1. Because without consideration. 1 Greenl. Ev., 352.

2. Because made under a misapprehension of the facts caused by misstatements made by plaintiff. Plaintiff says, "I told Vose the note had become due, and demanded the money." That was on the 29th of February, and the note was not due till the 3d of March.

It does not appear that he showed him the note, and Vose might well have forgotten the exact date of the note, and have been misled by plaintiff's statement. Under this misapprehension he would suppose that the notice fixed his liability, and might promise to make arrangements to pay the note.

In order to vary a written contract by proof of parol agreement made subsequently, *the evidence must be conclusive* to prove an intention to do so, *with a knowledge of the facts*,

and a new consideration. The acts and sayings of Vose both negative this intention. Davis v. Gowan, 17 Maine R., 387, is directly in point. There it was held that to prove a waiver of notice by a new promise it *must be proved by plaintiff affirmatively* that defendant knew, when he made the promise, that no demand had been made on the maker. In Garland v. Salem Bank, 9 Mass. R., 408, it is decided that when an endorser who was discharged in consequence of a want of notice or demand, *had actually paid the note*, under a belief of his liability arising from a misapprehension of the facts, he may recover it back, in an action for money had and received.

4. This action cannot be maintained because no demand for payment of this note was made at the place where it was payable before the suit was brought.

Statute of 1846, chap. 218, is peremptory on this point: "In an action upon a promissory note, payable at a place certain, after or at the expiration of a specified time, the plaintiff shall not be entitled to recover unless he shall prove a demand to have been made at the place of payment, prior to the commencement of the action."

No demand for payment of this note has ever been made at the Calais Bank.

5. The only promise of which there is any pretence in this case, is to take up this note at maturity, by a draft at three months. No demand for such draft has been made.

APPLETON, J. It appears from the evidence that the plaintiff, having a lien claim for labor on the bark Lapine, which one Amaziah Nash was then building, received in payment of the same the joint note of Nash and the defendants. Their note not having been paid at maturity, they gave in renewal thereof the one in suit, signed by Nash as maker, to the order of, and endorsed by, the defendants, and payable at the Calais Bank in three months. As, when the note became due there was no demand made on the maker nor notice

given to the defendants of its non-payment, they claim to be exonerated from all liability.

It was decided in the House of Lords in the case of Rowe v. Young, 2 Brod. & Bing., 165, that if a bill of exchange be accepted, payable at a particular place, the declaration in an action on such bill must aver presentment at the place and that such presentment must be proved.

In this state the English rule was not adopted. It has accordingly been repeatedly held in case of a note payable at a particular time and place, whether payable on demand or not, that no averment or proof of demand was necessary to entitle the holder to maintain an action on the note. Remick v. O'Kyle, 3 Fairf., 340; McKenney v. Whipple, 21 Maine R., 98.

The statute of 1848, chap. 218, which has been relied upon in the defence, applies only to notes payable at a place certain, *on demand*, at or after the expiration of a time specified. Stowe v. Colburn, 30 Maine R., 32.

In the case before us, the maker of the note, Nash, testifies as follows: "I agreed to give Patterson a note, endorsed by Vose & Joyce, and agreed with Vose that he should pay it —he told me he *would take care of the notes.* I put the property in his hands." In another part of his testimony, referring to the time when this note was given, he says, "that Vose & Joyce had agreed to pay this (the first note) and other notes for labor on the vessel, and were to have the proceeds of the sale of the vessel; that I was present when plaintiff presented this (the first) note to Vose for payment. Vose offered to give him a six months draft on New York in order to get time, *which plaintiff declined.* Vose then told him he would give him a note, payable at the Calais Bank, and he could get the money on it then and *he would take the note up at maturity* by a three months draft on New York." It appears from the testimony of the plaintiff that three or four days after the 29th of February he had a conversation with Vose, which was as follows: "I told him the note had become due, and demanded the money. He said he could

not pay it at that present time, but he would see Capt. Nash and *have it settled* immediately, and *for me not to sue the note until* he saw me again." On cross-examination he said, "Vose said in this conversation that he had paid a good deal of money for Nash, but he did not say he wanted Nash to pay the note. He said he wanted to see Capt. Nash so they could muster something to pay it." In all these conversations it is apparent that Vose was acting in behalf of the firm of which he was a member.

It was held in Fuller v. McDonald, 8 Maine R., 213, that parol evidence is admissible to show a waiver of demand on the maker and notice to the endorser at the time of the endorsement of the note in suit; that such waiver need not be positive, but may be inferred from the facts and circumstances attending the transaction. In Lane v. Stewart, 20 Maine R., 98, a waiver of demand on the maker was held to be sufficiently established by proof that the endorser, at the time of the endorsement of the note said, that if the maker did not pay it when it became due he would, and that after it became due he told the holder that if he would commence a suit against the maker, and could not collect it, he would pay it. So evidence to show a waiver of the necessity of making a demand or giving notice was received in Sanborn v. Jewell, 25 Maine R., 409. "What circumstances will, in our law, amount to the proof of a waiver of due presentment, or the want of due notice of the dishonor, is sometimes a matter of no inconsiderable doubt and difficulty. Slighter circumstances may be sufficient when the situation of the endorser is such as fairly to give rise to the presumption that the note was for his accommodation; or that he had not or could not have sustained any prejudice more than would be essential where no such presumption should arise." Story on Promissory Notes, sec. 277. It is apparent in the case before us that no injury could have arisen to the defendants from want of demand or notice. The vessel upon which the plaintiff had labored, and from the avails of which the funds were expected to meet this claim, was in their hands,

and when this note was taken, in renewal of a preceding one, they had "promised to take it up at maturity," and after maturity they had further promised to "have it settled immediately." In accordance with the previous decisions of this court, the defendants must be regarded as having waived demand and notice, and consequently a default must be entered.

Defendants defaulted.

GEORGE CROCKER, *app't from a decree of the Judge of Probate,*

versus

OLIVE W. CROCKER AND ALS.

On appeal from a decree of a Judge of Probate to the Supreme Court of Probate, the facts and all matters of mere discretion are to be determined by the Judge, sitting at *Nisi Prius*; and his judgment thereon is final and conclusive upon all parties.

If upon facts found by him a question of law arises, his decision is subject to exceptions to be heard before the full court.

Where no exceptions have been taken to any ruling of the presiding justice, the case is not properly before the full court.

REPORTED by HATHAWAY, J.

An appeal was taken from a decree of the Judge of Probate in the county of Washington, accepting the report of commissioners appointed by said judge, to make partition of the real estate of Simeon Crocker deceased, among said Crocker's heirs.

The case comes before the full court on report of the facts submitted by agreement of the parties, but no determination was made at *Nisi Prius* by the presiding judge.

George Walker, counsel for the plaintiff.

George F. Talbot, counsel for the defendants.

APPLETON, J. By the provisions of the act of 1852, chap. 246, sec. 13, "All appeals from the decrees of the Judge of Probate, except such as by law are tried by a jury which shall be tried as heretofore, and all petitions for a review may be heard and determined by the presiding justice, at any term held for the trial of jury causes, subject to exceptions to any matter of law by him so decided and determined."

The object of this section was to submit to the judgment of the presiding justice all matters of fact and of discretion, and that his judgment thereupon should be final and conclusive upon all parties. If upon facts found by him a question of law should arise, his decision thereof was to be subject to exception. This court sitting in banc, is thus relieved from the investigation of fact, and the parties litigant have all matters of fact or discretion arising upon appeal determined more speedily and at less expense. Moody v. Larrabee, 39 Maine R., 282.

The present case illustrates the expediency of the course prescribed by the statute. The inequality, inconvenience and incompleteness of the division by the commissioners are severally alleged as the reasons of the appeal taken. Those several reasons, so far as dependent upon the ascertainment of fact, belonged exclusively to the presiding judge, and could be tried and determined in the county in which the appeal is pending with greater convenience to the parties than elsewhere.

