REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By WALES HUBBARD,
REPORTER TO THE STATE.

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

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

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

} ASSOCIATE JUSTICES.

ATTORNEY GENERAL.

HON. NATHAN D. APPLETON.

*** The office of Reporter having become vacant by the death of the Hon. TIMOTHY LUDDEN, WALES HUBBARD, Esq., was appointed Reporter on the 12th day of May, 1859; and it was, by Legislative enactment, made his duty to prepare and publish Reports of cases which had been argued during his predecessor's continuance in office, and left unreported.

ERRATA.

Page 35, line 30, for "*two*" read *ten*.
40, line 11, for "*where*" read *when*.
51, line 32, for "*acceptance*" read *reception*.
278, line 3, for "*to*" read *do*.
520, line 34, for "*note*" read *notice*.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1858.

COUNTY OF AROOSTOOK.

JOHN H. BRADFORD *versus* JOSEPH CRESSEY.

By the deed of a parcel of land, the east line of which is described, "*thence east until it strikes the creek on which the mill stands, thence south-westerly on the west bank of said creek,*" (which is a small unnavigable fresh water stream,) the grantee is restricted to the *bank* of the creek. And such grant does not extend to the centre or thread of the stream, unless there are, in the deed, other words indicating that such was the grantor's intention.

If the construction, to be given to a deed, is doubtful, the circumstances connected with its execution, and the subsequent conduct of the parties as to occupation under the deed, may be properly considered in determining what was intended and understood by the parties.

Where a grant is bounded upon a non-navigable fresh water stream, a highway, or ditch, or party wall, and the like, such stream or highway, &c., is deemed to be a monument, located equally upon the land granted, and the adjoining land, and the grant extends to the centre of such monument.

A. erected, on a stream, a dam and mills, which he maintained for several years, when B. placed a flume in the dam, by which he drew water for the use of his mill. Even though B. were the owner of the land on which the dam was, he could not maintain an action against A. for allowing the water to run to waste, to the injury of B., there being between them no privity or community of interest in the property of the dam.

And, though B. may cause the dam to be abated as a nuisance, he cannot compel A. to keep it in repair.

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

S. H. Blake and *Tabor*, for plaintiff.

J. Granger and *Madigan* for defendant.

The opinion of the Court was drawn up by

RICE, J.—This action is case, for an injury to the plaintiff for disturbing him in the use of water by which the machinery of his bark mill was propelled. The case comes before us on a report of the evidence. It appears that the parties are owners and occupants of adjoining lots, deriving title from the same original grantors, Eunice and Samuel Kendall; that, running through the original lot, there is a small creek, or stream of water, on which there has long been a dam and mills, the right to which dam, and to the use of the water which is retained thereby, is now the matter in controversy.

In 1815, July 24, Eunice and Samuel Kendall conveyed lot No. 39 to Joshua G. Kendall. The plaintiff claims title under this deed, and, though he has not produced deeds of a date anterior to the date of his writ, which connects him with that title, there is other evidence in the case, which will authorize us to infer that he now holds the title formerly held by Joshua G. Kendall.

That portion of the deed to Joshua G. Kendall, which is material in the present investigation, reads as follows:—"Beginning at the south-west of said north half of said No. 39, thence north, on the west line of said lot, to the north-west corner, thence east, *until it strikes the creek on which Mr. Holton's mill stands, thence south-westerly, on the west bank of said creek, till you get within five rods of said Holton's mill, thence, on a straight line, until it strikes the centre of the south line of said premises, being the north line of land owned by Dr. Rufus Cowles.*"

This lot, which contains about 40 acres, it is conceded, lies wholly on the west side of the creek in question. Though there may be other facts presented by the evidence, which may be decisive of this case, the principal question in contro-

versy between the parties, and the one which they desire to have determined, is whether, by the deed above cited, the grantee, now represented by the plaintiff, obtained the right to use the water from the creek for propelling the machinery of his bark mill. Whether he has this right or not, depends upon the fact, whether, by the construction of his deed, his grant is limited to the *bank* of the creek, or extends to the centre or thread of the stream. The creek, at the point in controversy, in its natural state, is a very small, unnavigable stream, being, at its widest point, not more than two rods, and, in some places, only from six to ten feet wide. From the point five rods below the location of the Holton mill, the line diverges from the creek. If that point of departure be fixed upon the bank of the creek, the divergence will be such as wholly to exclude the dam from the premises of the plaintiff, under the deed before named. If, on the other hand, the point of departure below the Holton mill, is fixed in the thread of the creek, *filum medium aquæ*, the line thence will not diverge so far as wholly to exclude the dam, but will include that portion thereof into which the flume of the plaintiff has been inserted, and from which he draws water. It is for the interference, by the defendant, with the use of the water, thus drawn from the dam, that this action has been instituted.

Prima facie, the proprietor of each bank of a stream is the proprietor of half of the land covered by the stream. If the same person be the owner of the land on both sides of the river, he owns the whole river, to the extent of the length of his land upon it. 3 Kent's Com. 228.

By the common law of England, which our ancestors brought with them, claiming it as their birthright, the owner of the land, bounded on a fresh water river, owned the land to the centre of the channel of the river, as of common right. *Storer* v. *Freeman*, 6 Mass. 435; *Bradley* v. *Rice*, 13 Maine, 198.

In this country, in consequence of the greater size and navigable character of many of our fresh water rivers, the English common law doctrine, in relation to the rights of riparian proprietors, has been qualified in some degree, and,

in many instances, restricted to non-navigable fresh water rivers. It is not, however, necessary to examine the extent of these restrictions or qualifications, in this case, as the creek, the right to use the water of which is now in controversy, is not only fresh water but in no sense navigable.

The plaintiff contends that, by the terms of the deed under which he holds, his land, so far as it is bounded on the west bank of the creek, extends to the centre of the stream. That the words, "on the west bank of said creek," are of precisely the same import and signification as would be the words "on said creek," or "up said creek," or "by said creek," or any other words of similar import, each and all of which, it is said, have been held to constitute the stream, thus referred to in a deed or grant, a monument, and extend the grant thus bounded to the centre thereof, *usque ad filum medium aquæ.*

Chancellor WALWORTH, in the case *Canal Co.* v. *The People,* 5 Wend. 423, says, "if the grant is bounded on the stream, or along the same, or by the margin thereof, or when any other words of similar import are used, the grant legally extends to the middle or thread of the stream; and not only the bank, but the bed of the river and the islands therein, and the exclusive right of fishing, are conveyed to the grantee, unless they are expressly reserved, or the terms of the grant are such as to show a clear intention to exclude them from the general operation of the rule of law."

It was held, in *Paul* v. *Carver,* 26 Penn. State R. 203, that a tract of land bounded *along the northerly side of Tidmarsh street,* conveyed the grantor's title to the grantee to the middle of that street.

It was decided in *Starr* v. *Child,* 20 Wend. 149, that the description in a deed of a lot of land, "about 42 feet to the Gennessee river, thence along the shore of the said river to Buffalo street," carried the lot to the centre or thread of the river. In this case, it was held by COWEN, J., that *bank,* and *shore,* as applied to fresh water rivers, were equivalent terms.

The doctrine laid down in this case, has, however, been reconsidered by the Court of errors in New York, and over-

ruled in *Child* v. *Starr*, 4 Hill, 369; *same* v. *same*, 5 Denio, 599; *Halsey* v. *McCormick*, 3 Kernan, 296.

It has been decided that the same principle applies to the construction of grants bounded generally upon highways, party walls, ditches, &c., as to fresh water streams. And it is undoubtedly true, that where a grant is bounded upon a non-navigable fresh water stream, a highway, a ditch or party wall, or the like, such stream, way, ditch or wall, are to be deemed monuments, located equally upon the land granted and the adjoining land, and in all such cases, the grant extends to the centre of such monument.

It is, however, competent for the grantor to limit his grant as he may choose. He may exclude or include the entire monument, and run his line on either side, or to the centre thereof, at his pleasure, by the use of apt words to indicate his intention so to do. The intention of the party is always to be sought in the interpretation of deeds, as in other written instruments. If the language leaves that intention at all doubtful, the instrument should be examined and construed, when practicable, by the light of the circumstances which surrounded and were connected with the execution of the instrument.

To hold that a party may not bound a grant by the bank, margin, side, or shore of a stream of water, or by the side of a way, wall, ditch, or other similar object, would involve an absurdity. In all cases where the language used clearly shows such to be the intention of the grantor, the bank, side, margin, or shore, become themselves monuments, and are to be treated as such. Such is the rule of law. *Starr* v. *Child*, 5 Denio, 599; *Halsey* v. *McCormick*, 3 Kernan, 296; *Storer* v. *Freeman*, 6 Mass. 435; *Sizer* v. *Devereux*, 16 Barb. 160; *Hatch* v. *Dwight*, 17 Mass. 289; *Bradley* v. *Rice*, 13 Maine, 198; *Dunlap* v. *Stetson*, 4 Mason, 349; 3 Kent's Com. 434.

In *Child* v. *Starr*, 4 Hill, on page 375, WALWORTH, Chancellor, says:—"Running to a monument standing on the bank, and from thence running to the river, or along the river, &c., does not restrict the grant to the bank of the stream;

for the monuments, in such cases, are only referred to as giving the direction of the lines *to the river*, and not as restricting the boundary *on the* river. If the grantor, however, after giving the line to the river, bounds his land by the *bank* of the river, or describes his line as running *along the bank* of the river, or bounds it upon the *margin* of the river, he shows that he does not consider the whole *alveus* of the stream a mere mathematical line, so as to carry his grant to the middle of the river. And it appears to me equally clear that the grant is restricted when it is bounded by the shore of the river, as in the present case."

What then is the true construction of the grant under which the plaintiff claims to hold? The language of the deed seems to be unambiguous. The line extends to the creek, thence southerly on the *west bank* of said creek, &c. The terms here used, if construed according to the ordinary signification of the words, clearly exclude the bed of the stream.

But if deemed ambiguous, and the language is interpreted in the light of the circumstances that surrounded the parties at the time of the grant in 1815, the result is the same. At that time, the location of the present dam was occupied by Holton's dam and mill. The deed contains no words indicative of an intention to convey that mill or dam, or any portion thereof, or interest therein, or any right to the water privilege on which they stood. Yet, if the construction of the plaintiff were to prevail, the line of his lot would have run through the mill and dam, and included a portion of the water privilege. A fact so important could hardly have been overlooked by the parties to that deed.

Still further, the subsequent occupation of the parties, under that deed, has been such as to exclude the supposition that they understood that any portion of the mill, dam or privilege, was conveyed thereby. There is no evidence that Joshua G. Kendall ever occupied or claimed to occupy any portion of the privilege. He stood by and saw the defendant, after his purchase, rebuild the entire dam on the old site, and maintain the sole occupation thereof without objection. So, too, the

plaintiff, for several years after he entered into possession, drew water from the dam under a written license from the defendant, paying rent therefor; thus, in the most distinct manner, admitting the sole right of the defendant.

In view, therefore, of the plain language of the deed, under which the plaintiff now claims title, and of the circumstances under which it was given; in view, also, of the contemporaneous and subsequent acts of the parties claiming under that deed, we can have no doubt as to its true construction — that the plaintiff's lot is bounded by the *bank* of the creek, and does not extend to the centre or thread of the stream.

But if this were not so, still the present action could not be maintained. The evidence clearly shows that the defendant built the whole dam, and is now the owner thereof. The plaintiff has no title thereto, or any portion thereof. If it was originally placed upon his land without license, he might cause it to be removed as a nuisance, but he cannot compel the defendant to maintain any portion thereof. The defendant may permit the dam to fall to decay if he choose, or the water to run to waste, and not thereby subject himself to any liability to the plaintiff. The evidence does not disclose any privity or community of interest in the property of the dam between the parties. *Jewell* v. *Gardiner*, 12 Mass. 311.

From the view we have taken of the main question involved in this case, it is unnecessary to pursue this branch of the case further.

The defendant holds under a deed from Eunice and Samuel Kendall, dated Dec. 30, 1830. In that deed he is bounded on the land before deeded to Joshua G. Kendall. His lot contains about "two acres and thirty rods, more or less, together *with the water privilege necessary for his trade.*"

Under this deed, as we have already seen, he entered upon the premises and rebuilt the dam, which had been destroyed, on the old site, and has been in the sole occupation thereof, by himself, or those holding under him, until a short time before this action was commenced. It is contended by the plaintiff, that the latter words in the description of his deed,

cited above, are words of limitation, and tend to show that he did not take the entire water privilege by his deed. Whether this be so, or not, cannot be material to the plaintiff in this action, because, if those words restrict the rights of the defendant, which may well admit of doubt, it is very clear they do not enlarge the original grant under which the plaintiff claims.

The deed from Joseph Kendall and others to the plaintiff, being of a date subsequent to the date of his writ, cannot affect the rights of the parties in this suit.

According to the agreement of the parties, a nonsuit must be entered.

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

JOSEPH CRESSEY *versus* JOHN H. BRADFORD.

Trespass *quare clausum* cannot be maintained against one, for acts done on premises of which he has been in possession more than six years, so as to be entitled to betterments under c. 145 of Revised Statutes.

ON REPORT.

S. H. Blake and *Tabor*, for plaintiff.

J. Granger and *Madigan*, for defendant.

RICE, J. — This is an action of trespass *quare clausum*. The facts are the same as reported in the case, *Bradford* v. *Cressey*, *ante*, page 9, so far as the same are applicable. From that report, it appears that the defendant had been in the possession of the premises, which he is not charged with having entered unlawfully, more than six years. Under our Statute c. 145, he is entitled to betterments. In such case, trespass cannot be maintained. *Chadbourne* v. *Straw*, 22 Maine, 450; *Paine* v. *Marr*, 35 Maine, 181. *Plaintiff nonsuit.*

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

JOSIAH GILLERSON *versus* BARTHOLOMEW SMALL *& al.*

The owner of a tract of timber land gave a written permit to A. to cut timber thereon, according to a verbal agreement previously made; but, before the execution of the permit, he gave to B. a permit to cut the timber on the tract, excepting the part engaged to A. In an action by A. against B. and others operating with him, for cutting timber, which A. alleges to be embraced in his permit, it was *Held, that* parol testimony was admissible to prove the permit was written according to the verbal agreement previously made with the owner; *that* the statements of the proprietor, made to the agent of B. when the permit was made to B., of the extent of land engaged to A., were inadmissible to affect the rights of A.

Where the boundaries of a tract depend upon the location of a public lot, the record of such location, made by commissioners, appointed by this Court, is proper evidence to show such location.

The rule, applicable in actions of assumpsit, that, if one defendant is not proved liable, the verdict must be in favor of all the defendants, does not apply in actions of trespass.

ON defendants' EXCEPTIONS from *Nisi Prius*, MAY, J., presiding.

ACTION ON THE CASE, in which the plaintiff claims to recover damages of the defendants for interfering with and cutting certain timber, for the cutting and hauling of which the plaintiff alleges that he had a permit from the owner; and that he was greatly injured and damaged by the said interference and acts of the defendants, whereby he was obstructed and prevented from enjoying his rights under his said permit.

Plaintiff introduced a permit from Samuel A. Gilman to him, dated 3d Nov. 1856, and defendants introduced a permit from said Gilman to B. Small, one of the defendants, dated Oct. 14, 1856. It was conceded by the parties, that Small's permit covered all the land and timber contained in five half-mile strips belonging to said Gilman, excepting that part thereof which had been engaged, by said Gilman, to the plaintiff, before giving the said permit to said Small. The part engaged to plaintiff being excepted in Gilman's permit to Small.

The plaintiff testified that, in Sept. 1856, he agreed with Gilman for a permit for two teams, during the next lumbering

season; which agreement Gilman was to put in writing, to be signed by the parties; that the permit, dated Nov. 3, 1856, was made in accordance with the agreement made by him and Gilman in September.

The defendants contended, that the line claimed by plaintiff as the south line of Gilman's two and a half mile strip, was not so far south, by one-fourth of a mile, as the true line; and, therefore, the plaintiff's north line was one-fourth of a mile further south than the plaintiff claimed it to be. The plaintiff, to show the location of the public lots in said township, offered in evidence, subject to defendants' objection, a duly certified copy of the record of the petition for their location, and the proceedings thereon in Court, setting apart and establishing the same, including the return of the commissioners appointed by the Court, and the acceptance of the same by the Court — which copy was admitted against the objection of defendants.

To show the jury what territory was intended to be included in Small's permit, and what excluded therefrom by the exceptions therein, the following questions were propounded to Rufus Mansur, who, it appeared, had acted as the agent of defendant Small, in obtaining his permit, and who had testified that, although he had been upon the premises, he had no knowledge, except that derived from the plans, and from said Gilman, in relation to the boundaries and limits thereof. 1. What are the limits described in Small's permit? 2. What is the territory embraced in that permit? Will you show it to the jury on the plan? (referring to a plan used as chalk at the trial.) 3. Show the jury the territory exempted in that permit. The objection of plaintiff's counsel to these questions was sustained.

Defendants' counsel further inquired of the witness what agreement he made with Gilman, (at a particular time, some four or five days prior to the date of Small's permit,) and what the agreement was when the permit was executed; and what were the bounds agreed upon. The plaintiff objecting, these questions were excluded.

Two letters from Gilman to Small, and one from Mansur to Small, received by Small after the date of his permit, were offered by defendants and excluded.

There was evidence tending to show that Gilman had waived the performance of certain conditions, to be performed by plaintiff. The counsel of defendants requested the Judge to instruct the jury "that, if the evidence satisfied them that the labor of the men was not paid in advance, nor a release in writing delivered to the grantee from the persons employed in cutting and hauling, before any labor was performed by them, then the plaintiff had no such right as would enable him to recover." This instruction, the Judge declined to give, as, in his judgment, the non-performance of these conditions could not be taken advantage of by the defendants.

The verdict was for the plaintiff, and against all the defendants. The jury found specially that Gilman had waived the non-performance of conditions, before the acts complained of had been done by defendants.

The defendants' counsel requested the Judge to instruct the jury "that there must have been, at least, some one trespass, prior to the date of the writ, in which all the defendants participated by counsel, act or otherwise; or some one time, when all were trespassers, before a verdict could be found against any of the defendants;" but the Judge declined so to instruct the jury.

Upon the question of damages, the jury were instructed, that the plaintiff would be entitled to recover of the defendants only such damages as were the natural and direct consequences of their illegal acts, committed upon the territory excepted from Small's permit, and included within plaintiff's permit; that plaintiff could not recover damages for any acts done by his permission, nor for any acts done by defendants which were not committed prior to the date of the writ. The other rulings, excepted to by defendants, sufficiently appear in the opinion of the Court.

S. H. Blake and *Tabor*, for defendants.

The permit to Small was *before* the permit to plaintiff—

that is, before Gilman was legally bound by any permit, or plaintiff had any fixed right. And when Gilman made his permit to Small, he could give such territory, with such exceptions as he pleased. When, therefore, Gilman took a plan and marked out on it the territory promised to plaintiff, and told Mansur, Small could have all, excepting that — and Mansur took the permit and guarantied it upon this assurance — Small acquired a right to the territory, with the exception, *as agreed upon between Gilman and Mansur.* And there is nothing in plaintiff's permit, given afterwards, at variance with this idea.

Mansur should have been permitted to state the exception, as pointed out to him by Gilman — for it was before plaintiff had any rights — and to have stated the exception as agreed upon between Gilman and him — that is, the condition upon which he, as Small's agent, assented to the permit, and upon which he, as party to it, guarantied it to Gilman. His statement would not have varied any written contract, it only tended to show what a certain *parol* agreement or exception was. Small takes a permit to cut, excepting where Gillerson was to cut. *Where* was Gillerson to cut? Gilman took a plan and pencil, and marked *where.* The permit does not state where; and how else can we prove this, except by parol, and by Mansur or Gilman, by whom the "where" was limited and agreed upon?

Plaintiff's permit was given *after* Small received his. Gilman could not curtail or limit the permit he had already given to Small. Plaintiff testifies that the *verbal* promise to him was in September, when no writing was made or consideration paid — why shall not Mansur testify to the verbal statement of what plaintiff was to have, and to the fixed, and agreed upon exception in the permit, when he took it and sent it to Small for execution, and he guarantied it?

The instruction requested, as to joint trespassers, should have been given, and that given was erroneous. If a *given act* of trespass is alleged, all who concur in it are liable — those joined in the writ, who did not participate, would be

acquitted. But here is a trespass alleged, extending over a mile square, and continuing from Nov. 10 to the 13th of Feb. following. Now suppose that, on the 10th of November, A. went on alone and cut and carried away twenty trees within plaintiff's permit, and thus was concerned "in injuring plaintiff's operation," and went off the 15th of November, and did not return again or have to do with it further; and suppose B. went on the 10th of February, and left the 12th, having cut fifteen trees to the injury of plaintiff — having had nothing to do with A. — can A. and B. be joined in an action of trespass, and joint damages be assessed against them?

Or, suppose Small, on the 10th of November, with three men, went on and continued all the time until the 13th of February; but D. worked with them three days in January, and left; and E. worked three days in February, and left; can D. and E. be joined in an action with Small and the three men who were with him all the time, and be assessed for the entire damage done?

The evidence in this case was, that some of the defendants were there all winter, and others only a few days.

The questions asked Mansur were proper. It was time enough to object when, by his answers, it appeared that he did not know the location on the face of the earth — if he had no right to say what he knew from his knowledge of the plans of the township, and from what Gilman, the proprietor, had told him. The *reason* for his exclusion was bad, because the part excepted (in the permit) was never located by any body on the face of the earth.

J. Granger and *Madigan*, for plaintiff.

The rights of the parties must be determined by the written permits. All prior negotiations were merged in the written contracts. Gilman could not affect the rights of plaintiff by any declarations of his, made in the absence of plaintiff. The evidence offered through Mansur, was of that character. It was mere hearsay. Gilman was a competent witness. The letters were *inter alios* and mere hearsay.

Respecting the south line of the territory embraced in the

permit — that was a matter for the jury — the evidence was admissible. The actual location of the tract, on the face of the earth, was established.

Looking at the statements in the bill of exceptions, (upon which the case must be determined, and not on statements of excepting counsel, not found in the bill,) it appears that there was evidence tending to show that all the defendants were concerned in the operation, which it was contended produced the injury. It was of no consequence that they were not all operating every moment during the winter. The instruction does not authorize the jury to find a verdict against any who were not concerned in the operation. The case does not present such a state of facts as counsel for defendants suppose. A careful examination of the bill will show, that all the defendants must be regarded as having been proved to have been concerned in the operation, which occasioned the injury for which the verdict was rendered.

No instruction was requested as to the mode of assessing the damages, and none was given, excepting that the jury could give no damages for the injuries which defendants were not concerned in occasioning; and none for any injuries sustained after the date of the writ. It is not now denied that the proof sustains *a verdict* for the plaintiff. No motion was filed to set aside the verdict because the damages assessed were excessive.

The opinion of the Court was drawn up by

TENNEY, C. J. — The permit, from Samuel A. Gilman to the plaintiff, was dated Nov. 3, 1856, and gave the right, on certain conditions, to the latter to cut and haul pine and spruce timber standing on the land therein described. It was in pursuance of a verbal agreement, made the September previous. The permit from said Gilman to the defendant Small, dated Oct. 14, 1856, conferred the right to cut and haul timber on a tract of land, embracing that referred to in the permit to the plaintiff, but excepted that part engaged to plaintiff. To the portion, therefore, excepted, Small had no right

and he could not dispute the right of the plaintiff, under the permit of the latter, provided the permit to him applied to the land to which the verbal agreement related.

It was contended by the defendants, that the line claimed by the plaintiff, as the south line of Gilman's tract, was not so far south, by the fourth part of a mile, as the true line thereof; and, hence, the plaintiff's north line was the same distance further south than he asserted it to be. This proposition of the defendants was denied; and the plaintiff introduced evidence, subject to objection, that the south line of Gilman's tract was the north line of the public lots in the same township. The plaintiff further introduced the record of the location of the public lots, also subject to objection, to show their situation upon the earth. The record was the proper evidence of the location of the public lots, and evidence of the relative situation of those lots, and of the land referred to, in the permit to the plaintiff, was admissible.

For the purpose of showing the territory intended to be included in the permit to Small, and that intended by the exception in the same permit, the defendants introduced Rufus Mansur, as a witness, who had acted as an agent for Small, and who obtained the permit for him from Gilman; and he testified, that he had no knowledge of the location of the land described in the permit, except that derived from the plans, and from said Gilman, in relation to boundaries and limits thereof. He was asked, what were the limits described in Small's permit; what was the territory embraced therein; and to show it to the jury, on a plan before him, which was used, as chalk only, at the trial; and, also, the territory excepted in the permit to Small. The evidence, so offered, was excluded, upon the plaintiff's objection.

The statements of Gilman to the witness Mansur could not be competent to affect the plaintiff. And the plans, even if taken by order of Court, were unintelligible of themselves; and the defendants were not prejudiced by this ruling, and the acts of Gilman, at the same time, were equally improper.

The testimony of Mansur, offered by the defendants, and

excluded on the plaintiff's objection, that, when the agreement was made between Gilman and Small, Mansur acting as the agent of the latter, Gilman marked on the plan then before them, but not exhibited in Court, the limits of the territory to which the permit was to apply, to be given to the plaintiff afterwards, was incompetent evidence, for the reasons already given.

The written permit to Small was the evidence of the extent of his rights thereunder, and all verbal negotiations and agreements, prior to its execution, tending to vary or control the same, were inadmissible.

The letters of Gilman to Mansur, of October 9, and October 11, 1856, — of Gilman to Small, of October 25, 1856, — and from Mansur to Small, with sketch thereon, of October 20, 1856, could not legally affect, in any degree, the rights of the plaintiff, and were properly excluded.

The instruction requested to be given to the jury, that the plaintiff could not recover, if certain conditions contained in the permit to him had not been fulfilled, became immaterial after the verdict, in any view of the subject, the jury having found that those conditions were waived by Gilman.

The Court was requested to instruct the jury, that one trespass must have been committed prior to the date of the writ, in which all the defendants participated, by counsel, advice, or act, or otherwise, or some one time, when all were trespassers, proved, before a verdict could be found against any of the defendants. This instruction was properly withheld, and the instruction that it was competent for them to find against one, or more, or all the defendants, as the evidence might require, was correct. The Judge, under this request, continued and instructed the jury further, that they could find only against such defendants as were proved to have been concerned in carrying on the operation by which the plaintiff was injured, &c., and if any one or more was not proved to have been engaged in such operation, and in carrying on the same, prior to the date of the plaintiff's writ, they should find such defendants not guilty. We see no error in this.

The instruction requested was upon the assumption, that the rule applicable in an action of assumpsit was the true one in this case, that, if one defendant is not found liable, the verdict must be in favor of all the defendants, which cannot be admitted.

It is, however, insisted that the instruction given under this request authorized the assessment of entire damages against all the defendants, who were guilty of any act of trespass, though some of them may have participated only in a small part of the cutting and hauling complained of. The attention of the Judge was not brought in the request, to the case which the defendants' counsel presents in argument, making the distinction relied upon, and the instruction given was not predicated on such distinction. *Exceptions overruled.*

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

JOSIAH GILLERSON *versus* RUFUS MANSUR *& al.*

The owner of a tract of land gave to plaintiff a *permit* to cut and take away certain trees, reserving the ownership and control of the lumber cut, until payment therefor had been made; defendants, without license, entered upon the land, cut and removed the trees: — *Held*, that plaintiff had no such property, or right of possession, in the lumber, as would entitle him to maintain *replevin* therefor.

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

REPLEVIN, of two thousand spruce, and four hundred pine logs. Plea, general issue and brief statement that neither property in, nor right of possession of, the logs, was in plaintiff. The plaintiff introduced a permit to cut timber, from one Gilman to him, dated 3d of November, 1856. Defendants introduced a permit from Gilman, dated 14th of October, 1856.

That the ruling of the presiding Judge might be had, the defendants admitted they cut the timber upon, and removed

it from, the territory embraced in the plaintiff's permit, and while he held it. The plaintiff exhibited no other title. The Judge ruled that the action could not be maintained. If this ruling should be sustained, a nonsuit is to be entered; otherwise, the action is to stand for trial.

J. Granger and *Madigan*, for plaintiff.

Defendants were wrongdoers, trespassers upon the rights of plaintiff, or of Gilman, or of both.

Had the plaintiff such a right of property, *general* or *special*, in the logs as will entitle him to maintain this action? He claims under Gilman's written contract. The defendants cut and hauled the logs after the date of the contract, and before the date of the writ.

This contract is not a mere naked *license* to enter and remove the timber, but contains stipulations on the part of plaintiff to cut and remove all the logs, and to pay for the same at a time specified, under large forfeiture for any breach on his part.

This contract was a sale of the timber to plaintiff, subject to Gilman's claim, to secure the performance of plaintiff's contract, which Gilman might assert or waive, but which defendants cannot set up to avoid accountability to plaintiff. (*Leighton* v. *Stevens*, 19 Maine, 154,) and also the right to possession for the purpose of cutting, removing, &c. And the plaintiff could maintain trespass *quare clausum fregit* and *asportatis*, or trover, or replevin for the timber cut by any stranger. Long on Sales, 42; *Crosby* v. *Wadsworth*, 6 East, 602; 2 Selw. N. P., 482, 3, 4; *Clap* v. *Draper*, 4 Mass. 266; *Wilson* v. *Mackreth*, 3 Bem. 1824.

The plaintiff might have maintained an action against Gilman himself, if he had cut and taken away the timber during the time embraced in his contract with plaintiff. *Channon* v. *Patch*, 5 B. and C., 897; 2 Petersdorff's Ab. 1002; 1 Hill. Ab. 6, 7; *Stewart* v. *Doughty*, 9 Johnson, 108; *Bulkley* v. *Dolvier*, 7 Crown R. 232; Liford's case, 11 Coke, 50; 1 Greenl. Cruise, 116; *Pease* v. *Gibson*, 6 Greenl. 81; *Howard* v. *Lincoln*, 13 Maine, 122.

At the time the trees were severed by the defendants, the plaintiff had at least a special property in them, a right to take immediate actual possession, to cut them down and remove them. He had a right to do so, even against Gilman. He was accountable for them, if cut and removed during the time stipulated for him to do it, in his permit, although cut and carried away by a stranger.

S. H. Blake and *Tabor*, for defendants.

By the terms of Gilman's *permit*, plaintiff had the right to cut pine and spruce, the title to remain in Gilman until plaintiff had paid for stumpage. The plaintiff had no right to the exclusive possession of the tract, and would have been a trespasser if he had cut trees other than pine and spruce.

In whom was the title and right of possession of the timber cut by defendants? Clearly, in Gilman, who could seize it at his pleasure, and not in plaintiff, who had not cut or hauled it. The trespass may have injured plaintiff, and he has his remedy for the injury, and is prosecuting another action for injury, in this Court.

Plaintiff's title rests upon his permit, "to cut and remove therefrom spruce and pine timber." This timber he did not cut or remove, and consequently has no title to it.

TENNEY, C. J. — This was replevin for logs cut by the defendants, upon land of Samuel A. Gilman. It was admitted by the defendants that the logs grew upon land embraced in the description of territory in the permit given by said Gilman to the plaintiff, and from which he was entitled to take the pine and spruce timber, suitable to be sawed into boards, within a certain specified time, and not after, and upon certain conditions. The timber was not cut by the plaintiff. By the permit, Gilman was to have the full and complete ownership and control of all lumber to be cut upon the land. It does not appear that the conditions, upon which the timber could be cut by the plaintiff, were ever fulfilled in any respect. And nothing is exhibited in the case, that Gilman had not the title and right of possession exclusively to the property replevied, and

the issue that the plaintiff had no right of possession therein must have been for the defendants, on the evidence introduced.

Plaintiff nonsuit.

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

EMELINE B. WALKER *versus* BENJAMIN P. GILMAN.

Scire facias lies to obtain a writ of seizin of dower, where judgment has been rendered, and the time for issuing such writ has expired.

Where one institutes her suit for dower and marries before entry of action, and defendant does not object to the non-joinder of the husband; the objection comes too late on *scire facias* founded on the judgment.

By statute of 1848, the wife may maintain *scire facias* in her own name, or jointly with her husband.

The rule, that the record, of a Court of limited jurisdiction, should verify every fact required to give jurisdiction, is not applicable to the late District Court.

SCIRE FACIAS, to revive a judgment rendered September term, 1847, of the late District Court, in favor of Emeline B. Lincoln, for seizin and possession of a parcel of land in Moluncus, and for eighty dollars damages and costs of suit.

The case is presented on REPORT; the material facts therein stated appear in the opinion of the Court.

J. E. Godfrey, for plaintiff.

Scire facias is the proper remedy. *Pro. Ken. Pur.* v. *Davis*, 1 Maine, 309; 2 Bac. Ab. 729, title Execution, H; Tidd's Prac. p. 1002, (N. Y. ed. of 1807) ib. p. 1020; 6 Bac. Ab. title *Scire Facias*, C. 6, by and against husband and wife.

By statute of 1848, c. 73, the action is maintainable in plaintiff's name, without joinder of the husband. *Field* v. *Higgins*, 35 Maine, 336.

Defendant should have pleaded in abatement plaintiff's intermarriage with Walker. 1 Chit. Pl. 437.

W. C. Crosby, for defendant.

The present plaintiff is not, in legal intendment, the plaintiff in the original suit. Before entry of that action, she was legally known by the name of Emeline B. Walker.

Her marriage, after suit brought, is, at common law, good cause of abatement. 1 Bac. Ab. title Abatement, G.

The statutes in force in 1846 have modified the common law, so that in case of marriage, *after* action has been commenced, the husband, *on his own motion*, may be admitted as a party. R. S. of 1841, c. 115, § 82.

Notice to the husband should have been ordered. *Bridgham* v. *Prince*, 33 Maine, 174.

The legislative provision, that an action, brought by a woman, should not abate *after entry*, by reason of her marriage, implies, that such action may be abated, by her marriage *before* the entry of the action.

Before the statute of 1848, a wife was not authorized to institute a suit in her own name. *Vide Swift* v. *Luce*, 27 Maine, 285, per SHEPLEY, J.

This is matter of substance. The action was for dower and damages for detention. The last husband might release. *Ballard and ux.* v. *Russell*, 33 Maine, 196.

In the former suit, defendant did not appear, and consequently did not waive any defects in the process by not pleading in abatement. And may, on *scire facias*, avail himself of such defects. 2 Bac. Ab. title Error, K. 5.

The late District Court was an inferior Court, and the record should show every fact necessary to a correct rendition of judgment. No legal notice was given to defendant.

HATHAWAY, J. — In March, 1846, the plaintiff, then the widow of Ephraim Lincoln, commenced an action of dower, against the defendant, in the late District Court. In August, 1846, before the return day of the writ, she was married to Asa Walker, who was her husband at the time of the commencement of this suit. The plaintiff duly entered her action of dower, and recovered judgment therein, in September,

1847, by the name of Emeline B. Lincoln, against the defendant.

The defendant contends that the action cannot be maintained, because "the present plaintiff is not, in legal intendment, the plaintiff in the original suit," and because the record of the judgment does not show that the defendant had notice of that suit.

The case finds *the fact* to be, that the plaintiff, in this suit, was the plaintiff, by another name, in the original action.

If the proceedings, in that action, were irregular, because her husband did not become a party to it, the defendants should have taken advantage of the irregularity, by the appropriate plea, in that suit. It is too late now.

The rule, that it must appear by the record, *that* Courts of local or limited jurisdiction have verified every fact necessary to give them jurisdiction, was not applicable to the late District Court. Where the process contained the proper averments to give jurisdiction, and the Court acted in the matter, the existence of all the facts necessary to give jurisdiction is presumed. *Farrar* v. *Loring*, 26 Maine, 202.

This process is the legal mode of obtaining the writ of seizin of dower, sought by it. *Pilsbury* v. *Smyth*, 25 Maine, 427.

By statute of 1848, c. 73, the plaintiff could maintain this action, in her own name, or jointly with her husband.

Defendant defaulted.

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

RUFUS STEVENS *versus* HORACE BRAGDON *& al.*

In an action to recover possession of a lot of land, the certificate of the Land Agent of the State, permitting the defendant to enter upon the lot, as a settler, with proof that he has performed all the duties of a settler, but that the Agent has conveyed the lot to demandant's grantor, affords him no legal ground of defence.

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

WRIT OF ENTRY. The material facts contained in the report appear in the opinion of the Court.

J. Granger, for plaintiff.

S. H. Blake, *Tabor* and *Smith*, for defendants.

CUTTING, J. — The demandant has brought his action to recover possession of lot numbered twenty-three, in township numbered eleven, in the fifth range in the county of Aroostook, containing a fraction over one hundred and forty acres. And, to establish his title, first introduced deeds of warranty of the demanded premises from one Thomas F. Cook to Mark Shepard, dated March 24, 1845, and, from Shepard to himself, of June 4, 1846, and subsequently, in the progress of the trial, quit-claim deeds from the Land Agent to Josiah H. Blake, of Sept. 18, 1855, and from Blake to himself, of July 24, 1856.

The tenants introduced no title deeds, but did produce the Land Agent's certificate to Edward Stevens, dated December 31, 1851, giving him permission to enter as a settler upon the lot, and certifying that, upon his faithful performance of all the duties required of a settler, he would, without further consideration, be entitled to a good and sufficient deed from the State. And they further produced testimony tending to show that Bragdon was tenant in possession under Edward Stevens, and that the latter had complied with the conditions of the certificate, and was entitled to his deed, but that the Land Agent had improperly conveyed to Blake. All of which was denied by the demandant, who, on his part, introduced evidence tending to prove that, prior to 1851, he was in possession,

claiming to hold under his deed from Shepard, that he cleared and cultivated the land, and performed the settlers' duties, and resided on the lot up to 1856, when his brother Edward induced him to quit, through fear of great personal violence.

We have carefully examined the evidence touching these disputed points, and have come to the conclusion that it greatly preponderates in favor of the demandant, in whom is the legal title without the parol testimony, the introduction of which discloses no legal or equitable defence. The improvements by the tenants have been too recent to raise the question of betterments. According to the agreement of the parties, the tenant must be *defaulted.*

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

COUNTY OF WASHINGTON.

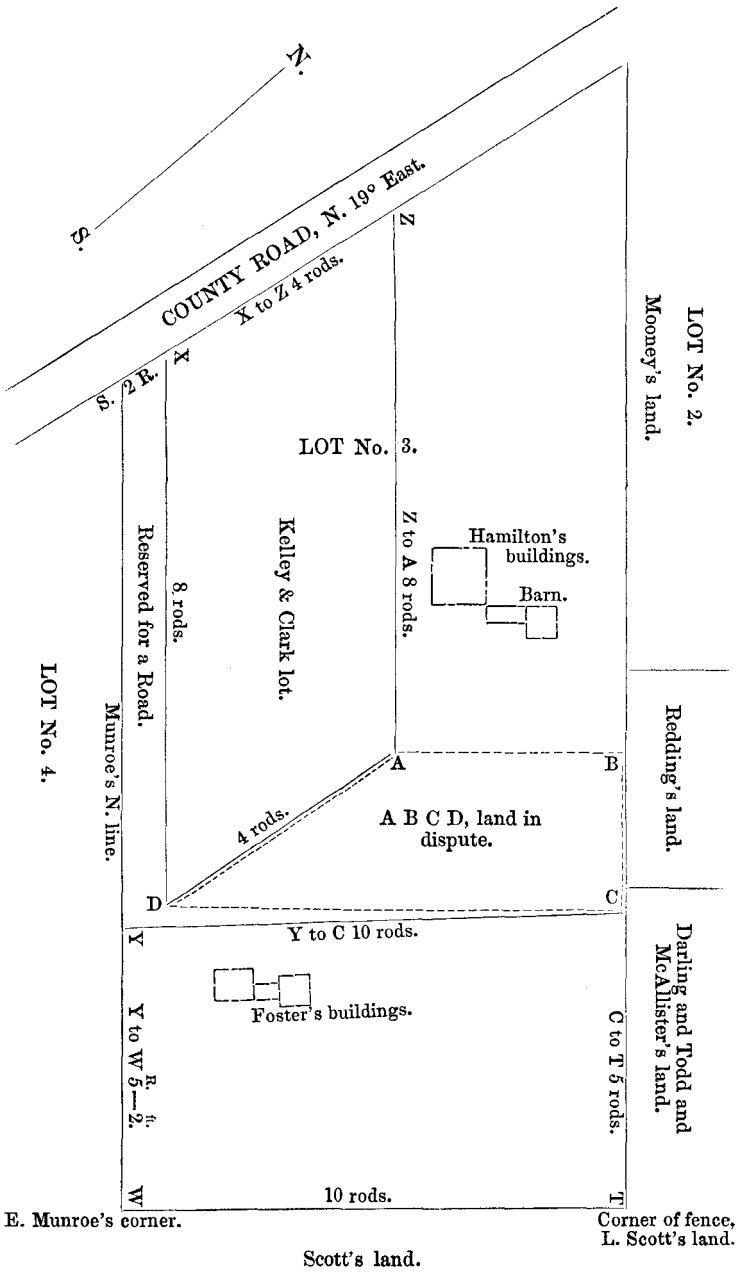
THOMAS L. HAMILTON *versus* EDMUND FOSTER.

Monuments, referred to in a deed, must, generally, prevail over the courses and distances; but where there is such a wide departure from the courses and distances laid down, that some of the monuments are evidently erroneous, or conflict with each other, some elements in the description may be discarded or essentially modified, if, from all the facts, it appears that such construction is necessary to effect the manifest intent of the parties.

WRIT OF ENTRY. Plea, general issue. This case was taken from the jury, and, on Report of HATHAWAY, J., submitted to the whole Court, to render judgment by nonsuit or default, according to the legal rights of the parties.

The only questions in the case were, as to the location of boundaries of land, described in the deed introduced. The facts, as reported by the Judge, points of law and rules of construction adopted, will appear from the opinion of the Court, in connection with the following plan: —

Hamilton *v.* Foster.



J. Granger argued for demandant, and cited *Otis* v. *Moulton*, 20 Maine, 205; *Cutts* v. *King*, 5 Greenl. 482; *Heaton* v. *Hodges*, 14 Maine, 66; *Loring* v. *Austin*, 8 Greenl. 61; *Wing* v. *Burgess*, 13 Maine, 111; *Vose* v. *Handy*, 2 Greenl. 322; *Hale* v. *Foster*, 7 Vermt. 100; *Jackson* v. *Marsh*, 6 Conn. 281; *Morse* v. *Griffin*, 20 Maine, 425; 7 Johnson, 217; 3 Wend. 636; 8 Johnson, 406; 4 Mass. 196; 3 Johnson, 375 and 378; 22 Maine, 350; *Frost* v. *Spaulding*, 19 Pick. 445; *White* v. *Gay*, 9 N. H. 126; 1 Met. 450 and 455; 22 Pick. 416; 10 N. H. 305; 34 Maine, 25; 11 Johnson, 191; 29 Maine, 169; 35 Maine, 64.

E. B. Harvey argued for the tenant, and cited *Purrington* v. *Sedgely*, 4 Greenl. 283; *Cutts* v. *King*, 5 Greenl. 483; *Cambridge* v. *Lexington*, 17 Pick. 222; *Bussey* v. *Grant*, 20 Maine, 281; 8 Greenl. 61; 23 Maine, 217; 4 Ken. & Mumf. 125; 17 Mass. 125 and 207; 16 Pick. 385; 1 Met. 378.

The opinion of the Court was drawn up by

TENNEY, C. J.—The writ and the evidence refer to a parcel of land lying in the town of Calais, not far from the village of Milltown. It is bounded on the westerly side by the county road, which, at that place, is represented to be upon a course north 19° east. This parcel of land was, many years ago, divided into four lots, by B. R. Jones, who made a plan thereof, and numbered the lots, beginning on the northerly side, one, two, three and four. The part of lot No. 2 which adjoins the county road, to the extent of 150 feet upon the northerly line of lot No. 3, was formerly owned or occupied by N. H. Mooney, and the portion in the rear, so far as it becomes material to the present inquiry, was owned and occupied by Ebenezer Redding, a part of which, as it seems from the plan and deeds, was afterwards owned by Darling and Todd and McAllister. Lot No. 3 has been called the Nevins lot, and lot No. 4 was owned by Edmund Munroe. The northerly and southerly lines of lot No. 3, are parallel with each other. The eastern end of the same lot, so far as it is presented to us in this case, is the western boundary of land

of Levi Scott, and is at right angles with the side lines of lot No. 3. The western end of lot No. 3 is the line of the county road, and makes, with the northerly line of said lot, an acute angle many degrees less than a right angle.