It is insisted that the return of the commissioners, which is signed but by two, does not show that the third commissioner was notified or present. If, in fact, he was notified and present, but dissented from the partition made by his associates, any defect in their return may be cured by an amendment. If he was neither notified nor present the report should be recommitted. Jackson v. Hampden, 16 Maine R., 184; Jackson v. Hampden, 20 Maine R., 37.

As no exceptions have been taken to any ruling of the presiding justice, the case is not properly before us. All questions of fact and all matters of mere discretion are to

be settled at *Nisi Prius*, and not here. The result is that the cause must be dismissed from the docket of this court and remanded to the county in which it is pending for further hearing, and for such disposition as the legal rights of the parties may require.

Dismissed from this docket.

COUNTY OF PENOBSCOT.

WILLIAM A. BEARCE *versus* STILLMAN F. WASHBURN AND AL.

Where one person advances funds, and another furnishes his personal services and skill, in carrying on a trade or operation, and is to share in the profits: it amounts to a partnership.

REPORTED by APPLETON, J., presiding at *Nisi Prius*, from which it appears that this action was brought against the defendants as co-partners in a lumbering operation, and that the goods sued for were used in that operation for the benefit of both defendants, who shared equally in the profits, one having furnished funds and the other performed the necessary labor.

The only question raised was whether the defendants were co-partners.

The full court were authorized to render such judgment as the law of the case might require.

H. P. Haynes, counsel for the plaintiff, argued that the defendants were special partners for that operation, without articles of co-partnership in writing, and cited Story on Partnerships, 3d ed., pp. 59, 60, 61, 94, 96, 97.

A. C. Smith, per se, denied that he was a partner, or liable for any further amount than the specific sum which he agreed to advance.

RICE, J. Assumpsit against the defendants, as partners, for goods sold and delivered. Smith, one of the defendants, contests his liability as a partner, on the ground that there was no legal partnership existing between the defendants; or if the court should hold otherwise, that the goods sued

for were not sold and delivered to, and on the credit of, the partnership. Washburn, the other defendant, does not contend.

Partnership, often called co-partnership, is usually defined to be a voluntary contract between two or more competent persons, to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a community of the profits thereof between them. Story on Partnerships, sec. 2.

If one person advances funds and another furnishes his personal services or skill in carrying on a trade, and is to share in the profits, it amounts to a partnership. 3 Kent's Com., p. 24; Dob v. Holsey, 16 Johns., 34.

The facts reported in this case, so far as the lumbering operation, in which they were engaged, is concerned, bring the defendants clearly within the definition of co-partners, both between themselves and in their relations with others. The evidence also shows that the goods sued for went to the use of the partnership, and were purchased with the knowledge and assent of both of the defendants. The papers referred to in the report have not come into the hands of the court.

Defendant defaulted.

PRESERVED B. MILLS *versus* SAMUEL DARLING, *Adm'r.*

A conveyance by husband and wife of real estate belonging to the wife, and a bond to reconvey given to the wife alone, constitute a mortgage; and not the less so because the wife gave no personal security for the money to be paid, as specified in the condition of the bond.

ON AGREED STATEMENT OF FACTS.

Writ of entry to recover possession of a lot of land in Bangor.

The defendant is in possession of the premises as adminis-

trator of the estate of Eliza M. Campbell, and also as lessee under her heirs at law, she having died in February, 1856, leaving no children.

The plaintiff claims title under a quit claim deed, dated February 1, 1854, from Benjamin G. Campbell, and Eliza M. Campbell, his wife, in her right to himself.

At the time Campbell and wife executed the deed to Mills, he executed to her a bond of the same date, to sell and execute to her a deed of the premises on the condition that she paid, took and delivered to him four notes, amounting to the sum of four hundred dollars, agreeably to the conditions of the bond. Mrs. Campbell has paid only sixty dollars towards the notes, which sum is endorsed on the bond.

Mills has paid and taken up two of the notes, and paid one year's interest on the other two notes. The notes have always been at a convenient place in Bangor, for her to pay them at her request.

The defendant submits to a default, but claims that judgment shall be rendered as of mortgage.

Judgment is to be rendered according to the legal rights of the parties.

A. G. Wakefield, counsel for the plaintiff.

Albert W. Paine, counsel for the defendant.

HATHAWAY, J. Benjamin G. Campbell and his wife, in her right, conveyed the demanded premises to the demandant, who at the same time gave her a bond, conditioned to convey the same to her on her payment of certain notes of the same date, given by him to Charles E. Mills, of which she subsequently paid a part only, which was endorsed on the bond.

The question is, whether or not the deed and bond constituted a mortgage. The counsel for the plaintiff insists, that the bond cannot operate as a defeasance within the meaning of R. S., chap. 125, sec. 1, because, "the deed was from two persons, and the bond to one person."

But the land belonged to the wife, and the husband joined in the deed merely to enable her to convey it. A conveyance to *her*, as stipulated in the bond, would have restored to both the husband and wife, the same title to the land which was conveyed by their deed to the demandant. It would have been, strictly, a *reconveyance.*

It is also objected that Mrs. Campbell gave no personal security for the money to be paid, as specified in the condition of the bond. It was not necessary that she should give such security. Rice v. Rice, 4 Pick., 349.

The demandant is entitled only to the conditional jugdment.

Judgment as of Mortgage,

HARRISON G. O. MORRISON *versus* ARTHUR MCARTHUR.

Where a grantor covenants that he is seized in fee of an *undivided* portion of the premises conveyed, and partition had previously been made by order of court among the several owners, of which he was ignorant, he is liable on his covenants, although he conveys no more than his original proportion of the whole tract.

As to the measure of damages in such a case.

This is an action of covenant broken.

April 11, A. D. 1853, the defendant conveyed to the plaintiff, by deed of warranty in common form, one undivided eighteenth part of the eastern half of township numbered three, in the eighth range of townships, on the Sebois stream, in the county of Penobscot, covenanting with said plaintiff, his heirs and assigns, that he was lawfully seized in fee of the premises, that they were free from all incumbrances, that he had good right to sell and convey the same to said plaintiff, and that he and his heirs would warrant and defend the same to said plaintiff, &c., forever. Prior to said conveyance to said plaintiff, but subsequent to the time when said de-

fendant became possessed of one undivided eighteenth part of said half township, to wit: on the 26th day of February, 1849, twenty-five-thirty-sixths parts of said half township were set off by metes and bounds to Josiah Towle, Solomon Parsons and William H. Parsons, by decree of the court on their petition for partition. It was admitted that the plaintiff was ignorant of the aforesaid partition and set off, and that he supposed that when he received the defendant's deed he became seized of one undivided eighteenth part of the whole of said half township. The breach alleged is that the defendant was not seized of one undivided eighteenth part of said half township at the time of his deed to the plaintiff, and had no right to sell the same.

The defendant offered to prove, by the commissioners who made the aforesaid partition, that the land set off in said partition was a fair average of said half township, and that due notice was given to all interested. This testimony was objected to by the plaintiff's counsel and excluded by the court *pro forma*.

The case was then taken from the jury by consent of parties, who agreed that a default should be entered if the aforesaid testimony was properly excluded, otherwise to stand for trial; if a default is entered the court are to assess damages.

Humphrey, counsel for the plaintiff.

Hilliard & Flagg, counsel for the defendant.

CUTTING, J. The defendant, by his deed of April 11, 1853, conveyed to the plaintiff one undivided eighteenth part of the eastern half of township numbered three, in the eighth range of townships, on the Sebois stream, in the county of Penobscot; and therein covenanted that at the time, he was lawfully seized in fee of the premises. But it appears that prior to the deed, Josiah Towle and others, being owners in common and undivided of twenty-five-thirty-sixths parts of the same half township, had, by the statute process of partition, caused their proportion to be set off by metes and

bounds, to be held by them in severalty. Those proceedings, being final and conclusive as to the proprietors residing in this state, affected a severance of the common property, so that the defendant's interest attached only to the residue of the half township after the separation — increasing in proportion as it diminished in quantity. Thus, for instance, after deducting Towle and others' interest, there would be remaining eleven thirty-sixths parts in one body, which, as between the defendant and his remaining co-tenants, may be represented by the *integer* eleven, of which he would be entitled to two eleventh parts, and of so much only seized in fee at the date of his deed to the plaintiff. Consequently he was not seized of that portion set off to Towle and others, and there was a breach of covenant in that particular.