The premises in the writ are described as bounded substantially as follows:—"Beginning at a point on the southerly line of lot No. 2, distant five rods from the north-westerly corner of Levi Scott's lot, in a north-westerly direction,—thence running in a south-westerly direction, at right angles with the said side line of lot No. 2, to a point two rods northerly of the side line of lot No. 4,—thence running northerly, by land formerly owned by Samuel Kelley, (called the Clark lot,) to the north-easterly corner thereof,—thence northerly to the southerly side line of lot No. 2, in a line at right angles therewith,—thence, on the last named line, easterly to the bound first mentioned.

The case finds that the occupancy of the land has been according to the dotted pencil line on the south-east side of the "barn," as located on the plan, and that the plaintiff has maintained a fence on that line, since he took possession under his deed, which was fifteen or sixteen years before the trial in April, 1856, and that the line has been in dispute seven or eight years; that the tenant pointed out to the surveyor the corner, marked on the plan "corner of fence," and said he supposed that to be the corner, and that he had occupied up to the line running south-westerly from said corner, but said the line had been disputed. No question was made that the line from this corner, at right angles with the southern line of lot No. 2, would strike the northern line of lot No. 4, at the distance of two rods from the corner referred to.

The oldest deed in the case is from Benjamin F. Barker to Samuel Kelley, dated October 24, 1833, and describes the land therein conveyed as "beginning on said county road, two rods from the north corner of lot No. 4; thence running on said road, northerly, four rods; thence running by a line, parallel with the said line of lot No. 4, easterly, eight rods; thence by a line parallel with said county road, westerly, four

rods, to the two rods reserved for a road; thence, by a line parallel with said side line of lot No. 4, eight rods, to the first mentioned bounds, meaning to convey thirty two square rods, the two rods of land aforesaid, between the lot herein conveyed and the lot owned by Edmund Munroe, is reserved by me for a road."

It is conceded, in argument, that the residue of the lot No. 3, westerly of the line, from the "corner of the fence" to the northerly line of lot No. 4, including houses and other buildings respectively, marked "Hamilton" and "Foster" on the plan, was conveyed in a deed from Barker to Emerson, dated January 29, 1835. And it appears that Emerson conveyed to Joseph Dearth the same land on February 9, 1836, and at the same time took back a mortgage thereof from Dearth, and that Dearth, on June 2, 1836, conveyed therefrom that portion, which is hereinafter described, to Pitman and Carlton, and, on January 28, 1840, Emerson conveyed to the demandant, and Samuel Hamilton, the whole of the land conveyed to him, before his deed to Dearth, excepting the part thereof which Dearth had conveyed to Pitman and Carlton, the title conveyed by Emerson to Dearth having reverted, and become forfeited in the former, under the mortgage of the latter, and the foreclosure of the same. On June 16, 1845, Samuel Hamilton released to the demandant all his interest in the land which they derived from Emerson.

The great question in the case is the true location upon the earth of the western boundary of the land conveyed by Dearth to Pitman and Carlton. The language used in the description of the land, attempted to be conveyed by this deed, is as follows: "Beginning at the south-east corner of said lot, bounded by land of Edmund Munroe and Levi Scott; thence running westerly, five rods, to land of Joseph S. Clark; thence running northerly, by land of said Clark and Joseph Dearth, ten rods, to land of Samuel Darling, Jr., and Todd and McAllister; thence running on a line of said Darling, Jr.'s, land, and Todd and McAllister's land, easterly, supposed to be five rods, to land of Levi Scott; thence running southerly, on a line of

Scott's land, ten rods, to the first mentioned bounds, containing fifty square rods, more or less."

The corner at which the description in the deed last referred to commences, the counsel for the parties agree in argument, is at the intersection of the westerly line of Scott's land, with the northerly line of lot No. 4. This is obviously correct.

The first line in the description in this deed, from the corner last referred to, will terminate at some point on the easterly line of the Clark lot, which, by the deed to Kelley, is four rods in length, and which point is left uncertain. This line will be more than five rods in extent, if its termination should be at the nearest point which can be reached, and will leave a parcel of land, not conveyed by the deed, lying upon the northerly line of lot No. 4, not exceeding two rods in width at the western end, and running to a point at the other, and of more than four rods in length. The second line, is on the easterly line of the Clark lot, extending four rods, if commenced at the most eastern extremity thereof, and the direction beyond the Clark lot is uncertain. It is uncertain, because it is to proceed upon the line of Clark and Dearth, when Clark has at this place no land, and the line of Dearth's land was the one which was to be fixed by the very deed. But it is to strike the land of Darling and Todd and McAllister, which is to be treated as a monument. If run so as to strike this monument, it makes a large angle at the northeasterly corner of the Clark lot, making two lines in that which is represented as one, and the length of both is very much increased beyond the distance of ten rods. If this second line in the description should be continued on the same course as that of the eastern line of the Clark lot, so as to make but one line, it would strike far to the westward of the land of Darling and of Todd and McAllister, upon the land of N. H. Mooney, which is not referred to in the deed.

The third line in the description is represented therein as being wholly on the land of Darling, and of Todd and McAllister, and supposed to be five rods in length; whereas, on

the hypothesis that the second line is wholly on the east line of Clark, and continued in the same direction, the third line must be in part upon two other proprietors, and extending nearly twice the distance of that represented in the deed.

On the other hand, the ground taken by the demandant in giving a construction to this deed is met with difficulties. If the first line in the description is coincident with the northerly line of lot No. 4, it can never reach the Clark lot or come within nearly two rods thereof, as it is described in the deed of the same to Kelley. And, if this difficulty could be overcome, so far that the Clark lot could be reached by the first line, the second line is that of Clark and Dearth's land, which diverges much from a line at right angles with the northerly line of lot No. 4, so that a new departure from the north-easterly corner of the Clark lot, on a line to strike the land of Darling, and Todd and McAllister, would be the introduction of a new line, and would cause a derangement in the distances laid down in the deed, as well as lead to a result inconsistent with that contended for by both parties.

These difficulties in the way of the demandant's claim, are attempted to be avoided on the ground that rights have been obtained by disseizin, so that the first line of the description will be coincident with the northerly line of lot No. 4, and will meet the Clark lot, and thence the second line will pass northerly to the southerly line of lot No. 2, at a distance of five rods from the "corner of the fence," and will strike the monument of Darling and others' line, as named in the deed. There is not such evidence of disseizin, as to give to either party the means of placing their respective claims on different grounds from those exhibited by the deeds, and other facts in the case.

If the variations, referred to, were only in distances, or courses and distances, and monuments referred to could be reached without doing violence to other parts of the description, the latter, by a well established principle of law, must prevail. But when there is such a wide departure from distances laid down, and lines terminate at monuments not re-

ferred to, and are coincident with those foreign to the description, and those named abandoned, a suspicion that the hypothesis of each party is erroneous may well be entertained, provided no other mode can be found, consistent with legal principles, which lead to reasonable results.

Under such a state of things, as is presented in this case, it is proper that all the evidence should be examined together, as well as each part separately; and it is not in violation of well established rules of construction, that some elements in the description may be found erroneous, so that the same should be discarded or essentially modified. This proposition is fully supported by authorities cited for the demandant. But this cannot be done arbitrarily, but must be founded upon facts in the case, that such was according to the intent of the parties. The word "and" has been construed to mean "or;" the direction of a line has been held to be its opposite in the design of the parties.

If the parcel of land conveyed to Kelley by Barker was a parallelogram, having its corners right angles, and it extended to the northerly line of lot No. 4, the great difficulty in the case would be wanting, and the demandant would be entitled to recover for the larger part, at least, of his claim.

Good reasons are found in the case for believing that the parties to the deed from Barker to Kelley did not know that the angles of the parcel, described at the county road, were not right angles, or, if they did know it, it was not brought to their attention. The side lines and the end lines were parallel with each other respectively, the former were precisely eight rods in length, and the latter were four rods. But the actual width of this parcel was much less than four rods, and could not contain an area of thirty-two square rods, which, it is clear from the deed, it was one important object of the grantor to convey and of the grantee to receive.

The deed of Dearth to Pitman and Carlton seems to treat the Clark lot as coming to the northerly line of lot No. 4. This is manifest from the fact, that the line from the place of beginning is represented as five rods long, and as terminated

at the Clark lot. As we have seen, this could not be upon any other line than that of lot No. 4, on its northerly side. From the termination of this line, the second line runs ten rods, which is the width of the whole of lot No. 3, and is represented as terminating on land of Darling and others, five rods from land of Levi Scott.

It is true, that in determining the quantity of land, and its boundaries, excepted in the deed from Emerson to the demandant and Samuel Hamilton, the same rule of construction must be adopted, which would have applied if the question had arisen between Dearth and Pitman and Carlton, where both were interested in the title. But if Pitman and Carlton, at that time, had contended that their title extended over the parcel claimed by the tenant in this case, would it not be unjust or illegal, that, if both parties to that conveyance had treated the Clark lot as bounded southerly on lot No. 4 in the deed, upon discovery of the common error, the grantees in that deed should so materially change three of the four lines of the parcel, and thereby include a much greater quantity of land then that contemplated, or which is represented in the deed? It is manifest that only one answer can be given to this question.

In examining the deed to Pitman and Carlton, it is certain that, on no construction can all the calls therein be answered, consistently with the literal import of the description of each line taken separately. It is not, then, a case where monuments cannot be found, but where they cannot be reconciled one with another. And, if no mode could be found to ascertain the intention of the parties, as disclosed by monuments, it is a case analogous to one, where monuments fail. In such a state of things, courses and distances are to govern.

The northerly and easterly lines referred to in this deed, as to their direction, are not in dispute. All the lines, as to length, are stated with exactness, excepting the third, qualified by the terms *supposed to be* five rods. But it does not appear that this was erroneous, unless the line on other grounds should extend to a much greater distance. The course of the

first and second lines, we are satisfied from the evidence, was intended by the parties to run, as they would have done, if the Clark lot was really a parallelogram, with right angles at the corners, and that it was bounded on the northerly line of lot No. 4. By the correction of these errors, which actually existed in the minds of the parties to the deed, the monuments will harmonize with the courses and distances very nearly, and the demandant should prevail.

But, as it appears from the plan that the southern line, as claimed by the demandant to be the southern boundary of the land conveyed to Pitman and Carlton, is two feet longer than is authorized by the deed, the eastern boundary of his land must be a line extended from a point five rods distant from the "corner of the fence," to a point in the northern line of Munroe's land, at the same distance from the intersection of his and Scott's line. The demandant can recover no land southerly of a line parallel with Munroe's northern line, and two rods distant therefrom, his claim in his writ being limited thereto. *Tenant defaulted.*

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

[NOTE. — This case was argued at July term, 1856, when the Court was held by five Justices only; but the opinion was not prepared until after HATHAWAY, J., had retired from the bench.]

HIRAM A. BALCH *versus* ISAAC PATTEN.

Assumpsit cannot be maintained against a trespasser who has cut and carried away grass, if he has neither sold it, nor had any benefit from it, but in its use.

The admission of a defendant, pending the suit, made to one in no way connected with the land as plaintiff's agent, or otherwise, that he had no other defence than title to the land, cannot be regarded as an express promise to pay for hay sued for in *assumpsit*, which he had wrongfully cut and taken from the premises; nor does such admission *imply* any engagement to account for it.

The impeachment of a deed, on the ground of fraud, as against creditors, is not a question that can be settled in an action of *assumpsit*.

Balch *v.* Patten.

[NOTE. — This action has previously been before this Court. See Vol. 38, page 353.]

ASSUMPSIT. The writ, which is dated March 18, 1853, contains a count for a quantity of hay, (according to account annexed thereto,) and another for money had and received. The case was heard on the evidence reported by HATHAWAY, J. By the Report, it appears that the plaintiff caused an execution, which he had obtained against one Tobias A. Hall, to be extended on certain real estate, as said Hall's property, on 17th of February, 1851, which levy was recorded June 10, 1851. A witness, who was in no way interested in the controversy, testified, "that defendant in April, 1856, told him he had no other defence to this suit, than title to the land; that he had cut the grass for three years; that he let the man, employed by him to cut the hay, have a part of it for cutting, and he had the benefit of the rest."

Plaintiff proved title to have been in said Hall at a time prior to his levy.

Defendant put into the case a deed from said Tobias A. Hall to Thomas D. Watts, dated June 10, 1839; also a deed from Watts to Charles S. Hall, dated December 29, 1843, acknowledged on the same day; also one from Hall to Ruth M. Hall, wife of said Tobias A. Hall, dated July 17, 1849. And plaintiff offered evidence tending to show that these conveyances were fraudulent as against the creditors of said Tobias A. Hall.

The defendant claimed to act as the agent of said Ruth M. Hall.

If, upon the evidence, the plaintiff can maintain his action, the defendant is to be defaulted, otherwise plaintiff to become nonsuit.

B. Bradbury argued for plaintiff.

The act of the defendant was originally a tort, which it was competent for the parties to waive. And, if it be waived by them, the owner may have his remedy in assumpsit, even in an action for use and occupation, where the relation of landlord and tenant does not exist. *Curtis* v. *Treat,* 21 Maine, 525.

When defendant stated that he had no other defence to this action than title to the land, he admitted a waiver of the tort, and his liability to plaintiff in this form of action, unless protected by the failure of plaintiff to show title to the land in himself. It was equivalent to an express promise to pay, if the title to the land was in the plaintiff.

But, if both parties have not waived the tort, still this action may be maintained, because the defendant sold or used the hay. He sold a portion of the hay to the man who cut it. In *Miller* v. *Miller*, 7 Pick. 285, payment was made in goods. It is the same if payment be made in labor. In another case, assumpsit was maintained where the trespasser had sold and *received no pay*. The balance of the hay the defendant either sold or used; in either case the result is the same. 2 Greenl. Ev. § 108, page 95, note (5,) and cases there cited. *Cummings* v. *Noyes*, 10 Mass. 436; *Webster* v. *Drinkwater*, 1 Greenl. 323; *Chauncey* v. *Yeaton*, 1 N. H. 451; *Jones* v. *Howe*, 5 Pick. 285; *Hill* v. *Davis*, 3 N. H. 384; *Johnson* v. *Speller*, 1 Doug. 167, note; *Smith* v. *Holsen*, 4 Term R. 211; *Appleton* v. *Bancroft*, 10 Met. 231; *Balch* v. *Pattee*, 38 Maine, 335.

The last case is the same as that now before the Court, in which it is intimated that the use of the property by the defendant would lay the foundation for assumpsit.

The money counts may be supported by evidence of the payment or receipt, (as the case may be,) not only of money but money's worth. *Payson* v. *Whitcomb*, 15 Pick. 212, 216; *Randall* v. *Rich*, 11 Mass. 494, 498; *Emerson* v. *Baylies*, 19 Pick. 55, 57.

The defendant alleges that the action cannot be maintained, because, he says, the testimony offered by him puts in issue the title to these premises, and that the title to real estate cannot be tried in assumpsit, and exhibits a proper title in one Thomas D. Watts, prior to the date of the levy of the plaintiff.

The direct question at issue, in this case, is the ownership of the hay. In determining this question, the title to the land incidentally becomes matter of controversy.

If A. enters upon the land of B. and cuts, carries away and converts into money, the timber growing there, B. may waive the tort and maintain assumpsit; but, in order to show his title to the timber cut, he must show his title to the land. May he not do this? Must he not do it? Can he show it in any other way?

If the title had been established by a judgment upon a writ of entry, still he must offer the judgment in evidence. The Court must consider it and determine upon it.

Can the defendant, then, come in and plead title in himself, and upon such a plea will the Court say, we cannot try this question, title to real estate is put in issue?

I apprehend, that where the direct question, in an action of assumpsit, is, upon the title to personal property, the Court may determine, incidentally, the title to real estate, so far as it has a bearing upon the ownership of the personal property.

In an action for trover, the title to the property may depend upon a title to land, and the Courts determine always incidentally as to the validity of the title to real estate, so far as it affects the ownership of the personal property claimed.

It is true that nothing is settled in assumpsit, in a case like the one at bar, but the individual case. Yet, in trespass *de bonis*, trover, and assumpsit, the title to real estate often arises incidentally, and why should not the Court try that question in assumpsit, as well as in trespass *de bonis* or trover.

I cannot see why such an objection should prevail, nor do I suppose it will.

The question, then, returns, was the plaintiff the owner of this land? The defendant denies that he was, because Tobias A. Hall, prior to the levy made by plaintiff, conveyed the premises to Thomas D. Watts, who conveyed them to Charles S. Hall, who conveyed them to Ruth M. Hall, wife of Tobias A. Hall, whose agent defendant claims to have been.

The plaintiff alleges that these conveyances are fraudulent and void. The evidences of fraud in this case are marked; it is covered all over with badges of fraud. The testimony

reported, and the depositions in the case, clearly establish the fraud.

The defendant, failing to establish the title of Ruth M. Hall, fails in his defence.

G. F. Talbot, for defendant.

The plaintiff cannot recover in this action, because the evidence, he introduces, establishes the legal title of Ruth M. Hall, whose servant and agent he claims to be, in the premises.

The evidence in the case does not show that the deed from Tobias A. Hall, in 1839, was not a *bona fide* deed. Nor is there any evidence to show that the plaintiff, at that time, was a creditor of Hall. His judgment was not recovered until 1851. But, whatever may have been the character of the conveyance, only a court of equity can set it aside. *Gardiner Bank* v. *Wheaton,* 5 Greenl. 573; *Traip* v. *Gould,* 15 Maine, 82; *Caswell* v. *Caswell,* 28 Maine, 232; *Webster* v. *Clark,* 25 Maine, 313.

I do not, however, deem it important to discuss the character of the conveyance from T. A. Hall to Watts, apprehending that the case will turn upon another point, viz.: —

Assumpsit cannot be maintained by this plaintiff for the cutting and conversion of the hay, because the act, if the plaintiff have any right to inquire into it, was a *tort,* and of itself furnishes no basis of a promise. In *Jones* v. *Hoar,* 5 Pick. 285, the Court refer to the opinion of Judge STRONG, who tried that case in the Common Pleas, adopt it and append it in a marginal note. Judge STRONG establishes with great precision the law of waiving torts and pursuing the remedy of *assumpsit.* After reviewing the leading English decisions, he lays down this as the result of his investigation. "Where the action is brought against the original tort feasor, unless there are some circumstances accompanying the transaction which will authorize the plaintiff to consider it a contract, or the property taken has been turned into money or money's worth, the plaintiff cannot waive the tort and bring assumpsit."

PARKER, C. J., recapitulates the principle in these terms. "The whole extent of the doctrine, as gathered from the books, seems to be, that one whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrongdoer sell the goods and receive the money, waive the tort, affirm the sale, and have an action for money had and received *for the proceeds.*"

Our own Court has adopted the law of this case, in *Simpson & al.* v. *Bowden*, 33 Maine, 549; *Richardson* v. *Kimball*, 28 Maine, 463; *Howe* v. *Russell*, 41 Maine, 446; *Emerson* v. *McNamara*, 41 Maine, 565; *Hall* v. *Huckins*, 41 Maine, 574.

What is meant, in the discussion in all these cases, by waiving the *tort* and affirming the *contract*, upon which assumpsit may be brought? Most clearly the *contract of sale.* It is assumed, by fiction of law, that the goods are *rightfully* in the hands of the tort feasor, that the tort feasor has become his agent, and that, in selling, he sells as the agent, and is accountable, not for the value of the goods, but for the actual avails of the sale. It is not that the goods have come into the tort feasor's hands, therefore he must pay for them, for the fiction is, that the owner entrusted them to his hands, he sold them for him, and promises to pay over the proceeds.

Thus, in *King* v. *Leith*, the Court say, "the assignees are entitled to receive what the party really received, which is *only what the sale produced.*" In *Feltham* v. *Terry*, "he may waive the tort and go for the *money clearly due.*" In *Lindon v. Hooper*, "he is liable to refund only *what he has actually received*"—* * "for the amount of money which the goods sold for." In *Humbly* v. *Trott*, Lord Mansfield said, "the Court will allow the plaintiff to waive the tort and bring an action in which he can recover nothing more than the sum *actually received.*" Judge STRONG'S notes in *Jones* v. *Hoar*, above cited.

Judge SHEPLEY says, in *Richardson* v. *Kimball*, "the plaintiff may waive the tort, and recover for the fruits of that tort, the amount *received by the defendant in money.*"

Now, in this case, there was no sale at all. There is testimony tending to show that Patten "cut a ton of hay in 1851, and a ton and a quarter in 1852. That he had the hay, that he had the benefit of it." This shows that he did not sell. It is true, he let a man have a part of the hay for *cutting it.* But this was no proceeds of the hay, no avails of a sale, no funds in his hands, which he is to account for as *money had and received,* but expenses incurred and a charge upon the property. Even if Patten had sold, he would be obliged to refund only the proceeds of the sale of the hay, less what he had expended in cutting it. This being the fact, under the law as the Court have established, I conceive, that the objection to the action is perfectly fatal.

As assumpsit cannot be brought upon the transaction itself between the parties, it can only be brought upon a promise which the defendant made, or which the Court may imply. The defendant made no such promise.

When this case was before the Court, on the first trial, (see *Balch* v. *Patten,* 38 Maine, 353,) a nonsuit was ordered upon the evidence of the plaintiff alone. The defendant put in no justification, and stood before the Court as a mere wrongdoer. The nonsuit was removed, because "evidence was introduced tending to show that the defendant cut the hay in the summer of 1851 and 1852, and *that he promised the plaintiff* to pay therefor, on the condition that the place, upon which the hay was cut, was the property of the plaintiff." But the evidence in the case does not come up to any thing of the kind. Mr. Freeman is employed to go to the defendant and ask him, "if he had any other defence to the action than the title to the land," and defendant replied that he had not. This comes very far from being a promise to pay. It is no promise to pay upon condition, even. It is a flat refusal to pay.

Neither will the law imply a promise. The defendant was in possession as the servant of Mrs. Hall, who claimed title under deed. That possession was adverse to the plaintiff. Hence the relation of landlord and tenant could not exist. A suit for use and occupation, even, could not be sustained in

such a case. *Wyman* v. *Hook*, 2 Greenl. 338; *Simpson* v. *Bowden*, 33 Maine, 549; *Howe* v. *Russell*, 41 Maine, 446.

It would be most singular, if the Court might imply a promise on the part of Patten to pay Balch for this hay, when the case discloses, and the defence implies, a direct refusal to pay, on the ground that the land was his principal's and that he was to account to that principal.

In this action, the plaintiff is in fact seeking to obtain a judgment that shall affirm his title to a piece of land in dispute. But, in *Codman & al.* v. *Jenkins*, 14 Mass. 93, the Court say:—"*Indebitatus assumpsit*, for rent, will not lie in favor of a stranger, *for the purpose of trying his title, or by one of two litigating parties claiming the land;* this action, not depending upon the validity of the plaintiff's title, but on a contract between the parties, either express or implied." And C. J. PARKER says, in *Miller* v. *Miller*, 7 Pick. 133, "It does not appear that there was any controversy about the title of the parties to the land from which the wood was taken, the price of which was sued for in this action. If that had been the point in dispute, the plaintiff might have been nonsuited and turned over to his writ of entry, or petition for partition." See Perkins' notes in same case.

When this case was previously before the Court, Judge TENNEY was careful to mention, as one of the grounds of taking off the nonsuit, "*that the defendant claimed no right in the land.*" If the title of the defendant had been put in, as it now is, it would have then been apparent that the action could not be maintained.

What I contend for may be briefly recapitulated thus:—

The defendant never promised the plaintiff; because the property taken was the property of Ruth M. Hall, his principal, who was in *actual possession* of the land under a recorded deed from the person from whom the plaintiff derives title. Plaintiff, though he had gone through the formalities of a levy, had not obtained actual possession; nor had there been any judgment of Court, upon writ of entry, or bill in equity, affirming his title as against the title of the defendant's principal.

The plaintiff's remedy, if he has any, is not in assumpsit.

1st. Because he never promised to pay, conditionally or otherwise.

2d. Because the law will not imply a promise, the relation of landlord and tenant not existing, and the defendant claiming adversely.

3d. Because the defendant did not sell the hay for the money or money's worth, and so has no *proceeds* in his hands which can be sued for as money had and received.

Nor will the Court permit *indebitatus assumpsit* "by one of two litigating parties claiming the land."

The opinion of the Court was drawn up by

TENNEY, C. J.—Insuperable difficulties are presented in the report to the maintenance of this action. The defendant had a conversation with William Freeman touching this suit, in April, 1856, in which he said he had no other defence thereto than the title to the land. This, certainly, cannot be regarded as an express promise to pay for the hay which he cut; neither does it *imply* an engagement to account in any way therefor, being said to one who had no connection with the land, as the plaintiff's agent or otherwise.

The plaintiff relies upon a title to the land in himself, under his levy on execution against Tobias A. Hall, and the fact that the defendant had the benefit of the hay, in support of the count for money had and received. It is well settled that where a party has obtained property belonging to another, by a trespass, and has received money therefor, or money's worth, the tort may be waived and assumpsit maintained by the owner. *Jones* v. *Hoar*, 5 Pick. 285, and note. But the evidence does not bring this case within the principle. Simply receiving the benefit of the hay in its use, by the one who took it, does not constitute a basis for the action in favor of the plaintiff, if the title to the land on which it grew was in him.

But the title to the land is claimed by the defendant to have

been in Ruth M. Hall at the time the grass was cut by him, and that he was acting as the agent for taking charge of the property. By the deeds on record, the title was then in Ruth M. Hall, but the plaintiff treats that title as void against creditors of Tobias A. Hall, on the ground of fraud. Whether it can be impeached on this ground, by the plaintiff, is not a question which can be settled in an action of assumpsit. *Codman & al.* v. *Jenkins*, 14 Mass. 93. *Plaintiff nonsuit.*

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

WILLIAM FREEMAN, JR., *versus* WILLIAM MOREY, JR.

Proof that a letter, addressed to one of the parties, was deposited in the post office, and the postage paid, raises no *legal* presumption that it came into the possession of the person to whom it was addressed, so as to make secondary evidence of its contents admissible; as is allowed, in case of notice, to charge parties to negotiable paper.

CASE, for alleged breach of contract. Plea, general issue. The action comes up on EXCEPTIONS by plaintiff, and also on his motion to set aside the verdict, which was for defendant, as being against law and evidence. At the trial, the plaintiff introduced evidence tending to show that defendant contracted to furnish, before a specified time, the iron work, castings, &c., for a mill he was building at Cherryfield in the year 1854; that defendant failed to perform the contract, and thereby the plaintiff suffered damage. The defendant contended, that he had fulfilled the contract made by him, and introduced evidence tending to show this. Several questions of law were presented by the bill of exceptions, which were elaborately argued, but the result to which the Court arrived, in considering one of them, renders further notice of the others unnecessary.

The defendant gave seasonable notice to plaintiff to pro-

duce at the trial all letters he had received from him, relating to the matter in suit.

J. Granger, for plaintiff.

Bradbury and *Walker*, for defendant.

The opinion of the Court was drawn up by

CUTTING, J. — The case finds that "the presiding Judge ruled, if defendant shows that the letters were deposited in the post office and the postage paid, it would be presumed that the plaintiff received them." And, thereupon, the defendant testified that "he could not give the dates of the letters, but that he wrote two or three letters to the plaintiff, the purport of which was, that he could not get castings to do plaintiff's work, and that, if he wanted his work done, he must furnish the castings, and that they were deposited in the post office and the postage paid." This evidence was objected to, among other reasons, because the defendant did not prove that "the letters had come into the plaintiff's possession." The materiality of the contents of the letters is not controverted; and hence the question arises, as to whether the defendant had laid a sufficient foundation for the introduction of secondary evidence, by showing the original letters to have been left at the office and the postage paid; or, in other words, whether, under such circumstances, the law would presume that the plaintiff had received them.

At common law, under like circumstances, such a presumption is unknown. Formerly, and until regulated by statute and the custom of merchants, notices deposited in the post office, to charge parties to negotiable paper, were insufficient. *Ransom* v. *Mack*, 2 Hill, 587. And, in this State, until the statute of 1835, proof that letters were written and directed to the overseers of the poor, through the same medium, unless accompanied by evidence of their acceptance, was not admissible to establish the statute notice to charge the defendant town; and not, even at the present time, unless there be also proof of their arrival at the office of delivery. The ruling

complained of was then in derogation of the common law, and is not sustained by the relaxation of that rule in relation to commercial paper or the pauper laws of the State.

Exceptions sustained, verdict set aside and a new trial granted.

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

JESSE B. BROWN, *in Equity, versus* FRANCES U. DWELLEY *& al.*

A trust results, by implication of law, in favor of one who has furnished his agent with money, paid to purchase for him a parcel of land, if the agent takes the conveyance to himself. And, if the agent dies solvent, this Court may decree, that the heirs shall release to the equitable owner.

SUIT IN EQUITY. The substantial allegations in plaintiff's bill, are, that his son, David B. Brown, now deceased, had for several years been allowed by him to sail his vessels and receive their earnings; to purchase and sell vessels and merchandize, and otherwise to employ funds in his hands belonging to him; the said David B. using his own name in such transactions when he chose; the plaintiff having full confidence in his integrity, and believing that he would faithfully keep and truly account for the money and property entrusted to him, whenever thereto required.

That the said David B. Brown purchased certain real estate, described in the bill, and the same was conveyed to him, his heirs and assigns, by deed duly executed. And the plaintiff alleges that the purchase was his purchase and for his benefit, and made with funds furnished by him for that purpose; that, at the time of the purchase, he did not know that the deed was not made directly to himself, as he expected it would be, and that, when he afterwards learned that the conveyance was to his son, he deferred taking a conveyance to himself, in confidence that the premises thereby conveyed would be held for his benefit, and conveyed to him when required.

That the said David, in the year 1853, made a voyage to California, and from thence sailed for New York, where he arrived about the first of January, 1854. That, on his arrival at New York, he was suddenly taken sick and soon after died, leaving a widow, Francis U. Brown, (now Dwelley,) and three children under the age of fourteen years. That his said widow was appointed administratrix of said David's estate, and, in due course of law, the estate was represented insolvent, and commissioners of insolvency duly appointed. That the plaintiff presented his claims against the said estate to said commissioners, amounting to $3000, and it was thereupon agreed, between the administratrix and her counsel and the said plaintiff, that the commissioners should allow but $2000, and that the administratrix would convey to plaintiff the title of the deceased to the premises that had been conveyed to said David, as before set forth. But afterwards the said estate proved actually solvent, so that the administratrix never was nor could be empowered to sell said land, nor could the guardian of said minors, except by decree of this Court as a court of equity.

The answer of said administratrix, and of J. C. Talbot, who had been appointed guardian, *ad litem*, for the minor defendants, admitted all the material allegations of plaintiff, set forth in his bill.

G. F. Talbot for plaintiff.

J. C. Talbot, Jr., for defendants.

The opinion of the Court was drawn up by

RICE, J. — None of the material allegations in the plaintiff's bill are controverted by the defendants. On the contrary, so far as the defendants have knowledge, they are expressly admitted. From the bill and answers, it appears that David B. Brown, in his life time, purchased the land described in the plaintiff's bill, and took a deed thereof in his own name, but paid therefor with the money furnished for that purpose by the plaintiff. From these facts, a trust resulted by implication of law, in favor of the plaintiff.

The estate of David B. Brown, which was represented to be insolvent, turns out, on settlement, to be solvent. There are no parties interested in said estate adversely to the plaintiff, except Frances U. Dwelley, who was the widow of said deceased, and is administratrix on his estate, and two minor children of the deceased, who appear by guardian.

As neither of these parties contest the truth or equity of the plaintiff's claim, but, so far as they have knowledge, expressly admit the same, we can perceive no reason why the prayer of the bill should not be granted.

The case is, therefore, remitted to the County Court, where a decree will be entered, directing the defendants to convey the land described, by deed of quit claim, according to the prayer of the plaintiff's bill, but without costs to the defendants, who are in no fault.

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

EDWIN PARKER *versus* THOMAS B. VOSE *& al.*

A. & B. entered into a contract, by which A. was to advance to B. the means for the building of a vessel, which, when completed, was to be delivered to A. "as his property, as collateral security." A., after her delivery to him, offered the vessel for sale by auction, and she was struck off on the bid of the agent of A. In a suit of A. against B., for the advances, it was *Held:* — *that* B. was not bound by the sale, (if he had not assented to it,) but might show the value of the vessel: — *that* A. could not legally become the purchaser, at such sale: — *that* the legal title to the vessel, being in A. before the sale, the sale to himself or his agent would work no change in the title to the property.

ASSUMPSIT, to recover balance of account. Plea, general issue.

In support of his case, plaintiff offered in evidence, an agreement between him and defendants, dated March 27, 1854, by which defendants, as party of the first part, engaged to build a vessel of a certain description therein specified, "to be de-

livered in Boston, as the property of said Parker, as collateral security."

The plaintiff, as party of the second part, agreed to furnish certain materials, to be used in the construction of the vessel, and also to furnish defendants with certain goods and merchandize, and to make sundry advances in money. "And it is further agreed, by both parties, that in case the party of the first part can sell the vessel at Robbinston, by consent of the party of the second part, and if, on her arrival in Boston, the party of the first part can make sale of the vessel to better advantage than the party of the second part, they shall have liberty so to do, provided the payment comes to the party of the second part for all moneys, acceptances, and all liabilities, commissions, and claims against said vessel."

There was, on the trial, sundry depositions introduced, but no copy of either of them is found among the papers in the case, the originals having been used at the argument and since withdrawn, to be used at the new trial that has been ordered. The opinion of the Court indicates the nature of some of the evidence.

The presiding Judge instructed the jury "that the defendants were bound by the sale [of the vessel] at auction in Boston, whether they assented to it or not." Whereupon, by consent, the case was withdrawn from the jury, to be submitted to the Court on Report of HATHAWAY, J. If the instruction was correct, a default was to be entered; otherwise, a new trial to be had.

B. Bradbury for plaintiff.

The vessel was launched in October, 1854, and arrived in Boston during the first days of November following, and was sold at auction on the 28th day of the same month. There is testimony in the case that Vose, one of the defendants, was in Boston some three weeks or more, endeavoring to sell the vessel. Had Parker a right to sell the vessel? The contract contemplates a delivery of the vessel in Boston, for the purpose of being sold. The plaintiff held the vessel, as his

property, as collateral security; he was bound to account to the defendants for the proceeds. The debt was absolutely due him at the time the vessel was launched, and he had a right to avail himself of the proceeds of his collateral security by a sale of the vessel at any moment. He could dispose of her at private sale or public auction.

A reasonable time had been allowed the defendants to effect a sale, and they were unsuccessful in their endeavors to effect any; upon legal principles, then, the plaintiff had the right to sell the vessel.

Was the sale a fair one? Both parties had endeavored to sell the vessel at private sale, but neither party could succeed in doing so. The testimony clearly shows that the vessel was duly advertised; a large company was present at the sale, which was properly conducted, and that the price, at which the vessel was sold, was a fair one for a vessel of her class, at the time of sale. The ingenious counsel for defendants suggested at the trial, as the ground of objection to the fairness of the sale, that the plaintiff himself was the purchaser. F. Rice testified—"I bought the vessel under an arrangement with Parker, and acted as his agent at the time. My instructions from Parker were, that he did not want the vessel sacrificed, and not to let her go to any other party at less than $14000."

It is difficult to perceive, for what reason this purchase by Parker, can invalidate the sale, as between him and the defendants. It is not the case of puffers or by-bidders, by which the auction price is unfairly swollen.

It is not a case between an owner of the property and a purchaser at auction, where the price is enhanced by the bids of the owner's agents; though, in this case, if the agent was employed *bona fide* to prevent a sacrifice of the property, under a given price, it would be a lawful transaction and not vitiate the sale.

Here the plaintiff has two objects; to save himself and save the defendants. It was for the interest of the defendants that he should not permit the property to be sacrificed; and

it is manifest that the defendants realized more for the property than they could have done in any other way. The motive of the plaintiff was laudable; the result beneficial to the defendants. Parsons on Contracts, vol. 1, p. 417 and 418. The sale was a fair one; the plaintiff had a right to make it; and the Court properly said the defendants were bound by it.

The instruction was immaterial. Manson testified, "the plaintiff and Vose had endeavored to effect a sale, and, not being able to get a satisfactory offer, mutually agreed to have her sold at auction at the time and place when and where she was sold."

The defendants, surely, would be bound by such an agreement, and it becomes, therefore, quite immaterial whether plaintiff had a right to sell, without their assent.

As to the equities of the case, it should be observed that the plaintiff has credited the defendants with the sum of $16000 for the vessel, instead of $12,700, the auction price.

F. A. Pike, for defendants.

The instruction given was erroneous. There was no sale. Parker set the vessel up at auction, and she was knocked off to his agent. No money was paid. There was no change of title. The legal title was in plaintiff before the sale, and so remained. There clearly was no sale, *so far as Parker was concerned.* It was simply an unsuccessful attempt at sale. Supposing it honest, it was but a mere trial of the market.

The most favorable position that can be taken for plaintiff, is, that Parker, as agent for defendants, sold to himself individually. But he could not be allowed to act in two capacities. The policy of the law wisely interferes and prevents any such duality. "It is a rule of law, well settled, and founded in the clearest principles of justice and sound policy, that the agent of the seller cannot become the purchaser, or the agent of the purchaser." These relations are utterly incompatible with each other. *Copeland* v. *Mercantile Ins. Co.*, 6 Pick. 204. An agent at a sale, made for his principal, cannot become the buyer. Story's Agency, § § 9, 10, 210, 211.

The defendants deny any assent to the sale, on their part. They claim their right to have that question submitted to the jury. It is not properly before the Court. The plaintiff's counsel has correctly stated the question to be determined, whether or not the instruction given by the presiding Judge was correct.

Nor is it true that Parker was acting for the interests of the defendants in the auction sale, and the sale, therefore, was a fair one and the price being reasonable, the sale should stand.

Parker's interest was to obtain the vessel at as low a price as possible. He protected his interest at the auction sale by means of his friend Rice, and having done this, it does not appear that he interested himself further in the matter. * * * * * The defendants were entitled, at the sale, to Parker's disinterested efforts in their behalf, and it is quite apparent that they did not have them.

But there is another view. The plaintiff, immediately upon taking the vessel at Robbinston, sued the defendants and assumed the vessel as his own, and credited them $16000 for her. If he assumed the vessel, thus making a conversion of her, he should be held to pay the defendants for her, what she was worth.

The opinion of the Court was drawn up by

TENNEY, C. J.—It does not appear in the report, that the claims of the plaintiff, as originally existing, are denied; but that the defendants had not been credited, as a payment, the value of the bark Pilot Fish, which was appropriated by the plaintiff to his own use, was a point in issue.

By the contract between the parties, of March 27, 1854, the plaintiff engaged to make certain advances to the defendants, for the purpose of enabling them to build and complete the bark. And, in consideration of these advances, thus agreed to be made, and which were in fact afterwards made, the bark was to be delivered at a wharf in Boston, as soon after she should be "launched as practicable, as the property of said Parker, as collateral security."

It was agreed by both parties in the contract, if, on the arrival of the vessel in Boston, the defendants could sell her to better advantage than the plaintiff could do, they had the liberty to make the sale, provided the payment should come to the latter, for all moneys, acceptances, and all liabilities, commissions and claims against the vessel.

Evidence was introduced by the plaintiff, tending to show that one of the defendants was in Boston for several weeks, after the arrival of the bark in that place, and was making efforts to sell her, but without success; and that, afterwards, the plaintiff caused her to be properly advertised for sale at auction by an auctioneer, and, at the time and place appointed, a large number of persons being present, she was struck off by the auctioneer, upon the bid of the plaintiff's agent. Evidence was also introduced by the plaintiff, upon which he relied, that one of the defendants consented to the sale so attempted.

The jury were instructed that the defendants were bound by the sale at auction, in Boston, whether they assented to the same or not. And the only question presented is, whether this instruction was correct.

The contract undoubtedly shows that the parties contemplated a sale in Boston, of the bark, after her arrival, by one party or the other, the defendants having the right to make it, in a contingency stated in the contract. No sale was made under this provision, by the defendants.

The instruction to the jury treated the transaction at the time the bark was exposed for sale at auction, as a conclusive sale to the plaintiff. By the contract, the legal title in the vessel was in the plaintiff, at that time, for the purpose of obtaining, from a sale thereof, money to be applied to claims against the vessel and the defendants. The money obtained from the sale, by the plaintiff, was to discharge the defendants *pro tanto;* and, so far, they had an interest in the bark.

The plaintiff cannot be treated as having acquired, at the auction, any right in the vessel which he did not before possess. The sale to him, being the owner, involves an absurdity. He had authority, under the contract, to make the sale, after

the defendants had failed, under the right given to them to do so, for the benefit of the defendants and his own. He was not in a condition, under their authority in the contract to make sale for their benefit, to become the purchaser. He was interested to obtain her at the lowest price, and his duty to the defendants required him to obtain the greatest price, which it was fairly in his power to do. Though the sale was, in form, made by the auctioneer, the latter acted under the agency of the plaintiff, and his agency cannot be regarded as substituted for that which the plaintiff had, under the defendants. It was still his duty to use all proper means to obtain, at the sale, the full value of the vessel.

The two interests, which an agent has to sell property, and to become the purchaser thereof, are so incompatible, that the law does not allow them to be united in the same person. This principle is well established by the authorities cited by the counsel for the defendants.

The interest of the plaintiff, to purchase the vessel at a low price, is not balanced, in law, by the supposed interest to obtain as much as possible, from the sale, of his claim against the defendants. Whatever remained of his claim, after deducting the receipts arising from the sale, was still outstanding and unpaid.

The occurrences at the auction could have no other effect than to tend to show, in some measure, the value of the bark in the market. How far this would be shown, would depend, perhaps, upon other facts and circumstances in evidence. The value of the vessel was a question of fact, to be settled by the jury, from all the proofs in the case, and the value, as tested by the bid of the plaintiff's agent, which was followed by its being struck off to him, is not conclusive upon the defendants, as a rule of law, and, we think, the instructions being unqualified, were erroneous.

According to the agreement of the parties, the action must stand for trial.

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

JOHN G. WETHERELL *& al. versus* HOSEA HUGHES.

In an action against an officer for not maintaining possession of personal property, which he has returned as attached upon a writ, his return is evidence of possession, that will render him liable, if the case discloses nothing to show that such return was made under misapprehension, and the creditor in the suit omits no duty required on his part, to fix the liability of the officer.

A demand, upon an officer, for personal property attached on a writ, within thirty days from the rendition of judgment, is indispensable to fix his liability, unless other facts are shown that supersede the necessity of a demand.

An officer who had attached, on a writ, property that could not be removed, and neglected to file in the town clerk's office a certificate, as the statute requires, or to keep actual possession of it, is released from liability to the creditor in the suit, if he neglect seasonably, on execution, to demand the property of the officer, although it had been sold pending his suit, on an execution against the same debtor in favor of another creditor.

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

G. F. Talbot for plaintiffs.

B. Bradbury for defendant.

The opinion of the Court was drawn up by

TENNEY, C. J. — This action is for the default of the defendant, as a Coroner of the county of Washington, to whom was committed, for service, a writ of attachment in favor of the plaintiffs, and a person since deceased, they being all members of a co-partnership, against one Kelliher, with written instructions on the back of the writ to "attach property." The first count in the writ charges the defendant with having "neglected and refused" to attach a certain house and barn, the property of the defendant in the writ against Kelliher, according to the precept thereof and the order of the plaintiffs.

It is not denied that the writ was duly delivered to the defendant, and that he was bound by law to attach the house and barn referred to, as personal property, they being placed upon the land of a stranger.

On January 23, 1854, the defendant made his return upon the writ, stating that he had, by virtue thereof, among other

things, attached the house and the barn as the property of the defendant in the writ, and that he had left an attested copy of the writ at the last and usual place of abode of said Kelliher; and he further returned, that he had filed a certificate (stating the contents thereof,) in the town clerk's office, in the town of Cherryfield, that being the place of the residence of said Kelliher, of the attachment of said house and barn. The return made by this defendant and filed in the town clerk's office, and the return upon the writ, are parts of this case. These certificates are not conformable to the R. S., c. 114, § 39, and they are so defective, that it is not contended, in defence, that they are sufficient to preserve the attachment upon the house and barn.

The return of the officer, upon the back of the writ against Kelliher, shows that he did attach the house and the barn, and there is nothing in the case tending to show that the return was made under any misapprehension of the defendant, in certifying that an attachment was made, when it was otherwise. This return is evidence that he took possession, which is necessary to constitute a valid attachment of personal property.