The testimony offered by the defendant and excluded by the ruling was immaterial. It was an attempt to show faithfulness on the part of the commissioners in the discharge of their duties, which the law will infer until the contrary has been made to appear. According to the agreement of the parties the defendant is to be defaulted, and the court are to assess the damages, which may be more or less, as the facts shall be disclosed at the hearing. It seems that the deed was made by the defendant in ignorance of the division. He manifestly intended to convey all his interest in the half township. If at the hearing he should tender a deed to that effect it might be worthy of consideration how far it should be received in reduction of damages.

Defendant defaulted.

DANIEL WARREN, *in Equity, versus* BENJAMIN F. BAKER.

Bills which seek a discovery only, in aid of an action at law, cannot be entertained by this court, as its jurisdiction is limited by statute to cases in which it can give relief, and to those in which the power to require a discovery is specially given.

Under the limited jurisdiction of this court in equity, it is well settled that relief consequent upon discovery ought not to be given, when the most appropriate proceeding to ascertain the extent of the relief is by the verdict of a jury.

BILL IN EQUITY, in which the plaintiff alleges that he was, on or about the nineteenth day of November, A. D. 1856, notified by John H. Wilson, sheriff of the county of Penobscot, that he held in his hands an execution against your orator, in favor of Benjamin F. Baker, of Norridgewock, in Somerset county, with directions to collect the same of your orator; that your orator was until that time totally ignorant that such an execution was in existence, or that any judgment had been rendered against him in favor of said Baker, or that a suit had ever been commenced against him by said Baker. That on investigation he ascertained that said execution was the third execution issued on a judgment recovered before the Supreme Judicial Court holden at Norridgewock, within and for the county of Somerset, on the third Tuesday of March, by adjournment on the third Tuesday of May, A. D. 1853, for the sum of two hundred thirty-six dollars and three cents damage, and eight dollars and four cents costs of suit, and dated October 28, A. D. 1856, and that to his best knowledge and belief, it is the first execution on said judgment which has ever been placed in the hands of an officer.

And your orator further says, that said suit was founded upon a note signed by your orator on the second day of August, 1836, for two hundred dollars, payable in one year and interest annually;—that your orator was at that time an infant under the age of twenty-one years, and that said note

was given to one Kidder, who took advantage of your orator's infancy and want of experience to obtain from him said note and a payment on the same on the day of its date, of eighty-two dollars and fifty-seven cents, for an insufficient consideration, which said consideration was an obligation for the conveyance of certain real estate situate in the state of New Hampshire, which, according to your orator's information and belief, was of no value, and from which your orator or any person by, through, or under him, has never at any time received any benefit whatever, and that if he had had knowledge of said suit before judgment was rendered, he should have made a defence to the same, and if he had had knowledge of the existence of said judgment within three years after it was recovered, he should have petitioned for a review of the action; that although by the officer's return upon the writ it appears that it was served by a summons being left at his last and usual place of abode, yet that the fact of such service never came to the knowledge of himself or any member of his family; that although by the records of said court it appears that two executions prior to that in the hands of said Wilson have issued on said judgment, yet that the existence of such execution and of such judgment have been fraudulently concealed from him by the said Baker; although your orator is of sufficient ability to pay the same, and has had property both real and personal liable to be levied upon from before said suit was commenced, until after the expiration of three years from the time when said judgment was recovered. Whereby, by reason of said fraudulent concealment, your orator has been barred of his remedy at law, and he brings this suit, and he prays your Honors to consider this matter in equity, where alone your orator can have relief, and to give him such relief as your Honors shall deem meet in the premises.

And may it please your Honors to grant your writ of injunction directed to said John H. Wilson, sheriff, and to all his deputies, and likewise to said Benjamin F. Baker, and to all and singular his counselors, attorneys, agents and solic-

itors whomsoever, enjoining and commanding them that they and each of them desist from further enforcement of said execution at law.

And may it please your Honors, also, to grant unto your orator your writ of subpœna directed to said Benjamin F. Baker, commanding him at a day certain and under a pain therein to be limited, personally to be and appear before your Honors in this court, and then and there, full, true, direct and perfect answers make to all the premises; and, further, to abide, stand to, and perform such further order, direction and decree therein as to your Honors shall seem meet.

To which there was a demurrer, in which the question raised was, whether this court has any equity jurisdiction over the case as made in the bill.

The demurrer having been overruled *pro forma*, at *Nisi Prius*, by APPLETON, J., presiding, this case comes before the full court on exceptions to that ruling.

D. D. Stuart, solicitor for the respondent, argued in support of the demurrer.

John E. Godfrey, solicitor for the complainant, in support of the bill.

The bill alleges:

1. The fraudulent concealment of a judgment for more than three years; which judgment was recovered upon a suit of which the complainant had no knowledge.

2. That the suit was upon a note to which he had a legal and equitable defence, which he would have made if he had had knowledge of the suit, or if he had known of the existence of the judgment in season to procure a review.

This court has jurisdiction as a court of equity in all cases of fraud, trusts, accident or mistake. R. S. of 1841, chap. 96, sec. 10, clause 5, or in the language of the R. S. of 1857, chap. 77, sec. 8, clause 4, "For *relief* in" such cases.

TENNEY, C. J. It is alleged in the bill, that a judgment

was obtained against the plaintiff in an action upon a promissory note of hand, given by him when a minor, under the age of twenty-one years, in consideration of a conveyance to him of a parcel of land of no value, advantage having been taken of him by the payee of the note, by reason of his infancy and want of experience; that although by the return upon the writ, a summons was left at the last and usual place of abode of the plaintiff, yet he was ignorant of the institution and pendency of the suit, and of the existence of the judgment thereon, till more than three years after the judgment was rendered, notwithstanding two writs of execution were issued thereon, previous to the one upon which he was called on for payment of said judgment; and that the defendant fraudulently concealed the existence of said judgment from the plaintiff, so that he has been prevented from making the attempt to obtain a review of the action, as he should have done, until his petition for review was barred by the statute of limitations.

The bill contains a general prayer for discovery and relief.

Under a demurrer to the bill, the defendant denies the equity jurisdiction of the court, and its power as such to grant any relief.

Bills of this sort are usually called bills for a new trial. 2 Story's Eq., sec. 887. And the only relief contemplated by the bill, is in its nature a review of the action, in which the judgment at law was rendered.

In the case of Marine Ins. Co. v. Hodgson, 7 Cranch., 332, it is said by Marshall, C. J., in delivering the opinion of the court, "Without attempting to draw any precise line, to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said, that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his

agents, will justify an application to a Court of Chancery." The doctrine contained in the above does not appear to be controverted by courts possessed of general chancery powers, as appears by the authorities cited in behalf of the plaintiff.

But in courts having the most ample jurisdiction in equity, "bills of this description have not of late years been much countenanced." Per Lord Redesdale, 1 Metf., Pl. Eq., by Joreney, 131; Floyd v. Jayne, 6 John. Ch., 479; Woodworth v. Van Baskerk, 1 Ibid., 432. And in these courts it is a rule well established, that if a bill prays for relief, as well as discovery, and if the party is not entitled to the relief, he is not entitled to a discovery. Warren v. Coombs, 17 Maine R., 404. And in cases where the remedy at law is more appropriate than the remedy in equity, or the verdict of a jury is indispensable to the relief sought, the jurisdiction will be declined; or if retained, will be so, subject to a trial at law. 1 Story Eq., sec. 66, and seq.

This court cannot entertain bills for discovery, which do not pray for relief, and seek a discovery only in aid of an action at law; and it cannot entertain bills of this description, for the reason, that by the statute its jurisdiction is limited to cases in which it can give relief; and to other cases, in which the power to require a discovery is specially given. And although relief may be and usually is given consequent upon discovery, it has been held, and such is the settled doctrine, under the limited jurisdiction of this court in equity, that such relief ought not to be given, when to obtain the verdict of a jury is the most appropriate proceeding, to ascertain the extent of the relief. R. S. of 1841, chap. 96, sec. 10; Warren v. Coombs, before cited; Woodman v. Freeman, 25 Maine R., 531.

The judgment referred to in the bill, according to the allegations therein, is a valid judgment at law, and is now in full force. The relief sought can be granted in no other mode, than by a review of the action in which the judgment was rendered. Discovery, in this case, can be only for the

purpose of obtaining a new trial, in an action at law; and to grant it would be an excessive exercise of the equity jurisdiction, which, according to well settled constructions of the statutes, has been conferred upon this court.

Bill dismissed.

RICE, APPLETON, HATHAWAY, and GOODENOW, J. J., concurred; CUTTING, J., did not concur.

GEORGE SOUTHARD *versus* GEORGE RICKER, *Appellant.*

Judicial notice can be taken only from the return of the selectmen, as to the posting of notices for the location of a town way, and if they omit to state in their return that such notices were posted "*in the vicinity of the proposed route*," the court cannot determine the road to have been legally established.

THE parties in this case agreed upon the following statement of facts:

This is an action of trespass commenced before a justice of the peace, for breaking and entering the plaintiff's close, in Alton, in this county. Judgment was for the plaintiff in the court below, for damage and costs, from which the defendant appealed in due form.

The records of the town of Alton show that in pursuance of an application, the selectmen of Alton for 1851 laid out a town way in said town, and made return of their doings as follows:

"The subscribers, selectmen of Alton, on the application of George Ricker and als., to lay out a town way in said town, beginning at the Bennock road, and ending at James Doleff's south line; having given seven days' notice of our intentions to lay out the same, and stated in said notice the *termini* thereof, by posting up said notice in two public places in said town, viz.: one at the tavern of A. S. Mansel, and

one at the school-house in school district No. 2, in said town on," &c. We therefore lay out said way," &c.

G. P. Sewall, counsel for the plaintiff, argued, with other objections, that the selectmen did not observe the requirements of R. S., chap. 25, sec. 28, requiring them to state in their return, that the notices prescribed in that section were posted in the vicinity of the proposed route.

J. H. Hilliard, counsel for the defendant.

CUTTING, J. If the town way crossing the plaintiff's close was legally established, the defendant was justified in doing the act complained of; otherwise not; and the burden is upon him.

We sssume that the procedings were correct, or by the proposed amendments may be made so, as it regards the notice of the meeting at which the road was accepted by the town, and that the non-assessment of damages by the selectment was immaterial, for the authorities cited by the defendant's counsel would seem to authorize such a conclusion. And still there remains another objection, where no amendment has been proposed, to the legality of the way, which we deem a valid one.

R. S., chap. 25, sec. 28, provides that "No such town or private way shall be laid out or altered, unless seven days previous thereto, a written notice of the intention of the selectmen of the town to lay out or alter the same, and stating the *termini* of such road, shall be posted up in two or more public places in the town, *and in the vicinity of the proposed route.*"

It does not appear in the selectmen's return of their doings that the notices were posted up in the vicinity of the proposed route. The notices may have been so posted, but such fact should appear affirmatively from the return; since from that alone we can take judicial notice, and can infer nothing except from what appears.

When we consider that "private property shall not be

taken for public uses without just compensation," and that the statute is explicit in prescribing the notice to be given, and also perceive that the statute may have been violated in that particular, we cannot determine the road to have been legally established. Consequently the defendant is to be defaulted, and judgment rendered for the amount agreed upon by the parties.

DANIEL GOODWIN *versus* JOEL W. CLOUDMAN AND ALS.

Upon hearing of a motion to set aside a verdict, because a juror who tried the cause was related to the prevailing party, the proof should exclude the reasonable possibility of knowledge of this fact on the part of all parties making the motion, and of their counsel.

One claiming by record title will prevail against a prior deed unrecorded, unless the grantee has actual knowledge of the prior conveyance.

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

In this case, after verdict for the plaintiff, Cloudman, one of the defendants, filed a motion for a new trial, because one of the jurors who tried the cause was a nephew of the plaintiff, and therefore disqualified by law to sit in the case. The defendants offered no evidence in support of the motion, except the motion itself and the affidavit of Cloudman, one of the defendants. Upon this evidence the court overruled the motion.

The defendants plead jointly.

D. D. Stuart, counsel for the plaintiff.

G. W. Ingersoll, counsel for the defendants.

APPLETON, J. The plaintiff's title is by a mortgage, unrecorded at the time E. S. Coe, as whose servants the defendants justify, acquired his title. The jury were instructed to find for the defendants, unless they were satisfied that Coe

had actual notice of this mortgage, which fact, by their verdict, they have found. This instruction affords no just ground for complaint.

After verdict, a motion was filed to set aside the verdict, because one of the jury was disqualified by reason of his relationship to the plaintiff. It may well be a matter of doubt if a party who neglects the right to challenge, which the law affords, can be permitted to take advantage of it after verdict. McLellan v. Crofton, 6 Greenl., 307. But, however that may be, the proof should exclude the reasonable possibility of knowledge of that fact on the part of all parties making the motion, and of their counsel. This the defendants entirely fail to do. The proof of ignorance of this relationship is from only one of the defendants and from one of their counsel. For aught that appears, all the facts which are now claimed as sufficient to set aside the verdict, may have been known to the other defendants, or to the associate counsel employed in the defence. The exceptions must be overruled.

Exceptions overruled, and judgment on the verdict.

ASA REDINGTON AND AL. *versus* WILLIAM A. FRYE.

In order to enforce a lien for services on logs, it is necessary that the property on which the labor was performed should be specifically inserted in the writ, as the property to be attached, and the officer therein ordered to attach it, instead of the property of the defendant, as is usual in all writs of attachment.

An officer cannot regard the averments in the declaration or endorsement of an attorney on the writ, when inconsistent with the express commands to him within directed.

Under the statute of 1848, chap. 72, the proceedings in regard to the debtor are *in personam;* but so far as the general owner of the property is concerned, when the laborer has contracted with another person the proceedings are strictly *in rem.*

Until the statute of 1855, chap. 144, the *res* could not be legally represented in court.

Redington and al. *v.* Frye.

It is necessary, in order to preserve the lien on logs attached, that the owners should have due notice of the pendency of the suit.

The act of 1848, and the additional act of 1855 have materially changed the law of lien on lumber.

REPORTED by HATHAWAY, J.

This, and the case of Ephraim Hamilton v. Hiram Crommett, were submitted to a referee under the annexed agreement, and in his reports, (also annexed,) the referee states certain questions of law, and the two cases are now submitted to the full court for the decision of those questions.

Upon said agreement and reports, the court are to render such judgment in these two cases, as law and justice may require.

This memorandum of agreement, made October 31, 1856, between William A. Frye, on one part, and Joseph M. Moore and Asa Redington on the second part, witnesseth.

That said parties agree that the following named suits, pending in the Supreme Judicial Court for Penobscot county, to wit: William A. Frye v. Joseph M. Moore; Moore & Redington v. William A. Frye; Martin N. Merrill (of whom said Frye is assignee) v. Moore & Redington, shall be referred to Hon. Jonas Cutting, to be determined upon by legal principles, whose decision shall be final and conclusive, in the matters embraced in said suits, upon the parties thereto.

And that in another suit pending in said court, wherein Ephraim Hamilton (of whom said Frye is assignee,) is plaintiff, and Hiram Crommett is defendant, in which the logs of Moore & Redington were attached on a claim of lien, for labor thereon, by said Hamilton, under the statute, and in which suit the log owners having had notice, said Moore & Redington have appeared specially, the same referee shall determine, upon legal principles, whether any lien existed, and whether it had been lost, and whether this writ, attachment and suit were valid and effectual, to perfect and secure such lien, and if he shall determine that it did exist and has

been secured and perfected, and not lost thus far, by said suit, writ and attachment, and without this reference, could be enforced upon said logs, then he shall determine and award what sum said lien existed for, and how much said Moore & Redington shall pay, if anything, in discharge thereof, and his determination shall be final and conclusive thereon upon the parties.