The requisite certificate not having been filed with the town clerk, and no return of the defendant that it had been done, the attachment was lost, after the lapse of five days from the time it was made, it not being contended that the possession was retained by the defendant. The property was then free to be taken on any other writ or execution.

While the plaintiff's suit was pending in Court, judgment was obtained in another action, and, upon an execution issued thereon, the house and barn were seized and sold. And, when judgment was obtained in the plaintiff's action against Kelliher, and execution taken thereon, and put into the hands of another officer, it was returned satisfied in part only, from certain other property attached on mense process, and from the goods, effects and credits of trustees, who were parties in the action; and the officer returned that he could find no other property within his precinct. The officer was clearly liable

for not retaining the property attached, if every thing had been done on the part of the plaintiffs, which they could have done, by the exercise of proper care and diligence. But not upon the ground that he had refused or neglected to make the attachment.

The second count in the writ charges the defendant with having omitted to perfect his attachment, by filing the certificate required by the statute with the town clerk. But, if this were, in fact, the whole of the second count, it would not cover the case of the plaintiffs, as shown by the evidence and admissions.

But the original writ is made a part of the case, and on analysing the second count, it is, in substance, a charge against the defendant for not retaining the property attached on the writ. The case finds, that the execution on the plaintiffs' judgment was taken out and put into the hands of F. L. Jackson, a deputy sheriff of the county of Washington, within thirty days after the judgment was rendered; but that no demand, whatever, was made upon the defendant, to surrender the house and barn, which he had attached on mesne process. On the authority of the case of *Pearson* v. *Tincker*, 36 Maine, 384, and other cases, such demand was indispensable, in order to fix the liability of the defendant, unless other facts than those appearing in this case should supersede the necessity of doing so.

According to the agreement of the parties, the plaintiffs are to become *Nonsuit.*

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

JOHN N. M. BREWER *versus* JAMES M. CHURCHILL *& al.*

In reducing to writing a contract, for the charter of a vessel, the usual printed form of a charter-party for a voyage was used by the scrivener, who erased the words, "for a voyage from," &c., and inserted "for a space of time, commencing on, &c., and to continue six months; should the vessel be upon a voyage at the expiration of the time specified, time to end on her arrival, &c., unless a longer time is agreed upon." The party of the second part agreed "to pay for the charter, during the voyage aforesaid, $600 per month for each and every month as before specified." An outward voyage was made, but the vessel was lost on her return voyage. In an action upon the contract, it was *Held:* — that the charter was not for a voyage, but for a specified time, which was terminated by a peril of the sea, up to which event, defendants are liable to pay the contract price, with interest since: — that defendants are not entitled to commissions or insurance on advance payments.

ASSUMPSIT. In the first count, the plaintiff declares on an account annexed to the writ, viz.: —

For charter of brig Broome from Nov. 24, 1853, to Feb. 3, 1854, at $600 per month,		$1400,00
Cr. By amount paid Captain at Boston,	$250,00	
" " " at Cardenas,	51,00	
		301,00
		1099,00
Interest,		219,47
		1318,47

Second count, was for the use and hire of brig Broome.

Third count, declared upon the charter party, dated Nov. 19, 1853, which was offered in evidence by the plaintiff.

It was agreed that, in pursuance of said charter party, the defendants took possession of the vessel on the 24th of Nov., 1853; that she arrived at Cardenas on the 22d of December following, with her cargo, at which place she remained until the 15th of January, 1854, when she sailed for Boston, with a cargo, and, on the 3d of the next month, was wrecked.

Plaintiff also offered an account current, dated July 22, 1856, rendered by defendants to plaintiffs, and admitted the payments of the two sums advanced to the master of the

vessel, but controverted the claim of defendants to commissions and insurance on the sums.

Upon the facts agreed, the Court, drawing such inferences as a jury would be authorized to draw, are to render judgment.

B. Bradbury for plaintiff.

Deblois and *Jackson* for defendants.

The opinion of the Court was drawn up by

CUTTING, J. — In reducing the contract declared on to writing, it is very apparent that the scrivener made use of the usual printed form of a charter party for a voyage, that the word voyage was substituted for a period of time as specified in the first part, and that all the subsequent portions of the printed form were retained. This will account for the incongruities of certain subsequent expressions, such as "the said voyage," "for such voyage," "voyage aforesaid," used in the covenants of the defendants, when no voyage had previously been mentioned in those of the plaintiff. Thus, "the party of the first part do covenant and agree on the freighting and chartering of said vessel, unto the party of the second part, (not for a voyage from, &c., as in the printed form, but) for a space of time commencing on the twenty-fourth of November, and to continue six months. Should the vessel be upon a voyage at the expiration of the time specified, time to end on her arrival at her port of discharge in the United States, unless a *longer time* is agreed upon." We can conceive of no language more strong to express the chartering for a space of time, stating both its commencement and termination, and even naming it "*the time specified.*"

If a voyage or voyages were intended, as contended for by the defendants, it is somewhat remarkable that no voyage is specifically mentioned, no port of departure or destination named, as is invariably the case when vessels are let for a voyage, and not for a period of time. If it is hereafter to be held as argued, it may be set down as an invention, and not a discovery from the authorities cited.

But the defendants agree to charter and hire the said vessel as aforesaid, on the terms following:—"to pay for the charter or freight of said vessel, during the voyage aforesaid, six hundred dollars per month for each and every month, as before specified." The term "as before specified," must refer to the time of the commencement and termination of the charter party, and embrace the stipulated period of six months. There could be no question that such would be the construction of the defendants' stipulation, except for the expression "*during the voyage aforesaid.*" But we have before observed that the words "said voyage," and "voyage aforesaid," have no correlative terms or antecedents in the former and material part of the contract, and being of so doubtful origin, can have but little influence to control what otherwise would be the clear expression of the intention of the parties. Had the scrivener only substituted the word *time* for the printed word *voyage*, the contract, throughout, would have been consistent. What he omitted, we must supply, not to alter, but to construe the contract, both in a grammatical and legal sense, and must, therefore, come to the conclusion, that the vessel was chartered for a specified period of time, which was terminated by a peril of the sea, up to which event, the defendants are liable to pay the contract price, with interest since. The case of *Havelock* v. *Geddes*, 10 East, 555, is conclusive upon this point. See, also, Abbott on Ship., 7th Am. ed., 356.

As to the *advance* payment of $250 to Capt. Tilton, we see no reason why commissions or insurance should be added.

Defendants defaulted.

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

GEORGE WALKER *versus* THEODORE LINCOLN *& al.*

The statute of 1850, which authorized the Land Agent to sell the timber and grass growing on lots *reserved for public uses*, in unincorporated townships, should be construed to include, in its provisions, a lot which was reserved "*for the benefit of public education in general.*"

By a deed, which, from its terms, conveys only *the right, title and interest* of the grantor, the grantee does not obtain any thing which the grantor had previously parted with, although the subsequent deed was first recorded.

ON FACTS AGREED.

TRESPASS, committed on a lot in township No. 14, in East Division, Washington County.

It was agreed that said township was one of the lottery townships, named in Act of Nov. 9, 1786, of the General Court of Massachusetts, establishing a Land Lottery; that the *locus in quo* was the lot named in the last clause of the first section of said Act, viz.: — "one lot, for the benefit of public education in general, as the General Court shall hereafter direct," and was assigned to the State of Maine, by commissioners appointed under the sixth section of the Act of separation of Maine from Massachusetts.

That said lot, and three other lots of three hundred and twenty acres each, were, by the said Act to establish a Land Lottery, reserved out of said township, for public uses, as set forth in the *proviso* of section one of said Act.

The plaintiff claims title, under deed of July 10, 1856, from the Land Agent of the State, acting under the Resolve of the Legislature, approved Feb. 26, 1856, entitled, "Resolve authorizing the Land Agent to sell the lot reserved for the future disposition of the Legislature, in plantation No. 14, east division, in the county of Washington," which deed conveys "all the right, title and interest which the State has" in said lot.

It is admitted that plantation No. 14 has not been incorporated, nor organized for plantation purposes.

The defendants admit the acts complained of, and justify them under a deed, or permit, dated May 21, 1855, which was

given in pursuance of the Act of the Legislature, approved Aug. 28, 1850.

The statements of plaintiff, and of one of the defendants, to be evidence, so far as the statements would be legally admissible, under objection, if embraced in depositions.

G. Walker, pro se.

G. F. Talbot, for defendants.

The opinion of the Court was drawn up by

TENNEY, C. J.,—The lot, on which the trespass is alleged to have been committed, is the one which was reserved "for the benefit of public education in general," in township No. 14, of the lottery townships, in the east division of the county of Washington, in the Act of Nov. 9, 1786, of the General Court of Massachusetts. The plaintiff claims an unqualified title to the lot, by virtue of a resolve of this State, passed Feb. 26, 1856, which authorized the Land Agent to sell all the right, title and interest the State had therein, and a deed of the Land Agent, conformable to the resolve, to the plaintiff, dated July 10, 1856.

The defendants admit the acts alleged in the plaintiff's writ, but contend that they were authorized, under a deed from the Land Agent of May 21, 1855, which was made in pursuance of the statute of Aug. 28, 1850, c. 196, sections one and two, to Nehemiah Preston, one of the defendants, aided by an Act amendatory of the same, passed April 24, 1852, c. 284. It is admitted that the defendants had all the rights which Nehemiah Preston acquired by the deed to him.

The principal question for our consideration is, whether the deed to Preston is applicable to the lot in controversy, as well as to the other lots reserved in the township. In the Act of 1786, referred to, it is provided "that there be reserved, out of said township, four lots of three hundred and twenty acres each, for public uses, to wit: one for the use of a public grammar school; one for the use of the ministry; one for the first settled minister, and one for the benefit of public

education in general, as the General Court shall hereafter direct."

By the Act of 1850, "in all townships and tracts of land, unincorporated or not organized for election purposes, sold or granted by the State, or Commonwealth of Massachusetts, or by both jointly, in which lands have been reserved for public uses, the Land Agent of the State shall have the care and custody of such lands, until such tract or township is incorporated as aforesaid." Section 1. "The Land Agent is authorized and directed to sell, for cash, the right to cut and carry away the timber and grass, from off the reserved lands, referred to in the foregoing section, which have been located," &c., "the right to continue until the tract or township shall be incorporated or organized for plantation purposes." Sect. 2.

In section one of the amendatory Act, referred to, the lands reserved for public uses, in tracts or townships organized for election purposes, are transferred to the care and custody of the Land Agent; and sections seven and eight of the Act of Aug. 28, 1850, are repealed. And section two provides that, "the Land Agent shall, in the management and disposition of said reserved lands, be governed by the provisions of the Act, of which this is amendatory, and the proceeds of all sales of the timber or grass, when paid into the treasury of the State, shall be credited to each tract or township, respectively, according to the provisions of the sixth section of said Act." By the section referred to, in the Act of 1850, the net proceeds of such sales "shall be paid over to the authorities provided by law to receive the same, when they shall hereafter exist."

It is insisted by the plaintiff, that the statutes of 1850 and of 1852, invoked in defence, did not authorize the Land Agent to sell the timber and grass upon the lot reserved "for the benefit of public education in general;" that the authority of the Land Agent was predicated upon the fact, that the fee in the *reserved lands named in the Act* was not in the State, but had passed from it; that the funds arising from the sale of timber and grass did not belong to the State, but the net avails were to remain in the State treasury, *to await the exist-*

ence of the being for which they were intended; and that the State, in its fiduciary character, was to preserve the gift until the beneficiary should come into existence.

The proviso in the Act of 1786 clearly points out the beneficiaries, who are to have the benefit of the three lots reserved for public uses, first named. The General Court of Massachusetts, at the time of the Act, afterwards the Legislature of this State, were to direct for what purpose of general education the fourth lot should be applied. "The authorities provided by law, to receive" the net avails of the sales of reserved lots, it cannot be doubted, will embrace the beneficiary, which shall be entitled, by a law of the State, to the fund arising from the sale of the lot last named.

It is not easy to perceive, if the State should provide for the sale of the timber and grass upon the public lots, the fee of which had passed from the State, (which still had charge of the lots,) to prevent the timber and grass from destruction and pillage, that they might not, with equal propriety, include in the same provisions another lot alike exposed to injury, wherein the fee still remained in the State, but reserved for public use.

The statutes, touching the sale of lots reserved for public uses, before cited, were not only permissive, in their terms to the Land Agent, but were mandatory upon him; he being required to sell the lots referred to. If the lots reserved "for the benefit of public education in general" were not intended to be comprehended in the provision, they would be left exposed to be deprived of the timber thereon, by accident or unlawful depredations, without any positive neglect of duty in the Land Agent, when the other lots were protected in this particular. Such an oversight in the Legislature cannot be presumed; it must be clearly exhibited in its acts before it can be held to exist.

It is not denied that the State had the power to authorize and require the Land Agent to sell the timber and grass upon all the lots *reserved for public uses,* including the one in question, if they had seen fit to exercise it. And, upon the actual

exercise of this power, even to the conveyance of a fee in the lot, including the timber standing thereon, if it had not been previously sold, the claim of the plaintiff has its foundation.

The plaintiff has shown great ingenuity, in the attempt to make plausible his claim; but the plain language of the statutes cannot be overlooked.

In the Act of 1786, *four lots are reserved for public uses,* out of the townships granted. No distinction is made, in any respect, between the three in which the fee in the State was divested, and the fourth, which it could, by its Legislature, appropriate afterwards for the benefit of public education in general. In the Act of 1850, as we have seen, the Land Agent was required to sell the right to cut and carry away the timber and grass from off the *reserved lands referred to in the foregoing section;* and, in the section so referred to, the care and custody is given to the Land Agent, of the lands which have been *reserved for public uses.* And, in the amendatory Act of 1852, the lands mentioned are those *reserved for public uses.* It is quite manifest, that the Legislature of this State intended that the Land Agent's obligation to sell timber and grass should extend to that upon all the lots *reserved for public uses.*

The deed to the plaintiff, though given subsequent to the one to Preston, was first recorded. But, from its terms, it conveyed only the *right, title and interest* of the State, in the lot described. And he obtained nothing which the State had previously parted with. *Coe* v. *persons unknown,* 43 Maine, 432. If the deed to him had been of the lot, in general terms, without any qualifying words, the question would be different from the one now presented. And, upon such a question, we intimate no opinion.

The statements of the plaintiff, and of the defendant Preston, expressive of the opinion of one and the other, as to the extent of the authority given to the latter, under the statutes and the deed to him, are not competent evidence and have no influence upon the law to be applied to the case.

Plaintiff nonsuit.

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

HOSEA S. HUGHES *versus* BENJAMIN W. FARRAR.

A horse, exceeding in value $100, is not exempted from attachment and execution.

In the revision of the statutes of 1857, the principal design was "to revise, collate and arrange the public laws," and, in revising, "to condense as far as practicable," — and a mere change of phraseology should not be deemed a change of the law, unless there was an evident intention, in the Legislature, to work a change.

ON FACTS AGREED.

TRESPASS, for taking plaintiff's horse. The defendant justifies the taking, and alleges that he, as sheriff, attached the horse by virtue of a writ, against the plaintiff, in his hands for service.

It is agreed that, at the time of taking the horse, he was of the value of $150; that plaintiff owned no other horse; that no tender of any sum of money was made to plaintiff, at or before the time of taking.

G. F. Talbot, for plaintiff.

G. Walker, for defendant.

The opinion of the Court was drawn up by

CUTTING, J. — The principal question presented, is, whether a horse of the value of one hundred and fifty dollars, the property of a debtor, owning at the same time no working cattle or other horse, is exempted from attachment and execution under the twelfth clause of section 36, of c. 81, of R. S. of 1857, which provides, that, "One pair of working cattle, or, instead thereof, one or two horses not exceeding in value one hundred dollars," shall be so exempted, and, "if he has more than one pair of working cattle, or, if the two horses exceed in value one hundred dollars, he may elect which pair of cattle, or which of the horses shall be exempted."

The plaintiff's counsel contends, that the one horse may be of a value unlimited, and that the two horses only must not exceed in value, one hundred dollars. While the defendant's

counsel, on the other hand, contends that neither the one horse, nor the two horses, shall exceed that sum in value, that the value is affixed to the one horse as well as to the two, and is descriptive of the horses.

If the clause read, one horse not exceeding in value one hundred dollars, or two horses not exceeding in value the same sum; then, upon this point, there could be no disagreement, the language would be too plain to admit of controversy, and we think such to be its true construction, although less concise than that used in the statute. If any doubts can be entertained upon this subject, we are authorized to look at the law as it was before the recent revision of the statutes, for, say the Court, in *Taylor* v. *Delancy*, 2 Caine's Ca. in Er., 151, "when the law, antecedently to the revision, was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed a change of the law, unless such phraseology evidently purports an intention in the Legislature to work a change." Our statute, embracing the exemption of horses, was first enacted in 1847, c. 32, § 2, which is in these words: — "Any person may keep one or two horses," &c., "provided the said horse or horses shall not exceed in all, the value of one hundred dollars."

The principal design, in the revision of 1857, was "to revise, collate, and arrange all the public laws of the State," and, in revising, to condense as far as practicable, "with indications of such new laws as might be deemed suitable and necessary," and, on examination of the commissioners' report, we perceive no indications of any change in this particular.

But the counsel for the plaintiff further contends, that he is aided in his construction, by the latter part of the clause, viz., "if the two horses exceed in value one hundred dollars, he may elect which of the horses shall be exempted;" and he virtually argues, that the debtor may keep one horse, irrespective of his value, because, if he have two horses of the value of five hundred dollars, then, inasmuch as they exceed in value one hundred dollars, he may elect the one worth four

hundred and fifty, and surrender the other, worth only fifty dollars, and, therefore, he says that the first and last part of the clause are in harmony, and the debtor keeps one horse exceeding in value one hundred dollars. We are satisfied that such cannot be the true construction, but rather, if the horse of the greater value were selected, he would be attachable under the first part of the clause, as being a horse not answering the description of the one exempted, and, under such circumstances, it would be much safer for the debtor to surrender the better horse, otherwise, he might be in danger of parting with both. A different construction would enable the poor debtor to ride a horse of great value, while, possibly, his poor creditor might be obliged to walk, or to ride the one diseased and discarded. It is thought that the Legislature, although liberal towards the debtor, anticipated no such result, and that the clause in the statute was not so much designed to encourage the growth of horses, as it was to enable the poor debtor to obtain and retain the means of an honest livelihood; and, at his option, to substitute horse power for that of oxen, to be confined to the farm, rather than to the race course.

Upon the second point, raised by the plaintiff's counsel, we are satisfied that the value was descriptive, and that a horse worth one hundred and fifty dollars is not the horse exempted by the statute.

According to the agreement of the parties,

A nonsuit is to be entered.

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

AMOS B. LONGFELLOW *versus* SAMUEL ANDREWS *& al.*

The indorser of a bill of exchange, that has been protested for non-payment, cannot legally institute a suit thereon, in his own name, against the acceptor, before he has paid the same to the holder, although he has admitted his liability and agreed on the mode in which he would pay it.

ON FACTS AGREED. The action is ASSUMPSIT. The defendants are declared against as acceptors of a bill of exchange, dated September 2, 1857, drawn by Jacob Clark, for $539,91, payable in sixty days to the order of the drawer, by whom it was indorsed; and was directed to defendants, at Boston.

It appears that plaintiff was an accommodation indorser, and that the bill was discounted by an agent of the Calais Bank, for the Bank. The bill, at its maturity, was protested for non-payment, and notice thereof was duly given to plaintiff, who, thereupon, promised said agent that he would provide for the payment of it. On the return of the bill from Boston to the bank, which was in the early part of January, 1858, the plaintiff paid it to the bank, by giving his own note. This suit was instituted on 7th December, 1857, which was after the acknowledgment of plaintiff, of his liability to pay the bill, and his promise to provide for its payment.

It was agreed, that on the fifth of January, 1858, the day of the entry of this action in Court, the president of the bank authorized the plaintiff to prosecute this action at his own cost and risk.

In the deposition of the cashier of the bank, he states that the bill became the property of the bank, Sept. 5, and so continued until Dec. 31st, 1857.

Porter, for plaintiff.

Walker, for defendant.

The opinion of the Court was drawn up by

HATHAWAY, J. — Assumpsit, by the indorser, against the acceptors of a bill of exchange.

The bill was duly protested, and the defendants were liable to pay it to the Calais Bank, Dec. 7, 1857, when this suit was commenced. At that time, the plaintiff was liable, as indorser, to the holder of the bill, but he had no such interest in the bill as would enable him to maintain an action on it, in his own name, until he paid it, Jan. 2, 1858.

The authority which the president of the bank gave him, Jan. 5, 1858, "to prosecute this suit, at the risk and expense of the plaintiff," was nugatory. The bank, *then*, had no interest in the matter, nor any power to do any thing to vary the legal rights of the parties in this action. As Mr. Chief Justice WESTON said, in *Bradford & al.* v. *Bucknam*, 3 Fairf. 15, "The objection, taken to the right of the plaintiff to recover, is not founded on the merits of the case, * * * but, with every disposition to sustain the action, we are unable to discover any legal ground which would justify it, at the time it was brought." The cases cited as authorities, by the plaintiff's counsel, are very materially different from this case. The action having been prematurely commenced, a nonsuit must be entered. *Plaintiff nonsuit.*

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

BARNABAS STROUT *versus* MILLBRIDGE COMPANY.

At common law, the mill owner was not authorized to build and maintain his dam, in such a manner as to flow the land of proprietors above his mill, on the same stream. And a continuance of his dam, to their injury, would be deemed a nuisance.

The owners of a dam erected across a *navigable* river, which caused the land above to be flowed, are not liable to a complaint for flowage, by the owner of such land, under the provisions of c. 126 of the R. S. of 1841.

COMPLAINT FOR FLOWAGE, under c. 126, of R. S. of 1841. The case comes before the Court on REPORT of the evidence by APPLETON, J., by which it appears that plaintiff introduc-

ed, without objection, deeds showing title in him to the land flowed, as set forth in the complaint. Also, several depositions, tending to show the extent to which his lands have been flowed, and the damage he has sustained thereby.

Wm. Freeman, called by plaintiff, testified that he was one of the defendant corporation; that the corporation commenced the dam, by which the plaintiff's land was flowed, and partly finished the same; that the name of the company was changed to the Millbridge Company; that the flowing of the plaintiff's land is caused by defendants' dam; that there is no other dam; that defendants' dam is two miles below the marsh; that mills have been built on the dam; that the dam constitutes a bridge and was completed in 1849; that the dam was built in tide waters, and that the mills are tide mills.

Another witness testified, that the dam keeps the water from flowing out; that, when there is a freshet in the river, the dam causes more land to be flowed, than was flowed before its erection. On cross-examination, witness stated, that the dam retards the falling of the tide; that the tide flows some miles above the dam; that the width of the river, at the "Narrows," where the dam is built, is 15 rods, at high water; the river is wider above the dam; it opens, from the Narrows, into Narraguagus bay. Vessels load at the Narrows, and the ebb and flow of the tide, at that place, is twelve feet. A steamboat could have passed through the Narrows before the dam was built.

The Act, incorporating the defendant corporation, was introduced, c. 151, of Special Laws of 1836, p. 137. Also, Act amendatory, c. 107, Special Laws of 1848, p. 148.

The Court to judge of the sufficiency of the complaint, and to enter up such judgment, by nonsuit or default, as the legal rights of the parties may require. If, on default, damages to be assessed by commissioners duly appointed.

G. F. Talbot, for the complainant.

It is not necessary, under the present statute, to aver, that the dam complained of was erected by defendants *on their*

own land, or on land of another person, with his consent. The case of *Farrington* v. *Blish*, 14 Maine, 423, was a decision on the statute of 1821, containing essentially different provisions than are contained in the statute under which this complaint is instituted. The averments of facts required, are contained in § 5, of c. 126, of R. S. of 1841: —"Any person sustaining damages in his lands, by their being overflowed by a mill-dam, may obtain compensation for the injury, by complaint to the District Court, in the county where the lands shall be situated, but no compensation shall be awarded for any damages sustained more than three years before the instituting of the complaint."

The remedy given is general, —to any person whose lands have been, or shall be, overflowed by a mill-dam. There is no restriction to any class of mills or dams, and no reference whatever to the ownership of the site of the mill or dam; nor is there, as in the second section of the Act of 1821, any word or phrase referring to, or adopting, any special description or limitation recited in a previous section. The statute having been essentially changed, the case of *Farrington* v. *Blish* becomes irrelevant.

Not only does the statute not require any averment that the dam complained of was built upon the respondent's own land, or land upon which he had a right to build, but there can be no reason conceived of why such fact, however it might be, could be of any importance, save that, if the dam had been erected unlawfully, upon land of the complainant, he might proceed against its builders as ordinary trespassers, or proceed to cut it away without any resort to suit. But, in this case, the dam appears to have been rightfully erected by an incorporated company, and by virtue of a charter from the Legislature.

The complaint is sufficient without any averment that the stream, across which the dam is erected, is not a navigable stream. Such an averment would be inconsistent with the fact, the stream being tide waters, somewhat obstructed by falls and rapids, but undoubtedly *navigable*. In other words,

then, the complainant claims that the remedies prescribed in chapter 126, of the R. S., do apply to *navigable* streams.

The statute regulating mills and flowage has always been in operation in this State, and similar provisions have existed in Massachusetts, since the time of the Revolution. These statutes are to encourage the use of water power and machinery. The remedies they prescribe, for the invasion of the enjoyment of owners of lands necessarily flowed, are remedies which are less onerous upon mill owners than those under the common law, and the statutes themselves suspend the common law remedies, and restrict the injured party to those they provide. In several respects, the flowage process favors the owners of mills. Only the absolute damages may be recovered of them. They are permitted to use the lands of private owners, during such season of the year as commissioners shall decide to be of no injury to the lands. They are saved from a multiplicity of suits, and the yearly damage, once equitably fixed, becomes the measure of future damages. Under these provisions, the milling and manufacturing interests in this State have greatly flourished. There seems to be no reason why this general Act, provided for the regulation of mills and dams, should apply only to mills and dams of a certain class. A mill-dam to work a tide mill at the mouth of a navigable tide creek, the margins of which are lined with extensive dyke marshes, like the Pleasant river, the Great Marsh stream, and other streams in this county, would be used for the same purposes as a mill-dam standing upon fresh water falls, and flowing extensive fresh intervals above. In both cases, the head of water drowns the meadows and destroys the hay of the proprietors of the meadows. Why should not the liabilities of one party, and the remedies of the other, be the same in both cases?

If mill-dams built upon navigable streams are exempt from the operation of the statute process of complaint for flowage, it must be either that they are expressly so exempted by the terms of the statute, or else upon the general principle that mill-dams, so built, are not rightfully there, and may be abated

as public nuisances. I proceed to examine the question in reference to each of these reasons. And—

1st. There is no express exemption of mill-dams across navigable streams, in the language of the Act. Section 5, in which the remedy is given, provides, that "any person sustaining damages in his lands, by their being overflowed by a mill-dam, may obtain compensation for the injury by application to the District Court," &c. Nothing could be more general. It is only made necessary that the lands shall be injured, and injured by a mill-dam. Neither is there, in this section, any adoption of, or reference to any limitary descriptions in the first section, or any phrase, like "*as aforesaid*" in the old law, to indicate that the complaint is confined to the kind of mill-dams previously mentioned. The first section gives the right to erect water mills and dams, so that the persons erecting them, provided that they do not injure any other mill-dam or mill site, shall not be liable as trespassers for the flowage which they necessarily cause. The insertion of the description *navigable* is to save public rights, the rights of the public to use the river as a way, and for the purpose of preventing an Act, intended to operate specially for the encouragement of water machinery, operating, by a mere inadvertence of phraseology, as a grant, also, of certain important easements of the public. Indeed, I respectfully submit that all the first section, containing the grant of a right to erect mill-dams, the limitations, *navigability*, not to injure dam or site of another mill, not to be built without title in the land, are necessary restrictions of that grant, and that the whole force of these phrases is exhausted in that restriction, and that they have no reference whatever to the fifth section.

2d. A mill-dam upon a navigable stream, as in this case, cannot be exempt from the statute process, of complaint for flowage, by reason of its being an obstruction and a nuisance, for if the dam, being across a navigable stream, be a nuisance, it is only so as it relates to the public right to use the waters of the river for the purpose of navigation. But, of these public rights, the Legislature is the sovereign and guardian.

"The Legislature have the right to impede or obstruct the navigation of navigable waters of the State, if the public good requires it." *Parker* v. *Cutler Mill-dam Co.*, 20 Maine, 353. They have exercised such power in the Act of incorporation of the defendant company, and in authorizing them, by such Act, to build and maintain this dam. The rights which the Legislature only could grant, were the public rights to the navigation of the river, and the use of the stream, as a highway. These rights have been granted to the Millbridge Company, or, to speak more strictly, a more perfect navigability of the river has been secured to the public, while certain privileges have been secured to the corporators. The public are completely estopped to make any complaint, affecting the navigation, and the Act of the Legislature places the river in the precise situation, so far as private rights are concerned, that a private or unnavigable stream would be in. *Clark* v. *Mayor & als. of Syracuse*, 13 Barb. 32, cited in United States Annual Digest, 1853, page 481.

While the Act of the Legislature gives the respondent company the same rights, as against the public, which an individual proprietor would have on a private or unnavigable stream, it left them under precisely the same liabilities, as to the interests of private owners of lands upon which they might intrude. The Legislature did not intend to give the company the absolute right to flow the lands of riparian proprietors, but the right to flow them, subject to the general provisions of the statute on that subject. Even if the Legislature had so intended, and had so enacted, the Act would be void for unconstitutionality, for private property cannot be taken, even for public uses, without compensation. The public easement, the Legislature could grant, the private title to lands they could not grant, without leaving a means of recompense to the owners. This recompense is provided in the flowage Act.

If the non-navigability of the stream, upon which a mill-dam is built, is essential to lay the foundation of a complaint, then the process of complaint for flowage is not applicable to

any of the rivers or streams of Maine, whereupon any mill-dam now is, or is ever likely to be built. For all the streams in which water runs have been declared to be navigable streams, in the case of *Brown* v. *Chadbourne*, and to leave the remedy to such streams as were not supplied with water would restrict it to such streams as were not liable to flowage at all. All the rivers upon which mill-dams are built, and logs floated, are navigable streams. The Court will not, certainly, require a condition which shall effectually make void the beneficial provisions of the statute.

But the Court may not be inclined to consider the reasoning, while entertaining the impression that the points herein discussed have already been settled adversely to this reasoning. I undertake to say that the Court have not so settled the law.

There is a marginal note in *Parker* v. *Cutler Mill-dam Co.*, 20 Maine, 353, to this effect. "*The corporation, while acting within the powers granted, is not liable for any injury suffered by an individual, by altering the flux and reflux of the tide.*" I have carefully examined this case, and find no such principle asserted, but rather that a doctrine precisely the reverse of this is distinctly intimated. The reporter has failed to notice a limitation in the language of the Court, which quite changes the proposition. Judge SHEPLEY, in the opinion, says:— "The jury have found that the dam was erected across Little River harbor. The corporation is not, therefore, liable for any injury which the plaintiff may have suffered, *by obstructions to the navigation*, by altering the flux and reflux of the tide." In order correctly to have indicated the point decided, the note should have read, *the corporation, while acting within the powers granted, is not liable for any injury suffered by any individual, in the nature of obstructions to the navigation, by altering the flux and reflux of the tide.*

A full examination of the case shows that this was the precise point decided. Parker sought damages for injuries by the defendant, to his *fishing* and *water privileges*,— he claimed that he was obstructed in his right to pass and repass from his

land to the sea. He proved, only, that some damage was occasioned by raising the water higher upon the beach, but no part of his land was flowed. The Court seem carefully to have inquired whether he was injured *in his lands*, in his private and exclusive rights, and refused to award damages, solely on the ground that he had shown himself injured, as one of the public, in the navigation of the water, and in the shore fishery, and that he had never acquired an exclusive right to any easements of that character; and the public rights of that character, his own among them, having been granted by the Legislature to the defendants, they were not in fault.

In the case of *Bryant* v. *Glidden*, 36 Maine, 36, the Court say, indeed, that it is required to allege, in a complaint for flowage, that the stream, upon which the dam complained of stands, is not a navigable stream. But they say so, first, in deciding a case wherein it appears that the dam was built upon a navigable stream, and without any charter or Act of the Legislature, authorizing the building; and, in the next place, they say so expressly on the ground that, if the stream is navigable, the dam is a nuisance, and to entertain such a complaint is to put the State to the expense of regulating a public nuisance. In this case, such presumption is impossible. The respondents had a charter of the Legislature, to build their dam; the Court, therefore, cannot turn over an injured party to his right to abate a nuisance, by his own hand, or by criminal prosecution. His remedy must be a civil remedy; why shall it not be, (as the one least oppressive to the respondents,) the statute remedy? If he is shut off from that, the Court must offer some reason for the exclusion, other than those wholly inapplicable reasons in *Bryant* v. *Glidden*.

I conceive that, had the authority of the respondent to build the dam appeared, the ruling upon that point would have been different, the Court adopting the idea that a public grant places the mill-dam owner in the same position toward riparian proprietors in which the owners of private streams stand. The Court, indeed, say "the whole proceeding," (*i. e.* complaint for flowage,) "has reference to dams authorized by

statute, and not to dams not authorized by statute." The dam in this case, though not authorized by the general statute, is yet authorized by the statute of incorporation.

But, if the respondents in defence say, if you are right in claiming that the public grant places us in the liability to riparian proprietors, as the occupants of non-navigable streams, then you should have set forth that special character of the stream, in your complaint, it is replied, we have substantially set it forth in these words:—"A mill-dam, erected on and across said Narraguagus river, at a place called the Narrows, below Salt Water Falls, in Millbridge, in said county, maintained, kept up and occupied by a corporation, called the Millbridge Company, created by a law of this State, for the purpose of raising a head of water to set in motion and operate mills." Here the corporate character of the act of erecting and maintaining is asserted, an assertion, as I have endeavored to show, tantamount to that of the non-navigability of the stream, if such had been its condition. At any rate, the power of the company to maintain the dam, so far as to preclude the Court from entertaining the idea of its being a nuisance, is fully in the case as a fact, and the complaint, not having been demurred to, or dismissed for defect in matter of form, and the facts being agreed upon, it is too late to take advantage of such defect, if it exist.

It would be a great hardship upon a citizen, owner of lands overflowed by a mill-dam, if, having a plain and unrestricted remedy before him, in § 5, of c. 126, of the R. S., which he is obliged to pursue or be mulct in costs, (for § 25 of the same chapter prohibits all other suits than those by complaint,) he finds that there are limitations and conditions which deprive him of its benefits. He brings his complaint, and the respondent effectually defends by pleading *navigable stream*,—you ought to have brought your action on the case. He brings his action on the case, and the respondent answers, I have a charter to maintain the dam, and, if your lands are overflowed, you must pursue the statute remedy.

The case of *Coggeswell* v. *Essex Man'g Co.*, 6 Pick. 94, is

a decision upon a Massachusetts statute similar to our statute of 1821.

B. Bradbury, for defendants.

This is a complaint for flowage, under c. 126, of R. S. of 1841.

Chief Justice WESTON, in *Farrington* v. *Blish*, 14 Maine, 425, says, "it is a process specially given, which should contain averments of all the facts made essential by the statute, to enable the complainant to avail himself of the remedy prescribed."

In that case it was held to be necessary to aver, in the complaint, that the dam complained of was erected by the respondent on his own land, or the land of another with his consent.

The counsel for the complainant endeavors to avert the effect of this decision, by alleging that a change in the statute, under which that decision was made, renders such an averment unnecessary.

Among the reasons, showing the propriety of such an averment, is this:—the same statute, (§ 19,) gives a lien upon the mill, mill-dam and appurtenances, for the accruing damages, and provides, (§ 21,) that the same may be sold upon execution; a penalty which it surely would not impose upon a citizen who had *not* erected, nor permitted to be erected, dams and mills upon his land.

While it is conceded that the Revised Statutes have altered the arrangement and phraseology of the former law, it is respectfully submitted that the meaning is not essentially changed. Taking the 1st and 3d sections of the 126th chapter of the Revised Statutes together, they convey the substantive idea upon which the decision of the Court, in the case of *Farrington* v. *Blish*, was based. It is still necessary to aver that the respondent had erected a water mill upon his own land, or (changing the language of the former law, to that now used,) on the land of another person, by the grant, conveyance or authority of the owner. Neither of these alle-

gations is to be found in this complaint. It is, therefore, insufficient; and the sufficiency of the complaint is specifically submitted to the Court by the terms of the report.

Further, the evidence in the case shows, and the learned counsel for the complainant admits in his argument, that the Narraguagus river, (across which the dam complained of is built,) is a *navigable river.*

In the case of *Bryant* v. *Glidden,* 36 Maine, 36, it is decided that it is necessary to aver, in a complaint for flowage, that the river, across which the dam is built, is *not navigable.* This complaint, containing no such averment, is insufficient.

But the counsel for the complainant insists that mill-dams across navigable rivers are not exempted from liability under the flowage Act, because, he says, that the language of the 5th section of the Act is general and unlimited, and includes any and all mill-dams wherever constructed.

This precise argument is answered by Chief Justice SHEPLEY, in the case of *Glidden* v. *Bryant,* before referred to, page 43. The first section of the Act, in terms, refers to all the subsequent provisions, as relating and referring back to itself. The 5th section cannot be broader than the 1st; and the 1st section *expressly* limits the right to erect and maintain a water mill to streams *not navigable.*

It is manifest that the Legislature never intended to surrender its power over tide waters and navigable rivers.

The subsequent action of the law-making power, in granting charters for the construction of dams, &c., over tide waters, shows that they have retained all the rights of a sovereign, in such cases. In fact, the Legislature has granted a portion of its powers over the river Narraguagus to the defendant corporation. The Millbridge Company has no other rights at the Salt Water Falls, than such as are derived from the State. They are subject to the control of the Legislature. For the manner in which they exercise their chartered rights, they are liable to the Legislature, on the one hand, and, under the law of the land, to persons damnified by their acts, on the other, but not under the flowage Act, which expressly excludes this class

of rivers from the operation of its provisions. But it would seem hardly necessary to consider the reasons which may have induced the Legislature to make this exception, so long as it is made in express, direct and unmistakable language.

If this view of the statute be correct, it becomes unnecessary to consider the suggestion of the counsel of the complainant, that a mill-dam upon a navigable stream cannot be exempt from the statute process of flowage, by reason of its being an obstruction and a nuisance.

Indeed, it is difficult to perceive how such a position can affect the construction of the statute, any further than that it might be one reason why the Legislature should be unwilling to extend the flowage Act to navigable streams.

It is quite unnecessary, also, to consider how far the case of *Brown* v. *Chadbourne,* (referred to by the complainant's counsel,) may extend or limit the application of the flowage statute to the rivers of the State, inasmuch as it is admitted that the Narraguagus river is a navigable stream.

The charter, granted by the Legislature to the defendant corporation, prescribes its rights, powers and duties. But it does not declare that the Narraguagus river is not navigable. Nor does it, in any way, subject the corporation to any liability under the flowage Act.

As a corporation, it is subject to the authority of the Legislature, and it is also liable to persons, complaining of any wrongful acts, under the laws of the land.

The opinion of the Court was drawn up by

RICE, J. — This is a complaint for flowage, instituted under the Mill Act, c. 126, R. S. of 1841, and comes up on Report.

At common law, the mill-owner was not authorized to erect and maintain his dam, in such a manner as to flow the lands of proprietors above his mill, on the same stream. Goubolt, 59; Cro. Jac. 556. Such a structure, by which the land of another would be overflowed, would be a nuisance. Com. Dig., Action on Case, A.

But, by section first, c. 126, R. S. of 1841, it is provided

that any man may erect and maintain a water-mill, and a dam to raise water for working it, upon and across any stream that is not navigable, upon the terms and conditions, and subject to the regulations therein expressed.

The evidence reported shows that the dam, by which the flowage complained of has been occasioned, was erected by the defendant corporation across a stream where the tide ebbs and flows, and which is navigable for sea-going vessels. This fact is admitted.

It is, however, contended that the fact that the stream is navigable does not preclude the complainant from recovering his damages for flowage in this form of procedure, under the provision of section five of the statute, above referred to; that section being general in its terms, and applying to all persons who may sustain damages in his lands, by their being overflowed by a mill-dam.

The first section of c. 126 authorises the erection of dams across streams *not navigable,* to raise water for working mills. It was not the intention to authorize, at the pleasure of individuals, the erection of such dams across navigable streams, thereby obstructing their navigation. *Bryant* v. *Glidden,* 36 Maine, 36.

The unlimited language used in the fifth section of that statute must be considered in connection with other provisions of the statute. The whole proceedings have reference to claims authorized by the statute, and not to claims not authorized by it. *Ib.*

The case not falling within the mill Act, the parties are to have their rights determined by the principles of the common law, unless that rule has been changed by the interposition of the Legislature.

The defendants are a corporation, and were originally incorporated under the name of the "Salt Water Falls Company." Chapter 151, Private Laws of 1836.

By this Act, the corporation was authorized to build, maintain, repair and rebuild, a dam and bridge, either separately or connected, as may be thought necessary, across the Nar-

raguagus river, in the town of Harrington, and at a place called Salt Water Falls, and, under certain restrictions, provided in said Act, the company is authorized to flow the water by means of said dam, and to use and improve the same for propelling mills, factories and for other purposes.

By section nine, of the same Act, it is provided, if any person or persons shall suffer damage by the exercise of any of the powers herein granted to said corporation, and the amount of such damage cannot be agreed upon by the parties, or some suitable person or persons, agreed upon to estimate the same, the Court of Common Pleas, for the county of Washington, shall, on application of the party aggrieved, cause said damage to be estimated by three disinterested freeholders of the same county:—*Provided, however,* that if either party be dissatisfied with the award of said committee, such party shall be entitled to trial by jury, in the manner other like cases are determined.

By c. 107, Special Laws of 1848, the Salt Water Falls Company were allowed to take the corporate name of the "Millbridge Company," with all the rights and privileges conferred on said Salt Water Falls Company by Act to incorporate the same.

Whether parties, who have sustained damage in consequence of their lands having been overflowed, by the operation of the works of the defendant corporation, are restricted to the remedies provided in the above Act of incorporation, it is not proper for us to determine at this time. The case, as presented, is not within the provisions of c. 126, R. S., 1841.

According to the agreement of the parties, a nonsuit must be entered.

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

DARIUS PEARCE *versus* DANIEL SAVAGE.

Under a devise, *in trust*, to executors for the children of the testator, till the youngest shall arrive at the age of twenty-one years, (the executors, in the mean time, to manage the estate, and receive the income,) the executors took a fee simple estate *in trust*, defeasible when the youngest child should come to the age of twenty-one years.

A notice to foreclose a mortgage, which states, "that the condition had been broken, and now the mortgagees give notice of the same, and that they claim a foreclosure of said mortage," is sufficient.

The person entitled to a vested remainder, has an immediate fixed right to future enjoyment, which passes by deed.

Though mortgagees may be joint tenants, yet, when the mortgage is foreclosed, they hold the estate in common.

The receipt of a mortgagee, acknowledging satisfaction of the debt secured by the mortgage, is not conclusive evidence of its discharge, but is open to explanation.

Where the mortgager, or one claiming under him, is entitled to redemption, the remedy is not in a suit at law, but by bill in equity.

WRIT OF ENTRY, dated Sept. 20, 1856, and the action was entered at the October term, of the same year. By agreement of parties, the case was tried as though commenced Oct. 6, 1857, and the date of the writ to be changed to that day. Plea, general issue, with a brief statement, and request to find the improvements, and the value of the land without them.

The case was taken from the jury, the parties agreeing, that it should be submitted to the full Court, on the Report of APPLETON, J., of the evidence.

The demandant read in evidence:—

1. The will of Elias Bates, dated May 31st, 1823, and codicil, dated Nov. 12, 1823, and second codicil, dated Nov. 18, 1823; and it was admitted that the legal title to the premises demanded, was in said Elias Bates, at the time of his decease.

2. Deed of mortgage, Winslow Bates to Benjamin D. Whitney and Joseph Richardson, of Boston, partners, under the

firm name of Richardson & Whitney, dated and acknowledged March 3, 1834, and recorded on the fifth of the same month.

3. A certified copy of a published notice, by said Richardson & Whitney, dated Oct. 20, 1840, to foreclose the said mortgage, which was objected to by the counsel for tenant, on the ground that the notice was not in compliance with the provisions of the statute, as it does not state the cause for which the foreclosure is claimed. The objection was overruled, so far as to admit the evidence. The notice was in usual form to the last sentence, which stated "that the condition has been broken, and now the said Richardson & Whitney give notice of the same, and that they claim to foreclose said mortgage."