Said referee shall make his award in writing in each of said suits, having power to award costs for either party, and to apportion the costs of reference among said suits as he shall deem proper, and return his award to court at said next term, and said suits shall stand continued, and at said term be disposed of in accordance with the several awards.

All depositions taken in the above named cases to be used at the hearing.

W. A. FRYE,
JOS. M. MOORE,
ASA REDINGTON.
By *Jos. M. Moore.*

In the case of Asa Redington and al. v. William A. Frye.

Pursuant to the agreement of the parties, as contained in their agreement of October 31, A. D. 1856, to which reference may be had, the undersigned referee, named therein, having duly notified the parties, met them at the office of A. Walker, in Newport, on the twelfth day of December, A. D. 1856, and heard their several pleas, proofs and allegations, and maturely considered the same, do award and determine, and this is my final award and determination in the premises, that the said plaintiffs do recover of said defendant the sum of one hundred and five dollars, debt or damage, and their costs of reference, taxed at sixteen dollars and seven cents, and costs of court, to be taxed by the court.

Unless the full court shall determine that the law upon the facts hereinafter stated does not authorize a recovery by the plaintiffs in whole or in part as above stated, but does sustain the defence, in whole or in part, which facts are as follows, viz: The said defendant, as a constable of Newport,

duly authorized, in November, A. D., 1855, served four writs, returnable before Thomas Clark, a justice of the peace, to wit: Farnsworth Lawrence v. Hiram Crommett; John Q. Brown v. Same; Humphrey Twombly v. Same; and Jeremiah Grindell v. Same; all founded on claims for personal labor in running logs for the defendant in those suits, and for which the several plaintiffs, in their several declarations, claimed to have a lien on the logs, then owned by the plaintiffs in this suit, who contracted with said Crommett to run said logs. The several writs commanded the officer to attach the property of the several defendants named therein, but not the logs in controversy, on which the labor had been performed, unless orders to that effect, endorsed on the back of the writ, and what appears in the declarations, might be so considered. On those writs the defendant, Frye, as constable aforesaid, attached and returned said logs in due form, except on the writ Brown v. Crommett the certificate left with the town clerk fixed the return day of the writ one week too early. The actions were duly returned before said magistrate, who rendered judgment and issued executions thereon, but no notice was given to the log owners of the pendency of said suits. And the defendant, as constable aforesaid, seasonably seized and sold said logs on said executions, and made his return thereon.

The questions presented to the court for their determination are:

1. Is it necessary, in order to enforce the lien for services, that the logs, on which the labor was performed, should be specifically inserted in the writ, as the property to be attached, and the officer therein ordered to attach them, instead of the property of the defendants, as is usual in all writs of attachment.

2. Is it necessary, in order to preserve such lien on logs so attached, that the log owners should have due and seasonable notice of the pendency of the suit as prescribed by law.

If the said court shall decide both of the aforesaid propo-

sitions in the negative, then the plaintiffs in this suit are not entitled to recover, but the defendant shall recover his costs of reference, taxed at three dollars and eighty-nine cents, and his costs of court, to be taxed by the court.

Provided, however, if the court shall come to the conclusion that in the suit Brown v. Crommett, the lien was lost by reason of the defect in the said certificate of the officer, and should otherwise decide in favor of the defendant, then the plaintiff shall recover only the sum of twenty-three dol- dollars and fifty cents, debt or damage, instead of the sum first mentioned, together with their costs of reference and of court, as before named. All the documents, such as the copies of the writs, executions, judgments and the officers' returns, and the writ and pleadings in this suit are made a part of this, my report, and may be referred to. All of which is respectfully submitted.

JONAS CUTTING, *Referee.*

December 12, 1856.

In the case of Ephraim Hamilton v. Hiram Crommett.

The undersigned, appointed referee as by the agreement of the parties, dated October 31, 1856, appears, having duly notified the parties, met them at the office of A. Walker, in Newport, on this twelfth day of December, A. D. 1856, and having heard their several pleas, proofs and allegations, and maturely considered the same, do award and determine, and this is my final award and determination in the premises, that the said Hamilton do recover of the said Crommett the sum of fourteen dollars, debt or damages, and his costs of reference, taxed at five dollars and ninety-nine cents, and costs of court, not exceeding one fourth part of the above named debt or damage. All of which is respectfully submitted.

JONAS CUTTING, *Referee.*

December 12, 1856.

The decision of the question as to whether the plaintiff has a lien on the logs attached and returned on the writ in

this suit, will depend on the opinion of the full court, upon the first question presented for their consideration, in my report in the case of Redington and al. v. Frye.

JONAS CUTTING.

Rowe & Bartlett, counsel for Redington and al.

In order to make an attachment of any other property than that of a defendant in a writ valid, there must be a direction in the writ to the officer to attach such property.

"A writ is a mandatory precept, issued by the authority, and in the name of the state."

A writ of attachment is addressed to the officer. His power in executing it is derived from the mandates contained in it, and is limited to the doing of those acts which he is therein commanded to do. Any act beyond that is void. When commanded to attach the goods of the defendant only, and he returns that by virtue thereof he has attached certain property named, the validity of the attachment depends upon the question whether the property returned is the property of the defendant. No other question can arise, whatever the kind of property.

It is not enough that other property is liable to attachment on the claim declared on. An attachment of a defendant's property on a writ of summons, would not be valid, because his property was liable to be attached for the debt. Nor would a return that a trustee had been summoned on an ordinary writ of attachment, be valid. It is not enough, to render the act of an officer valid, that the law allows such a thing to be done; but it must be further shown that the officer had special power to do the acts, and when such power can be derived only from a direction to do the act, that such direction has been given.

The recital in the declaration that a plaintiff claims such a lien, and brings the suit to perfect it, cannot help the case. The declaration is no part of the writ, but merely an appendage to it, not containing directions for the officer, but information for the court and the opposite party. The officer's

power is derived from the precept alone. The authority and justification of attaching officers does not depend on the correctness or sufficiency of the declaration, fortunately for them.

The direction of the attorney on the back of the writ cannot help it. The officer's authority is not derived from such, but from the directions on the other side, under the seal of the court and signature of the magistrate. The only effect of such direction, by an attorney or party, is to limit and control the exercise of the power conferred by the writ, not enlarge it, or to confer new powers.

But the officer does not justify under any such directions. His return on each writ is "by virtue of the within writ;" that is, by virtue of the power conferred upon me by the within writ, and in obedience to the commands therein given in the name of the state, under the signature and seal of the magistrate, I have attached, &c. Had his return been, by virtue of the power conferred on me by, and in obedience to the directions of plaintiff's counsel, written on the back hereof, I have attached, &c., that would have presented the question.

2. The act of March 12, 1855, chap. 144, imperatively requires that notice shall be given to the log owners in all suits brought to enforce lien claims. Attachment on the lien claim is no longer sufficient to perfect the lien, but the parties setting it up must do a further act; must cause such notice of the pendency of their suit as the court shall order, to be given to the log owners; otherwise their lien is lost, and their judgment is good only against the defendant contractors; for this is the only provision the law makes for the owners to come in and contest the extent of the lien claim; and having made provision for their coming in, the judgment would be conclusive upon them, if they had due notice, a nullity, as to its effect upon their property, if they had not notice, since this act, it is clear that the extent of the lien claim cannot be inquired into in any other suit or proceeding.

3. The mistake in stating the return day in the certificate filed with the town clerk, is fatal, in the attachment on the writ of Brown v. Crommett.

To perfect and retain that attachment, Frye was bound, either to retain custody and possession of the property attached, or to file with the town clerk a certificate of, among other things, the court to which the writ was returnable. In this case he did neither. His certificate did not state the court to which the writ was returnable. R. S., chap. 114, sec. 39.

G. W. Whitney and D. D. Stuart, counsel for the plaintiffs.

CUTTING, J. This action was instituted for the alleged wrongful conversion of the plaintiff's property. The defendant justified as an officer, having attached on *mesne* process and sold on execution the property, in favor of certain individuals, to enforce liens for personal services rendered for one Hiram Crommett, who had sub-contracted with the plaintiffs in those suits to run the lumber. The action was referred, by a rule of court, and the referee has reported in favor of the plaintiffs, unless his findings constitute a legal defence, and two questions, as matters of law, are presented to the court for their determination.

1. "Is it necessary, in order to enforce the lien for services, that the logs, on which the labor was performed, should be specifically inserted in the writ, as the property to be attached, and the officer therein ordered to attach them, instead of the property of the defendant, as is usual in all writs of attachment?"

The lien was created by the statute of 1848, chap. 72, sec. 1, and is sought to be enforced by sec. 2, which provides that: "Any person having a lien as aforesaid may secure the same by attachment."

There is no pretence that the lumber was ever the property of Crommett, the defendant in the original suits, whose goods and estate only the officer in the writs was com-

manded to attach. Suppose those writs had not only directed the officer to attach the goods and estate of the defendant, but for want thereof to take his body; with equal propriety it might be contended that the bodies of the present plaintiffs could have been taken, as that their property could have been attached. The officer had no concern with the averments in the declaration, or with endorsements of an attorney on the writ, when inconsistent with the express commands to him within directed. If a contrary doctrine should prevail, the people could not be said to be "secure in their persons and possessions from all unreasonable seizures," for then *meum* and *teum* would become convertible terms, at the will and pleasure of the officer.

What then, it may be asked, would be the laborer's remedy, inasmuch as his claim can only be enforced when he resorts to the provisions of the statute by a suit and judgment against his employer, to be secured only by an attachment? This question has already been answered in the case of Bicknell v. Trickey, 34 Maine R., 281, where the court say: "The proceedings under this statute (1848, chap. 72) are therefore to be viewed in a double aspect. So far as the debtor is concerned they are *in personam*, and, as against him, the plaintiff may insert any and all claims which by law can be joined. So far as regards the general owner of the property, and against whom the laborer has no legal claim, when the person with whom he has contracted is other than the owner of the lumber, the proceedings are strictly *in rem*."

Now, proceedings *in personam* authorize, on *mesne* process, attachment of the property of the defendant to respond the exigency of the writ and satisfy the judgment; whereas, proceedings *in rem* only authorize the attachment of the *thing*, and in that particular are in the nature of a libel, and in suits where the defendant is both the debtor and owner of the property on which a lien is attempted to be enforced, ordinarily no difficulty arises in embracing both proceedings in the same process. And the embarrassment has arisen in

a great measure by an erroneous idea that the remedy of the contractor and his sub-contractor is the same; whereas the former has his security on the goods and estate of his debtor, that is, *in personam*, as well as on the specific property benefited by his labor, which may be *in rem*, and after judgment it is optional with the creditor on which species of property he will levy his execution. In such cases an attachment of the debtor's goods and estate might include the property on which the services were bestowed, without any other specific directions to the officer in the writ, for indeed, such property would belong to the debtor, subject only to the lien. Perhaps when such property has been transferred by the debtor, after the contract, and before the institution of the suit, a specific insertion in the writ would become necessary. But a sub-contractor has no claim against the *owner* of the property—his claim is only against the *property* (*in rem*), and the person and property of his employer (*in personam*). So that in such suits two classes of respondents become interested, viz: the contracting debtor and the *thing* specifically attached, in which the former may appear and defend against the claim on his person and property, and the latter, by its owner, against all lien claims.

But heretofore, and until the enactment of the statute of 1855, chap. 144, the *res* could not be legally represented in court. This act provides, that "In all suits brought to enforce the lien given by the act to which this is additional, such notice shall be given, to the owners of the lumber, as the court shall order, and the owner may come into court and defend such suit." The construction of this statute raises the *second* question presented in the report, viz: "Is it necessary, in order to preserve the lien on logs so attached, that the log owners should have due and seasonable notice of the pendency of the suit, as prescribed by law?"

We have seen that, prior to this statute, a judgment might be recovered on a lien claim in an action wherein the interest of a third party had not been represented; and inasmuch

as the execution might be satisfied by the property of the judgment debtor without resort to that of such third party, no injury might be sustained by him. But whenever his property has been taken, such third party would not be precluded by such judgment, (it being *inter alios acta*,) from having his day in court, and in a suit against the officer he has heretofore been permitted to show that such judgment did not embrace a lien claim to its full extent, and to controvert any facts tending to establish the lien. Thus suits were unnecessarily multiplied, and an innocent officer not unfrequently subjected to expensive litigation in settling the rights of parties, which might as well have been settled in the original suit. Hence the necessity of the statute of 1855, making it imperative on the party attaching property owned by a third person, to give such owner due notice of the pendency of the suit, and an opportunity to defend against it. Having appeared and defended, or having had the notice and neglected, the lien judgment is conclusive upon him and his property, to which the lien was alleged to have attached.

The act, then, of 1848, and the additional act of 1855, creating a lien on certain lumber, and prescribing the mode of perfecting and enforcing it, have materially changed the law of lien on such property. Since those enactments, so far as it regards the party other than the defendant, the suit is substantially a proceeding *in rem*, and is in the nature of a libel against the lumber of a third party, who may legally come into court and "defend such suit." What suit? Certainly the suit on which his logs have been seized. How defend? Most assuredly, like any other adverse party, by controverting every material allegation in the plaintiff's writ, such as personal services performed on the lumber specifically described, and so as readily to be identified, and any other averments which may be necessary to bring the lien claim within the statute; for, in the language of the court in the case before cited, "the identity of claim and of property, must co-exist, and must be traceable till the fruits of the judgment have been obtained by a satisfaction of the

execution. The identity of the property must be established, else the lien cannot attach; the labor must be shown to have been done upon the specific property seized, for provision is made for nothing else." Such facts, therefore, it is incumbent on the plaintiff both to allege and prove before he can recover a judgment, the execution of which may be satisfied by the sale of the property claimed. If not from the declaration in the writ, how is the court to be informed that it is a suit in which it is necessary for the owners to be summoned, and what order to issue and on whom to be served? Whatever it may be essential for the plaintiff to allege and prove in order to perfect his lien judgment, it will be competent for the owner to controvert and disprove. And, before the statute of 1855, it may be questionable how far a party had the constitutional privilege of seizing and confiscating the property of another, in violation of private rights, without an opportunity to be heard. Marsh v. Flint, 27 Maine R., 479.

But in such a suit, since there may be two parties interested in the defence, viz: the debtor and the log owner, a question may arise as to the mode of conducting it. When that question is duly presented it may require an answer. In the present case the plaintiffs, who were such owners, had no opportunity to appear; the statute of 1855 was violated, and consequently the pretended lien was vacated, and the judgments recovered under such circumstances, and the executions issued thereon, were no protection to the officer. The questions proposed to the court being answered in the affirmative, judgment must be rendered on the award in favor of the plaintiffs.

WILLIAM A. BROWN AND ALS. *versus* NATHAN H. ALLEN.

An exception in a deed must be a portion of the thing granted, or described as granted, and which would otherwise pass by the deed.

Where a tract of land is granted in clear and unmistakable terms, the grantor, and those claiming under him, are estopped to say in a court of law, that the land thus described in the deed was inserted by mistake, and parol evidence is inadmissible to show that another piece of land was intended to be conveyed.

EXCEPTIONS were taken to the rulings of APPLETON, J., who tried the cause at *Nisi Prius.*

This is a writ of entry, to recover a part of the north half of lot No. 13, range 1, in Stetson. Plea, "Nul disseizin."

The demandant claimed title under a levy on the premises as the property of William O. Colbath, made February 15, 1855, and subject to objection. Writ in this action dated March 5, 1856. The demandant introduced a warrantee deed of the north half of lot No. 13, range 1, from Bartlett Leathers to said Colbath, dated December 16, 1836, and duly recorded. The land is described in said case as "the north half of lot No. 13, range 1, in Stetson," and it was admitted that, by said deed, said Colbath acquired the title to said land. The demandant also introduced a record of the judgment against Colbath, and rested his case.