4. Deed of Benjamin D. Whitney to demandant, dated and acknowledged Aug. 29, 1855, and recorded on the 5th of September following, for the consideration of $200, — which deed was objected to by tenant's counsel — for that, if the grantor had any interest, it was only a joint tenancy with Joseph Richardson, which could not be legally conveyed to a third person. The objection was overruled, and the deed admitted.

5. And also, deed of Joseph Richardson to demandant, (subject to the same objection by tenant's counsel,) dated Sept. 5, 1857, and recorded Sept. 11, 1857.

6. The Probate record of the report of Lorenzo Sabine and others, commissioners appointed by the Judge of Probate for the county of Washington, to make division of the real estate of Elias Bates among his children, dated April 10, 1840.

The demandant here rested his case. Whereupon, the tenant moved for a *nonsuit,* which the Court refused to direct.

The tenant then introduced the following, viz.: —

1. Deed from Henry Bates, 2d, now Winslow Bates, dated and acknowledged March 26, 1831, and recorded March 30, 1831, to Wooster Tuttle and Ezra Whitney, on condition that said Henry should faithfully perform his trust and agency, to which he had been appointed by said Tuttle and Whitney, to

settle and collect any demands against or in favor of the estate [of said E. Bates,] and to let and manage the real estate, &c.

2. Deed from said Tuttle and Whitney to Thomas G. Hathaway, dated April 11, 1840, acknowledged same day, and recorded May 6, 1840.

3. Lease from T. G. Hathaway to tenant, dated Nov. 6, 1841, of demanded premises.

4. Deed, Thomas G. Hathaway to tenant, dated April 30, 1853, of the same, acknowledged before Winslow Bates on the same day, and recorded June 11, 1853.

Much other evidence, including depositions, five accounts settled in Probate Court, and receipts, letters, &c., which, not being alluded to in the opinion of the Court, are here omitted, except that demandant put in a release of Wooster Tuttle, as executor of the estate of Elias Bates, to Winslow Bates, and in which said Tuttle does "for himself, his heirs, executors and administrators, remise, release and quit-claim unto the said Winslow Bates, his heirs and assigns, all actions and causes of action, and all claims or demands whatever, both at law and in equity, which against said Winslow Bates I ever had, now have, or which I, my heirs, executors or administrators can, shall or may have, claim or demand, for or by reason of any act, matter or cause or thing, from the 28th day of March, A. D., 1831, to the date of these presents. In witness whereof, I, the said Wooster Tuttle, have hereunto set my hand and seal, this 26th day of October, A. D., 1839.

"Wooster Tuttle, and seal.

"Signed and sealed in the presence of A. Calkins, S. Buckman.

"Acknowledged before Sam'l Buckman, J. P., Oct. 26, 1839."

The demandant also put in a receipt signed by Ezra Whitney to Winslow Bates, his agent, in full of all debts, dues, claims and demands against said Bates, on account of his agency, from the 28th of March, 1831, to Oct. 23, 1839.

It was agreed, by the parties, that the full Court should be authorized to draw such inferences from the evidence legally

admissible, as a jury would be authorized to draw, and enter a nonsuit or default according to the legal rights of the parties.

A. Hayden, for the demandant, argued —

That the declarations of a person from whom the party claims title, made before a conveyance from such person, are admissible, but must be pertinent to the question of title. And that the declarations of Winslow Bates, prior to the date of his mortgage to Richardson & Whitney, might be admissible, but not afterwards.

The account of Bates, of an apparent balance of $21,14, is only an account of receipts and expenditures; does not purport to be a final adjustment, and contains no charge for his services, which was $250 per year. That there was no evidence of a breach of condition; but that, on the 13th of March, 1834, ten days after his mortgage to Richardson & Whitney, there was a balance in his favor of $152,46.

The condition of the deed to Tuttle and Whitney had been faithfully performed, and the deed is, therefore, void. The release of Tuttle and the receipt of Whitney, the two executors of the estate of Elias Bates, establish this position.

Admitting that, on the 10th of October, 1832, there was in the hands of W. Bates the sum of $21,14, his retaining that sum was no breach of the condition of his deed. His agency still continued. No demand for the payment of the money was made. The condition is, after reciting that the executors had authorized said Bates, [Winslow,] *to collect and settle any demand in favor of, or against said estate, also, to let any dwellinghouse or store, or any other real or personal property belonging to the same;* the said Henry (Winslow) to be at all times under the advice and control of said executors, — then follows this condition — "If the said Henry (Winslow) shall *faithfully and honestly* perform the above trust and agency, then this deed is to be null and void, otherwise it shall *remain* absolute."

Is there the slightest ground for alleging that, having in his

hands $21,14, the agency continuing and no demand having been made, is proof that he had not, up to that time, "faithfully and honestly" performed the trust. The statement of such a proposition answers it.

But, we contend, that *paying over to the exeeutors money collected is not a part of the condition.* When a forfeiture follows the condition of a bond, or, what is the same thing, where the performance of a condition is to make a deed void, and is, therefore, in the nature of a forfeiture, it will be construed strictly.

The condition is not that Bates shall pay over the money collected. The object the executors intended to secure was evidently not that. They wished to secure his honesty and faithfulness in managing the estate with third persons; willing to trust to the personal responsibility of the agent to pay over any balance which might be in his hands when the agency terminated.

The condition, viz., *the honesty and faithfulness* of the agent, is presumed to be fulfilled, until the contrary is shown.

The will provided for the support and education of the heirs, and a part of the agent's duty was to make payments for these purposes. The executors, in their account, have charged nothing for payments thus made, which will account for the apparent balance of $1960, stated to be in the agent's hands, in the executors' final account, settled Jan. 25, 1840.

The deed of Bates to the executors could only avail them as security, up to the time of his conveyance to Richardson & Whitney, March 3, 1834, and if, up to that time, he had "honestly and faithfully" executed his trust and agency, the title he conveyed to Richardson & Whitney was as good as if the deed to the executors had not been made. The deed is in the nature of a mortgage, to secure future advances, which is only good for advances made up to the time of a subsequent conveyance by the mortgager.

It is objected by the tenant, that the deed of B. D. Whitney to demandant is not good, because Richardson did not join in it, and that they, being joint tenants, cannot convey their in-

terest by separate deeds, executed at different times. To this we answer: —

(1.) A joint tenant may convey his moiety, and thus sever the tenancy by destroying the unity of title. 1 Hilliard's Ab. 437, § 52.

(2.) The subsequent deed of Richardson would confirm this, if confirmation were necessary, and bring the whole title into demandant. It it were one deed, executed at different times by the two grantors, it would, undoubtedly, be good, and there is no difference between two deeds and one deed executed by different grantors at different times.

(3.) They are not joint tenants. The only ground on which it is claimed that they are joint tenants, is, that they were partners. But a conveyance to partners, whatever it may be by common law, does not make them joint tenants against the language of the statute, which provides that a joint tenancy can only be created by express words. This is expressly decided in *Blake* v. *Nutter*, 19 Maine, 16, and it has been held that, even at common law, the doctrine of survivorship and rights of partnership creditors does not attach to real estate held by partners, even when bought with partnership funds.

(4.) But it may be said that, being a mortgage, they are joint tenants.

Kinsley v. *Abbott*, 19 Maine, 430, decides expressly that, although before foreclosure the estate is joint, yet, after foreclosure, they hold as tenants in common. See, also, *Goodwin* v. *Richardson*, 11 Mass. 469. In *Randall* v. *Philips*, 3 Mason, 378, STORY, J., holds that, in the mortgage, even before foreclosure, they are tenants in common, and that, at death, the land goes to the heir, the debt to the administrator, the land being subject to the heir for the debt.

In *Rigden* v. *Vellier*, 2 Vesey, 258, Judge HENDRICKS held that its being a mortgage, instead of raising a presumption of joint tenancy, had just the contrary effect.

Was the deed of W. Bates to Richardson & Whitney void, because it was executed before the youngest child of Elias Bates arrived at the age of 21 years? and, if so, can the

tenant, claiming title under a later deed, from the same party, and made under the same circumstances, avail himself of this defence?

By the original will, it appears that the testator intended to give his children equal shares in his real estate,— no intermediate estate is devised,— so that, unless a fee passed to them at his death, the estate, from his death to the coming of age of the youngest child, remained *undevised.* This would be contrary to the rule of construction of wills, viz.:— that the testator is presumed to intend to devise his *whole* estate, unless, by the language of the will, a different construction is forced upon the Court. *Pickering* v. *Langdon,* 22 Maine, 413.

The intention of the testator, that the children shall share equally in the value of the real estate, at the time the youngest shall come to the age of 21 years, is not frustrated by a conveyance like that to Richardson & Whitney, *subject to the conditions of the will.*

There is no devise to the executors of any estate, not even possession is given to them. It is only the care and management, with a qualified right to sell for the accomplishment of particular objects.

Even if the Court should construe the clause in the codicil as a devise of a chattel estate to the executors, with a qualified power to convey part in fee, it is clear that Winslow Bates had a vested remainder, subject only to the condition. Such an estate may be conveyed by deed. 3 Greenl. Cruise, 141.

The reasonable construction of the will, codicil and deed of Bates, seems to be this. The will devises the fee in equal shares to the children, as tenants in common, with restriction of partition and several possession, until the youngest comes of age, subject to the management and improvement of the executors, with a qualified power of sale for specified purposes, and Winslow Bates conveys his interest, subject to all these conditions.

If this is not the case, and the fee did not pass to Winslow

by the will, until the youngest child was of age, then a share of whatever part was undivised came to him as an heir at law of the testator, and, being the same portion of the estate as that devised, makes the complement of his title. At any rate, it seems clear that, at the death of Elias Bates, an interest in his real estate passed to Winslow, by devise or descent, or both, subject to whatever restrictions are contained in the will, and so long as he, being of full age, kept himself within the spirit of the restrictions, he could convey his interest. 3 Greenl. Cruise, 435.

The tenant, who claims title under a deed from the same Winslow Bates, made during the time that these restrictions, whatever they are, existed, cannot set up and avail himself of a defence, because thereby he avoids his own deed and becomes a mere trespasser. 14 Pick. 467, and citations.

Winslow Bates, at the time of the conveyance to Richardson & Whitney, appears to have been in the actual possession of the property, so far as to collect the rents thereof.

If we hold that the restriction of the power to sell was intended by the testators for the benefit of the several heirs, then only Winslow Bates can make the objection to the validity of the deed. A conveyance of his interest must be good as against third persons.

J. Granger, for the tenant.

The opinion of the Court was drawn up by

TENNEY, C. J. — The testator, having, in his will of May 31, 1823, made certain specific devises of real estate, disposed of the residue thereof in the following language: — "I also give and devise unto my children, and their respective heirs and assigns, forever, all my real estate, not otherwise disposed of, in equal shares and proportions, when the youngest of them comes to the age of twenty-one years; and it is my will, that my real estate shall not be divided among them, until my youngest surviving child, in case of the decease of any of them, arrives at the age of twenty-one years; it is also my will, that

my children, nor any of them shall have power to sell, alienate or convey in any way or manner whatsoever, or cause the same to be divided, his or her part of any real estate, until my youngest surviving child comes to the age of twenty-one years. And it is my will, that each one's proportion of the rents and profits of my real estate, shall be paid to my children, respectively, when they arrive at the age of twenty-one years, and to my daughters at the time of their marriage." The testator nominated, constituted and appointed his friends, Wooster Tuttle and Ezra Whitney, jointly and severally, to be his executors of said last will and testament.

In a codicil to the same will, the persons appointed therein executors, and the survivor of them, were authorized, empowered and requested, to take into their care and management, all the real estate of which the testator should die possessed, and make all such contracts or agreements, as they should think most for the interest of his children, by renting or leasing all or any part of his real estate, for such term or number of years as they shall think best, and for the best rent which can be obtained, — to make any contracts or agreements with the lessees for any buildings, or improvements to be made thereon by the lessees, and for the purchase or sale of the same buildings, or improvements, at the end of the term respectively; and they were further authorized and empowered to make such improvements upon all or any part of his real estate, by repairing buildings, completing any unfinished one, erecting buildings, rebuilding, enclosing and fencing as they shall deem proper, and so as to render the same productive, by afterwards leasing or renting them.

So far as the will, in this case, confers upon the persons who were constituted the executors thereof, and who accepted the trust, and who were duly qualified to act in that capacity, the care and management of the real estate, so devised, its effect is similar to that of the will referred to in the case of *Deering* v. *Adams*, 37 Maine, 264, in which it was held, that the executors took, under the will, a fee simple estate in trust, defeasible at the end of twenty years, the term, during which, by

the will, the estate was not to vest in her grandchildren, and, by the authority of that case, the executors under the will, in the case at bar, took a similar estate in trust, defeasible when the youngest surviving child came to the age of twenty-one years, which was Sept. 20, 1839, the testator having died Dec. 13, 1823, and his will having been duly proved, approved and allowed on March 18, 1824.

The premises in question were a part of the real estate of which Elias Bates died possessed, and, on March 26, 1831, Henry Bates, 2d, afterwards Winslow Bates, his son, made, executed and delivered to Wooster Tuttle and Ezra Whitney, as executors of the will of Elias Bates, a mortgage of all his right, title and interest to and in the estate of the said Elias Bates; "the condition of the deed being such, that, whereas the said Tuttle and Whitney, executors as aforesaid, having appointed the said Henry Bates, 2d, (one of the legatees of said Elias Bates,) their agent, and having authorized the said Henry to collect and settle any demands in favor or against said estate, also to let any dwellinghouse or store, or any other real or personal property, belonging to the same, the said Henry Bates to be at all times under the advice and control of said executors, if the said Henry shall faithfully and honestly perform the above trust and agency, then the deed to be null and void, otherwise to remain absolute."

On March 3, 1834, the same Henry Bates, 2d, then Winslow Bates, made, executed and delivered to Joseph Richardson and Benjamin D. Whitney, their heirs and assigns forever, for security of his note to them, for the sum of $2548,74, of the same date, and interest in one year, all right, title and interest, which he had, as one of the heirs in the estate of his father, Elias Bates, deceased, by virtue of his last will and testament, or otherwise.

A notice was published, and recorded according to law, on Nov. 15, 1840, for the purpose of foreclosing the mortgage to Richardson & Whitney, and, notwithstanding it is objected that it was insufficient, in matter of substance, to answer the requirement of the statute, we think otherwise.

A notice, for the purpose of effecting a foreclosure of the mortgage to Tuttle and Whitney, was duly published, and was recorded on Aug. 30, 1841, by Thomas G. Hathaway, who married a daughter of Elias Bates; Tuttle and Whitney having assigned to him the mortgage from Henry Bates, 2d, on April 11, 1840.

On Nov. 6, 1841, Thomas G. Hathaway leased his interest in the premises in dispute, to the tenant, for the term of twenty-one years; and, on April 30, 1853, in consideration of the sum of six hundred dollars, conveyed to him the same, with covenants of warranty.

On Aug. 29, 1855, Benjamin D. Whitney, one of the mortgagees in the mortgage of Winslow Bates to Richardson & Whitney, released to the demandant all his interest in the premises demanded, in a deed of that date, with a covenant of non-claim; and, on Sept. 5, 1857, Richardson, the other mortgagee, did the same, in a deed in all respects similar.

It does not appear, that Winslow Bates, or those claiming under him, took possession of the demanded premises, or was in occupation thereof; but, it appears, that after the deed from Tuttle and Whitney to T. G. Hathaway, in the fall of 1840, the tenant went into possession of the same, by the permission of Hathaway, and has continued in possession since that time.

The case contains no evidence of the payment of the note of Winslow Bates to Richardson & Whitney, secured by his mortgage to them; and there is none that it was not paid.

Wooster Tuttle, by an instrument under seal, dated Oct. 26, 1839, remised, released and quit-claimed unto Winslow Bates, all actions and causes of action, and all claims or demands whatever, both at law and in equity, or otherwise, he ever had against him, then had, or which his heirs, executors or administrators can, shall or may have, claim or demand, for or by reason of any act, matter, cause or thing, from the 28th day of March, 1831, to the date of the release. Ezra Whitney, on Oct. 23, 1839, acknowledges the receipt, from Winslow Bates, as his agent, of the sum of $44,69, in full for

his account against the estate of E. Bates, to the date thereof, and in full for all debts due, claims and demands against said Bates, on account of his agency, from the 28th of March, 1831, to the date of the receipt. But it does not appear that the mortgage, given to Tuttle and Whitney, was ever formally discharged.

Was the mortgage to Richardson & Whitney, by Winslow Bates, entirely ineffectual? He undertook therein to do nothing forbidden by the will, but to convey all the right, title and interest, which he had under the same, as one of the heirs or otherwise, to the real estate therein described. His interest was in the nature of a vested remainder, the will having provided that, after the youngest surviving child should become of the age of twenty-one years, he, and his heirs and assigns forever, should be entitled to his share in the real estate. The person entitled to a vested remainder has an immediate fixed right of future enjoyment;—that is, an estate *in presenti*, though it is only to take effect, and pernancy of the profits, at a future period, and charged much in the same manner as an estate in possession. 2 Cruise, 188.

It is said, by Chancellor KENT, 4 Com. p. 254, 1st ed., "a vested remainder, lying in grant, passes by deed, without livery,—but a contingent remainder is a mere right, and cannot be transferred, before the contingency happens, otherwise than by way of estoppel." R. S. of 1841, c. 91, § 4.

Winslow Bates, by his father's will, had an immediate, fixed right of future enjoyment of his share in the estate; that enjoyment to commence when the estate in trust of the executors should be determined. By the assignment of his right in the mortgage, the assignees could take the right which he had, and no other, subject to his right of redemption. This in no wise conflicted with the devise in the will of the testator's real estate. He intended that it should remain entire and undivided, with no power to sell or alienate in his children, till the youngest survivor of them should arrive at the age of twenty-one years. At that time the restriction was to be removed, and they could possess the estate and dispose

of the same. The basis of a division was to be the value of the estate, at that time, and not before.

It is objected, in behalf of the tenant, that the deed of B. D. Whitney, of August 29, 1855, releasing to the demandant, with a covenant of non-claim, all his interest in the premises; and that of Joseph Richardson, on Sept. 5, 1857, also releasing his interest, with a similar covenant, are without effect, they having been made at different times by those, who, it is insisted, were joint tenants. If their mortgage was foreclosed, and the title absolute in them, that foreclosure operated as a new purchase, and the grantees held the estate afterwards as tenants in common. *Goodwin* v. *Richardson*, 11 Mass. 469; *Kinsley* v. *Abbott*, 19 Maine, 430; R. S. of 1841, c. 91, § 13.

But the deed to Tuttle and Whitney, of March 26, 1831, in mortgage by Henry, alias Winslow Bates, was prior in time to that to Richardson & Whitney, and was of "all my right, title and interest, to and in the estate of said Elias Bates." All the interest of the mortgager, so far as the case discloses, was the right, title and interest under his father's will; and this was all which he attempted to convey. His covenants of warranty extended no further. *Coe, pet'r for par.*, v. *persons unknown*, 43 Maine, 432. The covenant of seizin in no wise operated injuriously to the mortgagees, as they were in possession as devisees in trust, under the will; and, being such, the enjoyment under the deed was to commence *in futuro*. It is not perceived that their right of possession, under the will, till the testator's youngest surviving child should arrive to the age of twenty-one years, could in any way prevent their enjoyment, when that event should take place. That deed was effectual, in the same manner, and to the same extent, that the one to Richardson & Whitney would have been, if the latter was the only one from Winslow Bates, was prior to the other, or the former had been discharged.

If the mortgage to Tuttle and Whitney has been foreclosed, the legal title became absolute in them, or those claiming under them, and has come to the tenant indefeasible; and this action

must fail for want of title in the demandant. But if this mortgage is now outstanding and undischarged, it is still open to redemption, and the right to redeem has passed from Richardson & Whitney to the demandant.

If, on the other hand, the condition in the mortage to Tuttle and Whitney was never broken; or if the mortgager, or the one claiming under him, has done all which is required to entitle him to redemption, and to be admitted to the possession, which has been in the tenant for more than seventeen years, his remedy is not in a suit at law, but in a bill in equity. *Hill* v. *Payson & al.*, 3 Mass. 359; *Perkins & al.* v. *Pitts*, 11 Ibid. 134; *Parsons* v. *Wells & al.*, 17 Mass. 419; R. S. of 1841, c. 125, § 16.

The receipt of a mortgager, acknowledging satisfaction of the debt secured by the mortgage, is not conclusive evidence of a discharge of the mortgage, so as to defeat the title under it; but it is competent for the mortgagee to explain the transaction, by showing the nature of the satisfaction received. *Perkins & al.* v. *Pitts*, before cited. This he cannot be called upon to do in a suit at law.

Other questions of law are presented by the report, which have been argued, but their consideration is not important for the final disposition of this action.

According to the agreement of the parties, the plaintiff must be *Nonsuit.*

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

COUNTY OF PISCATAQUIS.

ICHABOD W. MITCHELL *versus* UNION LIFE INSURANCE CO.

The entry of a *special* appearance for defendant does not dispense with the observance of the Rule of Court, requiring pleas and motions in abatement to be filed within two days after entry of action.

A policy of insurance, having thereon a printed impression of the seal of the Insurance Company, is not to be regarded as a sealed instrument.

A father has a pecuniary interest in the life of a *minor* child, and an insurance of the life of such child is not within the rule of law, by which wager policies are declared void.

ASSUMPSIT on a policy of insurance, effected by plaintiff, for his own benefit, on the life of his minor son. The case is presented on Report of APPLETON, J. At the first term, the defendants' counsel entered his appearance "specially;" and, on the third day of the term, filed a motion to dismiss the action for want of proper service. By the officer's return, it appears that service had been made on a person, who is stated, in his return, to be an agent of said company. Evidence was offered, tending to show that the person, on whom the service was made, was not a general agent of defendants, but only an agent to receive applications for insurance, and other like services, in a certain locality.

The policy had upon it a printed impression of the seal of the company; and defendants contended that, the contract being under seal, *assumpsit* could not be maintained.

It also appears by the Report, "that defendants objected to plaintiff's recovering, on the ground that the policy is a wager policy;" whereupon, the plaintiff offered evidence, tending to show that he had furnished his son supplies and money.

Everett, for plaintiff.

Godfrey, for defendants.

The case was argued at July term, 1856, and the opinion of the Court was afterwards drawn up by

APPLETON, J. — By the sixth Rule of this Court, 37 Maine, 569, pleas or motions in abatement must be filed within two days after the entry of the action. The motion to dismiss was not filed till the third day, and was not in season. The entry of a special appearance does not dispense with the Rules of Court or with obedience thereto.

The impression of a seal is not a seal. The contract of insurance is not, therefore, a sealed instrument. The action is rightly brought.

Wager policies, in England, are prohibited by statute. In this country, they have been regarded as against good policy, and, by repeated decisions, have been declared void.

The general principles applicable to life insurance seem to be well settled. The party insuring, when the insurance is effected for his own benefit, must have an interest in the life to be insured. As his future earnings or gains may be indefinitely large, he may insure his own life to an unlimited amount. So he may insure that of his debtor, to the extent of his indebtedness. But a father, as such, has no insurable interest, resulting merely from that relation, in the life of a child of full age. He may, however, insure on the life of a child for the benefit of a child. Angel on Fire and Life Insurance, § 298; Bunyon on Life Assurance, 14.

But the insurance, in the present case, was effected by a father upon the life of a minor son, who was about proceeding to California, and to whom he had made large advances. In *Lord* v. *Dall*, 12 Mass. 115, it was held that a single woman, dependent upon her brother for her support, had sufficient interest in his life to entitle her to insure it. The father is entitled to the earnings of his minor child, and may maintain an action for their recovery. If the child be injured, he is entitled to an action *per quod servitium amisit*. He has a pecuniary interest in the life of a minor child, which the law will protect and enforce. An insurance, therefore, of the life of such child

is not within the rule of law, by which wager policies are declared void. *Defendants defaulted.*

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

COUNTY OF HANCOCK.

CHARLES E. JARVIS *versus* SAMUEL NOYES.

A part owner of a vessel, hired to the master on shares, who has received from the master her earnings, disbursed money for her repair, &c., is liable *as receiver*, to a co-owner of the vessel, for his portion of the net earnings, in an action of *account*.

But, whether as *bailiff*, — *quære*.

THE declaration in the writ is, — "in a plea of ACCOUNT, for that the defendant was bailiff of the plaintiff at said Castine, from the first day of January, A. D. 1850, to the day of the date hereof, [Oct. 10, 1856,] and had the care and management of one-eighth part of the schooner Eglantine, and of her earnings belonging to plaintiff, and was a part owner of said schooner, to wit, one —— part; and, during that time, received a large sum of money for earnings, as aforesaid, belonging to the plaintiff, of which he was to render an account on demand, to wit, the sum of $200. Yet, though often requested, the said defendant has not accounted for, nor paid said sum, but neglects," &c.

The case comes up on Report of DAVIS, J., of the evidence offered at *Nisi Prius*. The facts and evidence contained in the report, material to the question presented for decision, appear in the opinion of the Court.

C. J. Abbott, for plaintiff, argued, —

That an action of *account* may be maintained by one owner of a vessel, against a co-owner for his part of her earnings in the hands of the co-owner, as well as a bill in equity. R. S., c. 82, § 62; *Hardy* v. *Sprowl*, 33 Maine, 508; *Closson* v. *Means*, 40 Maine, 337. In *Hale* v. *Hale*, 3 Day's Cases, cited in 1 Dane, c. 8, § 11, page 165, where one part owner of a vessel had taken more than his proportion of the ship's money, an action of *account* was considered a proper remedy. It lies, also, for one partner against another, where the accounts are usually much more complicated than in the case of part owners of vessels. Dane, *Ibid*, § 8; and in § 9, it is laid down, generally, that *account* lies *in every case* where one has received money to the use of another. And, also, against the agent of prize shares, by one entitled to a share. 1 Dane, c. 8, art. 2, § 8.

Account lies against one who is bailiff or receiver. Bac. Ab., title Account, A.

A bailiff is one who has charge of lands, goods or chattels, to make the best benefit to the owners. 1 Selwyn's N. P., page 2, note 2. And this seems to have been the relation of defendant to plaintiff, (and the vessel,) in this case. He was the agent of the vessel, or ship's husband, and, as such, had the care and management of her, and received her earnings; for his part of which, plaintiff claims he shall account.

Defendant might also, perhaps, be chargable as receiver, and, if necessary, plaintiff desires leave to amend by adding a count thus charging him.

T. Robinson, for defendant.

This is an action of account, wherein plaintiff alleges defendant to be his bailiff, which defendant, by his plea, denies, and this presents the only point in issue, in the present state of the case. The remedy here invoked, though not entirely obsolete, has become, by non-user, very nearly so in this State. The only reported case being that of *Closson & al.* v. *Means*, 40 Maine, 337, wherein no question seems to have been raised

as to the form of action. There were no pleadings had, or issue joined, and the only matter therein decided as applicable to any other case is, that our statute sanctions such form of action in appropriate cases.

In *Jones & al.* v. *Harraden*, 9 Mass. 540, the opinion of Lord HOLT is quoted with favor, "that, whenever account could be maintained, *indebitatus assumpsit* might be also." Our Courts have repeatedly refused to sustain actions of assumpsit, between part owners of vessels, until after an adjustment of accounts, and an ascertainment of balances; and one main reason assigned for such refusal, in many cases, has been that it exposes parties, as in the present case, to a multitude of suits about the same thing, when, if the parties do not adjust among themselves, one process, far more appropriate and efficient, a suit in equity, would bring the whole matter to a final conclusion, relieved of every impediment. In this respect, account has no advantage over assumpsit. This principle is fully sustained in *Dodge* v. *Hooper*, 35 Maine, 536, and in many preceding cases, as they have come before this Court, and if the Court, in such cases, will not sustain the familiar action of assumpsit, which is broad enough to meet almost every case where money is claimed by one party from another, it is difficult to perceive how the waking up of this antiquated remedy will restore lost rights, and cause the Court to retrace its steps, and allow parties to luxuriate in a multiplicity of lawsuits, by a simple change of form.

When the Court decided, in *Dodge* v. *Hooper* and other cases there cited, that *no action* could be maintained by one part owner of a vessel against another, for the avails, until after a settlement as to her earnings and disbursements, the action of account, as well as all other actions at law, was manifestly intended; the term "no action" being sufficiently comprehensive to embrace all such forms of proceeding in Court as are known as actions of law. If plaintiff is simply claiming his proportion of six hundred dollars, acknowledged by defendant to have been by him received, he has clearly mistaken his remedy. He should have sued in an action of

assumpsit, and not of account, the law being as laid down on the 95th page of Oliver's Precedents, 2d edition. The action of account does not lie against one for any *ascertained* sum of money, but only for *uncertain* damages.

The fact, that defendant assumed to act as agent of the vessel, is controlled by the other superior fact, that the master sailed the vessel on shares, in the ordinary way, and thus, as owner, *pro hac vice*, having the possession and management, to the exclusion of the general owners. The defendant, then, could only have been agent of the vessel to a very limited extent, at most, only receiving, from time to time, such part of her earnings as the master might pay over to him, and disbursing bills that come against her, and were not paid by the master, from the funds so received.

The case finds that there were six owners, that plaintiff owned one-eighth, that defendant was a part owner, and that three part owners have brought their separate actions of account. It does not appear to what extent defendant had assumed liabilities for the vessel, or what amount he had disbursed on her account, after the admission as to the six hundred dollars.

It would not require much time, or very large repairs and improvements, to wholly exhaust so small a fund. But the action of account, as here attempted to be put in force, exhibits no advantage over the common action of assumpsit; both are equally liable to the same objection, only adjusting by parts, and by many suits, what could more properly be fully concluded by one process. But, if the plaintiff will resort to this form of action for the enforcement of the claim he sets up, he should be held to follow the remedy strictly, as is laid down on 95th page of Oliver's Precedents, before cited; there must not only be shown to be a privity of contract between the parties, but all must *join* and be joined.

But defendant denies that he ever was plaintiff's bailiff, and it is most evident that the case is entirely deficient of material facts to sustain such allegation. The most that is shown, is that, being a part owner of a vessel, he assumed to act as

agent to a very limited extent, simply receiving money of the master and paying bills. Being a part owner, and the other owners not appearing, this service seemed to be rather forced upon him than sought. The vessel being let to the master on shares, defendant could exercise no control, as agent or owner, in her management, nor did he ever attempt so to do. He simply received such portion of the earnings of the common property as the special owner and exclusive manager saw fit to pay over, from which he disbursed as occasion required. This relation constitutes defendant, at most, but a receiver, and held to account only for moneys received, and not as bailiff, to account for the right management and proper income of profits of the thing entrusted to his employment, and so his defence, if sued as receiver, would be materially and entirely different from his answer to the present action. The present action must, therefore, fail, if for no other cause, because it does not charge defendant in his proper capacity. 2 Greenl. on Evidence, article Account, § § 34, 35, 36 and 37.

The opinion of the Court was drawn up by

GOODENOW, J. — The report presents only one question for the decision of the Court, which is, whether an action of account can or cannot be maintained, upon the facts stated. It is admitted, or proved, that the plaintiff was owner of one-eighth part of the Eglantine, and that the defendant was also part owner of the same vessel; that the defendant had no written authority from his co-owners, to act as agent of the vessel, but that he had always acted as such, had received her earnings, had paid some of her bills, (the master having also paid a part of them,) and had paid out, at different times, several sums, from her earnings, to the respective owners; and that, in April, 1854, the defendant stated to the plaintiff, that there was in his hands six hundred dollars of the earnings of the vessel, belonging to the owners.

It was also proved that there had been no settlement among the owners of said vessel; that she was sold by them in April, 1854, and that the plaintiff, the defendant, Mark H.

Perkins, Sylvanus Rich, John Dresser, and Samuel W. Hall, were part owners of her, and that separate actions of account had been commenced by said Perkins and Rich, to recover their respective shares of the earnings, of said vessel, against the defendant, which actions are now pending. Said vessel was sailed on shares, and the earnings, in the hands of the defendant, were received by him of the master.

The form of proceeding by "an action of account" was recognized in Massachusetts before the separation of Maine. It has been expressly recognized in this State. In *Hardy* v. *Sprowl*, 33 Maine, 508, Mr. C. J. SHEPLEY says, "If no other mode can be agreed upon, the remedy is by action of account." It is recognized by our statutes, and the mode of proceeding somewhat changed and simplified. When the interlocutory judgment has been rendered that the defendant do account, and he shall unreasonably neglect to appear, or appearing, to render an account before auditors appointed to take it, they shall certify the fact, and the Court may enter a default and judgment thereon, or cause the damages to be assessed by a jury. R. S., c. 82, § 62.

This form of proceeding may now be regarded as more simple and direct, in producing an adjustment of accounts between persons who may not sue or be sued in an action of *assumpsit*, than a bill in equity; and it may be precisely for this reason that it is still preserved; notwithstanding it "has fallen into disuse," as Professor Greenleaf says, "in most of the United States." It is, he admits, a legal remedy, where not abolished by statute.

We are inclined to the opinion, from the evidence reported, that the plaintiff is entitled to recover of the defendants as *receiver* only, and not as *bailiff;* that is, the amount he has actually received, and not the amount he might have received.

An action of *account* lies against a bailiff, not only for what profits he hath made and raised, but also for what he might have made and raised, by his care and industry, his reasonable charges and expenses deducted. Co. Lit. 172.

One merchant may have *account* against another, where they

occupy their trade together; and, if one charges me as *bailiff* of his goods *ad merchandizandum*, I must answer for the increase, and be punished for my negligence; but if he charges me as *receiver*, *ad computandum*, I must be answerable only for the bare money or thing delivered. Co. Lit. 272.

The case finds that the defendant "had always acted" as agent of the vessel, &c. From these facts, we think his *appointment* by the plaintiff may be fairly inferred. In *Sargent* v. *Parsons*, 12 Mass. 148, PARKER, C. J., says:—"The action of account is maintainable only against a bailiff; and a bailiff can only be one who is *appointed* such, or who is made such by law, which latter instance applies only to a guardian, who is bailiff of his ward, and who is liable, not only for rents and profits actually received, but also for those which might have been received by a proper management of the estate. The plaintiff may deem it expedient to ask leave to amend." 2 Greenl. Ev. § 36.

The defendant is ordered to account, and the action is to stand for further proceedings.

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

CHARLES LOWELL *versus* NATHAN HASKELL *& al.*

The death of the principal in a bond given to release him from arrest on execution, within the six months named in the bond, discharges his sureties from liability.

ACTION OF DEBT against the sureties of a poor debtor, who had given the statute bond to be released from arrest. The debtor caused the creditor, in the execution, to be duly notified of his claim to have the benefit of the oath for the relief of poor debtors, but, before the time arrived which was appointed for his disclosure, which time was before the six months named in the bond would expire, the debtor died.

Lowell, pro se.

Robinson, for defendants.

The opinion of the Court was drawn up by

HATHAWAY, J. — Debt, against the sureties on a poor debtor's six months bond.

The principal died within the six months stipulated in the bond, its conditions not performed. The bond was only a substitute for the detention of the body. *Spencer* v. *Garland,* 20 Maine, 75. The liability of the surety, therefore, is similar to that of bail, and the death of the principal, before the bail is fixed, discharges the bail. *Champion* v. *Noyes,* 2 Maine, 481, Rand's ed., and authorities, *passim.*

The obligation to perform the contract, on the part of the defendants, was discharged by the act of God. 1 Parsons on Contracts, 524; *Baylies* v. *Fettyplace,* 7 Mass. 338, Rand's ed.; *Harrington* v. *Dennie,* 13 Mass. 93, do.; *Knight* v. *Bean,* 22 Maine, 531; *Craggin* v. *Bailey,* 23 Maine, 104.

Plaintiff nonsuit.

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

CHARLES M. DOANE *versus* JAMES FREEMAN *& al., adm'rs.*

Under our present laws, if one die intestate, and, at the time of his death, the next of kin living are nephews and nieces, the children of a deceased nephew of the intestate take, by representation, the share of the intestate's estate, to which their parent would be entitled, if alive.

DEBT, for the amount due to plaintiff from defendants, as administrators on the estate of Lydia Buckley; the plaintiff claiming to be an heir of said Lydia, and entitled to a share of her estate, under a decree in Probate for the distribution of the same. The questions controverted are, plaintiff's claim

to be entitled as an heir; and, if an heir, the part of the estate to which he is entitled. By the STATEMENT OF FACTS agreed on, it appears that said Lydia Buckley died intestate, in 1853, leaving no issue, father or mother. She left no brothers or sisters living. There were living, at the time of her death, three children of one brother, and also grandchildren of said brother, whose parents were deceased. There were living a child of one sister, and also grandchildren of said sister, whose parents were deceased. There were also living one child of another sister, and a grandchild of said sister, whose parents were deceased. The plaintiff is a grandchild of a sister. The plaintiff's parents and grandparents were deceased at the time of intestate's death. Plaintiff was, therefore, a grand-nephew of the deceased.

If the Court should be of opinion that plaintiff is entitled, as an heir, its opinion is also desired whether the nieces and nephews take numerically, or by representation, and whether the grand-nephews and nieces, (if entitled at all,) take numerically, or by representation of their immediate ancestor. Damages to be assessed by the clerk, in accordance with the decision of the Court.

J. A. Peters, for plaintiff.

By the R. S. of 1841, c. 93, § 1, No. 3, the three living children of the brother of the intestate would be entitled to one-third of the estate, one-ninth each, and each sister's child, one-third each, of the whole estate. *Quinby* v. *Higgins*, 14 Maine, 309.

But this statute has been changed, by the Act of 1852, c. 295, § § 2 and 3, approved April 26, 1852, and this has been incorporated into the R. S. of 1857, c. 75, § 1, No. 3.

By this amendment, grand-nephews and nieces inherit. Before this Act, they did not. We claim that they inherit *numerically*, with nieces and nephews, because they are to inherit in the "*same manner.*"

If not numerically, then it follows by representation. That is, the grandchildren of a brother of the intestate inherit

their own immediate ancestor's portion together; *i. e.* the brother's one-third is to be divided into seven parts, one part to each child living, and one part to all the children of each deceased child.

Wiswell argued for defendants,

And cited c. 93 of R. S. § 1, and 14 Maine, 309, (same as referred to by plaintiff's counsel.) Also R. S. of 1857, c. 75, § 1, and c. 295 of the laws of 1852, and contended that the amended statute contemplates for the grand-nephews to take only in cases where the nephews are all deceased.

The opinion of the Court was drawn up by

HATHAWAY, J.— The brothers and sisters of Lydia Buckley, if living, at the time of her decease, would have inherited her estate, in equal portions, but they being dead, leaving issue, at the time of her decease, their children and the children of their deceased children, took the inheritance by *representation*. "Succession, *in stirpes*, according to the roots, since all the branches represent the same share, that their root, whom they represent, would have done. 2 Bl. Com. 217.

Lydia Buckley's brothers and sisters, who died, leaving lineal descendants, were the roots from which the inheritance branched, and it is merely matter of computation to ascertain the portion of each lineal descendant.

The plaintiff, being an orphan grandchild of Lydia's deceased sister, is entitled to a portion of the inheritance, which must be ascertained, as agreed by the parties.

Defendants defaulted.

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

LEONARD J. THOMAS *& als. versus* THE ROCKLAND INS. CO.

Where the owners of a vessel have sustained loss by a peril insured against, and they design to abandon her, their communication to the underwriters, intended for a notice of an abandonment, should directly, and in terms, authorize a legitimate inference, that the owners designed thereby to abandon the vessel.

And, without such an abandonment, the underwriters will not be liable for an actual, or constructive, total loss, but only for a partial one, where the vessel was abandoned at sea by her master and crew, and was afterwards taken possession of by salvors, brought into port, libelled, and sold under an order in admiralty.

As to the mode of assessing damages in case of partial loss.

THIS is an action of ASSUMPSIT, on a policy of insurance of a vessel called the *A. Hooper*, dated Oct. 13, 1854. Action commenced Dec. 14, 1855. Plea, general issue, with a brief statement of matters relied on in defence.

The case came on for trial at April term, 1858, before CUTTING, J. It appeared in evidence that the vessel insured, while on a voyage, became distressed by the weather, and was abandoned at sea, by the captain and crew sometime in Dec. 1854; and, soon afterwards, was taken possession of by a part of the crew of another vessel, who, as salvors, brought her into the port of Boston.

There were two issues of fact made and submitted to the jury, who found and returned, (1) that the vessel was not cast away by the barratry of the captain; and (2) that the amount of actual repairs necessary to be made on the vessel, after the injury, to put her in as good condition as when insured, (ordinary wear and tear excepted, and exclusive of any salvage decreed,) was the sum of one thousand dollars.

Questions arising whether the plaintiffs are entitled to recover for a total or for a partial loss, and for what sum, the parties consented that the presiding Judge should report the evidence bearing on these questions, and the finding of the jury, for the consideration of the full Court, who are to enter up judgment as the legal rights of the parties require. It

appears, from the report of the case, that, on Dec. 21, 1854, after said vessel was brought into Boston in possession of the salvors, certain libels were entered against her and her cargo, for salvage, in favor of said rescuing crew and the owners of the vessel to which they belonged, in the Admiralty Court for the district of Massachusetts. The vessel and cargo were seized by the Marshal for the district, on the same day, by order of Court, and by him held until the 24th day of January, 1855, when, by order of Court, she was sold at auction, and the proceeds of sale were paid into Court. Blanchard, Sherman & Co., bid off the vessel for $2500; and the cargo sold for $124.

On the 25th day of the same January, salvage was decreed with costs, as prayed for, after paying which, there was left in said Court, from proceeds of sale of vessel, the sum of $1042,96; and from sale of cargo, $36,22. The said balances were paid over to the owners of vessel and cargo, respectively. On Dec. 18, 1854, Blanchard, Sherman & Co., acting for the owners, telegraphed from Boston to defendants, as follows: "Schooner A. Hooper has been brought in by salvors, abandoned — what shall be done?" On Dec. 23, 1854, acting for owners, said Blanchard wrote said defendants, as follows: "By direction of the owners of schooner 'A. Hooper,' who have a policy of insurance at your office on said vessel, as we understand from them, we telegraphed you, a few days ago, that said vessel had been abandoned at sea, and picked up and brought to this port, though in charge of salvors, asking what should be done, and requesting an answer.

"Not having received any answer, we have further to report that the salvors have brought a libel suit, granted by our Court of Admiralty; said libel being returnable on the 29th instant. It is thought by us that you had better be informed of these facts, so that you could take any course you might choose in regard to it. If you wish to make any defence to this libel suit, please inform us, as the owners have requested us to look to their interests in the matter. Any advice or orders to us will have our prompt attention."

The dispatch and letter were received in ordinary course, but the defendants paid no attention to them, and made no reply. After the loss, plaintiffs assigned their policy, as appears thereon, to Blanchard, Sherman & Co., who, on March 1, 1855, made a demand of payment of said defendants. Blanchard, Sherman & Co., paid $90 as counsel fees for plaintiffs, in defence of the salvage suits.

J. A. Peters argued for plaintiffs.

Plaintiffs claim to recover as for a *total* loss.

It was either an *actual* total loss, or a *constructive* total loss. Actual, because we abandon at sea, and the vessel was never restored to us in any way, but was to us totally lost. The cases, from *McMasters* v. *Shoalhed*, 1 Espinasse, 257, to the latest decisions, assume that, even if the vessel was not sunk or destroyed as a vessel, in order to prevent its being a total loss, there must be a *restoration*. In the case named, the Court say: — "If a ship had been sunk and weighed up again, *and if it was restored to the owners*," there would be no actual total loss. But, in the case at bar, the vessel was lost at sea — taken by salvors, and by order of Court, sold, &c. Of course, as we have received the surplus of the sale, that should be deducted from the amount insured.

At all events, this was a constructive total loss — that is, the damage was more than half her value when repaired. She was sold for $2500; salvage, in round numbers, was $1500; repairs, $1000. In making up this amount, no deduction of one-third, new for old, is to be deducted from the salvage. *Sewall* v. *United States Ins. Co.*, 11 Pick. 90.

It is claimed, we made no abandonment, to the insurers, (defendants,) — none was necessary. We had nothing to abandon; she was not in our hands to abandon, not in our possession, nor could we possess ourselves. She was decreed to be in possession of salvors. It is said, we could have paid the liens and released her. We, however, were not obliged to do so. Another answer is, that she was sold before the amount of salvage was decreed. She was sold on the 24th of Janu-

ary, and salvage was decreed on the 25th. It was contested; we could not settle it; and the defendants knew the circumstances as well as the plaintiffs.