In defence, the tenant introduced, subject to all legal objections, a warrantee deed from one Walsh to Bartlett Leathers, of the whole of lot No. 13, range 1, in Stetson, dated March 10, 1856, duly recorded. Deed William O. Colbath to Joseph Leathers, dated March 7, 1837, of a part of the north half of lot No. 13, range 1, in Stetson. The language is as follows: "Part of lot No. 13, range 1, in said town, viz: twenty-five arces, taken from the north end of said lot, by a line running east and west through said lot, parallel with the north line, so far south from said north line as to contain twenty-five acres."

The demandant did not claim the land embraced in this

deed to Leathers, but he did claim to recover all the north part of lot No. 13, range 1, not embraced in this deed. The tenant also offered deed of William O. Colbath and Henry H. Colbath to James Colbath, dated November 5, 1840, duly recorded, of a parcel of land, situate in said Stetson, described as follows: "A part of lot No. 13, range 1, it being a part of the south half of said lot, and all of said half lot, except so much of said half lot as is deeded from William O. Colbath to Joseph Leathers, containing twenty-five acres, more or less. The demandant objected to the introduction of said deed, as irrelevant to the issue between the parties.

The objection was overruled *pro forma*, and the deed admitted. The tenant then introduced the conveyances, subject to the same objection by the demandant, connecting himself with the title under the last mentioned deed. And for the purposes of this trial, the court instructed the jury that the defence was made out, and that they should return a verdict for the tenant, which was done.

The plaintiff objected to any parol testimony to affect the deeds in any manner, or show a mistake in the language of the deeds. The court overruled the objection and admitted the parol testimony, below recited.

Joseph Leathers testified, that he owned, and was in possession of, the north end of lot No. 13, range 1, in Stetson, at the time the Colbaths, William O. and Henry H., conveyed to James Colbath, that he never owned any part of the south half of No. 13, range 1, and that he never knew that William O. or Henry H. ever claimed any part of the south half of No. 13. That James Colbath occupied the south part of the north half of said lot, after the conveyance from William O. and H. H. to him, until he conveyed it to Spaulding.

Henry Hill testified, that he made the deed signed by William O. and Henry H. Colbath, dated November 5, 1840. That at the time he made that deed William O. Colbath was in possession of the south part of the north half of No. 13, range 1. That he never knew that William O. Colbath

claimed or owned any part of the south half of No. 13, range 1. The whole lot, No. 13, range 1, contained one hundred acres.

The jury were instructed, however, to pass upon the question of betterments in the case, for which a claim was made by the tenant under the statute, so that if the foregoing rulings were wrong the whole case might be finally disposed of by the full court upon these exceptions. The finding of the jury, in answer to the questions proposed to them upon the subject of betterments, make a part of the case, and if the full court are of opinion that the demandant is entitled to recover, final judgment is to be entered upon those findings in accordance with the law of the case. The deeds, levy, and judgment on which levy is made, are referred to.

To the foregoing rulings and instructions the demandant excepted.

L. Barker, counsel for the demandant.

It is not in dispute that William O. Colbath was originally sole owner of the "*north half of lot No.* 13, *R.* 1, *in Stetson.*"

The demandant, by his levy, has succeeded to that title, and is entitled to recover possession of the demanded premises, unless it was conveyed by the deed of November 5, 1840, from William O. and Henry H. Colbath to James Colbath, Jr. Upon the legal effect of that deed the rights of the parties depend.

It will be noticed at the first, that Henry H. Colbath had no interest in the north half, at the date of the deed, and has never pretended to have, so that if, as the tenant contends, the deed conveys the north half, we find Henry H. giving a warrantee deed of property which he never professed to own, and in whom the records show no title.

The language in the deed is as follows: "A part of lot No. 13, R. 1, it being a part of the south half of said lot, and all of said half lot, except so much of said half lot as is deeded from William O. Colbath to Joseph Leathers." The ten-

ant connects himself with the title under that deed, and claims to have it cover the demanded premises. By the deed of William O. Colbath to Joseph Leathers, dated March 7, 1837, it appears that a part of the north half had been conveyed, and the demandant only claims to hold the balance under his levy.

If the word south could be stricken from the deed to James Colbath, and the word north inserted, it would be a perfect description of the demanded premises. In no other way, and by no other means, can the deed be made to apply to them. As it reads, there is no allusion to the north half —nothing said about the north half, and no word or sentence that would lead a creditor of William O. Colbath on examining the records, to suppose that he had conveyed or intended to convey the north half, and especially after tracing the sole title to the north half into him, on finding an entire stranger to that title joining in the conveyance, and that conveyance a warranty.

The object of the parol testimony objected to, and admitted, was to show that the north half, or a part of it, was intended to be conveyed by that deed.

The rules of law applicable to conveyances of real estate, are so few and simple, that it would seem there could be no difficulty in applying them to this case.

Parol testimony can be introduced for the purpose of affecting deeds in two cases only: first, where there is a latent ambiguity; and second, where the description is false.

A latent ambiguity arises when taking the language of the deed, just as it reads, it will apply equally well to two objects, and in that case parol testimony is admissible to show which was intended by the grantor, as if a deed be made to John Jones, of Bangor, and there be two John Jones's.

It may also be introduced to show that part of the description is false or impossible, and if proved so, such false part is rejected as surplusage, when, if the remaining part of the description is sufficient to operate as a conveyance, the por-

tion retained is conveyed, otherwise the deed is inoperative and void.

No principle of law is better settled than that parol evidence is inadmissible to add to, contradict, or vary the language of the deed, or for any other than the purposes above named. Vose v. Handy, 2 Greenl., 322; Child v. Wells, 13 Pick., 124; Pride v. Lunt, 19 Maine R., 115; Wing v. Burgess, 13 Maine R., 111.

It is equally well settled that in an action at law parol evidence is inadmissible to show that the parties *intended* to convey one parcel of land, when, in fact, the deed conveyed another. This would contradict the deed. Lincoln v. Avery, 1 Fairf., 418.

Some part of the description may be false, or two descriptions of the same premises in the same deed may be given, one of which may be false, and will therefore be rejected, and enough still remain to constitute a valid conveyance. Abbott v. Pike, 33 Maine R., 204 and 207.

Still this does not contradict the deed, because it leaves all that is really true to operate as a deed, without being affected by parol evidence. The parol evidence is only admissible to show what is false in the description, and which is therefore to be rejected, and enough must still remain to constitute a valid deed.

Parol testimony is wholly inadmissible to show a mistake in describing the premises, except in some item of boundary, as already stated, and which may therefore be rejected. It cannot be received to show that some word was inadvertently, or by mistake, used by the scrivener or party who drew the deed, and therefore the premises intended to be conveyed by the parties were not conveyed, unless the parol evidence is receivable to correct the mistake. Lincoln v. Avery, 1 Fairf., 418; Locke v. Whiting, 10 Pick., 278; Bell v. Morse, 6 N. H., 205; Linscott v. Fernald, 5 Greenl., 496.

Now it is respectfully contended, that, upon these general principles, the testimony objected to is clearly inadmissible

in this case. The deed undertakes to convey the south half. The testimony goes to show that the grantors owned no part of the south half, but were in possession of the north half, and that they intended to convey the north half.

It is not offered to explain a latent ambiguity, for there is none on the face of the deed. As it reads, it can apply to but one object.

It is not offered to show a false description of the premises, with the view of having such false descriptions rejected, for what is there false in the description? No item of boundary is wrong, because none is given. The lot and range are properly described, and if they were not they could not be rejected, because no other description is given. There is only one description—every part of it is essetial.

It does not come within that class of cases where a part of the description can be rejected. What part is false, and which part is true?

If what the tenant contends is true, it is a case of mistake, which cannot be corrected in a court of law. The word north should have been used instead of south, and then the intention of the parties would have been carried into effect. But if the grantor made a mistake, it is not the fault of his creditors, who entrusted him with their property, upon the strength of his record title to this property. If he intended to convey the north half of the lot, or any part of the north half, by his deed of November 5, 1840, he has certainly entirely failed to do so. There is no allusion in it to the north half.

The allusion to the deed of William O. to Joseph Leathers does not help the matter. 10 Met., 250; 8 Cush., 418; 19 Pick., 253. No date is given of the deed referred to, nor any reference to any volume or page in the registry where it may be found. An inference, and only that, may be drawn, that some portion of the south half may at some time have been conveyed to Joseph Leathers. If so, the grantee would take the remainder; if not, then the deed would cover the whole south half. But what the grantee took, or

did not take, by that deed, is no concern of ours, so long as it does not convey the north half, nor undertake to do so. If the tenant is permitted to establish his title to the north half by this parol evidence, instead of by his deed or some instrument in writing, he may hold any other premises to which he may please to assert title, by evidence of the same grade, directly in the teeth of the statutes directing the mode of transferring real estate by deed, chap. 36, and "to prevent frauds and perjuries," chap. 53.

As was well said by PARRIS, J., in Lincoln v. Avery, 1 Fairf., 418, which is entirely decisive of this case, "the admission of this evidence to explain and vary the deed, and establish title, would shake the security of all the real property in the state, and overturn one of the soundest principles of evidence."

G. W. Ingersoll, counsel for the tenant.

In the deed from W. O. and H. H. Colbath to J. Colbath, the first part of the description does not agree with the last. The half lot, part of which was deeded to Joseph Leathers, was in fact the *north* half, not the *south* half, as mentioned in the deed. Here is a *latent ambiguity.* The question is, which part of the description shall stand? Parol evidence is admissible, to a certain extent, to explain a latent ambiguity. Linscott v. Fernald, 5 Greenl., 496.

The question, in other words, is simply this, what was the *intention* of the parties? That intention is to be gathered from the deed itself, and from other evidence admissible by the rules of law.

1. The quantity of the land conveyed, *twenty-five acres*, agrees with the construction contended for by the defendant, and it is not certain that it would agree with plaintiff's construction, even provided Joseph Leathers had owned a portion of the south half. Thatcher v. Howland, 2 Met., 41.

2. W. O. and H. H. Colbath never owned any portion of the south half. Would they be likely to undertake to convey a *part* of a lot which they did *not own*, as a part which

they did own? Thatcher v. Howland, 2 Met., 44, 45. The court will look at the history of the title. Jameson v. Balmer, 20 Maine R., 425.

3. W. O. Colbath, previously to his deed to James Colbath, occupied this portion of the north half. After his conveyance to James, James occupied this portion. None of the Colbaths ever owned or occupied any of the south half. The parties to the deed gave, by their acts, the construction to the deed contended for by defendant, and that construction was *acquiesced in for fifteen years*, and never disputed by any one till plaintiff's levy, February 15, 1855, fifteen years after the conveyance.

There is no extraneous fact to support the plaintiff's construction.

The question then is this, do not the facts above stated show that it was the *intention* of the parties, W. O. and H. H. Colbath, to convey the land in dispute, and was it not equally the intention of James Colbath to take a conveyance of that land? It would seem that no proposition could be plainer.

The testimony of Joseph Leathers and Henry Hill, showing only the acts and situation of the parties, in order to explain a latent ambiguity, are clearly admissible. Linscott v. Fernald, before cited.

In cases of doubtful construction, the construction given by the parties is deemed the true one. Stone v. Clark, 1 Met., 378; Haven v. Brown, 7 Greenl., 421.

"What is most material and most certain shall control what is less material and less certain." Loring v. Norton, 8 Greenl., 68. The defendant's construction, aided by the parol evidence, is most certain.

The courts will uphold conveyances, if possible; will reject what is false in the description, if what remains, together with admissible parol evidence, will show the intention of the parties. Wing v. Burgis, 13 Maine R., 111; Vose v. Handy, 2 Greenl., 322; Worthington v. Hybyer, 4 Mass., 196.

It is a familiar principle, that if parties, *after* the convey-

ance, erect monuments, the monuments control the description. This is the act of the parties, showing their intention. Dunn v. Hayes, 21 Maine R., 76.

It is proper for the court to look at the history of the conveyance, to ascertain the situation of parties, and thence their intention. Jameson v. Balmer, 20 Maine R., 425.

RICE, J. The parties claim title under the same original grantor. The only question in controversy between them, is, whether William O. Colbath had any legal title to the north half of lot No. 13, range 1, in Stetson, at the time of the levy upon it as his property. It is conceded that said Colbath acquired a good title to said north half, by deed, dated December 16, 1836. A deed from him to Joseph Leathers, of twenty-five acres, taken from the north end of said north half, dated March 7, 1847, was introduced, subject to objection.

To show that at the time of the levy against William O. Colbath, he had parted with all his interest therein, and therefore nothing passed by the levy, the defendant read, subject to objection, a deed from William O. Colbath and Henry H. Colbath, dated November 5, 1840, and recorded, of a parcel of land situated in said Stetson, described as follows: "A part of lot No. 13, range 1, it being a part of the south half of said lot, and all of said half lot, except so much of said half lot as is deeded from William Colbath to Joseph Leathers."

Leathers was permitted to testify that he did not own any part of the south half of No. 13. There was also testimony that November 5, 1840, W. O. Colbath was in possession of the south part of the north half, and that he was not known to have possession of any part of the south half of No. 13.

The description in the deed of November 5, 1840, is distinct and clear. There is no ambiguity upon its face, nor is there any apparent repugnancy in its terms. It is contended that the exception in this deed, taken in connection with the testimony, shows not only a latent ambiguity, but that the

description of the land by number is inconsistent with the whole deed, and should be rejected as false.

As already remarked, the alleged repugnancy arises from the exception in the grant. All the south half is conveyed, *except*, &c.

An exception in a deed must be a portion of the thing granted, or described as granted, and can be nothing else. Craig v. Wells, 1 Kernan, N. Y., 315.

In Bell v. Morse, 6 N. H., 206, the land demanded had been conveyed in distinct terms of description, but the deed contained an exception of "thirty feet in front, on the north corner, to run parallel with the line of my garden fence, to the eastern line of the lot I bought of Joshua Howard." It was proved by parol, subject to objection, that the land described in the exception was no part of the land conveyed, as described in the deed, but was part of another lot, which it was contended the grantor intended to convey. There were other facts, similar in character to those in the case at bar, tending to show a mistake in the description in the deed.

The court, in their opinion, say: But there are circumstances in this case which certainly render it not improbable that the land intended to be conveyed by that deed was in fact the forty acres.

One of these circumstances is the fact that a part of the forty acres, which was actually staked out by the parties at the time, is excepted in that deed. Every one must at once perceive, that an exception, to have any effect, must be a part of that which would otherwise pass by the deed, and that when one thing only is granted, to except another thing from the operation of the grant must be idle and nugatory.

There must be a grant before there can be anything for the exception to rest upon. Strike out the description, by number, in this case, and the exception falls with it, and nothing would pass by the deed. Thus the exception, being part of the thing granted, cannot be repugnant to the grant.

In Lincoln v. Avery, 1 Fairf., 418, it was held that parol

evidence is inadmissible to show that in writing a deed the scrivener, by mistake, inserted the words, "*the north half*," immediately preceding the number of the lot. That case is in point, and well sustained by authorities.

Where a tract of land is granted in clear and unmistakable terms, the grantor and those claiming under him are estopped to say in a court of law, that the land thus described in the deed, was inserted by mistake, and that another piece of land was intended.

Such mistakes or errors can be corrected, if at all, only in a court of equity. Bell v. Morse, 6 N. H., 205; Barnes v. Leonard, 10 Mass., 459.

The parol evidence was improperly admitted. The exceptions are therefore sustained. But the verdict may be amended, and judgment entered, according to the agreement of the parties.

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PROMISSORY NOTES.

PROTEST.

QUANTUM MERUIT.

RAIL ROADS.

SLANDER.

STATUTES CITED.

STOCKHOLDERS.

SURETY.

VERDICT.

WARRANTY.

WILL.

WITNESS.

WRITS.