It has been decided in numerous cases, and fully, in this State, that when a master makes a sale of a vessel from the necessity of his situation and the circumstances, when she has become disabled, no abandonment to the insurers is necessary. *Prince* v. *Ocean Ins. Co.*, 40 Maine, 481; 2 Phillips on Insurance, 4th ed., page 244.

The doctrine is put upon the ground that, when a master has sold, there is nothing to abandon, and no benefit could result from it.

If, then, there is no reason to abandon when a master has sold, how much more reason not to abandon when a sale has been made without our power and *by authority of law.* What difference, whether the sale was authorized by *necessity*, which, as a *fact*, must be *proved*, or whether that necessity is established in another form by a judicial determination.

But, although the reason is very strong, we are also not *without authority. Storer* v. *Gray*, 2 Mass. 565.

In *Robinson* v. *Georges Ins. Co.*, 17 Maine, 131, WESTON, C. J., in a somewhat similar case to this, ruled, at *Nisi Prius*, that a recovery for a total loss could be had without an abandonment. The Court set aside the verdict, not upon that ground, but because the master had no authority to settle the salvage himself, and sell, instead of having it determined by a Court. A particular attention to the whole case will show that the marginal note is completely wrong, and may mislead. See also 12 Mass. 291.

But, if an abandonment was necessary, we contend one was stated or made, (1) by the dispatch, (2) by the letter.

No particular form is required, and no technical words need even be in writing. *Macy* v. *Whaling Ins. Co.*, 9 Met. 358.

It may be, "in express terms, or *by necessary implication.*" *Pierce* v. *Ocean Ins. Co.*, 18 Pick. 93.

Apply this language here, and, upon the circumstances and

situation we *were* in, ourselves out of possession, and telegraphing that the vessel had been picked up abandoned.

The case was submitted without argument, on the part of the defendants.

The opinion of the Court was drawn up by

CUTTING, J. — Assuming that here was a constructive total loss, the *first* question presented is, was there an abandonment? It seems that no form of an abandonment has been prescribed by law, and it has been held that it need not be in writing; that any words which directly, and in terms, abandon the property insured to the underwriters, in consequence of a loss by a peril insured against, are sufficient to comply with the provisions of law. But the cause of the abandonment must be communicated to the underwriters, that they may judge whether to accept or not. 2 Phil. on Ins. (4th ed.) 384; *Macy & al.* v. *Whaling Ins. Co.*, 9 Met. 358. *Pierce* v. *Ocean Ins. Co.*, 19 Pick. 83.

Neither the telegraphic dispatch of Dec. 18, nor the letter of Dec. 23, 1854, directly, and in terms, authorize a legitimate inference that the owners designed thereby to abandon the vessel. It is true, they speak of the vessel as abandoned by the crew at sea, and brought into port by salvors, but no cause for such abandonment is assigned — no amount of damages or claims of salvors are stated or estimated. The dispatch only inquires as to "what shall be done," and the letter gives knowledge of the libel suits, and requests information if the underwriters wish to make any defence — information as necessary and proper to be given in case of a partial as a constructive total loss, since, if the former, the insurers would be interested in the amount of salvage to be recovered, and the expenses in defending against the same, and notice to them of the pendency of the suits might prevent any subsequent controversy in the adjustment of the salvage and costs, on settlement as for a partial loss.

But, *secondly*, it is contended that, if no abandonment was made, none was necessary, because the vessel was taken pos-

session of by the salvors, libeled and sold by authority of law, and the proceeds paid into Court, and that the sale, under such circumstances, is similar to that made by the master from necessity, as explained and illustrated in *Prince* v. *The Ocean Ins. Co.*, 40 Maine, 481, and cases there cited.

The circumstances constituting the necessity in those cases, and the one under consideration, are wholly dissimilar. In those cases, the vessels were in foreign ports and in peril from which they could not be extricated without an expense exceeding their real value. In this case, the vessel is brought into a home port within a short distance of the insurers, with whom the agents of the plaintiffs could have had daily communication, and yet the vessel was not abandoned and thereby subjected to the sole control of the defendants, subject, perhaps, to the salvors' lien. It is true that the vessel may have been in the custody of the law, and so she might have been, had the salvage claims been nominal in amount.

Our conclusion then, is, that the plaintiffs cannot recover for either an actual or constructive total loss, but may recover for a partial loss. The vessel, in the policy, was valued at $5000, on which was insured one half of that sum; consequently, by a rule of law, applicable to marine insurance, the parties are to share equally the loss. The expenses of repairs, as found by the jury, were $1000, from which one third is to be deducted, new for old, reducing them to $666,66, to which is to be added the salvage and expenses, including $90 counsel fees; viz., $1547,04, amounting in all to the sum of $2213,70, of which the plaintiffs are entitled to a judgment for one-half; viz., for $1106,85, and interest on that sum from the time it became payable, which, according to the terms of the policy, was sixty days after *proof and adjustment* of the loss. Interest in this case should be computed only from the date of the writ; viz., Dec. 14, 1855. Upon this subject, see 2 Phil. on Ins. 700, and cases cited.

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

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT,

1858.

COUNTY OF CUMBERLAND.

JOHN TAPPAN *& als., in equity, versus* THOMAS A. DEBLOIS, *Adm.*

When the intention of a testator can be ascertained from the will, a court of equity will carry that intention into effect, if it can be done consistently with the rules of law.

Jurisdiction is given to this Court, by the Revised Statutes of 1841, c. 96, § 10, (R. S. of 1857, c. 77, § 8,) of all cases of trusts, whether arising by implication of law, or created by deed, or by will.

The general provisions of the statute 43 of Elizabeth, relating to bequests in trust for charitable uses, are in force in this State. But, as the jurisdiction of this Court, over such cases of trust, is not derived exclusively from that statute, so it is not restricted by it.

When such a trust is created by a bequest for charitable purposes, if the charity is definite in its objects, is lawful, and is to be regulated by trustees specially appointed for that purpose, this Court has jurisdiction over it, independently of the statute of Elizabeth, derived from its general jurisdiction over trusts, and will cause it to be executed, whether the uses designated are, or are not, within the terms of that statute.

A bequest of property to trustees, to be by them paid over to the executive committee of the American Peace Society, to be expended in the cause of peace, is sufficiently definite; and the trust so created will be enforced by this Court.

Tappan *v.* Deblois.

BILL IN EQUITY, brought by trustees named in the will of the late William Ladd. The property was bequeathed to them "in trust, for the cause of peace, to be by them paid over to the executive committee of the American Peace Society." The facts sufficiently appear in the opinion of the Court.

The heirs at law of said William Ladd claimed to hold the property, on the ground that the bequest was void — not being for "charitable uses," within the terms of the statute 43 of Elizabeth, and being too indefinite in its objects to be enforced by a court of chancery, under its general jurisdiction, conferred by the statutes of this State.

Rand argued for the plaintiffs: —

1st. The words of the devise are sufficient to pass the property; the devise is legal; and the trustees are capable of taking.

2d. It is not void for uncertainty. There are numerous cases in which bequests for purposes less definite have been supported. Hill on Trustees, 183, note 1; 2 Story's Eq., § § 1149, 1181; *Sohier* v. *St. Paul's Church*, 12 Met. 250.

3d. Such a devise may be regarded as within the equity of the statute of Elizabeth. The statute has always been construed with great liberality; and all uses of a charitable nature are considered as "charitable uses," within the meaning of the statute. Hill on Trustees, 657; 2 Story's Eq., 511, § 1164; *Burbank* v. *Whitney*, 24 Pick. 146; *Bartlett* v. *King*, 12 Mass. 537; *Going* v. *Emery*, 16 Pick. 107; *Bartlett* v. *Nye*, 4 Met. 378; *Brown* v *Kelsey*, 2 Cush. 243.

4th. But if the bequest is not within the statute of Elizabeth, the trust will be maintained by this Court, under its general jurisdiction, independent of that statute. 2 Story's Eq., § § 1162, 1187; *Vidal* v. *Girard's Executors*, 2 How. 194.

Shepley & Dana argued for the defendants: —

1st. The devise is not to charitable uses, but to *moral* and *political* uses only. It is, therefore, not within the uses enumerated in the preamble of the statute 43 of Elizabeth, c. 4.

The uses there specified are, "gifts, devises, &c., for the relief of aged, impotent and poor people; for maintenance of sick and maimed soldiers and mariners; for schools of learning, free schools, and scholars of universities; for repairs of bridges, ports, havens, causeways, churches, sea-banks and highways; for education and preferment of orphans; for or towards the relief, stock or maintenance of houses of correction; for marriages of poor maids; for supportation, aid and help of young tradesmen and handicraftsmen; for relief or redemption of prisoners or captives; for aid or ease of any poor inhabitants concerning payment of taxes. 2 Story's Eq., § 1160.

The devise in this case is certainly not for any one of the purposes here described, and being void, the property must go to the heirs at law.

A bequest in trust, for such objects of benevolence and liberality, as the trustee, in his own discretion, shall most approve, cannot be supported as a charitable legacy, and is, therefore, a trust for the next of kin. *Morice* v. *Bishop of Durham*, 9 Ves. 399.

2d. The statute of Elizabeth forms, in principle and substance, a part of the law of this State. *Going* v. *Emery*, 16 Pick. 107.

3d. This statute being the law in this State, a court of chancery will not sustain a devise for charitable purposes, unless it is for such uses as are therein enumerated.

"The various charitable purposes which will be sustained are enumerated in the statute of 43 of Elizabeth." 2 Kent's Com. 285.

In a court of chancery, such trusts only as are within the letter and spirit of the statute of Elizabeth will be sustained. "Trusts for indefinite purposes of a benevolent nature, not charitable within the purview of that statute, will be declared void; and the property will be distributed among the next of kin. 2 Story's Eq. § § 1155, 1158, *et seq.*

4th. The American Peace Society, at the time of the death of the testator, had not been incorporated; and, without the

statute of Elizabeth, the bequest would be declared void. *Baptist Association* v. *Hart's Executors*, 4 Wheat. 1.

5th. A bequest "in trust for the cause of peace" is too vague and uncertain to be executed; and it must either be declared void, or a trust for the heirs at law. *Morice* v. *Bishop of Durham*, 10 Ves. 522.

Such a bequest is not within the statute of Elizabeth; and it is so general and indefinite, that it could not be controlled by a court of equity. 2 Story's Eq. § 1157; *Ommaney* v. *Butcher*, 1 Turn. & Russ. 269; *Vesey* v. *Jameson*, 1 Sim. & Stu. 69.

"If the trust, or the persons who are entitled to the benefit of it, as *cestuis que trust*, are altogether uncertain, the bequest is undoubtedly void." *Bartlett* v. *King*, 12 Mass. 537.

Such a bequest cannot be sustained, either under the statute of Elizabeth, or by the general jurisdiction of the Court, without that statute. *Wheeler* v. *Smith*, 9 How. 55.

The opinion of the Court was drawn up by

DAVIS, J. — The late William Ladd, by his will dated July 9th, 1839, after making various bequests to relatives and friends, proceeded to make provision for his widow, and then to dispose of all the rest of his property for the benefit of the American Peace Society, of which he was an officer, and to whose interests many years of his life had been devoted. The present controversy turns upon the construction and effect to be given to the eleventh, twelfth, and thirteenth clauses of the will.

"11 *Item.* I will and bequeath to my beloved wife, Sophia Ann Augusta, all such of my household furniture as she shall choose to retain for her own use, and all my wearing apparel, watch, spectacles, &c., to dispose of as she may see fit, and also sixty dollars a month be paid to her monthly, out of the proceeds of my estate, during her life.

"12 *Item.* All the rest of my estate, real, personal and mixed, I bequeath to John Tappan, merchant, of Boston, Mass., Anson G. Phelps, merchant, of the city of New York, and Samuel E. Coues, merchant, of the town of Portsmouth, N. H.,

in trust, for the cause of peace, to be by them paid over to the executive committee of the American Peace Society, for the time being, in such manner that the whole of my property, excepting the provisions above made for my wife and others, shall be expended in the cause of peace, both principal and interest, within ten years of my death, leaving ample funds for the payment of my widow's monthly allowance.

"Nevertheless, should the American Peace Society change its present constitution, then I leave it to the above named trustees to expend the amount of my money in such other ways as they may think most agreeable to my intentions.

13. I also will that the amount of my property which is to be reserved for my wife, as above specified, shall also be expended in the cause of peace, in ten years after her death, as that in ten years after the death of both of us, there shall be nothing of my property left unexpended."

Samuel E. Coues accepted the trust of executor, and partially settled the estate. In 1849, he resigned the trust, and Alexander Ladd was appointed administrator of the estate, with the testator's will annexed. Said Ladd died in 1855, and the defendant was appointed in his place in 1856.

The trustees named in the will accepted the trust; and the executor, after settling the estate, and paying the other legacies, paid over to them the proceeds of the rest of the property, reserving a fund sufficient, when invested, to pay the allowance of sixty dollars a month to the widow. She lived until 1855. After her decease, the trustees claimed to receive the fund that had been reserved for her support, for the benefit of the American Peace Society; but the defendant declined to pay it over to them, as the heirs at law of William Ladd also claimed the property. To which of these claimants does the estate belong?

Before examining the other questions which have been argued with so much learning and ability, it is important for us to ascertain the intention of the testator, as expressed in the will. For it has long been the settled doctrine in courts of equity, that such intention should be carried into effect, if it

can be done consistently with the rules of law. *Thelusson* v. *Woodford*, 4 Ves., Jr., 329.

It is contended, by the counsel for the defendant, that there are two distinct legacies to the trustees; one in the twelfth clause, to be paid by them to the executive committee of the American Peace Society, — and the other in the thirteenth clause, to be expended by the trustees themselves, in the cause of peace.

But we are of opinion that there is but one bequest, which is all embraced in the twelfth clause. After making the specific bequests in the previous clause, making provision for a monthly allowance for the widow, the testator proceeds, "All the rest of my estate, real, personal and mixed, I bequeath to John Tappan," &c. This is the only sentence in either clause containing any words of gift or bequest. The remainder of the two clauses relates solely to the time of payment to the trustees, and the time and manner of payment by the trustees to the executive committee of the Peace Society. Though the trustees were residuary legatees, in gross, they were not to receive the whole property at one time. At the death of the testator, they were to receive all except a reserved fund, the interest of which would pay the widow sixty dollars a month. At the death of the widow, they were to receive the rest.

It is equally clear that it was only in a contingency that never happened that the trustees were themselves to expend any part of the property. They had no discretion conferred upon them except as to the time when, within ten years from the death of the testator, and of the widow, they should pay over the property to the executive committee of the Peace Society. They had no authority to expend it in any other way, unless that society should change its constitution. Whether, in that event, the bequest would have been void, because of the uncertain and indefinite nature of the charity, we are not called upon to decide. The constitution of the Peace Society was not changed; and, consequently, the clause in the will providing for that contingency became inoperative, and the will is

to be treated as if it contained no such provision. The bequest is valid, if so at all, under the general provision, that the trustees should receive the property — one portion on the death of the testator, and the rest on the decease of the widow, and "*pay it over* to the executive committee of the American Peace Society, for the time being, *in such manner*, that, in ten years after the death of both, there should be no property left unexpended."

The object of the American Peace Society, as defined by the second article of the constitution, is "to illustrate the inconsistency of war with christianity, to show its baleful influence on all the great interests of mankind, and to devise means for insuring universal and permanent peace." At the time of the testator's death, this society was not incorporated; nor does the case show that it has been incorporated since. The question is, therefore, — is a bequest of property to trustees, to be paid by them to an unincorporated society, and to be expended by such society "in the cause of peace," valid? The counsel for the defendant insists that such a bequest is too vague and uncertain to be executed by a court of chancery, under its ordinary judicial equity powers; and that the bequest is not to "charitable uses," within the statute of 43 Elizabeth, but is only to moral and political uses.

The general provisions of the statute of Elizabeth are undoubtedly in force in this State. But it is quite certain that the bequest in the case before us is not within the literal terms of the statute. It has, however, always received an extremely liberal interpretation; and a great variety of bequests have been sustained, which, though not within the letter, have been deemed charitable within the equity of the statute. 2 Story's Eq., § § 1161, 1164. Such a principle of construction gives such latitude to the judicial discretion, and depends for its application so much upon the impressions made by different cases upon the minds of different Judges, that we need not be surprised to find the decisions apparently in conflict. On comparing many of the bequests that have been sustained, with others that have been pronounced void, we doubt if any

very satisfactory reason can be given why they should not have been decided alike.

Thus, a bequest of a fund to executors, to be applied to such charitable and other purposes, as they shall think fit, has been held to be void, on account of its indefiniteness. *Ellis* v. *Selby*, 1 Mylne & Craig, 286. So, also, a bequest in these words, "in case there is any money remaining, I should wish it to be given in private charity," has been held to be invalid. *Ommany* v. *Butcher*, 1 T. & Russ. 260. And a bequest to trustees, for such charitable purposes and persons as the trustees, in their discretion may think fit, has been held to be too vague and indefinite to be executed. *Vesey* v. *Jamson*, 1 Sim. & Stu. 69. And, if the gift is to benevolent, religious and charitable objects, it has been declared invalid, not only on account of its uncertainty, (*Morice* v. *Bishop of Durham*, 10 Ves., Jr., 522,) but also, because the uses were not limited to cases of charity, but extended to those of benevolence also. *Williams* v. *Kershaw*, 1 Keen, 232, 274.

On the other hand, a bequest for such religious and charitable purposes, as the majority of the trustees should approve, has been held to be valid. *Baker* v. *Sutton*, 1 Keen, 224. So, also, a bequest for such charities as the trustees may think fit, recommending poor clergymen who have large families and good characters. *Moggridge* v. *Thackwell*, 7 Ves., Jr., 36; 13 do., 416. And a bequest for such charitable and pious uses as the executors may think fit, recommending that the greater part be expended for the advancement of the christian religion in America, has been sustained. *Attorney General* v. *London*, 3 Bro. C. Cas., 171. So, also, a bequest for the poor inhabitants of St. Leonard; Ambler, 422. Lord ELDON held that a bequest to the Welch Circulating Charity school, "to purchase such religious books as the trustees should think fit," was within the statute of Elizabeth. *Attorney General* v. *Stepney*, 10 Ves. 22. And Lord THURLOW held that the bequest of a fund to be forever applied for the purchase and distribution of such books as "may have a tendency to promote the interests of virtue and religion, and the happiness of

mankind," was sufficiently definite. *Browne* v. *Yeall*, 7 Ves., Jr., 50, note 5.

Whether these bequests would have been sustained, except under the statute of Elizabeth, may be doubtful; though the better opinion seems now to be, that the statute was merely cumulative and ancillary; not extending the power of the testator, but furnishing more available remedies to legatees. *Dutch Church* v. *Mott*, 7 Paige, 80. But, though it may be true, that the English Courts enforced trusts for charitable uses before the statute of Elizabeth; yet, it is also probably true, that, since that time, they have exercised jurisdiction over such trusts only under the statute. 2 Story's Eq. § 1155.

The first case of importance in this country was that of the *Baptist Association* v. *Hart's Ex'rs*, 4 Wheat. 1. This case arose under the law of Virginia, where the statute of Elizabeth had been repealed. The bequest was to an unincorporated society, in trust, for certain specified purposes; and the Supreme Court of the United States declared it void, because such a society was not capable of taking and disposing of the legal estate. That such a bequest would have been held valid in any State where the statute of Elizabeth was in force, there can be no doubt. *West* v. *Knight*, 1 Chancery Cas., 135. For a bequest will never fail for want of a trustee. If there is no trustee named in the will, or, if the trustee named is not capable of taking, the executor, or the heir at law, will be held as trustee; or the Court will appoint one. *Washburn* v. *Sewall*, 9 Met. 280; *Sohier* v. *St. Paul's Church*, 12 Met. 250; *Brown* v. *Kelsey*, 2 Cush. 243; *Groton* v. *Ruggles*, 17 Maine, 137; *Beaty* v. *Kurtz*, 2 Pet. 583; *Burr* v. *Smith*, 7 Vermont, 210; *Whitman* v. *Lex*, 17 S. & R. 88.

The correctness of the decision in the case of the *Baptist Association* v. *Hart's Ex'rs*, very soon began to be doubted. It was commented upon without approval, though not with any distinct dissent, by the same Court, in the case of *Inglis* v. *Trustees of Sailors' Snug Harbor*, 3 Pet. 113. In this case the bequest was sustained, though to an unincorporated society, and for purposes general in their nature. In the case of

Porter v. *Chapin*, 6 Paige, 649, Chancellor WALWORTH says, "although some doubt was thrown upon the question of charitable donations for the benefit of a community or body not incorporated, so as to be capable of taking and conveying the legal title to the property, in the case of the *Baptist Association* v. *Hart's Ex'rs*, I believe it is generally admitted that the decision in that case is wrong." And this remark is quoted with approbation by the Supreme Court of Massachusetts, in the case of *Bartlett* v. *Nye*, 4 Met. 378. And, finally, the doctrine of this case has been distinctly questioned by the United States Supreme Court, in the case of *Vidal* v. *Girard's Ex'rs*, 2 How. 127, 192, 196. And the Court came to the conclusion that charitable uses may be enforced in chancery, upon the general jurisdiction of the Court, independent of the statute of Elizabeth.

By the R. S. of this State, c. 77, § 8, we have jurisdiction, as a court of equity, of all cases of trusts, whether arising by implication of law, or created by deed, or by will. And, in cases of bequests for charitable and other purposes, we are satisfied, upon a careful examination of all the authorities, that our jurisdiction is not exclusively derived from, nor restricted by the statute of 43 of Elizabeth. *Burbank* v. *Whitney*, 24 Pick. 146. Before that statute, courts of chancery may not have had power to enforce trusts for indefinite charities, especially if no trustees capable of taking were interposed. And, even since that time, if the bequest is so imperfect and vague that the intention of the testator cannot be ascertained, it will be declared void. Thus, a bequest to A. B., in trust, without any designation of the trust, would be held to be void, or a trust for the heirs at law. But if the trust is expressed, and is sufficiently definite to be understood, and is consistent with the rules of law, it will be enforced, either under the statute of Elizabeth, or independent of it. And, though the bequest is for charitable purposes, "if the charity is definite in its objects, is lawful, and is to be executed and regulated by trustees, who are specially appointed for the purpose," a court of chancery has jurisdiction over it, independ-

ently of the statute, derived from its general authority over trusts. 2 Story's Eq., § 1187.

In the case at bar, the object is sufficiently definite to be understood. A bequest "to the cause of Christ," has been held to be sufficiently certain. *Going* v. *Emery*, 16 Pick. 107. "The cause of peace" is not more doubtful, or indefinite.

That the object is lawful, and the bequest to trustees specially named, and capable of taking, is not denied. No suggestion is made that they will not appropriate the property according to the intention of the testator. Should they fail to do so, the trust may be enforced by the Court in the State where they reside.

Nor is there any doubt or uncertainty as to the beneficiaries of this trust. The testator very clearly intended that the property should be paid to the American Peace Society. This society was made the *cestui que trust.* A bequest "to the Universalist religious denomination, in the county of Berkshire," was held not to be void for uncertainty, though no trustees were named in the will. And trustees were appointed by the Court to carry the trust into effect. *Universalist Society in North Adams* v. *Fitch*, Law Reporter, August, 1858; not yet reported.

In the case before us, the trustees will have discharged their trust, when, after receiving the property, they shall have paid it to the executive committee of the American Peace Society. Beyond that, neither they, nor the Court, are responsible for its disposal. The testator, when living, had a right to give his property to that society. He had the same right, by his will, to direct his executors, or his trustee, to appropriate it in the same way at his decease. That such was his intention, as expressed in his will, there cannot be the slightest doubt; and it is our duty to see that this intention is carried into effect. The balance of the estate, remaining in the defendant's hands, upon the settlement of his final account of administration, must be paid over to the plaintiffs.

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

INHABITANTS OF NORTH YARMOUTH *versus* GREELEY SKILLINGS.

In respect to public corporations, which exist for public purposes alone, like counties, cities and towns, the Legislature, under proper limitations, have the right to restrain, modify, enlarge or change them, providing, however, that property owned by such corporations shall be secured for the use of those having an interest in it.

If a town is divided, and a part of its territory, with the inhabitants thereon, is incorporated into a new town, the old town will retain all the property, and be responsible for the existing liabilities, unless there is some legislative provision to the contrary.

But, upon such division, the Legislature have constitutional authority to provide that the property, owned by the original town, shall be appropriated or held for the use and enjoyment of the inhabitants of both towns, and to impose upon each town the payment of a share of the corporate debts.

If, upon such division, the original town holds any property, such as flats, sedge banks, or fisheries *in trust*, for the use of all the inhabitants, the Legislature may provide that the original town shall still hold such property *in trust* for the inhabitants of both towns.

In regard to property so held *in trust*, whether the Legislature, by dividing the town, without making any such provision, could deprive a part of the inhabitants of their accustomed use of it, — *quære.*

TRESPASS, *quare clausum.*

In 1743, the proprietors of the lands in the town of North Yarmouth, conveyed to certain persons, then selectmen of said town, "all the flats, sedge banks and muscle beds in said town, lying below high water mark."

This conveyance was made "in behalf of, and for the sole use, benefit and behoof of the present inhabitants of said town of North Yarmouth, *and of all such as may or shall forever hereafter inhabit and dwell in the said town*, to be by said inhabitants, forever hereafter used, occupied and improved in common, with full liberty to graze, feed, cut rock weed, dig all sorts of shell fish," &c.

The rights conveyed by said deed, continued to be enjoyed by the inhabitants of North Yarmouth until 1849, when the Legislature divided said town, erecting a part of the territory into the town of Yarmouth. By the legislative Act of division and incorporation, it was provided that the inhabitants

of both towns should continue to hold and enjoy in common, all their rights and privileges in said flats, &c.

Subsequently, the town of North Yarmouth claimed to hold said flats, sedge banks, &c., for the exclusive use of the inhabitants of that town, denying the right of the inhabitants of the new town of Yarmouth to any enjoyment thereof. The defendant was originally an inhabitant of North Yarmouth, and, after the division, an inhabitant of Yarmouth. Claiming the right thereby to enter upon said flats, he went thereupon and cut a quantity of grass, for which the plaintiffs brought this action of trespass *quare clausum.* At the hearing, before DAVIS, J., the facts were REPORTED by the agreement of the parties, and the case submitted to the full Court.

Howard & Strout argued for the plaintiffs.

By the facts agreed, the plaintiffs were sole owners of the premises upon which the alleged trespass was committed, (by conveyance from the proprietors of North Yarmouth in 1743, May 25th,) up to the time of the incorporation of Yarmouth, Aug. 8, 1849. Special Laws, 1849, c. 264.

The *title* to the land owned by plaintiffs, was not affected by the Act of incorporation referred to. Although it was competent for the Legislature to establish a new corporation from a part of North Yarmouth, and define its limits territorially, yet the Legislature could not disturb the *title* to the land within the limits of either corporation. They could properly change the municipal jurisdiction of the territory, but not its *title.* In respect to their *titles* to lands, towns are as independent of the legislative control as are individuals. The Legislature could no more transfer the real estate of one town to another, than they could convey the property of one man to another, by legislative enactment.

When the inhabitants of Yarmouth were incorporated into a separate town, they ceased to have any municipal rights or privileges in the town of North Yarmouth, and in its lands and public landings, &c. As individuals, merely, they had no right, title or interest in such lands and privileges. But it

was only in their corporate relation, that they possessed any such right and interest, and when their municipal relation changed, their prior municipal rights and relations ceased.

This was not a mere division of a town, but it was a creation of a "separate town," investing it with all the privileges and powers, and subjecting it to all the duties and liabilities incident to the inhabitants of other towns in this State. The town of North Yarmouth, remained with all of its corporate rights and privileges, and, with its corporate obligations and duties unchanged, were liable for all the debts and obligations of the town before the incorporation of Yarmouth. *Windham* v. *Portland*, 4 Mass. 389; *Richards* v. *Doggett*, 4 Mass. 539; *Hampshire* v. *Franklin*, 16 Mass. 86.

There is no evidence from which it can be inferred, that the plaintiffs held the premises in trust. But, if in trust, then only for the inhabitants of the town of North Yarmouth, for the time being, with their attendant corporate rights, duties and obligations, and not for the inhabitants of any other town, who share none of the corporate relations of the plaintiff town, since all such relations are local and territorial in their origin, design and operation. *Green* v. *Putnam*, 8 Cush. 21, 27.

The fifth section of the special law, 1849, c. 204, is unconstitutional and inoperative; and, consequently, Yarmouth had no title, or right, or interest in and to the premises. And the justification of the defendant wholly fails.

The fourth section of the same statute has been pronounced unconstitutional, in some of its provisions, in a suit between the towns of Yarmouth and North Yarmouth. *Yarmouth* v. *North Yarmouth*, 34 Maine, 411.

Shepley & Dana argued for defendant.

This case is to be distinguished from *Yarmouth* v. *North Yarmouth*, 34 Maine, 411, because that was a case where the power of the Legislature to alter the rights of private corporations was called in question. In the case at bar an entirely different question is presented.

The town of North Yarmouth was a public corporation; and the only question is, whether or not the Legislature, in erecting the town of Yarmouth out of the limits of North Yarmouth, as before constituted, had the right to make the provision it did in regard to the common lands.

It has been settled in this country, ever since the case of *Skerrett* v. *Taylor & als.*, 9 Cranch, 52, that the only restriction on the legislative action in regard to public corporations, is, that while they may change, modify, enlarge or restrain these corporations, they should secure the property of these corporations for the uses of those for whom *and at whose expense* it was originally purchased. See 2 Kent's Com., 5th ed. 305.

In Angell & Ames on Corp., 3d ed., page 28, it is laid down that, while private corporations, being created by an Act of the Legislature, which is regarded as a *contract*, the Legislature cannot constitutionally impair it, by annexing new terms and conditions onerous in their operation, or inconsistent with a liberal construction of the grant. The Legislature, as the trustee of the public interests, has the exclusive and unrestrained control over public corporations, and, acting as such, as it may create, so it may modify or destroy, as public exigency requires or recommends, or the public interests will be best subserved.

Here, in 1849, was the town of North Yarmouth owning certain flats and sedge banks, which had been conveyed to the town by the proprietors in 1745, for the use of the inhabitants. "The inhabitants of every town, in this State, are declared to be a body politic and corporate by the statute, but these corporations derive none of their powers from, nor are any duties imposed upon them by the common law. They have been denominated *quasi* corporations, *and their whole capacities, powers and duties are derived from legislative enactments.*" *Hooper* v. *Emery*, 14 Maine, 377.

If the Legislature had seen fit, by merely changing the lines of the town, to transfer the inhabitants of North Yarmouth into another town, without any provision preserving their

former rights, as such inhabitants, it could have done so. The Legislature has authority to change the boundaries of towns *at pleasure*. *Ham* v. *Sawyer*, 38 Maine, 41. But towns cannot change their boundaries. *Freeman* v. *Kenney*, 15 Pick. 44.

The Legislature, if it had seen fit, might have wholly abolished the town of North Yarmouth, for towns exist at the *pleasure* of the Legislature, and not at their own pleasure, (*Gorham* v. *Springfield*, 21 Maine, 61,) and in that case, these flats and sedge banks, mentioned in the case at bar, would have been subject to the disposition of the Legislature.

But we have seen that the Legislature, though having the power, did not deprive the town of North Yarmouth of its rights to these banks and common lands. Though it had drawn a line through the town, yet, it provided that those residing within the limits of the old town, should retain their rights to this common property, the same as though no line had been drawn and no new name given.

Where a town owns property, it is entirely within the province of the Legislature, upon dividing that town, to provide as to the enjoyment of that property. *Brewster* v. *Harwich*, 4 Mass. 278; *Randolph* v. *Braintree*, 4 Mass. 315; *Harrison* v. *Bridgton*, 16 Mass. 16; *Windham* v. *Portland*, 4 Mass. 384; *Minot* v. *Curtis*, 7 Mass. 441; *Brunswick* v. *Dunning*, 7 Mass. 445; *Hampshire* v. *Franklin*, 16 Mass. 86.

The effect of legislative action changing the boundaries of towns, upon the property, rights and privileges of its inhabitants, are succinctly stated in this last case cited, where the Court hold the following language: — "By general principles of law, as well as by judicial construction of statutes, if a part of the territory and inhabitants of a town are separated from it, by annexation to another, or by the erection of a new corporation, the remaining part of the town, or the former corporation, retains all its property, powers, rights and privileges, and remains subject to all its obligations and duties, *unless some express provision to the contrary should be made by the Act authorizing the separation.*"

By a reference to the cases, it will be found that where the

Legislature, in altering town lines or erecting new corporations, have made no provision as to the enjoyment of the property of the old corporation, that property remains in the old corporation; but where, in the Act of alteration or separation, the Legislature has, in terms, prescribed the mode in which this property shall be enjoyed, their action is conclusive.

The question then, is, did the Legislature, in the Act of August, 1849, make such a provision as gives to the town of Yarmouth, the right to enjoy the property which belonged to North Yarmouth, at the time Yarmouth was erected out of it?

The provisions of the 5th section of the Act of August, 1849, are plain. By that section, the town of Yarmouth is to enjoy these common lands, that before the division, belonged to North Yarmouth, the same as if no division had been made. If the Legislature had the power to make provision in regard to the enjoyment of this common property, the 5th section clearly gives the right to Yarmouth to enjoy this property.

The cases already cited show, that, had the Legislature seen fit, in the Act of separation, to have provided that the inhabitants of Yarmouth should exclusively be entitled to the use of these lands which lie in her limits, it could have legally done so.

When, then, the Legislature said to the town of North Yarmouth, "we will call a part of you Yarmouth, but the rights of all the inhabitants to enjoy the common property, wherever situate, shall be preserved," the interests of the town of North Yarmouth were sufficiently consulted, and they should be content with the exclusive rights, which, under the circumstances of that case, the Court felt compelled to give them by their decision in the 34th of Maine, and suffer the defendant quietly to enjoy those rights which, but for a legislative *line*, as an inhabitant of North Yarmouth, he would have been entitled to.

The opinion of the Court was drawn up by

MAY, J.—Trespass *quare clausum* against the defendant, an inhabitant of the town of Yarmouth, for breaking into and en-

tering upon certain flats, or sedge banks, situate in said town of Yarmouth, and cutting the grass growing thereon. The alleged act of trespass is admitted, but the defendant justifies it as the servant of said town of Yarmouth, and as an inhabitant thereof, and also as having been an inhabitant of the town of North Yarmouth, before, and at the time when that part of it on which he now lives, was incorporated into the town of Yarmouth.

The incorporation of Yarmouth was Aug. 8, 1849, and it is admitted that the whole title to the *locus in quo* was in the town of North Yarmouth, up to that time, and still is, unless it has been affected by the Act incorporating said town of Yarmouth. The territory composing the new town was taken wholly from the town of North Yarmouth, and the Act of incorporation provides that "the inhabitants of said towns shall continue to hold and enjoy, in common, all the rights and privileges hitherto belonging to the inhabitants of North Yarmouth, in any and all public landings, cemeteries, gravel-pits, muscle beds, flats and fisheries of every kind, within the limits of said towns." Private Laws of 1849, c. 264, § 5.

The deed under or through which the plaintiffs claim the flats or sedge banks, upon which the defendant entered, bears date May 25, 1743. A copy or record of it, found upon an ancient book of records, purporting to be the book of records of the original proprietors of the town of North Yarmouth, is made a part of the case. It recites, among other things, "that, in consideration of the sum of five shillings, paid us by Messieurs Cornelius Soul, Jonas Mason and Edward King, selectmen and trustees of said town of North Yarmouth, there be and hereby are given, granted and sold to the said Cornelius Soul, Jonas Mason and Edward King, selectmen and trustees as aforesaid, in behalf of, and for the sole use, benefit and behoof of the present inhabitants of said town of North Yarmouth, and of all such as may or shall forever hereafter inhabit and dwell in the said town, all and singular the flats, sedge banks, muscle beds, and all other conveniences whatsoever in the said town of North Yarmouth, lying and being be-

low high water mark, with all the privileges and appurtenances thereto belonging, (except the salt marshes on Small point,) to be by the said inhabitants forever hereafter held, used, occupied and improved, in common, and that all and every the said inhabitants shall and may forever hereafter have free and full liberty to graze, feed, cut rock weed, and dig all sorts of shellfish, on or by any other way or means to use and improve the said granted premises," &c. Whether this original deed is to be regarded as a conveyance to the three individuals therein named, or to the town of North Yarmouth, as a municipal corporation, it is not now material to inquire. It is apparent, from the whole phraseology of the deed, that it was intended, by the proprietors of the territory of North Yarmouth, as a conveyance in trust, for the benefit of those persons individually who then were or might subsequently be inhabitants of the town of North Yarmouth. The idea that that town might subsequently be cut up into several distinct towns having other corporate names did not, probably, occur to the grantors. Their purpose, undoubtedly, was to grant the specific rights and privileges referred to in the deed, for the use of such inhabitants as then lived upon, or should afterwards, in all coming time, reside upon the territory of which they had been, or were then, the proprietors, and which they had conveyed or might subsequently convey to their grantees within the limits of their propriety. But whether the rights and privileges to be enjoyed, so far as the intention of the grantors can be gathered from the deed, were intended to be incident to, and dependent upon a residence within the limits of the town of North Yarmouth, as they then existed, or as they might afterwards be made to exist, it may not be essential to determine, because the case finds that the whole legal estate was in the town of North Yarmouth at the time when that portion of its territory was incorporated into the new town of Yarmouth, upon which the defendant resides. A construction that should regard all persons, resident within the old town when the new town was incorporated, as *cestui que trusts*, under the original grant, cannot be deemed inequit-

able; and, if so, whether it was competent for the Legislature to cut off any portion of the *cestui que trusts* from the enjoyment of their individual rights and privileges, without their consent, would deserve grave consideration.

In the case before us, they have not attempted to do so. The whole purpose of section five of the Act incorporating the town of Yarmouth, before recited, was to secure to the inhabitants of both towns the continuance and enjoyment of the same rights and privileges, in regard to all public landings, cemeteries, gravel-pits, muscle beds, flats and fisheries which they had before enjoyed in common, within the limits of said towns; and, it is conceded by the learned counsel for the plaintiffs, that if the Legislature had the constitutional authority to enact that section, and the same is valid and binding, then the plaintiffs cannot prevail.

The law is now well settled that, "in respect to public corporations which exist only for public purposes, as counties, cities and towns, the Legislature, under proper limitations, have a right to change, modify, enlarge or restrain them, securing, however, the property for the uses of those for whom it was purchased." 2 Kent's Com. 305; Angell & Ames on Corp., 3d ed., page 28, and authorities there cited; and such has been the uniform practice of the Legislature of this State, from its earliest existence. And the reason why this power exists, is, because the Acts by which such corporations are created are not contracts within the meaning of the constitution of the United States, or of the constitution of this State. The public good evidently requires that such corporations should be subject to legislative control. The Legislature, therefore, as the trustee of the public interests, is properly invested with unrestrained power over the existence of all public corporations.

It is also well settled that towns are public corporations. *Inhabitants of Gorham* v. *Inhabitants of Springfield*, 21 Maine, 61, and the authorities cited in defence fully establish the position that, where a town owns property, or is liable for outstanding debts, it is within the province of the Legislature,

at the time of the division of any such town, or the incorporation of a new town out of a part of its territory, to provide for an equitable appropriation or enjoyment of such property by the inhabitants of the old and new towns, or to impose upon each the payment of a share of the corporate debts. The exercise of this power, in this State and Massachusetts, has been so long continued, and so frequent, and so often acted upon by the highest judicial tribunals, as within the legitimate scope of legislative authority, that we feel no hesitancy in coming to the conclusion that the exercise of such power is constitutional and valid.

It is true that, without some legislative action in relation to the property and existing liabilities of the old town, upon its division, or the incorporation of a new town out of its territory, the old town will be entitled to the entire property, and solely answerable for such liabilities. It is said, by PARSONS, C. J., in the case of the *Inhabitants of Windham* v. *Inhabitants of Portland*, 4 Mass. 384, that "a town incorporated may acquire property, real or personal; it enjoys corporate rights and privileges, and is subject to obligations and duties. If a part of its territory and inhabitants are separated from it by annexation to another, or by the erection of a new corporation, the former corporation still retains all its property, powers, rights and privileges, and remains subject to all its obligations and duties, unless some new provision should be made by the Act authorizing the separation." The same doctrine is reiterated by C. J. PARKER, in the case of the *Inhabitants of Hampshire County* v. *Inhabitants of Franklin County*, 16 Mass. 86.

In the present case, such new provision seems to have been made, and made, too, in terms plainly indicative of the legislative will, that this defendant, and all others resident within the limits of North Yarmouth, as it then existed, should continue to enjoy, so far as relates to the flats and sedge banks in question, the rights and privileges to which he had been accustomed prior to the incorporation of the new town of Yarmouth.

We do not find, in view of the fact, that the town of North Yarmouth, at the time of the incorporation of Yarmouth, held these flats and sedge banks in trust, solely for its own inhabitants, any thing which prevented the Legislature from providing by law, upon the separation, that all the inhabitats of both towns should enjoy the rights and privileges to which they were then entitled as *cestui que trusts*, in the same manner as if no separation had taken place; or, in other words, we see nothing in the circumstances that could restrain the Legislature from providing that, for the purposes of justice and equity, both towns should be regarded as North Yarmouth, so far as should be necessary in order to give efficacy to all the rights and privileges to which all the inhabitants were then entitled, and would have continued to be entitled by virtue of the trust, if the new town had not been created. And this is in effect what has been done. For the enjoyment of these rights and privileges, provision was made that the tenancy in common which then existed, under the trust, between the inhabitants upon the whole territory of both towns, should continue in the same manner as if no separation had occurred. So far, then, as the Act of incorporation of the new town related to these rights and privileges, no separation did in fact take place, or, if it did, the old town must be regarded as holding the legal estate in trust for the inhabitants of both.

This case is wholly unlike the case between these parties, reported 34 Maine, 411, and cited for the plaintiffs, on which much reliance is placed in the argument. The distinction between the two cases is very clear. In that case the corporation which held the funds in trust was a private corporation, and, for that reason, not subject to legislative control. The attempt of the Legislature to change the direction and application of funds, so held, was very properly regarded as unconstitutional. It is very apparent from the reasoning and authorities cited in that case, that the Court would have come to a different result, if the funds, which were attempted to be divided by the Legislature, had been in the hands of the town, and not in the hands of a board of trustees, to whom they

had been conveyed in trust for specific purposes, by an Act of the Legislature of Massachusetts, passed in 1806. That case turns wholly upon the fact that the trustees of the fund were a private, and not a public corporation.

In view of all the facts in this case, we are of opinion that the defendant has established his justification, and is, therefore, entitled to a judgment in his favor. *Plaintiff nonsuit.*

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

RICHARD C. CABOT *versus* JOSEPH C. GIVEN.

In a suit by an *indorsee* against the *maker* of a promissory note, payable to an insurance company, and indorsed and transferred for the company by the president, parol evidence that he was acting president, at the time of the indorsement, is admissible and sufficient, without producing the records of the company.

And, in such suit, between other parties, proof of the handwriting of such president is sufficient evidence of the indorsement and transfer of the note to the plaintiff, without evidence that he had special authority for that purpose.

ASSUMPSIT by an indorsee against the maker of a promissory note, of the following tenor: —

"$601. Boston, Nov. 8th, 1855.

"For value received, I promise to pay to the Commercial Mutual Marine Insurance Company, or order, six hundred and one dollars, in fourteen months from Nov. 3d, 1855. Payable in Bath, Me. Joseph C. Given."

The note was subsequently, and before its maturity, indorsed and transferred to the plaintiff, in payment of a claim which he had against the company. The indorsement was as follows: — "Com. M. M. Ins. Co., by Geo. H. Folger, Pres't."

The case was opened for trial before DAVIS, J., at the April term, 1858. The defendant pleaded the general issue, with a brief statement that the note was given for a policy of insurance; that the plaintiff knew that fact when he purchased the

note; and that a loss happened by which the company became liable to pay the policy. An account in set-off for the loss was duly filed by the defendant.

The sufficiency of the indorsement, and the authority of Folger to make it being denied, the plaintiff called Charles H. Tyler, who testified that he was formerly paying teller of the Grocers' Bank, Boston, where the Commercial Mutual Marine Insurance Company did their business to a large amount. He further testified (the defendant objecting, and being overruled,) that George H. Folger was acting as president of said insurance company in 1855, and acted as such for three years previous to 1856. He had known him to draw checks and sign notes. The indorsement on the note in suit is in his handwriting. He acted as president through the year 1855.

On cross-examination, he testified that he, (witness,) was not one of the directors of the insurance company. He had never attended a directors' meeting; had seen Folger preside at a stockholders' meeting; never saw a copy of the by-laws of the insurance company; was connected with the Grocers' Bank when it failed, Nov. 30, 1855; had done business with Folger three years previous to the stopping of the bank, and between December, 1855, and May, 1856, when the insurance office stopped.

Here, the plaintiff was permitted (defendant objecting) to read the note to the jury; and he rested his case.

The defendant introduced the letters of the plaintiff to the defendant, dated Jan. 10, 1857, and Feb. 5, 1857, and also the by-laws of said insurance company.

"Boston, Jan. 10, 1857.

"Mr. Joseph C. Given, Brunswick, Maine,

"Sir: — I hold your note for $601, 'payable at Bath,' 3 — 6 January, and protested for non-payment. This note I received in December, 1855, for a debt due to me by the insurance office, discounting interest only. I was then informed that you were able to pay your note and would do so.

"I have, therefore, to request you to pay the same without

delay, as it is an inconvenience and loss to me not to receive the money now.

"It is easy to prove what I state, and it is well settled that no off-set can be made by any claim that you may have against the office, to whom you gave the note at first, as it was negotiable, and all mutual offices have sold their stock notes, when necessary, as they form their capital. The principle is quite clear and settled in law and equity.

"I remain as ever,

"Richard C. Cabot, No. 34 Doane St."

"Boston, Feb. 5, 1857.

"J. C. Given, Esq.,

"Dear Sir: — I have received yours of 29th ult., and now, in compliance, send you an exact copy of your note, without any addition or omission, except the memo. of the notary of protest, in red ink, and which, of course, was not on the note when you signed it.

"I can easily prove that I took this note of the company through Mr. Athearn, one of the directors, in December, 1855, in part payment for money which the company owed me, discounting interest six per cent. I paid for the note as cash. Mr. Athearn, at the time, assured me that it was a very good note, which would certainly be paid, and offered to guarantee it for five per cent. I then inquired of a professional man, and was informed that you could make no off-set to the note, under the circumstances, in case you had any claim on the company, or should have at any time afterwards, and this is undoubtedly the fact. I was not compelled to take your note, as I then could have had other notes, or other property or money. I regret that you should suffer any loss; I know from experience how disagreeable it is, but it is in no way my fault; I have been defrauded by directors of corporations out of ten times this amount. I am obliged to "grin and bear it." I find that all persons who have demands on me, make me pay to the utmost that law or justice will allow, and, as I do not wish to reside in an alms-house the remainder of my days,

in order to prevent this, I must collect what is due to me as far as possible. If you have any acquaintance here to whom you wish me to go and verify what I write to you, I will do so willingly. I remain yours, &c.,

"Richard C. Cabot."

The defendant offered to put in the policy of insurance, and to prove that the note declared on was given for said policy, that a loss happened under said policy, as set forth under his brief statement, and that the plaintiff knew, when he took the said note, that it was given for the policy of insurance aforesaid.

The Court offered to admit any testimony on the part of the defendant, to prove that the note did not come into the hands of the plaintiff before its maturity, or in due course of business, or for a valid consideration. But, without such evidence, other than what had already been introduced, the Court excluded the testimony offered by the defendant, holding that, under the circumstances of the case, the plaintiff could not be affected by any thing contained in the policy; and that the defendant could not off-set his claim against the insurance company in this action. The Judge also ruled, as matter of law, upon the facts proved, that the indorsement of the note was a valid and sufficient indorsement.

The case was then withdrawn from the jury, to be submitted to the full Court.

If the action was maintainable upon the foregoing testimony, and the foregoing admissions and exclusions of testimony were correct, the defendant was to be defaulted; otherwise the action was to stand for trial.

S. & D. W. Fessenden, for plaintiff, contended —

1. That the evidence of Tyler to prove that Folger was president of the company was admissible. *Bank of U. S.* v. *Dandridge,* 12 Wheat. 64; *Stage Company* v. *Longley,* 14 Maine, 448; *Warren* v. *Ocean Ins. Co.* 16 Maine, 439; 2 Greenl. Ev. § 62.

2. Folger being president of the company, and, by the by-

laws, treasurer *ex officio*, it was within the scope of his authority to indorse the note. Angell & Ames on Cor. § § 284, 299, *et seq.*; *Bank* v. *Warren*, 7 Hill. 91; *Fleckner* v. *Bank of U. S.* 8 Wheat. 338; *Howland* v. *Myer*, 3 Comst. 290; *Aspinwall* v. *Myer*, 2 Sandf. 180; *Bank* v. *Atlantic Silk Co.* 3 Met. 282.

3. The note was negotiable, and indorsed to plaintiff before maturity. He is not subject to the equities between the original parties. 1 Parsons, 209; *Adams* v. *Smith*, 35 Maine, 324; Edwards on Bills and Notes, 145; *Sweetser* v. *French*, 2 Cush. 310.

Barrows argued for the defendant—

1. There is no legal evidence that Folger was president of the company. The records of the company were the best evidence on that subject; and, unless some reason was shown why the records could not be produced, parol proof should not have been admitted. 1 Greenl. Ev. § § 87, 88; 2 Greenl. Ev. § § 60–64; Starkie's Ev. 102; *Bank* v. *Atlantic Silk Co.* 3 Met. 282.

2. But, if it was sufficiently proved that Folger was president of the company at the time the note was indorsed, it does not follow that he had any authority to make such indorsement. Special authority for that purpose should have been proved. No such authority was shown. The idea that the president had such authority, unless specially conferred by the directors, is expressly negatived by the sixteenth section of the by-laws,—"no promissory note or obligation shall be given without the previous vote of the committee of finance."

3. The plaintiff himself offered no evidence that the note was transferred to him in good faith, in the usual course of business, and for a valuable consideration. He ought, therefore, to have been nonsuited. Bayley on Bills, 492; *Rees* v. *Marquis of Headfort*, 2 Campb. N. P. C. 574; *Heath* v. *Sansom*, 2 B. & A. 291; *Aldrich* v. *Warren*, 16 Maine, 466; *Monroe* v. *Cooper*, 5 Pick. 412.

4. We offered to prove that the plaintiff knew that the note was given for a policy of insurance. He knew, therefore, of the equities between the original parties, and took the note subject to these equities as much as if the note had been overdue. Bayley on Bills, 544; 1 Parsons on Con. 215; *Knapp* v. *Lee*, 3 Pick. 452; *Thompson* v. *Hale*, 6 Pick. 261.

5. But the plaintiff advanced nothing for the note. He merely discharged a demand which he previously held against the company. It was not such a consideration as precludes the maker from availing himself of his claim in set-off against the company. The plaintiff and the defendant each held a policy of insurance from the company, and the equity of neither was superior to that of the other. *Howes* v. *Smith*, 16 Maine, 180; *Rosa* v. *Brotherson*, 10 Wend. 85; *Evans* v. *Smith*, 4 Binn. 367; *Bay* v. *Coddington*, 5 Ch. R. 54; *Coddington* v. *Bay*, 20 Johns. 637.

The opinion of the Court was drawn up by

DAVIS, J.—On the eighth day of November, 1855, the defendant procured a policy of insurance from the Commercial Mutual Marine Insurance Company, for the sum of $8000, on the ship Marcia Greenleaf, giving therefor his negotiable promissory note for $601, payable in fourteen months. In December following, the plaintiff, having a claim against the company, received the defendant's note therefor, in part payment, indorsed as follows:—"Com. M. M. Ins. Co., by George H. Folger, President." The case shows that the plaintiff took the note in good faith, long before its maturity, and for a valuable consideration. *Adams* v. *Smith*, 35 Maine, 324.

The defendant afterwards met with a loss within the terms of his policy of insurance, and, the company having become insolvent, it has not been paid. He thereupon declined to pay the note to the plaintiff; and he has filed his account for the loss in set-off in this action. But it is obvious that, if the note was legally transferred to the plaintiff, this account in set-off cannot be allowed. The defendant took upon himself

the risk of the solvency of the insurance company; and, if he chose to give a negotiable promissory note for the policy, he cannot complain of any *bona fide* holder for requiring him to pay it. The only question, therefore, is as to the validity of the transfer of the note to the plaintiff.

It is said that the case does not show that Folger was president of the company, because it was not proved by the record of his appointment. There are some cases, in which a corporation is a party, involving the authority of the officers, in which their authority must be proved by the record. But the cases are numerous in which their authority has been proved by parol evidence. In this case, the action is between other parties, neither of whom has the custody of the records, and before a Court in another State, so that there is no compulsory process by which they can be produced. It is proved that Folger was the acting president, prior and subsequent to the time when the note was transferred. He signed the policy of insurance, as president, for which the note was given, only one month before it was transferred; and no annual meeting could have intervened for the choice of any one in his place. We think the evidence is sufficient that he was authorized to act as president at the time.

But it is said that, if he was president of the company, and so, according to the customary mode of transacting such business, authorized to transfer the note, the presumption that he was so authorized is disproved by the by-laws, which are a part of the case. And it is true that no specific authority to indorse notes is given by the code of by-laws to the president, or to any other officer of the company. But it does not follow that such authority is not necessarily implied in powers which are granted.

And it should be remembered that this is not an action against the company as indorsers, upon the contract of indorsement. It is not a case embraced in the terms of § 16 of the by-laws. It is a suit between *other parties*, involving only the authority of the president *to sell the note in payment of a demand against the company*. And, in addition to the presump-

tion arising from the usual course of such transactions, the president is made, by the by-laws, *ex officio* treasurer; and so he had the legal custody of the assets. He was also authorized to represent the company as stockholders in banks and other corporations; to receive all moneys coming due, and give good and sufficient discharges for the same; to adjust and pay all losses, &c. He transferred the note in suit, before any loss had happened to the defendant, and in payment of a loss that the plaintiff had suffered. And we are satisfied that the transfer was valid and sufficient to pass the title. The rulings of the presiding Judge were correct, — whether as matters of law or of fact being immaterial, as the case did not go to a jury. According to the agreement of the parties, the defendant must be defaulted.

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

YORK & CUMBERLAND RAILROAD CO., *Petitioners for Review, versus* THOMAS M. CLARK.

No exceptions will lie to the refusal of the Judge at *Nisi Prius*, to grant a review.

PETITION FOR REVIEW of an action in which the defendant formerly recovered judgment against the petitioners. At the hearing, before DAVIS, J., the petition was ordered to be dismissed, and the petitioners filed exceptions.

As the only question determined by the full Court was whether exceptions would lie to such an order, a report of the facts in the case becomes unnecessary. The case was elaborately argued by

J. C. Woodman, for petitioners,

F. O. J. Smith, for defendant.

The opinion of the Court was drawn up by

MAY, J.—This case comes before us upon exceptions taken to the ruling of the Judge at *Nisi Prius*, in ordering the dismissal of a petition for review upon the whole case as presented before him. His adjudication, therefore, must have involved the determination of all such questions of law and fact as arose at the hearing. That both questions of law and fact were embraced in that adjudication is apparent, from the statement of the case, as contained in the exceptions. There is, however, no specific ruling in relation to any matter of fact or law, other than what relates to the admissibility of certain evidence, which was objected to by the petitioner, and admitted. Upon the merits, the only ruling consists in the order of dismissal.

Assuming that this order, in the judgment of the full Court is erroneous, and that the review prayed for should have been granted, the question arises whether this Court have any power of revision upon exceptions taken to the action of the presiding Judge. It is clear that, if exceptions will lie and are sustained, the case can only be remanded for a rehearing at some *Nisi Prius* term in the county from which it came. If error has occurred, we have no power to render such a judgment, as, in view of all the facts, law and justice may require.

It is nevertheless true, as is often repeated in the learned argument for the petitioner, that courts are established for the administration of right and justice, "freely and without sale, completely and without denial, promptly and without delay." The *modes*, however, by which these ends are to be accomplished, are fixed by the constitution and the laws. The great end of all judicial investigation and proceedings is the establishment of justice between the parties litigating. Judges are appointed, and juries are empanneled for this purpose, and appropriate functions are assigned to each.

While it is true that juries are the judges of the facts, and courts, of the law, it is equally true that only such facts are

for the jury, as enter into the final judgment of the case, whilst all the facts, which are merely incidental to the trial of a cause, belong entirely to the Court. Thus, in jury trials, whether civil or criminal, the facts, having a bearing upon the issue which is being tried, are for the jury, and their finding will be conclusive upon the parties, unless it afterwards appears, to the satisfaction of the Court, that there are other facts affecting the action, or fitness of the jury which tried the cause; or which, after using due diligence to ascertain them, were *unknown* to the party at the trial, and *subsequently* discovered, on account of which justice requires that a new trial should be had.

Whether a verdict or a judgment which has been rendered shall be set aside, is a question for the Court, and the facts bearing upon that question, as well as the law, belong exclusively to that particular tribunal to which, under our statutes, the power which is invoked is intrusted. In some cases, the facts, which are to be determined as the basis of action, are left to be decided by a single Judge; as where the ground of the motion is newly discovered evidence or the relationship of one of the jurors to a party in the suit. So, too, in the case of a judgment upon default, whether the party against whom it was rendered had due notice of the suit, or submitted to a default without any undue negligence on his part, through some misapprehension or mistake, when he had a reasonable ground of defence, and intended to have made it, and whether such party is entitled to a further hearing, are all questions for a single Judge.

In other cases, the action of the law court is required; as where the motion is to set aside a verdict as against the evidence. The law deems a verdict which has been rendered by the concurrence of twelve men, duly qualified to sit, and who are presumed to have been impartial, unbiased, and beyond the influence of any corrupt motive, too sacred to be set aside as against evidence by a single Judge. The statute, therefore, in such a case, requires the concurrence of a full Court. R. S. of 1857, c. 77, § 17.

It is very apparent, from the numerous authorities cited by the counsel for the petitioner, that the class of questions above referred to, relating as they do, not to the final disposition of the cause, but simply to the incidents attending its progress, are addressed to the discretion of the Court, whether that Court consists of a single Judge or a full bench. To be sure, that discretion is not to be exercised arbitrarily, but to be guided and controlled, in view of all the facts, by the law and justice of the case, subject only to such rules of public policy as have been wisely established for the common good. The Judge, at *Nisi Prius*, and the full bench are to be governed by the same principles, and to seek the same great end. Each may err, but both are presumed to act with that legal wisdom and integrity which their position demands.

Until the passage of the R. S. of 1857, the decision of a single Judge, in questions of this kind, which were by law left to him, was final. His decision was not open to exceptions. Such has been the almost uniform policy of the law. The counsel for the petitioner, however, while he concedes this, contends that the case of a petition for review is an exception to the common rule. The question presented on such a petition is simply whether an existing adjudication shall stand or be set aside. It is addressed to the discretion of the Court as much as a motion to set aside a verdict, or for the continuance of a suit. The decision of the Judge or Court upon it determines nothing finally between the parties. No reason is perceived, therefore, in the case of a petition for review, why any different rule should be applied to a decision by a single Judge upon it, than is applied to other cases which are precisely similar in their character and effect. Still, if the statutes have made any distinction it must be enforced.

No question as to the right to except to an adjudication upon a petition in review had arisen in this State prior to 1852. Before the statute of that year, c. 246, § 13, such cases were heard by the full Court. By that statute, it was provided "that all petitions for 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." By the R. S. of 1857, c. 89, § 1, the same jurisdiction is conferred upon a single Justice, but this statute contains no provision with reference to any exceptions to his adjudication. If such right exist, it can only be by force of some other statute. "The granting of new trials at common law," says C. J. WHITMAN, in *Moulton* v. *Jose*, 25 Maine, 76, "is matter of discretion, and not subject to exceptions." The statute of 1822, c. 193, § 5, and the R. S. of 1841, c. 97, § 18, providing for summary exceptions, restrict the right to except to matters of law. Under these statutes, as well as that of 1852, before cited, all matters of fact or of discretion were left wholly to the determination of the presiding Judge, and his decision in relation thereto was final. *Moody* v. *Larrabee*, 39 Maine, 283; *Emerson* v. *McNamara*, 41 Maine, 566.

That portion of the statute of 1852 which provided for exceptions in matters of law, arising upon the hearing of petitions for review, seems to have been inserted to confer a right, which, under the then existing statutes, did not exist. Without such provision, the adjudication of a single Justice, upon a petition for review, would, undoubtedly, have fallen within the general current of authorities, wherein it is decided that exceptions will not lie to matters of discretion.

In view of the numerous decisions, and the statutes, we think it clear that, prior to the R. S. of 1857, c. 77, § 27, exceptions were not allowable in cases like the present, unless some question of law was therein distinctly presented.

The question now arises, whether, under the provisions of the statute last cited, the right to except *generally* in cases of this description has been conferred. If it has, it would seem to be open alike to both parties. Such a result might tend to obstruct the administration of right and justice "promptly and without delay." If a new trial should be granted, and the party against whom the decision should happen to be should except, before the question upon the exceptions could be considered and determined, much time might necessarily

elapse, and justice, which is the great end to be obtained, would be delayed. By this statute, it is provided that, "when the Court is held by one Justice, a party aggrieved by any of his opinions, directions or judgments in any civil or criminal proceeding, may, during the term, present written exceptions in a summary manner, signed by himself or counsel, and, when found to be true, they shall be allowed and signed by such Judge." In this revision of the statutes, the words "in any matter of law," contained in the preceding statutes, are entirely omitted. Does this change in the phraseology of the statutes sufficiently show that it was the intention of the Legislature to subject the opinions, directions or judgments of a single Judge, in matters of discretion submitted to him, to revision upon exceptions by the law court.

That the language of the present statute is sufficiently broad for that purpose is not to be questioned. Literally, it extends to any of the opinions, directions and judgments of any Justice, sitting at *Nisi Prius*, in any civil or criminal proceeding. But we are not satisfied, when considered in connection with the common law and the long series of decisions under the former statutes, that the legislative intention in the recent revision of the statutes was to allow exceptions in matters of discretion. To give it such a construction, would open the door for exceptions upon motions for continuance, as well as upon every other incidental or side issue which might arise in the progress of a cause, and be determined by a single Justice in the exercise of his discretionary power. We think such a radical change, in the long established mode of administering justice, would not have been left to mere implication, and, if it had been intended to subject the discretionary power of the Judge, in all cases, to the revision of a full Court, the Legislature would have manifested that intention by a direct and unequivocal use of language to that effect. If the generality of the language in the present statute is to be limited at all, (and it is conceded in the argument of the petitioner's counsel that it ought to be in relation to such questions as are merely incidental and interlocutory,) it is not perceived why

the limitation should not be held to apply to all questions of fact and discretion to the same extent it existed before.

It is urged that the right to except, under the present statute, should be extended to adjudications upon petitions for review, because, it is said, that a refusal to grant a new trial is decisive of the whole case, and therefore final. It is true, the effect of such refusal is to let the former judgment stand. But this effect is merely incidental, and follows upon such adjudication no more certainly than it does in the case of a refusal upon motion to take off a default or a nonsuit. So a refusal of the presiding Judge to grant a continuance may incidentally work the same effect. The final determination in the case is the judgment that stands.

In the case of *Leighton* v. *Munson*, 14 Maine, 213, C. J. SHEPLEY, in announcing the opinion of the Court, remarks, that "the party can have no strictly legal right to have an action, once disposed of," (in that case it was disposed of by a Judge in the exercise of his discretion,) "restored for that cause simply upon motion." He further says, "this Court," (that is, the law Court,) "may exercise such a legal discretion upon a proper application for a new trial, but the party might as properly except to the refusal of the Judge to continue the action to the next term, to enable him to obtain his testimony, as to except to the refusal to restore it upon motion, after it had been properly disposed of." As the same power which was vested in the law Court, at the time of this decision, is now vested in a single Justice, no reason is apparent why such Justice, in a hearing upon a petition for review, is not clothed with the same discretion as the law Court formerly was. In both cases, the discretion to be exercised must be the discretion of the particular tribunal in which the law has placed it. An exception to the refusal of a Judge to take off a default stands upon the same ground. *Thornton* v. *Blaisdell*, 37 Maine, 195. As there is no substantial difference in the effect of an adjudication upon a petition for review, and upon a motion to take off a nonsuit or default, all alike being matters of discretion, there is no reason why the same rule

in regard to the right of exceptions should not be applied to each, and to all other cases where a like discretionary power is exercised.

Perceiving no error in regard to any specific question of law raised upon the exceptions, the conclusion to which the Court have arrived, in view of the whole subject, and the laborious and able argument of the counsel for the petitioner, is, that the exceptions must be dismissed.

Exceptions dismissed.

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

THOMAS G. THORNTON *versus* YORK BANK *& als.*

The possession of one tenant in common of real estate is always presumed to be in maintenance of the right of all the tenants, if his acts will admit of that construction. And, if he enters upon the common property and takes the whole rents and profits, without paying over any share thereof to his co-tenants, such possession is not to be considered adverse, but in support of the common title.

But, if one tenant in common takes actual and exclusive possession of the entire estate, under a deed of the whole, duly acknowledged and recorded, from one who has no title, and receives the rents and profits, denying the right of any other person in the land, such possession is a disseizin of his co-tenants.

When such possession is apparently exclusive and adverse, the presumption of disseizin may be rebutted by other evidence showing that the rights of the co-tenants have been admitted or acknowledged.

The respondents to a petition for partition cannot avail themselves of the provision of the Revised Statutes of 1841, c. 145, (R. S. 1857, c. 104,) by which tenants may be allowed compensation for buildings and improvements made by them, or those under whom they claim.

If the respondents have no interest in the land, the petitioner is entitled to costs, though he recovers less than he claimed in his petition.

If there are several parcels embraced in the petition, and his share in some of them is less than he claims, if the respondents have no interest in those parcels in which he recovers less, the case is not within chapter 121, § 14, of R. S. of 1841, (R. S. 1857, c. 88, § 10,) and the petitioner is entitled to costs.

Thornton *v.* York Bank.

THIS was a PETITION FOR PARTITION of certain premises situated in Standish, lying between the Saco river and New river. George Scammon, under whom both parties claimed, owned the whole of the central portion, and one undivided half of the strips lying on either side. Scammon conveyed one third part of his interest therein to James B. Thornton, by his deed, dated Jan. 15, 1829; and Thornton conveyed the same to the petitioner, Jan. 17, 1831. By these conveyances, the petitioner acquired a title to one-third part of the central portion, and one-sixth part of the two strips. But in his petition he claimed one third part of the whole.

The respondents claimed, through mesne conveyances, under a deed from Scammon to Hobson and Came, dated Aug. 12, 1831. This deed purported to convey the entire estate; but the respondents actually acquired by it no interest in the strips. They did acquire whatever interest Scammon had remaining in the central portion. Under this deed, they took possession of the whole; and they claimed to hold it by disseizin. They contended, and, at the hearing before HOWARD, J., at the October term, 1855, they introduced evidence to prove that they had been in open, exclusive, adverse possession of the entire estate for more than twenty years before the filing of the petition. The petitioner introduced rebutting testimony; and the case was reported for the determination of the full Court.

Fessenden & Butler, argued for the respondents.

The respondents had such a possession as constituted a disseizin. It was not necessary that they should claim under a recorded title. *Ken. Proprietors* v. *Laboree*, 2 Greenl. 287. When such a defence is set up, the idea of a title, rightful in its origin, is excluded. *Jackson* v. *Newton*, 18 Johns. 356; *Sumner* v. *Stevens*, 6 Met. 337; *Melvin* v. *Proprietors of Locks, &c.*, 5 Met. 33.

The disseizin has not been purged by any entry of the petitioner with an express intention to take possession. *Young* v. *Withees*, 8 Dana, 165.

Negotiations for purchasing the interest of another are no recognition of a superior title in him. 18 Johns. 362, before cited.

Should the petitioner prevail, the respondents will be entitled to betterments. *Bracket* v. *Norcross*, 1 Greenl. 89; *Bacon* v. *Callender*, 6 Mass. 303.

In any event, the respondents will be entitled to costs, for the petitioner claims one-third of the whole premises, and his share in a portion is only one-sixth part. R. S. of 1841, c. 121, § 14.

Swasey argued for the petitioner.

Upon the point that there had been no disseizin, he cited *Colburn* v. *Mason*, 25 Maine, 434; *Barnard* v. *Pope*, 14 Mass. 438; *Fisher* v. *Dewerson*, 3 Met. 544; *Liscomb & ux.* v. *Root*, 8 Pick. 375; *Stetson* v. *Veazie*, 11 Maine, 408; *Tilton* v. *Hunter*, 24 Maine, 32; *Frye* v. *Gragg*, 35 Maine, 29; *Bates* v. *Norcross*, 14 Pick. 224; *Varney* v. *Stevens*, 22 Maine, 334; Co. Litt. vol. 1, b. 199; Cowp. 218; *Fairchild* v. *Shackleton*, 5 Burr. 2604.

The respondents are not entitled to betterments. *Liscomb* v. *Root*, 8 Pick. 376.

The opinion of the Court was drawn up by

TENNEY, C. J.—Both parties derive title from George Scammon, who received a deed from Joel Libbey, dated May 25, 1825, of certain real estate, which embraces the land in controversy. The petitioner's right is under the deed of Scammon to James B. Thornton, dated January 15, 1829, and is of one-third of one-half of a strip of land, eight rods in width on the Saco river, and of the strip of land four rods wide on the New river, and one-third of the residue of the premises, described in the petition, in common and undivided with others. The respondents claim under a deed from Scammon to Jabez Hobson and Abraham L. Came, dated August 12, 1831, through several mesne conveyances.

The defence is, that the respondents, and those under whom

they claim, have had open, notorious, exclusive and adverse possession of the whole land described in the petition, for more than twenty years prior to the date of the petition; and, if this defence should not prevail to its full extent, the respondents insist that they are entitled to be allowed a compensation, for the value of the buildings and improvements on the premises, made by them, and those under whom they claim.

"The possession or entry of one tenant in common, or joint tenant, is always presumed to be in maintenance of the right of all; and he shall not be presumed to intend a wrong to his companions, if his acts will admit of any other construction." Stearns on Real Actions, 41.

The occupation of the premises by Scammon, from the time of his conveyance to James B. Thornton till the date of his deed to Hobson and Came, is not in the least inconsistent with his possession, intended to be in conformity to his interest still remaining, and a full acknowledgment of the right which he had conveyed with covenants of warranty.

Scammon had no title to the portion of the estate which he had conveyed to James B. Thornton, and, consequently, his deed transmitted none of the same portion to Hobson and Came. But, if the latter took actual and exclusive possession of the entire estate, under the deed to them, taking the rents and profits to their own use, asserting their own exclusive property in the land, and denying the title of any other person, it was an adverse possession by them, and those claiming under them, and an ouster of the other tenants. Stearns on Real Actions, 41.

In *Prescott* v. *Nevers*, 4 Mason, 330, the defendant had a deed of the whole land, but his title extended only to an undivided fourth part, in common with other proprietors. He, however, made an actual entry into the whole, claiming the entire fee and right therein. It was held that his acts of ownership amounted to a disseizin of the co-tenants, for he entered as sole owner, and his possession was open and notoriously adverse to them. The Court say, "there can be

no legal doubt that one tenant in common may disseize another. The only difference between that, and the other cases is, that the acts which, if done by a stranger, would *per se* be a disseizin, are in the case of tenancies in common susceptible of explanation consistently with the real title. Acts of ownership are not in tenancies in common necessarily acts of disseizin. It depends upon the intent with which they are done."

If one tenant in common enter into the whole of an estate, under a deed duly acknowledged and recorded, from one who has no title, it is an actual disseizin of his companions. Stearns on Real Actions, 41. If a tenant in common enters on the common property, and takes the whole rents and profits, without paying over any share thereof to his cotenants, his possession is not to be considered adverse to them, but in support of the common title. *Parker* v. *Prop'rs of Locks & Canals on Merrimack river*, 3 Met. 91. And it has been held, in England, that even a refusal to pay such shares, is not sufficient evidence of an ouster, without denying the title. *Fisher & al.* v. *Prosser*, Cowp. 217.

Whether the possession of Hobson and Came, after taking their deed from Scammon, constituted an ouster of the petitioner, is a question of fact to be determined by the evidence; and the presumption arising from the possession, if apparently exclusive, that the occupants claimed the whole estate, and denied the right of the tenant, may be rebutted by proof. And the issue before us is, "did they oust the petitioner?"

The warrantee deed of Scammon to James B. Thornton, and that of the latter to the petitioner, were on record before Hobson and Came took the deed of Aug. 12, 1831. This was constructive notice to them of the title of the petitioner; and, hence, they are presumed to know that they could not hold adversely to him, without doing him a wrong, especially as both held under the same grantor. That Hobson and Came did not design to hold adversely to the petitioner, for a considerable time, at least, if at all, after they took their deed from Scammon, has some support from the omission on their

part to record the deed to them, dated Aug. 12, 1831, until May 6, 1835.

Moreover, it is in evidence, not contradicted, from Scammon, who was a competent witness under statute of 1855, c. 181, that, at the time of the conveyance to Hobson and Came, Scammon took back an obligation in writing, that they would convey one-third part of the premises owned by the petitioner, in the event that he would not confirm the sale as made to them; and Scammon was to repay to them $66,60, in case the reconveyance should be made. This obligation was a recognition of the petitioner's title, by the parties thereto. And the possession, which constructively passed by the delivery of the deed to Hobson and Came, cannot be regarded in fact adverse to the petitioner, but in conformity to the title which they actually acquired.

From the time that the deed was given to Hobson and Came, to the time when Hobson gave his deed to P. B. Abbott, the occupation of the premises was apparently the same as it long had been in connection with the saw-mill which was built by Hobson and Came, upon what is called the mill privilege, and which is no part of the land in dispute, for the accommodation of the owners of the mill and their customers, extending back to the year 1824, previous to the deed of Scammon to James B. Thornton. And this occupation had no characteristic indicative of an intention, on the part of Hobson and Came, to hold as against the petitioner an adverse, or even an exclusive possession, or to deny to him title in the premises.

While Abbott was in possession under his deed from Hobson, he is proved to have admitted, fully, that the petitioner had an interest in the land. This is evidence that he was holding the possession for his co-tenants, as well as for himself. It is true, that Abbott not only occupied a house which he built upon the premises, and other buildings, but that he enclosed a garden near his house with fence. But, when it is considered that the ground in question, not covered with buildings, was open to all, and used by those who had business

at the mill, the whole being covered with roads, according to the evidence, it cannot be treated as proof of an exclusive and adverse possession in him, who had freely admitted the petitioner's title, that he took effectual measures to protect his garden by a fence. The admission of the petitioner's title, and the fencing of the garden by Abbott, are perfectly consistent.

The petitioner, on Dec. 29, 1842, leased his right in the premises to Abijah Usher and Stephen B. Lane, for one year, a part of which right was underleased to P. B. Abbott, who occupied under the lease in 1843. The case discloses nothing tending to show that the lessees, or those claiming under them, were disturbed in their possession. This is certainly strong evidence that other tenants in common, under the title by deed, did not then design to claim adversely to the petitioner.

Upon a careful examination of the evidence, we are not satisfied that the respondents, and those under whom they claim, have held the premises so as to have acquired a title to the part conveyed to James B. Thornton, by an open, notorious, exclusive and adverse possession, for the term of more than twenty years.

It is very clear that the Legislature did not design that, in a petition for partition, the respondents can avail themselves of the provisions of the statute, by which a tenant may be allowed compensation for the value of buildings and improvements, made by them, or those under whom they claim. R. S. of 1841, c. 145, § § 22 to 31, inclusive. *Tilton* v. *Palmer*, 31 Maine, 486; *Liscom & ux.* v. *Root*, 8 Pick. 376.

Judgment for partition, according to the title herein decided as belonging to the petitioner.

A question has been argued in relation to costs. The petitioner having title to one-sixth part only of the two strips, one on Saco river and one on New river, is entitled to less land in the division than he claims in his petition. But Scammon acquired, by his deed from Joel Libbey, only one undivided half in the strips, and in his deed to Hobson and

Came, he reserved to himself, as not conveyed by the deed, one undivided half of eight rods on Saco river, and the whole of four rods, together with all water privileges on New river. Hence, Hobson and Came obtained no title to any part of these strips, under Scammon's deed to them. And the respondents have no title by deed, excepting under that of Scammon to Hobson and Came. Therefore, the petitioner did not hold his sixth part in the strips *in common* with the respondents; and, their title under the alleged adverse possession of over twenty years having failed, they have not succeeded in holding any thing, to which he has not shown title, in the strips.

We think the case does not come within the provision of R. S. of 1841, c. 121, § 14, so as to entitle the respondents to costs; § 13, c. 121. *Costs for the petitioner.*

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

JOHN GUNNISON, *Adm'r of Estate of* JOSEPH D. SADDLER, *versus* JOHN W. LANE.

In a suit brought by an administrator of an estate, one, interested therein as an heir, is a competent witness, by the provisions of the statute admitting parties and persons interested to testify.

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

This action was tried at April term, 1858. At the trial, the plaintiff offered *John Saddler*, the father and sole heir of the intestate, as a witness. The defendant objected to his admission, on the ground that the provisions of the statute, admitting parties and other persons interested as witnesses, do not apply to any cases where the party prosecuting, or the party defending, is an executor or an administrator. R. S., c. 82, § 83. And it was contended that, this being a case in which the plaintiff is an administrator, these provisions of

the statute could not apply to it, and no person interested could be admitted as a witness.

But the presiding Judge ruled that the word "cases," in the statute, § 83, is not synonymous with the word "suits," in § § 78 and 79; but it is restricted in its signification to the particular question of the admissibility of any witness offered.

The witness was permitted to testify; and the defendant filed exceptions.

Swazey, in support of the exceptions, argued that the witness was not rendered competent by the provisions of the recent statutes of this State.

By the statute of 1855, c. 181, § 1, it was enacted that witnesses should not be excluded on account of *interest*. By the second section, it was provided that the first section should not apply to *parties*.

The statute of 1856, c. 266, made *parties* witnesses.

By "the repealing Act" of 1857, both these statutes were repealed; and, until the repeal of the statute of 1855, an *interested witness*, in a case prosecuted or defended by an administrator or executor, was rendered competent, by the provisions of that statute.

The only statute that we now have, changing the common law in this particular, is the R. S. of 1857, c. 82, § § 78 to 83, inclusive.

The 78th section provides for the admissibility of parties and other interested witnesses to testify.

The 83d section excludes the application of any of the provisions of the 78th section, to cases prosecuted or defended by executors or administrators.

In this case, the plaintiff is administrator. The language of the 83d section is explicit and unambiguous. It admits of no construction, and, upon principle, needs none. It excludes all persons from being witnesses, who are interested as parties or otherwise, in actions like this. There are, obviously, good reasons for this exclusion. If an administrator, as a *party* plaintiff in an action, cannot be a witness, or the

defendant, there are good and sufficient reasons why the heir of the intestate should not be.

If this section of the statute admitted of any construction, none could be given to it so as to render the witness admissible, without doing violence to the language used.

It is always to be supposed that the Legislature intended the most reasonable and beneficial construction of their acts, when the design of them is not apparent.

The Court has no right, in construing a statute, to modify language clear and intelligible. The natural import of the words of a legislative Act, according to the common use of them, is to be considered as expressing the intention of the Legislature. The language of a statute is not to be enlarged or limited by construction, unless its object and plain meaning require it.

This statute is in derogation of the common law; and all such statutes are to be construed strictly. This is an established rule.

Gerry, for plaintiff, contended that the word *cases*, in § 83, means and is used in the sense of parties or instances. The whole section relates to parties. The latter clause of the same section clearly indicates that the construction, contended for by defendant, is erroneous and would be very unjust. If adopted, the testimony of interested witnesses could not be used in any event, while that of parties might be. The latter clause of the section provides that the deposition of a party, that has been taken, may be used after his death, if the opposite party is still alive. In this case, if the deposition of Saddler, deceased, had been taken before his death, it could be used in this case, because the opposite party is still alive. But, if the construction contended for by the defendant's counsel obtains, neither the deposition, no matter when taken, nor the witness, could be admitted in the case.

The COURT *sustained the ruling* of the Judge at *Nisi Prius*, and *overruled the exceptions.*

WILLIAM H. D. JOYCE *versus* MAINE INSURANCE COMPANY.

A description of a house in a policy of insurance, as "occupied by" the insured, is a description merely, and is not an agreement that the insured should continue in the occupation of it.

The question whether certain specified facts would increase the rates of insurance upon the property insured does not relate to matters of science or skill.

Such a question calls for the opinion of the witness upon the influence which certain facts would have upon others, and whether they would be induced thereby to charge higher rates of premium; and it is inadmissible.

The insured was bound by the terms of his policy to give notice to the company, if any thing should occur by the acts of others to increase the risk, the company thereupon having the right, at their option, to terminate the insurance. The risk was so increased, and the insured gave the company no notice; the house was subsequently destroyed, but the fire originated from causes in no way connected with the facts by which the risk had been increased. *It was held* that, as it could not be certainly assumed that the company, if notified, would have terminated the insurance, the liability of the company upon the policy still continued.

THIS was an action upon a policy of insurance, dated Sept. 17, 1855, upon the house of the plaintiff. The house was destroyed by fire, February 19, 1856, and notice thereof was given to the company. The plaintiff occupied the house himself at the time when the policy was obtained; but he subsequently moved out of it, and it was unoccupied at the time of the fire.

The defendants, at the trial before APPLETON, J., introduced an expert in insurance business, and proposed to ask him, whether, in his opinion, the rate of premium for insurance would be increased by vacating a dwellinghouse? The question was excluded.

The defendants then offered to prove that a small stable, which stood thirty feet from the house insured at the date of the policy, on land owned by another person, was afterwards, before the fire, by parties, not under the control of the insured, moved within fourteen feet of the house; and that no notice was given to the company by the assured of such increased risk, as he was bound to do by the terms of his policy,

though a reasonable time therefor had elapsed. But, it being admitted that the fire originated in the house insured, and was not communicated from any other building, the Court ruled that the facts offered to be proved would constitute no defence.

The Court also ruled that the words in the policy—"one story dwellinghouse occupied by" the insured—were words of description, and did not imply a warranty that it should be occupied by him during the term.

The defendants, thereupon, submitted to a default, subject to the opinion of the full Court upon the correctness of these rulings.

Shepley & Dana, for the defendants, argued:—

1. That the question proposed and excluded should have been admitted. It was clearly within the rules regulating the testimony of experts. 1 Greenl. Ev. § 440; *Webber* v. *Eastern R. R. Co.*, 2 Met. 147; *Hawes & al.* v. *New England Ins. Co.*, 2 Curtis, 229.

2. The plaintiff was bound by the terms of his policy to give the company notice of any increase of risk. And a neglect to communicate to the company any facts within the knowledge of the assured, which are material to the risk, will render the policy void. Angell on Fire and Life Ins. § 175.

3. If the plaintiff had notified the company of the increased risk, they would have terminated the insurance; and, by his neglect, they were discharged from their liability thereon.

Howard & Strout argued for the plaintiff.

The question proposed to the witness, as an expert, was properly excluded. It did not relate to a matter of science or skill, but called for the opinion of the witness upon the very fact to be determined by the jury. 1 Greenl. Ev. § 441; *Campbell* v. *Rickards*, 5 B. & A. 840; *Durell* v. *Bederley*, 1 Holt's Cas. 283; *Carter* v. *Boehm*, 3 Burr. 1918.

The question, whether the risk for insuring an unoccupied house would be greater than if occupied, is not one of science, but of mere conjecture, upon which there might be end-

less diversity of opinion. *Jefferson Insurance Co.* v. *Cotheal*, 7 Wend. 72.

The increase of risk by the acts of other parties did not affect the policy, if they in no way caused the loss. Angell on Fire and Life Ins. § 162; *Stebbins* v. *Globe Ins. Co.*, 2 Hall, (N. Y.,) 632.

The words of description in the policy were no agreement as to future occupation. *Catlin* v. *Springfield Insurance Co.*, 1 Sumner, 434; *O'Niel* v. *Buffalo Fire Ins. Co.*, 3 Comst. 122.

The opinion of the Court was drawn up by

TENNEY, C. J.—In the defence of this action, which is on a policy of insurance against a loss by fire, the opinions of certain persons, who were shown to have had experience in the business of insurance, as to the comparative risk of a dwellinghouse, which had been vacated after the occupation thereof, and when the occupation had continued;—and, whether the premiums of insurance would or would not be increased in consequence of the owner vacating the house, were offered, and, on the plaintiff's objection, excluded.

None of the inquiries related to matters of science and skill. 1 Greenl. Ev. § 440. A witness cannot give his views on the manner in which others would probably be influenced, if the parties acted one way or the other. Therefore, the opinion of a person conversant with the business of insurance, upon a question whether a premium would have been increased by the communication of certain specified facts, has been held inadmissible. 1 Greenl. Ev. § 441 and note (1) and (2).

The defendants offered to prove that a small stable, standing on a lot adjoining the one upon which the dwellinghouse insured was situated, owned by a third person, was removed to a spot nearer to the house insured, than that on which it stood at the date of the policy, and had been raised in height, and increased in other respects; this evidence was excluded on the plaintiff's objection.

It is stated in the policy, that "this policy is made and ac-

cepted in reference to the application for it, and to the conditions hereto annexed, which are hereby made a part of this contract, and are to be resorted to, in order to ascertain and determine the rights and obligations of the parties hereto, in all cases, not herein otherwise specially provided for." In the conditions referred to, as stated in the body of the policy, is the following, in number 4. — "If, after insurance is affected on any building or goods in this office, &c. the risk shall be increased, by any means whatsoever within the control of the assured, or if such building or premises shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect. If, during the insurance, the risk be increased, by the erection of buildings, or by the use or occupation of neighboring premises or otherwise, of which prompt written notice shall be given to the company by the assured, or if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance, after notice given to the assured or his representative, of their intention to do so, in which case the company will refund a ratable portion of the premium."

By the former of the two periods, quoted from the conditions, the acts of the assured, therein specified, are to be followed by a forfeiture of all benefit from the policy. In the latter, it is otherwise. If the evidence offered would embrace such a case as last described, which may well be doubted, but upon which no opinion is given, such use of the neighboring premises does not avoid the policy; but prompt notice to the company is alone required by the terms of the condition. The company cannot assume that they would have terminated the insurance, if the notice had been given of the removal of the stable from one part of the lot to another, of which the plaintiffs had no control, and, as the fire which destroyed the building was not due to the removal of the stable, no injury would be proved to have been done to the company, if this evidence had been admitted.

The house insured is represented in the policy as occupied in part by William H. D. Joyce. This cannot be an agreement that he should continue in the occupation, but it is merely descriptive of the house, such as is common in a deed of conveyance.

We are satisfied that the rulings were free from legal error.—According to the agreement of the parties, judgment is to be entered for the plaintiff.

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

STEPHEN S. LEE *versus* WILLIAM KIMBALL.

Where the consignee, in a bill of lading, sells the goods before their arrival, and assigns the bill of lading to the vendee, if the purchase is made in good faith, and in the usual course of business, the right of the consignor to stop the goods *in transitu* is thereby divested, notwithstanding the consideration of the sale was the payment of an antecedent debt.

It seems, that such an assignment of the bill of lading as *collateral security*, for an antecedent debt, would not divest the right of the consignor.

THIS was an action of TROVER for a quantity of coal. The case was submitted to the full Court upon an agreed statement of facts.

The plaintiff, a merchant in Baltimore, on the 28th of Oct., 1856, sold to John Cox & Co., of Portland, a cargo of Cumberland coal, for the gross sum of $974,29; and he shipped the coal, to be delivered according to the bill of lading, "to said John Cox & Co., or their assigns, they paying freight." Cox & Co. paid for the coal by two acceptances payable, one in sixty, and the other in ninety days.

Before the maturity of either of said drafts, and before the arrival of the coal in Portland, Cox & Co. became insolvent. But, before their insolvency, and before the arrival of the coal, they sold and conveyed it to the defendant by a bill receipted

in common form, and at the same time indorsed and delivered to him the bill of lading.

The draft of Cox & Co. first becoming due having been protested for non-payment, and they having become insolvent, the plaintiff claimed the right to stop the cargo of coal *in transitu;* and he seasonably exercised such right by taking possession thereof, before the vessel, having the same on board, came to anchor in the harbor of Portland, and tendering to the master the freight money due thereon.

The defendant had purchased the coal in good faith, in the usual course of business, in payment of a debt then due to him from Cox & Co., without any knowledge that it had not been paid for by them; and he paid the master of the vessel the freight thereon, and took possession, forcibly removing the agent of the plaintiff — who, thereupon, brought this action of trover.

Deblois & Jackson argued for the plaintiff: —

The fact that the coal was paid for by Cox & Co., by bills of exchange, did not defeat the right of the vendor to stop it *in transitu,* the vendees having become insolvent. *Newhall* v. *Vargas,* 13 Maine, 93.

This right of the vendor is a continuing lien upon the property, and cannot be divested by an assignment of the bill of lading.

The sale of the goods by the consignee, and the assignment of the bill of lading, in payment of an *antecedent debt,* is not in the usual course of business, and cannot divest the right of the consignor to stop the goods *in transitu.* Parson's Mer. Law, 63; *Stanton* v. *Eager,* 16 Pick. 476; *in re Westzinthus,* 5 B. & A. 201; *Salomons* v. *Nessin,* 2 D. & E. 678.

Fessenden & Butler argued for defendant: —

The facts in this case constitute a bar to the right of stoppage *in transitu,* according to well settled principles. Abbott on Shipping, title Stoppage in Transitu; *Lickbarrow* v. *Mason,* 1 Smith's Leading Cases, 507; *Winslow* v. *Norton,* 29 Maine, 419.

Nor does it make any difference that the goods were sold in payment of an existing debt. *Bank of Sandusky* v. *Scoville*, 24 Wend. 115.

The opinion of the Court was drawn up by

CUTTING, J. — In the celebrated case of *Lickbarrow* v. *Mason*, (reported in 6 East, 21,) it was settled that "the consignor of goods may stop them *in transitu*, before they get into the hands of the consignee, in case of the insolvency of the consignee; but, if the consignee assign the bill of lading to a third person, for a valuable consideration, the right of the consignor, as against such assignee, is divested." Such, now, is the established rule of commercial law in England, and in this country.

It appears, from the facts agreed upon by the parties in the case presented, that while the cargo of coal was in transit, and previous to the insolvency of the consignees, they indorsed and delivered the bill of lading to the defendant, "who had purchased the coal in good faith, in the usual course of business, and without knowledge that the same had not been paid for."

But it is contended that a part of the consideration, being the payment of a pre-existing debt due from the consignees to the defendant, rendered the transfer ineffectual to limit the plaintiff's right of stoppage *in transitu*.

This Court have held that a pre-existing debt constitutes a valuable consideration in the transfer of negotiable paper. *Holmes* v. *Smyth*, 16 Maine, 177; *Norton* v. *Waite*, 20 ib., 175. *Vide*, also, *Bank of Sandusky* v. *Scoville*, 24 Wend. 115, and *Swift* v. *Tyson*, 16 Pet. 1. And we think there is no distinction in principle between those cases and the one under consideration. A debt due from a person *solvent* at the time of the negotiation should be considered, when surrendered, equivalent to the payment of money; for, as was well remarked by BRONSON, J., the maker could have paid his note, and then in lieu thereof received back the money. "It is not the case of a note received in security of a pre-existing debt,

without parting with any thing at the time." So here, the coal was received in *payment* and *discharge* of the debt, and not as *security;* and the authorities cited by the plaintiff's counsel apply only to the latter, as does also the second section of R. S., c. 31, which refers to "security for an antecedent demand," and is in affirmance of the commercial law upon that subject. *Plaintiff nonsuit.*

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

HORACE P. STORER *versus* ELLIOT FIRE INSURANCE CO.

A policy of insurance was obtained, not from the defendants, upon a stock of goods and merchandize contained in a certain building designated in the policy. Subsequently, another policy of insurance was obtained of the defendants, upon a stock of merchandize "in the chambers" of the same building. The goods *in the chambers* were destroyed by fire. In an action upon the latter policy, *it was held* —

That there was a latent ambiguity in the policies, in regard to the merchandize intended by the parties to be embraced therein, properly explainable by parol testimony; and —

That, it being proved the goods in the chambers were not intended to be included in the first policy, the defendants were liable for the whole loss.

THIS is an action upon a policy of insurance on "a stock of merchandize contained *in the chambers* of a four story brick and slated building" on Middle street, in the city of Portland. The policy was dated, April 30, 1856, and contained these stipulations, among others, — "Other insurance permitted without notice, until requested."

"And it is further agreed, that in case there should be any other insurance, made as aforesaid, on the property hereby assured, whether prior or subsequent, the assured shall be entitled to recover, on this policy, no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon."

It appeared in evidence, that the plaintiff had a policy of insurance from the Howard Fire Ins. Co., dated Sept. 25, 1854; another from the Springfield Co., dated Sept. 13, 1853; and another from the Hampden Ins. Co., dated Nov. 6th, 1854. These policies had been renewed so that they were all in force at the time of the fire, June 24th, 1856. The description was substantially the same in all of them, being "a stock of dry goods contained in a four story brick store," referring to the same building described in the policy in suit.

By the first three policies, the goods of the plaintiff "in the building," were insured. By the last policy, being the one in suit, the goods "*in the chambers* of the building," were insured. The loss upon the goods in the chambers was $4488,67. And the defendants contended that these goods, though in the chambers, were necessarily "in the building," and were embraced in the other policies. If this were so, the defendants were not liable for the *whole loss*, but for their proportion, only, with the other companies.

Hereupon the plaintiff introduced evidence, subject to the objection of the defendants, that, at the time when he procured the first three policies, he did not occupy the chambers, and had no goods there; that the agents of the companies examined his stock, as it then was situated, in the lower stories of the building; and that it was then understood by him and them, that the policies covered such goods, only, as he should keep in the portions of the building then occupied by him.

It also appeared that the same person from whom, as agent, the plaintiff procured the policy in suit, was also, at that time, agent for the other companies, and knew of the other insurance.

At the hearing, before DAVIS, J., after the evidence was all in, the case was withdrawn from the jury, by the agreement of the parties, and submitted on REPORT, to the determination of the full Court.

The case was argued by *Fessenden & Butler*, for the plaintiff: —

The construction which the defendants would put upon these three policies, introduced by them, is, that they cover, by their very terms, goods *in the whole or any part of the "building or store."*

Looking at the face of these policies alone, without reference to any extrinsic evidence, it is sufficient to say, that their language will not bear such a construction. They simply describe the property as contained in a certain building, leaving it to be ascertained *aliunde* what the character of that building was, and in what part of it, (if a part,) the property insured was contained, and, in short, leaving all facts and circumstances to be ascertained by extrinsic evidence, which are necessary to apply these contracts to their subject matter.

In this view, the parol testimony introduced by the plaintiff in the case becomes not only admissible, but necessary and indispensable to the ascertaining of the intention of the parties, and the right construction of these policies.

It is well settled that parol evidence is admissible under such circumstances.

It is always permitted to show by parol evidence the situation and relation of the parties to a written instrument, under what circumstances it was made, to ascertain the subject and apply the words of the instrument to it, especially, as in the case at bar, where the terms are general. 1 Greenl. Ev. §§ 282, 286, 288; *Knight* v. *N. E. Worsted Co.*, 2 Cush. 271, 283, *per* SHAW, C. J.; *Philbrook* v. *N. E. Mut. Fire Ins. Co.*, 37 Maine, 137; *Per* TENNEY, C. J., quoting language of WHITMAN, C. J., (in *Cummings* v. *Dennett*, 26 Maine, 397,) with approval; *Cushman* v. *North Western Ins. Co.*, 34 Maine, 487; *Stacey* v. *Franklin Ins. Co.*, 2 Watts & Sarg't. 506, 546.

The attention of the Court is called particularly to the last of the above cases, not only upon the point to which it is cited, but as covering the whole ground of the case at bar.

The admissibility of this testimony comes under the well settled rule of law, "that if the contract be intelligible, and

the evidence shows an uncertainty, *not in the contract*, but in *its subject matter*, or its *application*, other evidence which will remove the uncertainty is admissible. Parsons on Contracts, vol. 2, p. 72, and cases cited in note U.

The parol testimony, sought to be introduced, would not vary or contradict the policy in suit. It would add nothing to or subtract nothing from what is written, nor change it in the least. It shows the property insured *was contained* in *the building*, agreeing with the description in the policy; and further identifies it and points it out.

While policies of insurance are governed by the general rule, that they cannot be varied or contradicted by parol evidence, yet, it may be safely said that their subject matter, like many other mercantile contracts, makes it necessary to go out of the written instrument, in order to interpret it, more frequently than in most contracts.

Policies are to be construed liberally, according to the intention of the parties, for the indemnity of the insured, and the advancement of trade. 1 Burr. 345; 2 Rain. 373.

Shepley & Dana argued for the defendants: —

The other policies covered all the merchandize belonging to the plaintiff in the whole building. Such is the literal reading of them. There is no ambiguity in the description; and parol testimony, to prove that such was not the contract of the parties, was inadmissible.

The defendants are, therefore, liable for their proportion of the loss, only, with the other companies.

The rule of construction, in case of double insurance, will be found in *Lucas* v. *Jefferson Ins. Co.*, 6 Cowen, 635.

The same person being agent for all the companies, they are presumed to have had notice of this insurance. *Sexton* v. *Montgomery Ins. Co.*, 9 Barb. 191; Angell on Life and Fire Ins. § 91.

The opinion of the Court was drawn up by

GOODENOW, J. — This is an action on an insurance policy, dated April 30, 1856. The writ bears date Dec. 17, 1856.

It was admitted that the fire took place June 24, 1856, and that the plaintiff sustained a loss thereby, to the amount of $4488,67, which sum, with interest thereon from July 26, 1856, the plaintiff is entitled to recover of defendants, if he is entitled to recover his *whole loss from them*, without contribution from other insurance companies.

The defendants offered, subject to objection, a policy of Howard Fire Insurance Company, dated Sept. 25, 1854; a policy of Springfield Fire and Marine Insurance Company, dated Sept. 13, 1853; and a policy of Hamden Insurance Company, dated Nov. 6, 1854, to the plaintiff; and also the application on which the policy in the office of the Springfield company was founded; and the application, dated April 28, 1856, on which the policy in suit was founded. It was admitted that these policies were renewed yearly, until the fire. The plaintiff was insured under defendants' policy, "$5000, on his stock of merchandize contained in the chambers of a four story brick and slated building, occupied by him and others, situate on the northerly side of Middle street, and extending through to Temple street, in Portland, Maine, as per application and plan, No. 6147, on file at this office, forming part of this policy and warranty on the part of the assured."

The policy further provided that, "other insurance (should be) permitted without notice, until requested." And "that, in case there should be any other insurance made as aforesaid, on the property hereby assured, whether prior or subsequent, the assured shall be entitled to recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon."

The plaintiff was insured in the Howard Fire Insurance Company, $2000, "on his stock of dry goods and fixtures of store, contained in a four story brick store, situate on Middle street in said Portland."

He was also insured in the Hamden Fire Insurance Company, $2000, on his stock of merchandize, composed principally of dry goods and ready made clothing, contained in a

four story brick building on the northerly side of Middle street."

Also, in the Springfield Fire and Marine Insurance Company, "$5000, on his stock of dry goods and fixtures contained in a four story brick store, situate on Middle street and on Temple street, and being numbered 125, Mussey's Row, so called, as described in a survey, No. 143, on file in this office," which is a part of the policy.

The application states the insured property to be "in a four story brick store, slate roof, situated on Middle street, in Portland."

The plaintiff, being called by his counsel, testified that, at the times said three policies, in the Springfield, Howard and Hamden offices, were issued, he occupied part of a building known as the "Mussey block," on the north-westerly side of Middle street, in Portland; that L. D. Hanson & Co.'s store formed a part of said block; that their store was separated from the other part by a brick wall, from bottom to top, and that they occupied from cellar to attic, said store being arranged to be so occupied, with stairs inside communicating with the different stories, and there was no access to the chambers excepting through the room in the lower floor. This store was No. 19, on Middle street. The other part of said block was finished for two stores, on the ground floor, with basements under them, and the chambers over them were occupied as lawyers' offices, and for other purposes. After going into a more minute description, he states that his store consisted of the ground floor, and basement under it. It had no connection with any other part of the building. It was known as No. 125. The chambers were numbered 123. At the times the insurance was effected in the Springfield, Howard and Hamden offices, he had no right in any other part of the building. The chambers were then occupied by other parties. That, in 1855, he went into the wholesale business, having been previously engaged in the retail trade; that, at different times during the year 1855, he hired these chambers in the building, two, at first, on the second floor, then the room

in the third story — there was no connection between these chambers; they were hired at different times, and at different rents. The chamber in the third story was used as a store-room for whole bales and packages of goods; there was no way of passing from his store to either of said chambers, without going into the street.

The plaintiff also testified, that the agents of the Hamden and Howard offices, and of the Springfield office, when they took the risks, examined the premises, and he pointed out to them the portion of the building occupied by him as his store, and wherein he wished insurance, and the premium was fixed upon such examination; that he did not have any intention of change of business, or of hiring these chambers at the time insurance was effected in these offices. After he had hired the three chambers, he applied to the agent of the three offices, before named, and obtained a separate insurance in the defendant company, of which the same person was also agent, and that he charged a higher premium, the risk being greater.

The third story chamber, where the goods were lost, was next to Temple street, which was narrow, and opposite were wooden buildings, and just above was a livery stable from which the fire took; that he hired this chamber after the last renewal of the other policies. At the time of the fire, the stock in the store No. 125, that is, the lower floor and basement, was between $25,000 and $30,000, and the loss there amounted to about $2,500.

It is contended, on the part of the defendants, that the three first policies, as well as the policy of the Elliot Company, covered the stock of the plaintiff in the chambers of the four story brick store, the only distinction being that the policy of the Elliot Company covered that in the chambers *alone*, while the other policies covered whatever he had in either or all the four stories. And, also, that there was no ambiguity in the descriptions in the policies.

Did the three policies, or either of them, introduced by the defendants, cover the merchandize in the chambers? If they

did not, it will become unnecessary to consider the second proposition of the defendants.

Taking into view the several descriptions contained in the four policies which have been introduced in evidence in this case, we find a latent ambiguity, which may be removed, and which, in our opinion, has been removed by parol testimony. The parol testimony introduced does not vary or contradict the language of the policy on which this suit is founded. It only goes to show where the property was to be found, to which the policy was intended to apply. The building, in which the goods were, may be found without the aid of parol testimony. But it is found to contain other occupants beside the plaintiff, with different entrances, and carrying on different kinds of business. Were the policies intended to apply to goods in the whole building? The parol testimony shows that the plaintiff occupied only a part of it, when the three first policies were issued. It shows the part he occupied when the last policy was issued, which was "on his stock of merchandize, contained in the chambers of a four story brick and slated building, occupied by him and others," &c.

We are of opinion that the parol testimony offered was admissible, and that the three first policies did not, nor did either of them, cover the merchandize in the chambers or any part of it; and that, therefore, the plaintiff is entitled to recover of the defendants for his *whole loss*, as before stated.

Defendants defaulted. Damages, $4488,67, *and interest on the same from July* 26, 1856.

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

NATHANIEL F. CUMMINGS *versus* CHARLES F. LITTLE *& als.*

In an action upon a promissory note against several persons, by a holder having express or implied notice that some of them became parties to it as sureties, if the fact is not apparent upon the face of the note, it may be proved by parol testimony.

Whenever one having no interest in a note becomes a party to it, at the request and for the accommodation of another, the relation of principal and surety exists; and the original holder, between whom and the principal the consideration passed, is presumed to have knowledge of the fact. And, if such note is transferred after it is dishonored, the indorsee has implied notice of the fact; and he takes the note subject to the equities existing between the original parties.

A surety upon a promissory note, upon payment by him, is entitled to be subrogated to all the rights and securities of the holder, for the purpose of obtaining reimbursement; and it is the duty of such holder, having such securities from the principal, to retain or dispose of them for the benefit of the sureties. And, if holding such securities, he surrenders them to the principal, without the assent of the sureties, he thereby discharges them to the amount of the value of the securities so surrendered.

Where two persons signed a note as sureties for a third, and the holder, having collateral security from the principal, of less value than the amount of the note, surrendered it to him, without the assent of the sureties, the principal is still liable for the whole note, and the sureties for the excess above the value of the security surrendered.

But if they are all sued in one action, being liable for different sums, the plaintiff cannot recover against either.

THIS case was submitted to the full Court, upon REPORT of the evidence by DAVIS, J. The facts sufficiently appear in the opinion of the Court.

The defendants were joint and several promisors upon three promissory notes, payable to Wendall P. Smith or order. Smith also held a mortgage from one of the defendants, of whom he had the notes, of personal property of less value than the amount of the notes. Afterwards, without consulting the other defendants, who were in fact sureties on the notes, though not signing as such, he discharged the mortgage. At a still later period, the notes having been long overdue, he transferred and indorsed them to the plaintiff in this action. One of the defendants has been defaulted. The other

defendants introduced parol evidence, subject to the objection of plaintiff, that they became parties to the notes as sureties for the one who has been defaulted; and they contended that the surrender of the mortgaged property, by Smith, while he held the notes, discharged them from their liability.

Anderson & Webb, argued for the plaintiff:—

1. Testimony that any of the signers were sureties only was improperly admitted, it not having been shown that the payee of the notes or the plaintiff had any knowledge of such relations. *Price* v. *Edmunds*, 10 Barn. & Cress. 578; *Sprigg* v. *Bank of Mount Pleasant*, 10 Peters, 257.

2. The promisee of the notes was not restricted to look to his collateral security for payment; but he might have his action against the promisors, and abandon and relinquish all claim upon the mortgaged property, without impairing the validity of the notes.

3. If the signers were in fact principal and sureties, the holder, who had no knowledge of such relation, would not be affected by it; and knowledge of the position of the signers to each other cannot be inferred from the fact that the notes were given in discharge of the debt of one. *Wilson* v. *Foot*, 11 Met. 288.

4. The defence here set up is rested on the practice of courts of equity; and, if true in fact, and under any circumstances could be sufficient in law to relieve the signers, or any of them from liability, it cannot avail Edward P. Little; for he had the benefit of the mortgaged property, in the application of the proceeds of its sale to the payment of the joint notes of himself and C. F. Little; and consequently all equitable claim, on his part, to have the advantage of security, or to be protected from injury by their employment of it, is fully answered; nor can he disclaim knowledge of and assent to the disposition of the mortgaged property, for he, with his co-signer, had been sued on the notes dated Sept. 21, 1852; and the suit was discontinued, and one of the notes surrendered by Smith, upon receipt of the proceeds of the sale.

Rand argued for the defendants: —

1. The notes were indorsed to the plaintiff when overdue, so that he is in the position of Smith, the payee.

2. Parol evidence was admissible to prove that Foss and E. P. Little were only sureties. *Harris* v. *Brooks*, 21 Pick. 195; *Carpenter* v. *King*, 9 Met. 511; *Lord* v. *Moody*, 41 Maine, 127, and cases there cited.

3. Smith, by giving up the security of the furniture furnished by C. F. L., the principal, or by diverting it to a different purpose, without the assent of the sureties, discharged them. *Baker* v. *Briggs*, 8 Pick. 122; *Carpenter* v. *King*, 9 Met. 511; *Commonwealth* v. *Miller*, 8 S. & R., 452. And this, upon the well settled and equitable principle that a surety, upon paying a debt, is entitled to stand in the place of the creditor, and be subrogated to all his rights against the principal.

The opinion of the Court was drawn up by

DAVIS, J. — This is an action upon three promissory notes, of the following tenor: —

"Portland, Feb. 14, 1851.

"For value received, we, jointly and severally, promise to pay Wendell P. Smith, or order, $126,35 in one year from date.

"C. F. Little,
"E. P. Little,
"Alexander Foss."

The notes differ only in the time of payment. And C. F. Little gave to Smith a mortgage of personal property, valued at $414, of the same date of the notes, to secure the payment thereof. These notes remained in Smith's hands until they were overdue. While he held the notes in suit, he also held another note against C. F. Little and E. P. Little, amounting to about $300, not secured by mortgage. And he agreed with C. F. Little, that if he would pay the note for $300, he, Smith, would surrender and discharge the mortgage given to secure the other notes. This was accordingly done, without the knowledge or consent of either of the sure-

ties; and the following indorsement was made upon the mortgage:—

"Portland, Oct. 1, 1853. The lien on the within described property, created by the within mortgage, is hereby declared to be discharged, and the property no longer subject to said mortgage; but the debt within described, to secure which this mortgage was given, is still subsisting, and in no part paid. "Wendell P. Smith."

Smith afterwards transferred the notes to the plaintiff, who has brought this suit upon them as indorsee. Charles F. Little has been defaulted. But the other defendants contend, and have introduced evidence to prove, that they were in fact sureties, though the note itself did not so indicate; and that Smith, by surrendering the collateral security taken by him of the principal, has discharged them from their liability.

It is contended that, as these defendants did not sign the notes in such a manner as to show that they were sureties, evidence of that fact is not admissible. Such evidence has often been admitted in suits between such sureties for contribution. *Carpenter* v. *King*, 9 Met. 511; *Lord* v. *Moody*, 41 Maine, 127. And, where the action is against the signers, by a holder having express or implied notice of the fact that any of them are sureties, this fact may be proved by parol evidence. *Harris* v. *Brooks*, 21 Pick. 195.

It is said in argument that there is no evidence that Smith knew that Foss and E. P. Little were sureties. But, as the note was given to him, he could not have been ignorant that the consideration was between him and C. F. Little alone. He must, therefore, have known that the other defendants were sureties. And, as he transferred the notes when overdue, his indorsee, the plaintiff, had implied notice of the fact. When a person becomes a party to a bill or note, at the request and for the benefit of another, whether as guarantor, indorser, or surety, the relation of principal and surety exists, and must be regarded by all parties affected with notice. *Griffith* v. *Reed*, 21 Wend. 502; *Pitts* v. *Congdon*, 2 Comst.

352. This, of course, does not include an indorser of negotiable paper in the usual course of business. Such an indorser is not a surety for the maker, and is not discharged if the holder extends the time of payment, or surrenders collateral security taken from the maker. *Hurd* v. *Little*, 12 Mass. 503.

The plaintiff, in this case, having taken the notes after they were dishonored, they are subject to whatever defence might have been made to them in the hands of Smith. Did the discharge of the mortgage, by Smith, operate as a release of the sureties upon the notes?

That an extension of the time of payment given to the principal, or a surrender of collateral security, without the assent of the sureties, will discharge them from their liability, is a principle of law established beyond all controversy, by numerous authorities. 1 Story's Eq. § 325; *Baker* v. *Briggs*, 8 Pick. 122. And this—not on the ground that the contract is thereby changed—but on the ground that the surety is entitled to be subrogated to all the rights and securities of the creditor; and if the creditor, without the assent of the sureties, surrenders or impairs their rights, and thus deprives them of their means of reimbursement, he shall not afterwards compel them to pay the debt. *Bangs* v. *Strong*, 4 Comst. 315; *Clason* v. *Morris*, 10 Johns. 539; *Mathews* v. *Aiken*, 1 Comst. 599.

"The rule here is undoubted," says Lord BROUGHAM, "and is founded in the plainest principles of natural reason and justice, that the surety, paying off a debt, shall stand in the place of the creditor, and have all the rights which he has for the purpose of obtaining reimbursement." *Hodgson* v. *Shaw*, 3 Mylne & Keene, 183. And Chancellor KENT says:—"a surety will be entitled to stand in the place of the creditor, to enforce every security, and to have those securities transferred to him, that he may avail himself of them against the debtor. This right stands not upon contract, but upon the same principle of natural justice upon which one surety is

entitled to contribution against another." *Hays* v. *Ward*, 4 Johns. Chan. Cases, 130.

Applying these principles to the case before us, it is obvious that Smith was under obligation to hold the mortgaged property, not merely for his own benefit, but for the benefit of the sureties upon the notes secured by it. And if he chose, without their assent, to surrender the security without the payment of the notes, it would be contrary to equity and good conscience for him to be allowed afterwards to enforce the payment of the notes against them.

It is said, however, that these facts ought not to be held to discharge E. P. Little, because the money paid when the mortgage was discharged by Smith was appropriated in payment of a note on which he was liable with C. F. Little. And we should be of that opinion, if the money had been *the proceeds* of the mortgaged property. In that case, it could have made no difference to E. P. Little, whether it was applied to one note or another, he being liable on both. But it does not appear that the property was sold. C. F. Little may, at that time, have been able to pay the note without selling the property. Or, as the other note had been put in suit, E. P. Little may have furnished the money with which it was paid. Or, if C. F. Little procured it otherwise, it does not appear that he would not have paid the note, and thus settled the action commenced upon it, though Smith had refused to discharge the mortgage. The case is silent on all these points. And we cannot infer that the release of the collateral security was no injury to E. P. Little, merely from the fact that another note on which he was liable was paid on the same day.

A more difficult question still remains. The notes secured by the mortgage amounted to $505,40. The property mortgaged was valued at $414. One of the notes had been paid. But the three remaining notes, which are now in suit, had been on interest from their maturity; and, at the time when the mortgage was discharged, they amounted to more than the

value of the mortgaged property. It has been treated as a doubtful question, whether the value of the property stated in the mortgage, is not conclusive upon the parties. Admitting that it is conclusive, it is so only in regard to the value at the date of the mortgage. Any subsequent loss or depreciation may properly be taken into consideration in estimating the value of the property at the time when the mortgage was discharged. And it is obvious that the discharge of the mortgage could have injured the sureties only to the amount of the value of the property, so estimated. And, though the sureties are discharged to that extent, for the excess of the amount due at the date of the discharge, over and above the value of the property then released, the sureties are still liable. *American Bank* v. *Baker*, 4 Met. 164; *Bank* v. *Colcord*, 15 N. H. 119; 9 Watts & S. 36; 20 Penn. 297; 6 Sm. & Marsh. 24.

But it does not follow that they are liable in this action. If an action at law can be maintained upon the note, it cannot be against the principal and sureties *jointly*. For, in such an action, the defendants cannot be separated in the judgment. They must stand or fall together. But they are not liable for the same amount. How, then, can judgment be entered up? There is no provision of law by which the principal may be held for the whole, and the sureties for a part only, and several executions be issued accordingly. Nor have this Court general equity powers, as in some of the States, by which, after judgment against all the parties, the plaintiff may be enjoined from enforcing it against the sureties for the whole amount. Therefore, in an action at law, unless they may prove the release of the collateral security as an entire defence to the action, they have no remedy. *Baker* v. *Briggs*, 8 Pick. 122. In this action, if liable at all, they are liable for the whole amount of the note. Not being liable for the whole, they cannot be held in this suit for any part. If the plaintiff had released the principal, he would thereby have discharged the sureties. But the release of collateral security, of less value than the amount of the note, discharged the

sureties *pro tanto* only. As to the plaintiff's remedy for the balance, it is unnecessary for us to express any opinion.

According to the agreement of the parties, *a nonsuit must be entered.*

NOTE.—This case having been argued in writing, was submitted to all the members of the Court. The opinion was concurred in by TENNEY, C. J., and by RICE, HATHAWAY, APPLETON, and CUTTING, J. J. MAY and GOODENOW, J. J., dissented, holding that, in this action, judgment should have been rendered against all, for the amount recoverable of the sureties.

SIMEON CUMMINGS *versus* JOHN MAXWELL.

By c. 271, § 3, of the statutes of 1856, (R. S. of 1857, c. 46, § 26,) the remedy of a creditor of a corporation against the individual stockholders was by an action of the case, to be commenced within six months after the rendition of judgment against the corporation.

That Act affected remedies only, and was not unconstitutional, as impairing the obligation of contracts.

The remedy which creditors of corporations have against the individual stockholders, for the corporate debts, exists by statute only; and the Legislature may change or restrict it upon pre-existing, as well as upon subsequent contracts.

ACTION OF THE CASE. The plaintiff recovered judgment against the York and Cumberland Railroad Company for $166,33, March 19, 1855. He afterwards took out, successively, two writs of execution upon said judgment, both of which were returned in no part satisfied.

He, thereupon, on the 12th day of July, 1856, commenced this action against the defendant, as a stockholder in said company, who pleaded thereto the general issue, and, by brief statement, the statute of limitations. At the hearing before APPLETON, J., at the October term, 1857, the case was withdrawn from the jury, and submitted on REPORT to the full Court, with the agreement that a *nonsuit* should be entered if the action was barred by the statute of limitations.

E. L. Cummings argued for the plaintiff:—

1. It is a well established principle of law, that Courts will refuse to give statutes a *retrospective* operation, unless the intention is so clear and positive as by no possibility to admit of any other construction, the presumption being that all statutes are intended to operate prospectively only, unless the contrary is clearly and positively expressed. *Plumb* v. *Sawyer*, 21 *Conn.* 351; Bac. Ab. Statute, C. 4; Dane's Ab. Statute, c. 196, art. 1, § 19; *Hastings* v. *Lane*, 15 Maine, 134; *Whitman* v. *Hapgood*, 10 Mass. 439; *Oash* v. *Van Kleeck*, 7 Johns. 477; 1 Kent's Com. 455; Sedgwick on Statutory and Constitutional Law, pp. 188–190, 193–197.

2. Courts will not construe a statute of limitations fixing the time within which actions must be brought, to apply to rights of action existing at the date of such statute, unless a reasonable time is allowed in which to commence such actions before the statute takes effect. *Call* v. *Hager*, 8 Mass. 430; *Smith* v. *Morison*, 22 Pick. 430; Angell on Limitations, pp. 18 and 19; *Sturgess* v. *Crowningshield*, 4 Wheat. 207; *Ogden* v. *Saunders*, 12 Wheat. 262; *Proprietors of Kennebec Purchase* v. *Laboree & als.*, 2 Greenl. 88; Sedgwick on Statute and Constitutional Law, p. 134.

3. Statutes which impair the obligation of contracts, or disturb vested rights, are retrospective and void. *Wales* v. *Stetson*, 2 Mass. 146; *Foster & als.* v. *Essex Bank*, 16 Mass. 245, (271.)

4. The facts in the case at bar bring it within that principle. R. S. of 1841, c. 76, § 18; 1 Kent's Com. 455; Sedgwick on Statute and Constitutional Law, p. 135-6, 198 and 412; *Van Hook* v. *Whitlock*, 3 Paige's Chan. Cases, 409.

J. C. Woodman argued for the defendant:—

1. By the statute of 1856, c. 271, § 3, it is provided that the action against the stockholder "must be commenced within six months after the date of the rendition of judgment against the corporation." In this case, judgment was rendered against the corporation March 19th, 1855; and the suit

against the defendant was not commenced until July 12th, 1856, more than fifteen months afterwards. It was, therefore, barred by the lapse of time.

2. The statute of 1856 took effect on the 10th day of May; and the limitation of six months in this case did not apply until September 19th, giving the plaintiff ample time to commence his action before the remedy against the stockholders was barred by the statute.

3. The statute of 1856, in its application to suits for collecting pre-existing debts, was not unconstitutional. It simply shortened the time during which the stockholder should be individually liable for the corporate debts. It did not impair the obligation of any contract. No contract existed between the creditor and the stockholder. The contract was between the creditor and the corporation; and this remains in full force. But the remedy against the stockholder did not arise from any contract with him. It was given by, and depended solely upon, provisions of positive law, which are to be construed strictly. *Gray* v. *Coffin*, 9 Cush. 192.

4. The Legislature, therefore, might shorten the time of this liability, or remove it altogether. It was in the nature of a forfeiture, or a penalty; and there could be no vested right in it. The Legislature could repeal the statute creating it, and take away all remedy. And, even after a prosecution has been commenced, it will not be saved, if the statute is repealed, without a saving clause. *State* v. *Boies*, 41 Maine, 345; *Commonwealth* v. *Marshall*, 11 Pick. 350.

The opinion of the Court was drawn up by

HATHAWAY, J.—By R. S. of 1841, c. 76, § § 18, 19, 20, the remedy of the creditor of the corporation was to seize on execution the property of the individual stockholder, or, at his election, to have his action on the case. By statute of 1845, c. 169, the remedy against the individual stockholder is by *scire facias*, "*provided* that this Act shall not apply to any suits or actions now pending." And, by statute of 1856, c. 271, § 3, case is restored and *limited to six months* after

the rendition of judgment against the corporation. This action was not seasonably commenced. *Longley & al.* v. *Little,* 26 Maine, 162. *Plaintiff nonsuit.*

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

NEHEMIAH LARRABEE *versus* GEORGE W. RIDEOUT.

A., claiming to be tenant in common with B., filed his petition for partition of two distinct parcels of land, described in his petition, in separate counts; and, on the issue that B. was sole seized of both parcels, the verdict was in his favor as to the first count, and for the petitioner as to the second. At a subsequent term, (as the record shows,) it was considered by the Court that the petitioner take nothing in the premises described in the first count, and that partition be made of the premises described in the second; and commissioners were appointed to make partition. The action was then continued from term to term; and, at the term to which it was last continued, the petitioner appeared and had leave to discontinue his petition, and the respondent had judgment and execution for costs. In an action, on petition for partition, brought by the same petitioner against the devisee of the respondent in the former suit, for partition of the premises described in the first count of the former petition, it was *Held:* —

That such entry of discontinuance did not vacate the verdict and judgment so rendered for the respondent in the former action; and *that* the judgment in that suit is a bar to the petitioner's recovering against the respondent in this action. CUTTING, J., dissenting.

PETITION FOR PARTITION of two parcels of land described in separate counts in the petition. The petitioner claims three-eighteenth parts in common with the respondent of each of said parcels.

The case was entered at the January term, 1856, and tried at October term, 1857, before APPLETON, J. The verdict was for the petitioner. The case is presented on EXCEPTIONS, taken by the respondent to various rulings and instructions of the Judge at the trial.

It appears, by the bill of exceptions, that the respondent pleaded sole seizin; and also, by brief statement, alleged that the petitioner was estopped by a former judgment, upon a

verdict rendered on the same issue, in a case of petition for partition, brought by said Larrabee and one Dakin, claiming partition of the same premises, and in the same proportion in favor of said Larrabee as that now claimed, and presented and offered in evidence a duly authenticated copy of said former judgment. The identity of the premises, described in the first count of the former petition, with the premises described in the first count of the pending petition, was admitted. The presiding Judge ruled that the judgment in the former suit is no bar to this petition.

Depositions, taken before the Judge of the municipal court of the town of Brunswick, were admitted against the objection of respondent's counsel. There were several instructions to the jury excepted to and fully argued, but, as they are not considered in the opinion of the Court, further reference to them becomes unnecessary.

By the record of the judgment on the former petition, it appears that, at the November term, 1850, Mary Larrabee, the respondent in that case, pleaded sole seizin. The jury found the respondent was sole seized of the premises described in the first count of the petition; and that the petitioners were seized in fee of five-sixth parts of the premises described in the second count of said petition. The action was then continued from term to term, on motion of petitioners, to set aside the verdict, and, on exceptions filed by petitioners, which had been signed and allowed by the presiding Judge, until April term, 1853, when the motions and exceptions were overruled. At the April term, 1854, "it was considered and ordered by the Court that the petitioners take nothing in the premises named in the first count of their petition, and that partition of the premises named in the second count of their petition be made according to the verdict of the jury." And commissioners were appointed to make partition.

"The petition was then continued from term to term to the present term, [April term, 1855.] And now the said petitioners appear and have leave to discontinue the said petition against the said Mary Larrabee."

"It is therefore considered by the Court that the respondent recover, against the said petitioner, her costs of suit." Execution for costs issued Nov. 10, 1855.

The said Mary Larrabee died in the year 1855, and her will was duly proved. The respondent claims as devisee under her will; and the petitioner, under her deed to him, dated March 9, 1842.

Gilbert, in support of the exceptions, argued that the record of the former judgment was wrongfully excluded:—

1. There was a verdict on this identical issue in favor of the respondent's testator, confirming her title.

2. All dilatory questions being settled by the law court, judgment follows by the spontaneous action of the law.

3. That judgment must be the appropriate one. Such, and such only, as the law prescribes, to be based upon the verdict rendered.

4. The verdict being in favor of the petitioners for partition of other premises, and in favor of respondent's testator, the respondent there establishing sole seizin in these premises, the law prescribed judgments of opposite effect; interlocutory in one, and final in the other. R. S. of 1841, c. 121, § 17.

5. As to the latter, the case neither was, nor could be longer in court. Judgment was rendered, and the Court had no further control over it, without new process, as by petition for review or writ of error.

6. By the verdict, the respondent in that case acquired a right which could not be taken from her; and, as a matter of construction, we are to presume that when the Court granted leave to discontinue, that leave applied and could only apply to that part of the petition then pending; that is to say, to that count in the petition upon which the verdict was in the petitioner's favor, and the proceedings then pending upon the interlocutory judgment. 2 Johns. 181 and 191; 7 Conn. 414 and 418.

Shepley & Dana, for the petitioner: —

By c. 84 of laws of 1854, the Judge of the municipal court of Brunswick was authorized to act as a justice of the peace, in all matters. The depositions were, therefore, rightfully admitted.

The record of the proceedings in the former case disclosed no such judgment as was a bar to the present proceeding.

The only judgment rendered in the former case was one giving the petitioner leave to discontinue. This was a matter entirely within the power and discretion of the Court, and the right of the Court to enter this judgment or order cannot be questioned here.

A nonsuit or discontinuance does not prevent the plaintiff from bringing another action for the same cause. *Knox* v. *Waldoboro'*, 5 Greenl. 185; *Hull* v. *Blake*, 13 Mass. 153, 155; *Bridge* v. *Sumner*, 1 Pick. 371; *Morgan* v. *Bliss*, 2 Mass. 113.

Judgment is not rendered by the spontaneous action of the law, nor is it rendered by the law in any sense. It is the province of the Court to render judgment. They render such judgment as the law authorizes them to, if they see fit.

A legal judgment is the determination of the mind of him who expounds and applies the law. Without it, the law cannot be enforced.

A criminal has been convicted of a crime by the verdict of a jury, and the Court neglects to render judgment, and finally the indictment is *nol. pros'd.* The Court *might* have rendered judgment, but, till that was done, the criminal was in the hands of the Court, who might thus virtually pardon; when, if the law had been executed, this prerogative would have vested with the executive.

It cannot be doubted, that, as long as a process is before the Court, it is for the Court to make such disposition of it as seems fit. *Locke* v. *Wood*, 16 Mass. 317; *Haskell* v. *Whitney*, 12 Mass. 47, and editor's note.

What was pending when the Court allowed the petitioner to discontinue? Simply a petition in which a special verdict

had been rendered. Upon such a verdict, judgment does not follow of course. *Mirwan* v. *Ingersoll*, 3 Cowen, 367.

There is no pretence that judgment was moved for by counsel, and the docket of the Court, from which the record is made up by the clerk, does not show any thing further than the mere rendition of a verdict. That part of the record which declares that the Court "considered and ordered that the petitioners take nothing in the premises named in the first count," &c., is simply the "legal opinion" of the clerk as to the effect of the verdict.

But this, we submit, is a proper matter for the *Court* to determine. In all proceedings of this nature, the judgment is reserved till the final disposition of the cause.

Interlocutory orders, necessary to the progress of the cause, are constantly made; but further than this the Court does not act. If different rights are fixed during the progress of the cause, the appropriate entry is made, and, when the cause comes to be disposed of, these rights are perfected by appropriate judgments.

But the Courts of law are not continually issuing executions on issues raised during the pendency of a cause; such a course would tend to inextricable confusion. The different issues raised and passed upon are but parts of a cause, and are only effectuated by a judgment on its final disposition. *Beebe* v. *Griffing*, 2 Selden, 465, cited in U. S. An. Digest, 1854, p. 458, § 9. Until this disposition, they are held in suspense; if, by that, the petitioner is allowed to withdraw from Court, he stands, after payment of cost, as though he had never entered his complaint.

It is only after final judgments in a cause, that appeals or exceptions on interlocutory orders made in that cause can be brought forward.

It is true, commissioners were appointed here, but there was no interlocutory judgment *quod partitio fiat*, nor any judgment that petitioner should take nothing on his first count.

If it were otherwise, still all the orders and interlocutory

judgments rendered during the pendency of a cause are but the provisional determinations of the specific issues presented, but all made to depend upon, and be determined by, the final disposition of the cause.

Suppose, after a verdict, it should appear that the Court had no jurisdiction of the cause or the parties, the reasoning of respondent's counsel would entitle him to all the benefits of the verdict, though the Court should finally determine that it had no authority to receive it.

A petition is entered and sundry proceedings had under it; and finally the petitioner is allowed to discontinue his petition. When that order is passed, what is there on which the Court can base a judgment, except the mere fact that after entry and discontinuance the respondents are entitled to costs? Except for this purpose, the whole proceedings are vacated. If the respondents were not willing that petitioners should have this leave, they should have appeared and been heard. But, as the record stands, this judgment of discontinuance is the only one which has been rendered.

The only *judgment* that appears is the judgment for *respondent's costs* on discontinuance. In terms, the docket entry is confined to that, and, if the record shows any other judgment, it is erroneous, and the Court have it in their power to correct the error.

The docket entry of April term, 1855, is "discontinued," "costs for respondent."

According to the argument of respondents' counsel, the respondent in the former case obtained two judgments; one for her costs on the verdict, and another for her subsequent costs on the discontinuance. But how was the cost taxed? The docket, and record and the papers from which the record is made, show that after verdict no cost was taxed, though respondent was entitled to costs if she had judgment; but, though the judgment claimed by respondents' counsel was rendered in April, 1854, he did not take execution for costs till November, 1855, at which time no execution for costs could legally be issued, being more than a year after what

respondent claims was a rendition of final judgment in his testator's favor. The taxation shows that the costs of respondent, incurred prior to April, 1854, were included in the execution, while his argument goes on the ground that, in April, 1854, respondent's testator obtained a judgment which entitled her to full costs up to that time; and that all the subsequent costs she could recover would be for the subsequent continuance of the petition in court.

This is alluded to, to show that, until after the filing of this second petition, the parties and Court did not consider the judgment on the former any thing more than on a mere discontinuance.

In *State* v. *Benham*, 7 Cowen, cited by counsel of respondent, a verdict of guilty on an indictment still pending was pleaded by defendant in bar to another indictment found at the same term for the same offence, and the Court held the verdict a bar, on the ground that any other course would put the defendant twice in jeopardy for the same offence. See concluding paragraph of Judge WILLIAMS' opinion in that cause.

Gilbert, in reply:—

The special statute of 1854 was unknown to me, until it was cited in the argument of the opposite counsel. It confers on judges of municipal courts the powers of justices of the peace. It contemplates that they should act as such. But, in taking the depositions, the judge did not act as a justice of the peace.

At the trial, the record offered was ruled out, because the petitioners, in that case, upon verdict, recovered judgment for partition of other premises, and, before final judgment as to the partition of other premises, the petitioners discontinued. The record, however, discloses a judgment in the respondent's favor upon the verdict recovered by her.

When the verdict is rendered and all intervening questions are settled, the law prescribes the judgment; and, in the eye of the law, that judgment follows with unfailing cer-

tainty. The Judge has no discretion in the matter. He cannot interpose either to withhold or to vary the judgment.

It is not a case where the law confers upon the Judge power to render one judgment or another, according to his sense of legal right.

The presiding Judge never dictates the form or nature of the judgment. He enters a general order on the last day of the term, not as to the form of any judgment, but that judgment be rendered, as of that day, in all matters of final decision, except those in which judgment has been rendered of a former day. And then the clerk records the proceedings and the conclusion of law in each case.

When the form or substance of the judgment is discretionary, then, only, the Judge makes special order as to so much.

In *Marsh* v. *Pier*, 4 Rawle, 288, 289, KENNEDY, J., says, "But a judgment of a proper court, being the substance or *conclusion of the law* upon the facts contained in the record, puts an end to all further litigation on account of the same matter."

Where a criminal has been convicted by a verdict, a case is presented of legal discretion in the Judge. The law makes it his duty to award sentence, in his discretion, within certain limits fixed by law. Or, he may, if he sees fit, permit a *nol. pros.* to be entered, if moved by the prosecuting officer for the State. But, though he may "thus virtually pardon" a crime against the State, he may, in no wise, pardon a private right of a suitor, which he has acquired by a verdict.

But, in the case the record of which we offered, the law was peremptory. The verdict determined that the petitioner had no estate or interest in the land in question. That being so settled, neither the respondent in that suit, nor her devisee, could be again vexed for the same cause; and the statute gave her costs. R. S. of 1841, c. 121, § 13. And judgment must follow with certainty.

But judgment *was actually rendered.* So says the record;

and that judgment, right or wrong, cannot be attacked in this indirect manner.

Nor is the proposition a correct one, "that, as long as a process is before the Court, it is for the Court to make such disposition of it as seems fit." Applied to this case, it is saying that, after verdict, and after all legitimate efforts to get rid of the verdict had been exhausted, the Court had the power to order, peremptorily, leave to discontinue, not only as to that in which the verdict was for the petitioners, but also to that as to which the verdict was for the respondent, the devisor of the respondent in this action.

The cases cited by counsel, (16 Mass. 317, and 12 Mass. 47, and editor's note,) show authoritatively that, after trial has commenced, or after reference by rule of court, the plaintiff has no right to become nonsuit, without the consent of the adverse party, or leave of Court granted for good cause. And, by implication, they go still further, to the extent that, after verdict, there is no such right or power.

But, grant that such a discontinuance could be had, what then? There was none such in this case, as to that part of the verdict for respondent; for, upon the verdict, judgment had been rendered. So says the record; and the record must stand until changed or annulled by the appropriate process.

The verdict was not a "*special*" one; it was a general and direct finding of the issue joined. But, whether special or general, judgment has been rendered upon that verdict, as the record of the case shows.

The counsel very fitly inquire, "what was pending when the Court allowed the petitioners to discontinue?" [Here counsel traced the proceedings in the case, as shown by the record.] What was pending? Simply the partition of the premises to which the petitioners had been found entitled. Nothing more. Certainly not any question as to the other land. That question had been so decided, that nothing more could be done. The rights of the parties had been fixed by the verdict. And these rights could not be changed. The

verdict had separated the two parts of the petition; and the action for the Court was necessarily different in the two, interlocutory in one, final in the other.

If there had been no other land involved than that respecting which the verdict was for the respondent, could any one doubt what would be the rights of the parties? And were those rights changed, because the petitioners had embraced other lands in the same petition, and saw fit to abandon their proceedings before final judgment as to them?

The opinion, concurred in by a majority of the Court, was drawn up by

HATHAWAY, J. — A petition for partition of two parcels of land, described in the first and second counts in the petition, of each of which parcels, the petitioner claimed to own three undivided eighteenth parts, in common and undivided.

The respondent pleaded sole seizin, and a former judgment, in bar, and, an issue having been duly submitted to the jury, a verdict was rendered for the petitioner, and the case is presented on exceptions to the rulings of the Judge at the trial.

The admission of the depositions of Mrs. Merry and James Ham was objected to, because they were taken before the justice of the municipal court of Brunswick, acting in his official capacity as justice of that court. The statute of 1850, establishing that court, c. 195, § 2, gave him concurrent authority with justices of the peace in that matter, and the depositions were properly admitted.

The ruling of the Judge, by which the plea in bar, and the evidence introduced by the respondent in support of it, was excluded from having any effect, presents a more serious question.

Whatever titles the petitioner and the respondent have, or claim to have to the lands of which partition is sought, is derived from Mary Larrabee.

The petitioner's title is by her deed to him of March 9,

1842; and the respondent's title is as her devisee, she having deceased in 1855.

The judgment pleaded in bar was on a petition for partition against Mary Larrabee, in which the petitioner claimed partition of the same parcel of land described in the first count of this petition.

A former judgment between the same parties, determining the same issue, would, undoubtedly, be conclusive as a plea in bar, and such judgment, between the petitioner and Mary Larrabee, would have the same effect, for the respondent, being her devisee, is privy in estate with her. 1 Greenl. Ev. 8th ed., § § 189, 522, 523, 528, 531; *Colton* v. *Smith*, 11 Pick. 316; *Outram* v. *Morewood*, 3 East, 346.

In 1849, at the March term of the late District Court in the county of Cumberland, Nehemiah Larrabee (the petitioner in this case,) and Sarah C. L. Dakin, entered their petition for partition of two parcels of land described in the first and second counts in said petition, of which they alleged they were seized in common and undivided with Mary Larrabee. The land described in the first count in that petition was the same land described in the first count of the petition in this case, and the petitioner, Larrabee, claimed the same portion thereof as in this petition.

Mary Larrabee appeared in that case and pleaded sole seizin in herself, and, on trial of the issue, a verdict was rendered that she was sole seized in fee of the premises described in the first count in the petition, and, by the record, it appears that the verdict on the second count was in favor of the petitioners, and that the case proceeded with the usual progress of litigated actions until the April term of this Court, 1854, "when and where it was considered by the Court that the petitioners take nothing in the premises named in the first count of their petition, and that partition of the premises named in the second count in their petition be made, according to the verdict of the jury." It appears by the record that commissioners were then appointed, and that the petition was continued from term to term till the April term, 1855,

when it was thus recorded, "and now the said petitioners appear and have leave to discontinue the said petition against the said Mary Larrabee."

The process of partition, by petition, is analogous to that of a writ of partition, at common law; the former being a substitute for the latter. 1 Greenl. 376.

It is not adversary in its character, unless the petitioner's claim is resisted, and if so, and litigated, as the statute prescribes, the proceedings of the trial and its results are subject to the same legal rules which govern in other actions at law.

The proceedings, on the petition of Nehemiah Larrabee and Sarah C. L. Dakin against Mary Larrabee, have the same effect, as evidence in this case, as if that petition had been in his name alone, for the several shares which each petitioner claimed were specified therein, and, by R. S. of 1841, c. 121, § 16, as amended by statute of 1842, c. 31, § 16, the joinder was authorized.

The judgment of the Court, April term, 1854, was conclusive of the rights of the parties to the land described in the first count of the petition, and could not be affected by the continuance of the petition, for the purpose of completing the proceedings necessary to carry into effect the interlocutory judgment, that partition should be made of the land described in the second count.

The litigation had ceased. — The respondent was out of Court. — She could recover no costs for further attendance. She was then entitled to executions for her costs. *Ham* v. *Ham*, 43 Maine, 285.

The Judgments in favor of the petitioners and the respondent, at the April term, 1854, were both conclusive of their several rights in the matter, of the benefit of which judgments neither party could deprive the other after that Court had adjourned. *Brown* v. *Bulkely & al.*, 11 Cush. 169.

A discontinuance of a suit is similar to a nonsuit. It happens by reason of the plaintiff's fault, lapse or neglect. It occurs while the suit is in progress.

That the plaintiff might discontinue or become nonsuit, after the suit was terminated in the defendant's favor, would be an absurdity.

The plaintiff cannot become nonsuit or discontinue after a verdict for the defendant.

"After a general verdict, there can be no leave to discontinue, for that would be having as many trials as the plaintiff pleases." *Price* v. *Parker*, 1 Salk. 178; *Greene* v. *Monmouth*, 7 Mass. 467; *Haskell* v. *Whitney*, 12 Mass. 47 and Rand's notes; *Bridge* v. *Sumner*, 1 Pick. 371; 2 Johns. 181, 191; 3 Greenl. Ev. § 263.

Before the return of a verdict, the Court may permit the plaintiff to become nonsuit, but this cannot be done after the verdict is rendered. *Judge of Probate* v. *Abbott*, 13 N. H. 21.

If a plaintiff, after a verdict against him, could at his pleasure discontinue or become nonsuit on his own motion, and thereby vacate the verdict, the defendant could never recover a verdict which he could retain. A Judge presiding could not prevent the plaintiff from abandoning his action in Court, if he wished to do so; but such procedure on his part, alone, could not be permitted to deprive the defendant of the rights which he had already acquired by his verdict or judgment. To allow him to do so would operate very unequally — it would be oppressive — it would give the plaintiff as many new trials as he pleased to have, without giving the respondent any opportunity to be heard upon the question whether he should have them or not. Undoubtedly, the records of the judgments of the Court are conclusive of their correctness, however erroneous may have been the proceedings upon which they are founded, until the errors, if any, be legally corrected.

The well known accuracy and care of the late Chief Justice, who, at the April term of the Court, 1855, gave leave to enter, of record, a discontinuance of the petition against Mary Larrabee, render it highly improbable that he should have permitted such an improvident entry of record to be made on the plaintiff's motion, (the respondent being out of Court,

for "the judgment had expelled her," *Ham* v. *Ham*, before cited,) as would vacate the verdict and judgment which she had previously obtained; and, upon inspection of the record, we are satisfied that the discontinuance entered had no such effect.

The records of the whole case must be considered together, and they present a clear, unambiguous narrative of the proceedings — they show that the first count in the petition was finally adjudicated upon and disposed of in April, 1854, and that the respondent was then entitled to execution for her costs, and that the only petition against Mary Larrabee, which remained pending, was for the partition, which had been ordered by the Court, of the land described in the second count in the petition.

Having failed to obtain what they sought by the first count in their petition, the petitioners might have thought that a partition of the land claimed in the second count was not worth the expense of it, and they had a legal right to discontinue any further proceedings, but the discontinuance could be only of that which was then pending.

A discontinuance cannot be predicated of that which has been previously concluded.

When they had leave to discontinue their petition against Mary Larrabee, they had no petition against her, except *only* for partition of the land described in the second count of the original petition. The first count had been previously finally disposed of, and so it appears of record.

The plea in bar disclosed a valid defence against the petitioner's claim under the first count in his petition, which was erroneously excluded. *Exceptions sustained.*

TENNEY, C. J., concurred in the result. MAY, GOODENOW, and DAVIS, J. J., concurred.

CUTTING, J., *dissenting.* — It appears from the record of this Court, at the April term thereof, 1855, that the petitioner "had leave to discontinue his said petition against the said Mary Larrabee," who was allowed her cost, for which she re-

ceived her execution. Such an entry operated to make void all prior proceedings, and they will so remain as long as such entry continues upon the docket. The entry is a part of the record. The opinion discusses the authority of a Judge of this Court to authorize such an entry. Suppose he had no such authority, then let it be reversed or corrected, and in some way set right. It is not such a proceeding as can be avoided *collaterally*, like the record of inferior magistrates having no *jurisdiction* over the subject matter. It is almost every day's practice to enter neither party upon the docket, (which is the same as a discontinuance without costs,) even after verdict in cases where there has been a settlement by the parties. And who ever contended that debt or *scire facias* would lie on such a judgment? And, still, such records would be as valid as the one in question. The case discloses none of the circumstances which induced the Judge to permit the entry, and, if it did, they could not be introduced to impeach the record. It may have been allowed by agreement of parties. If the records of the highest court in this State can be so easily avoided, and set aside so summarily, they will be worthy of but little reliance.

JABEZ C. WOODMAN *versus* YORK & C. RAILROAD COMPANY & STEPHEN W. EATON, *Trustee*, & WILLIS & CHURCHILL, *Assignees*.

Where a railroad corporation had conveyed to certain persons all its property, *in trust*, to secure the payment of certain debts, the trustees to have the right to take possession of the property and dispose of the same in case of default of the company to pay such debts; and the trustees permit the company to use and manage the road and other property, its funds, in the hands of its treasurer at the time of the conveyance, are embraced therein, and cannot be held against the paramount right of said trustees, by a creditor of the company, who has subsequently caused them to be attached on trustee process.

Woodman *v.* York and Cumberland Railroad Co.

In this case, the principal defendants were defaulted; and the alleged trustee disclosed that he had formerly been the treasurer of the railroad company, and that there was a balance due from him to the company. Thereupon William Willis and James C. Churchill appeared and claimed the funds in the hands of Eaton, by virtue of a conveyance of all the property belonging to the railroad company, made to them *in trust*, for certain purposes, January 1, 1857. Eaton had been treasurer before that time, and the funds in controversy were then in his hands. The corporation still continued in possession of the railroad and other property, managing it for their own use. But, in case of failure, by the corporation, to pay certain bonds and coupons secured by the conveyance *in trust*, it was the right of the trustees to take possession of and manage the property, or sell it by auction, for the purposes specified in the conveyance to them.

The plaintiff claimed that, as the corporation had remained in possession, managing the property exclusively for their own benefit, the money in the hands of Eaton belonged to the corporation, and was subject to be attached on trustee process by the creditors thereof. But Davis, J., before whom the case was heard, ruled otherwise, and the plaintiff filed exceptions. The questions presented by the bill of exceptions were very fully argued by

Woodman, pro se.

Fox, for Willis *& al.*

The exceptions were *overruled* by the full Court, by whom it was *held*:—

That the money in Eaton's hands, was embraced in the deed of trust to Willis & Churchill:—

And that, whatever were the rights of Willis & Churchill, *as against the corporation*, before taking possession of the property, they might interfere at any time, as against *third parties*, to prevent any of the property from being destroyed,

or put beyond their reach, the right of the trustees being paramount to that of attaching creditors.

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

DAVID HOOPER, *Adm'r, versus* INHABITANTS OF GORHAM.

An action brought upon the statute, to recover against a town for a *personal* injury, caused by a defect in its highway, and which action was pending when the provisions of c. 87, § 8 of the R. S. of 1857, took effect, will not, after that time, abate by the death of the plaintiff, but may be prosecuted by the executor or administrator of the deceased.

ACTION OF THE CASE, commenced by Edward Hooper, the plaintiff's intestate, upon the statute to recover damages for an injury to his person, caused by an alleged defect in a highway. The action was entered at the January term, 1857. During the January term, 1858, the said Edward Hooper deceased, and the suggestion of his death was entered upon the docket of that term. At the next (April) term, the administrator appeared, and moved the Court that he be admitted to prosecute this action in his capacity of administrator; to which defendants objected. Thereupon, the parties agreed that the question of the administrator's right to prosecute be referred to the full Court, on the Report of the case by DAVIS, J., presiding at *Nisi Prius*. If the action survives, the administrator is to be admitted to prosecute; otherwise, the action is to be dismissed.

Howard & Strout argued for the administrator: —

That, by the provisions of c. 87, § 8 of R. S. of 1857, this action survives.

Trespass on the case is an action brought for the recovery of damages for acts unaccompanied with force, and which, in the consequences only, are injurious, as stated by Espinasse, Dig. p. 598; 1 Com. Dig., Action on the Case, A.

Trespass upon the case is the form of expression in use generally, out of New England, even in actions of assumpsit. But we adopt the expression "*of the case*," for the same purpose and as identical in its import. 1 Com. Dig., Actions upon the Case, upon Promises, A; Am. Precedents, p. 124, note.

If there be any distinction, *trespass on the case* is the more comprehensive and embraces *actions on the case.* But no distinction is perceived. 1 Chitty's Pl. 132; *Files* v. *Magoon*, 41 Maine, 104.

Swasey, for defendants, argued:—

That this action abates by the death of the plaintiff. It does not survive by the principles of the common law. *Nicholson* v. *Elton*, 13 Serg. & Rawle, 416; *Hambly* v. *Trott*, Cowp. 375; *People* v. *Gibbs*, 9 Wendall, 29; *Stebbins* v. *Palmer*, 1 Pick. 71; *Chamberlain* v. *Williamson*, 2 M. & S. 408.

The statute in force at the time when the action was commenced, enlarging the causes of action which survive, was the R. S. of 1841, c. 120, § § 15, 16. By this, the following named actions were added to those which survive by law; to wit:—replevin, trover, assault and battery, trespass for goods taken and carried away, and actions of trespass and *trespass on the case for damage done to real or personal property.*

The present action is for *damage to the person*, and not to property. It does not, therefore, survive by the provisions of the statute of 1840.

The statute of 1857, c. 87, § 8, adds to the actions which survive by law, the following, to wit:—replevin, trover, assault and battery, trespass and trespass on the case.

It is contended that this statute is not, by its provisions, applicable to the case, does not affect it, and that, by it, this case does not survive.

1. Because this action does not come within its description of actions. It is named, in the statute upon which it is brought, "a special action on the case," and is for an injury to the

person of the plaintiff. The right and the remedy are both created by the statute—not being recognized by common law. The statute has given this special remedy by which to enforce its created right. It is a mere statute remedy. And, had the Legislature intended that, for an injury like this, the cause of action should survive to be enforced by an executor or administrator, there would have been no necessity of the other enactment in the same section of the statute, on which this action is based, which provides that, in case the life of any person is lost, a given sum may be recovered of the town by indictment, to be paid to the executor or administrator for the use of the heirs, &c., of the deceased.

Where a statute creates a right and provides a remedy, no other remedy lies. *Boston* v. *Shaw*, 1 Met. 130; *Baird* v. *Wells*, 22 Pick. 312; *Walcott* v. *Upham*, 5 Pick. 292.

2. Notwithstanding the statute of 1857 omits the words "for damage done to real or personal property," which were contained in that of 1840, still, it is contended that the statute is to receive a construction by the Court. If the language were to receive a literal construction, it would lead to absurdities, and make a class of actions survive which it cannot be supposed the Legislature intended. By such a construction, (if the words "trespass on the case" are intended to describe an "action on the case,") all actions in form *ex delicto* survive. Not only actions of that character for injuries to the *absolute* rights of persons and property, such as actions for libels and verbal slander, actions for injuries to the health or comfort, as for nuisances, &c., &c., but also for injuries to *relative* rights, as for seducing or harboring wives, criminal conversation, debauching daughters and servants, &c, &c. It is not reasonable to suppose that the Legislature intended that such causes of action shall survive, and be commenced or prosecuted by executors or administrators, or that it intended that the named action of trespass on the case shall survive, except for injuries to property, and this idea is strengthened by reference to the language of the ninth section of the same statute of 1857.

A statute is to be so construed as to have a reasonable effect, agreeably with the intention of the Legislature, and, where any particular construction would lead to absurd or unreasonable consequences, it will be presumed that some exception or qualification was intended.

A statute is not to be construed according to technical rules; the letter of a statute may be restrained or enlarged, according to the true intent of the Legislature. The question does not, altogether, depend on the mere *form* of remedy. *Smith* v. *Sherman*, 4 Cush. 413.

3. Because this statute was not in force at the time when the action was commenced, but was enacted whilst it was pending in Court, and, by its terms, applies only to future actions.

Statutes are always to be construed as *prospective*, unless the intention to give a retrospective operation is clearly expressed. *Tappan* v. *Tappan*, 10 Foster, (N. H.) 50; *Hastings* v. *Lane*, 15 Maine, 134.

This ground is assumed, in the first place, upon principle, as there is nothing in the language of the Act indicating an intention to have it operate upon actions already commenced; and, in the second place, for the reason that the Legislature, by its enactment, has prevented its application to pending actions. "The Repealing Statute" of 1857, § 2, contains this language:—"The Acts declared to be repealed remain in force for the preservation of all rights and their remedies existing by virtue of them, and, so far as they apply to any office, trust, judicial proceeding, right, contract, limitation or event already affected by them."

The opinion of the Court was drawn up by

MAY, J.—*Actio personalis moritur cum persona* is among the most ancient maxims of the common law. It was not, however, universal in its application. It had its exceptions, and these, in England, as well as in many if not all the States in this Union where the common law has prevailed, have been greatly extended by legislation. The ancient strictness of

the rule has been constantly giving way before a more enlightened civilization, and a more full and perfect development of the principles of natural justice. Judicial expositions of the statutes, which have been passed touching the survivorship of actions and causes of action, seem to have been made in the same liberal spirit which has led to the various enactments. If the language of a statute will allow it, no reason is perceived why such a construction should not be adopted as will give to executors and administrators, for the benefit of heirs or creditors as the law may require, authority to institute or maintain suits for the recovery of such damages as the deceased party, whom they represent, may have suffered in his lifetime, either in his person or his property, by reason of the tortious or other acts of any person, in the same manner as the party injured might have done if living.

The rule of the common law was, that actions in form *ex delicto* did not survive. It is said that the maxim *actio personalis moritur cum persona*, is not applied in the old authorities to causes of actions on contracts, but to those in tort which are founded on malfeasance or misfeasance to the person or property of another, which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representatives by the statute law; it being a general rule that an action founded on tort, and in form *ex delicto*, was considered as *actio personalis*, and within the above maxim. Broom's Legal Maxims, 4th ed., 562, and cases there cited.

The legislation of this State seems to have followed, substantially, the English statutes of 4 Edward 3, c. 7, and 3 & 4 of Will. 4, c. 42. By our R. S. of 1840, c. 120, § 15, "in addition to actions which survive according to the principles of the common law, the following also shall survive, namely: actions of replevin, actions of trover, assault and battery, actions of trespass *for goods taken and carried away*, and actions *of trespass* and trespass on the case *for damage done to real or personal property.*" It is readily seen that this statute extends its life giving protection to such actions only as

relate to the real or personal estate of the deceased, with the single exception of actions of assault and battery. By it the common law is left in force as to all other actions of tort, which affect only a man's health, life, person, feelings or reputation; such, for example, as arise from the unskilfulness or negligence of a surgeon, an attorney, or a stage proprietor, or for slander or libel, and the like. In such cases no action would survive to the executors or administrators, nor could be commenced by them, because they were regarded by the common law, not so much as representing the person as the personal estate of the testator or intestate of which they are in law the assignees. 3 Bl. Com., 16th ed., 302, n. 9; Com. Dig., "Administration," B. 13.

Such was the law of this State when this action was commenced and until the revision of the statutes in 1857. By that revision, c. 87, § 8, it is provided that, "in addition to those surviving by the common law, the following actions survive;—replevin, trover, assault and battery, trespass, trespass on the case and petitions for and actions of review; and "*these actions may be commenced by or against an executor or administrator, or, when the deceased was a party to them, may be prosecuted or defended by them.*" The question now presented is whether these provisions embrace an action like the present, which is a special action on the case, brought upon the R. S. of 1840, c. 25, § 89, to recover damages for an injury to the person of the plaintiff, caused by an alleged defect in a highway. The statute of 1857 differs from that of 1841, as will be seen in this; that in the latter the words "actions of trespass" are qualified or restricted by the words "for goods taken and carried away" immediately following, and the words "actions of trespass on the case," by the words "for damage done to real or personal property." In the present statutes the restrictive words are wholly dropped. What was the intention of the Legislature in this omission? The words are too important to have been left out of the last revision without some purpose. What was that purpose? It could have been no other than to cut off the restrictive qualification

which was imposed by these words upon the actions to which they referred, and thus to leave the words "trespass" and "trespass on the case" to have the same effect as if the restriction had never existed. Such a purpose has nothing in it so unnatural or strange as to lead the Court to seek for some other construction, or cause for the omission of these words, as being more in harmony with the dictates of justice and the progress of legislation upon this subject, than that which we have adopted. No such construction or cause can be found. We see nothing inequitable or unjust in such a construction of the statute as will tend to secure to the heirs or creditors of a person deceased, through the agency of his executor or administrator, a suitable compensation for injuries received by the testator or intestate, when in life, whether such injuries were directly to his property or to his person. Such a construction does no injustice to the tort feasor. It may tend to prevent wrongdoing.

Do then the words "actions of trespass," or "trespass on the case," as used in the statute of 1857, embrace a case like the present. There is no distinction between an action of the case sounding in tort, and trespass on the case. The difference in the form of the words is accidental rather than real. The authorities cited for the plaintiff show that, notwithstanding the difference in the form of expression, the meaning, the substance is the same. The objection that the statute is prospective in its operation does not apply, because the death of the plaintiff's intestate was not until after the statute took effect. The result is, that the action, according to the agreement of the parties, the administrator of the deceased plaintiff having appeared to prosecute it, is to stand for trial.

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

JOHN C. HUMPHREY *versus* THOMAS WARREN *& al.*, AND WM. WOODBURY, *Trustee.*

Where one summoned as trustee declines to answer interrogatories that relate to matters with the principal defendant, occurring since the service of the writ, and which he states, in his disclosure, are in no way connected with his transactions with such defendant, prior to the service on him, such refusal to answer will not be considered a sufficient reason for charging him as trustee.

THIS case is presented on plaintiff's EXCEPTIONS to the order of DAVIS, J., at *Nisi Prius*, discharging the trustee on his disclosure. The alleged trustee made the general declaration that he had in his hands no goods, &c., and submitted himself to examination. During the examination, the plaintiff's counsel proposed interrogatories which the trustee declined to answer, unless the Court should direct him to answer, because (as he states) the transactions concerning which he is inquired of, were long subsequent to the service of the writ upon him in this action, and are in no way connected with any transaction had between him and the principal defendants, at or prior to the time of his being summoned as trustee.

The plaintiff contended that the trustee should be charged or held to answer the questions which had been propounded.

Barrows, in support of the exceptions, argued: —

1. The policy of the law concerning foreign attachment is to render the effects and credits of the principal debtor in the hands of the trustee available for the benefit of the creditor, and the law should receive a liberal construction in furtherance of this object. *Whitney* v. *Monroe & trustee*, 19 Maine, 44.

The general denial of liability by a trustee is in the nature of a plea, and is subject to a full subsequent investigation by question and answer. The trustee has every advantage that an honest man could possibly require, and is and *should be* held to make a full disclosure of the true business relations

between himself and the defendants. If he fails to do so he is chargeable. *Toothaker* v. *Allen & trustee*, 41 Maine, 324.

It is not for him to set up rights or draw conclusions as to matters of law, but he is to disclose all the facts, so that the Court may be enabled to do so understandingly, and, admitting property of the principal defendant in his hands, it must clearly appear from his answers, independent of any general assertions and conlusions of his own, that he has claims to an equal amount before he can be discharged. *Lamb* v. *Franklin Manuf'g Co. & trustee*, 18 Maine, 188; *Webster* v. *Randall & trustee*, 19 Pick. 19.

The Court will not direct the trustee what questions to answer, but he acts at his peril in refusing to answer. *Smith* v. *Cahoon*, 37 Maine, 288.

2. Although the trustee's liability in general depends upon the state of facts existing when the trustee process is served, it is not always strictly so, but the liability may be greatly modified or increased, and in some cases depend entirely upon matters occurring subsequent to the service of the process. *Smith* v. *Stearns*, 19 Pick. 23.

Suppose the trust fund is in the hands of the trustee to secure a debt due to him from the principal defendants. Is the payment of that debt or the putting into his hands by the debtors of other property, and out of which he might and ought to have discharged the debts, although done after the service of the trustee process, immaterial in settling the question of his liability? Is the payment of large sums by the trustee, to and for the principal debtors, subsequent to the service of the trustee process, immaterial, when considered as denoting the character of the transactions between them? *Nealley* v. *Ambrose & trustee*, 21 Pick. 185.

3. Upon the foregoing principles and rules, the evasions and refusals to answer of the trustee in this case, and his replies to the interrogatories, are unjustifiable, and, not having made a full disclosure of the business relations between himself and the principal defendants, he is not entitled to his discharge. When asked what property and funds of the

principal defendants have come to his hands, and upon what consideration, since the service of the trustee process, and what sums he has paid to or for them since that time, he gives in reply only his own, or his counsel's legal conclusion, that those matters have nothing to do with the case. He should have stated the facts and circumstances of those transfers and payments, in order that the Court might judge.

Suppose it should turn out, upon full answers given to those questions, that the property placed in his hands by the principal defendants, subsequent to the service of the process, was made over to him without an adequate or full consideration, or upon some such plan as is developed in *Hooper* v. *Hills* and *trustee*, 9 Pick. 435; would not the Court say that he ought to have applied those funds to the discharge of the lien which he had upon the property that was in his hands at the time of the service of the process, and that the plaintiff here is entitled to the benefit of that reduction?

4. I maintain that, having admitted property of the defendants in his hands, and not having disclosed fully all the facts and circumstances necessary for the Court to determine whether he has just and legal claims against them to an equal amount, but having preferred to substitute his own legal conclusions for such full statement, the presumptions are all against him, and he should stand charged for the amount of the plaintiff's judgment, unless he can clear himself on *scire facias*. At all events, to *discharge* him on this disclosure was erroneous.

Fessenden & Butler, for trustee.

The opinion of the Court was drawn up by

MAY, J. — The trustee in this case, after making his introductory and general answer, distinctly affirms that, at the time of the service of the writ upon him, he had no goods, effects or credits belonging to the principal defendants, in his hands or possession. A close, and somewhat protracted examination into the business transactions subsisting between him and the defendants, at the time of such service, as well

as into the final result of such transactions, has failed to show any error in this statement. It is not now contended that the trustee ought to be charged upon the facts which are stated in his disclosure; but it is urged that his omission or refusal to answer certain interrogatories propounded to him is wholly unjustifiable, and that, for this reason, he is not entitled to be discharged. These interrogatories are found to relate wholly to transactions which occurred long after the service of the writ upon the trustee, and, which he states unequivocally, have no connection with any transactions which existed at the time of such service. His answers, so far as given, are neither vague nor equivocal. He declines to answer further, simply because the matters and things inquired about have no connection with any business or liabilities which existed between him and the defendants, when the writ was served. This case, therefore, differs widely from that of *Toothacre* v. *Allen & al.* and *trustee*, 41 Maine, 324, cited in the argument, in which there was no distinct and positive denial of liability, except in that part of the trustee's answer, which, being introductory, was properly regarded as in the nature of a plea. There, the subsequent statement of existing facts, left the trustee's liability in a state of some uncertainty. Under such circumstances, it was very properly decided that a neglect to give, upon inquiry, the state of the accounts between him and the principal defendant, as they existed when the service of the writ was made, without assigning a sufficient reason for such neglect, was a proper basis on which the trustee should be charged.

Whether the subsequent matters in the present case had any relation to, or connection with transactions which existed at the time of, and prior to the service of the writ, may properly be regarded as a matter of fact, and such relation or connection having been fully denied by the trustee, no reason is perceived why the trustee, upon his whole disclosure, should not be discharged. *Exceptions overruled.*

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

JOHN H. NICHOLS *versus* JOHN FROTHINGHAM *& al.*

A note payable "six after date," is not void for uncertainty. But the intention of the parties, if legally ascertainable, should control in the construction of it.

The ambiguity, being patent, is not explainable by parol testimony. But, from the paper itself, in the light of the circumstances in which it was given, the actual intention of the parties may be inferred.

Whether the *intended* time of payment of such note is a question for the Court, or for the jury — *quære.*

Where such note was given to an insurance company for a policy, six months being an usual term of credit, if there be nothing in the note to indicate a different time, the law will regard it as a note payable in six months from its date.

A note payable to the order of L. M., president of M. F. and M. Ins. Co., is payable to the company; and the indorsement by L. M., *as president, &c.*, will be a sufficient transfer of it, in the absence of all proof that he was unauthorized to negotiate and indorse it.

ASSUMPSIT upon a writing declared on as a promissory note, which is as follows: —

"$1500. Boston, May 1, 1854.

"Six after date, we promise to pay to the order of L. Monson, president of the Metropolitan Fire and Marine Insurance Company, of Boston, fifteen hundred dollars at Merchant's Bank, Boston. Value received.

"Frothingham & Workman."

On the back of the note was this indorsement, "Metropolitan F. & M. Ins. Co., by L. Monson, President."

The writ contains several counts; the first count is on a note payable to L. Monson, or his order, (and by him indorsed,) payable in six, (meaning six months,) after the date thereof; second, as for a note payable in six (meaning six months,) after its date, to said company, or their order, and indorsed by L. Monson, their president, being thereto lawfully authorized, &c.; third, for money had, &c.

Plea, general issue, and joinder. At the trial, before DAVIS, J., the plaintiff read in evidence the note declared on, and called Jesse Fogg, who testified that he is one of the as-

signees of said company, and, since March 3, 1855, has had charge of its business, the company having gone into insolvency; Luther Monson was acting president of the company in 1854–5. The witness produced and identified the record book of the stockholders, and of the directors; [from which plaintiff read sundry by-laws which relate to the authority of the president of the company, to execute papers and generally to superintend the business of the company, &c.] The witness further testified that, "as assignee, I presented to defendants, during the summer of 1855, at Montreal, a note of $1501, dated April 12, 1854, and requested its payment. They asked me if I had the other note — I inquired, what note? They turned to their books and said another note given for addition on same policy for $1500 on six months, the same policy for which they had given the note of $1501."

"I have examined the company's book of bills receivable, (which book is produced,) and find only two notes of defendants, one of April 12, 1854, for $1501, and another of May 1, 1854, for $1500."

The plaintiff testified that, in the first week of October, 1854, he discounted the note in suit, at its face — that he and others had a claim against the company for a loss the company had insured against, and in settlement he took this note and paid the others their part, in cash.

The election of Monson as president, and of E. W. Thayer as secretary of the company, for the years 1853–4, was shown by the company's record.

The defendants offered evidence in support of their account in set-off, which was for the amount due them from said company for losses they had sustained and which the company had insured against.

All the evidence was received, subject to all legal objections.

The case was withdrawn from the jury, the parties agreeing that the presiding Judge should report the evidence for the determination of the full Court, who are to enter such judgment as the law, and so much of the evidence as is legally

admissible require, with power to draw such inferences of fact as a jury would be authorized to draw.

Rand, for defendants, argued: —

That plaintiff has no title to the note or paper; it was never legally transferred to him.

It is payable to the order of L. Monson. The words "president," &c., are only used as *descriptio personæ*. It is not indorsed by *Monson*, but by the *company*.

If it is to be regarded as a note *to the company*, there is no evidence in the case that Monson had any authority to indorse or transfer it. The president had no authority *ex officio*. Ang. & Ames on Corporations, 294, c. 9, § 9, (2.)

Nor had he authority by the charter or by-laws. No vote or direct authority of any kind has been proved.

The note is void for uncertainty. "Six after date." *Six* what? Here is a patent ambiguity, and parol testimony is not admissible in explanation. 2 Parsons on Cont. 75, 78.

Shepley & Dana, for plaintiff, argued: —

On the 1st of May, 1854, the defendants gave their note for $1500. The time when they were to pay this sum is left uncertain by the terms of the note.

In contracts of this sort, ambiguities and uncertainties frequently appear, and the Court, in the exercise of its discretion, constantly infers from the paper itself, or the circumstances under which it is given, or from both of them, what was the actual intention of the parties, rather than that the maker of an instrument should avoid it and derive advantage from his own want of accuracy. Thus, Courts have again and again found in the figures on the magin of the note the amount the maker agreed to pay, even where there was no sum named in the body of the note; and they do this, not because the figures are a part of the note, for when there is a discrepancy between these and the sum named in the body of the note, the figures are always rejected, but as *something* to aid the Court in concluding what was the intention of the parties.

This practice of the Courts is a far greater stretch of a discretion wisely vested in them than is the inference of the time when a note is payable, when the note is silent on the subject. No one wonders when the Court infers and declares that where a note, otherwise perfect, is wholly *silent* as to the time when payable, that note is payable presently.

So far as any thing contained in the note is concerned, it is just as void for uncertainty as the one declared on in this suit. But, where it is evident from the paper itself, it was the intention of the parties to make a note payable at some future time, and that time is left unnamed, it is the duty of the Court to leave the question of time to the jury upon proper allegations in the writ.

I. As to the nature of the instrument. It was a note payable in six months after date.

(1.) Where there is a contradiction, ambiguity or uncertainty in the terms of the instrument, it may, especially against the party making or negotiating it, be so construed as to give effect to it, according to the presumed intention of the parties. Chitty on Bills, 10th ed., 131.

(2.) A note payable "twenty-four after date," is not void for uncertainty, nor is it a note on demand; it is payable some time after date. Such a note is admissible in evidence without other testimony, under an averment in the declaration that twenty-four months after date was the time meant by the parties, the jury being the judges of the fact of the time intended. *Conner* v. *Routh*, 7 How. Miss. 176, (in Byles on Bills, 3d ed., 70, note, and in 2 Supp. U. S. Dig. p. 603, § § 17, 18.)

II. To whom payable.

In contracts not under seal, if the agent intend to bind his principal and not himself, it will be sufficient if it appears in such contract that he acts *as agent*. *Andrews* v. *Estes*, 2 Fairf. 267; *Shotwell* v. *McKown*, 2 South. 828; *Penty* v. *Stanton*, 10 Wend. 271; *Mann* v. *Chandler*, 9 Mass. 335.

A bill of exchange directed to "John A. Wells, cashier Farmers' and Mechanics' Bank, of Michigan," and accepted

by writing across the face thereof, "accepted, John A. Wells, cashier," is drawn upon and accepted by the bank, and not by Wells in his individual capacity. *Farmers' and Mechanics' Bank* v. *Troy City Bank*, 1 Doug. 457, cited 3d ed. Byles on Bills, 52, note.

The indorsement of a promissory note, payable to an insurance company, in the form "W. Earle, as secretary," is to be considered as the indorsement of the company, if nothing further appear to indicate that it was intended as the indorsement of some other party. *Nicholas* v. *Oliver*, Boston Law Reporter, February, 1858, p. 592.

III. The note was properly and legally negotiated and transferred.

By the 7th Art. of the by-laws, the cash funds, under which term notes of hand are included, were placed at the disposal of the president, whose action bound the company.

The testimony of Welch, who was a clerk for the company in 1854, is conclusive as to the power of the president to transfer the notes of the company, and shows that the notes in suit were transferred with the knowledge and consent of the directors.

Monson was really the general agent, president, treasurer and cashier of the company, and, as such, was authorized to indorse notes. *Odiorne* v. *Maxey*, 13 Mass. 178; *White* v. *Westport Manuf'g Co.*, 1 Pick. 215; and any restriction upon his authority to indorse must be proved by the party contesting it. *Wild* v. *Passamaquoddy Bank*, 3 Mason, 505; *Badger* v. *Bank of Cumberland*, 26 Maine, 428, and cases cited in Byles, p. 130, n.

Proof of the acts and proceedings of the president and directors of the company, from which it may be inferred that any person was authorized to indorse the notes of the company, is competent evidence of such authority. *Nichols* v. *Oliver*, (N. H.) in Law Reporter, Feb. 1858, p. 592. The decision in *Barker* v. *Mechanics' Ins. Co.*, (3 Wend. 98,) is opposed both to principle and authority. Angell & Ames on Corp. (3d ed.) 286, and cases cited.

The opinion of the Court was drawn up by

MAY, J.—The right of the plaintiff to recover in this action is resisted upon several grounds. And, first, it is said that the note declared on is void for uncertainty. It is in these words:—

"$1500. Boston, May 1, 1854.

"Six after date, we promise to pay, to the order of L. Monson, president of the Metropolitan Fire and Marine Insurance Company of Boston, fifteen hundred dollars, at Merchants' Bank, Boston. Value received.

(Signed,) "Frothingham & Workman.

The only obscurity in the note arises from the want of a definite statement of the time when payable. A blank form was used, and the blank space, left for the insertion of the proper word to designate the time, was not filled. Does this omission render the note void? Such a consequence is to be avoided if possible, and if it can be done consistently with the rules of law. *Rice* v. *The Dwight Manufacturing Co.*, 2 Cush. 80.

In the construction of the note, the intention of the parties is to control, if it can be legally ascertained; and the authorities cited in defence clearly show that an ambiguity, such as appears upon the face of the note, is not open to parol explanation. It is a patent ambiguity, which is well defined as one which is "produced by the uncertainty, contradictoriness or *deficiency* of the language of an instrument, so that no discovery of facts, or proof of declarations, can restore the doubtful or smothered sense, without adding ideas which the actual words will not of themselves sustain." Roberts on Frauds, p. 15.

In such a case, however, it is competent for the Court to determine from the paper itself, in the light of the circumstances in which it was given, what was the actual intention of the parties. *Webster* v. *Atkinson*, 4 N. H., 21. Otherwise, the maker might reap an unjust advantage from his own neglect to use clear and appropriate language, which the law

does not allow, when it is possible to ascribe to the language, under the circumstances in which it was used, any appropriate legal effect. Where there is nothing in the contract to lead to a different conclusion, and it is clearly apparent that some word indicative of the intention of the parties was intended to be used, but omitted by mistake, the parties may properly be presumed to have intended to use that word which is most commonly used by the same or other parties under the same or similar circumstances. Their probable intention, in the absence of any thing to the contrary, may well be taken as their actual intention. *Coolbroth* v. *Purinton*, 29 Maine, 469.

In the case of *Connor* v. *Routh*, 7 How. Miss., 176, cited by the plaintiff, it was held that a note payable "*twenty-four after date*" was not void for uncertainty, but was a note payable at some time after date, and was admissible in evidence, without other testimony, under an averment in the declaration that twenty-four months after date was the time meant by the parties, and it was left to the jury to judge as to the fact of the time intended. In the case before us, the Court are authorized to draw such inferences as a jury might. It does not, therefore, become material for the Court to determine whether the legal interpretation to be put upon the note as to the time of payment, in view of the circumstances attending its creation, appropriately belongs to the jury or the bench. That the time of payment meant by the parties may be determined by the one or the other, we have no doubt.

In view of all the facts in this case, we are of opinion that the word omitted in the contract after the word six was intended to be months; that it was left out by mistake, and that both parties understood the term of credit to be six months. Notes payable in six days are seldom seen, while those payable in six years are not very common. The word most frequently in use in the commercial arrangements of men, not only in our cities, but in the country, to designate the time when notes and bills fall due, is months. Especially is this so where the numerical adjective used in connection

with it is six, as in the present case. There being nothing in the note in suit to indicate that any other term of payment was intended by the parties, the law, under the circumstances, regards it as a note payable in six months from its date.

It is further contended that the note was not payable to "the Metropolitan Fire and Marine Insurance Company," but that these words in it, as well as the words "President of" immediately preceding them, were only used as *descriptio personæ*. It cannot be denied that, if the note was intended to be payable "to the order of L. Monson" as an individual, and not as president of the company, acting officially, the insertion of such descriptive words was wholly nugatory. Under the circumstances of this case, we cannot doubt that it was the intention of the parties to the note to make it payable to the order of L. Monson, as president of the Insurance Company, and so, by its very terms, the said Monson is distinctly recognized as having official authority to indorse it. Such must have been the mutual understanding of the parties. That the note may properly be regarded as payable to the order of the company, and that they are sufficiently designated as the payees, is well sustained by the authorities. In addition to those cited by the counsel for the plaintiff, upon this point, we cite the case of the *Trustees of the Ministerial and School Fund in Levant* v. *Parks & al.*, 1 Fair. 441.

It is further objected in defence that if the note is not void for uncertainty, and can properly be regarded as a note payable to the Metropolitan Fire and Marine Insurance Company or their order, in six months from its date, still it has not been legally indorsed, because it does not appear that Monson, the president of said company, had any authority to indorse it. It is, therefore, contended that the indorsement now upon it, through which the plaintiff, as indorsee, claims, is void. But we are of opinion, in the absence of all proof tending to show any want of such authority, that it is well established by the legal evidence in the case. It might, perhaps, be well questioned whether the recognition of such authority in the note itself would not, if uncontrolled by other

evidence, be sufficient to show it. In view of all the facts, the note, having been legally indorsed before it became due, or was dishonored, is not open to the equities subsisting between the original parties, and the defence which is set up therefore fails. *Defendants defaulted.*

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

PHEBE S. CURTIS, *Adm'x, versus* SYLVANUS C. BLANCHARD.

The plaintiff's intestate was a part owner of a vessel, against which, at the time of his decease, were certain outstanding unpaid bills, charged to the vessel and owners. The defendant had been ship's husband; and, after the decease of her intestate, the plaintiff, *as executrix*, gave him special authority, as her agent, to sell the share of the vessel belonging to the estate. This action was for the proceeds of the sale, *and it was held:* — That the defendant had no right to appropriate the proceeds to the payment of the demands against the vessel and owners, but that he must account therefor to the plaintiff.

THIS was an action against the defendant as surviving partner of the firm of Blanchard & Smith. The facts are substantially stated in the marginal note, and also in the opinion of the Court.

Fessenden & Butler argued for plaintiff: —

The case finds that the defendant's firm, as agents of plaintiff, made sale of one-sixth part of the vessel, and received the proceeds thereof. Not having any claim in set-off themselves, and not being personally liable for any debts of the vessel, it is difficult to understand on what principle they withhold the proceeds from the plaintiff.

The only reason assigned seems to be that the other owners of the vessel would not consent to their payment, and directed the same to be appropriated in another direction.

1. It was the clear duty of the defendant's firm to account

to their principal for said proceeds, without asking the consent or taking the direction of any third person.

An agent is not permitted to set up any adverse title or claim of a third person, to defeat or prejudice the right of his principal. Story on Agency, p. 207, § 217, and cases cited in note.

An agent must account to his principal, and cannot set up the *jus tertii* in an action of his principal against him. *White* v. *Bartlett*, 9 Bingham, 378, and cases cited.

The fact that defendant's firm were also agents of the other owners does not alter the case. The agencies were entirely separate and independent.

It is to be noticed that the authority, to sell the intestate's portion of said vessel, did not result from any powers of defendant's firm as ship's husband, even if they continued such, as respects said portion after intestate's death, but from a special agency conferred upon them by plaintiff as administratrix.

2. But the other part owners had no lien or claim upon, or any authority over said proceeds.

"Partners, as such, may be ship owners, but, generally, part owners are tenants in common." MORTON, J., in *French* v. *Price*, 24 Pick. 19.

There may be a partnership, as well as a co-tenancy, in a vessel. When a person is to be considered as part owner, and when a partner, in a ship, depends upon circumstances. "The former is the general relation between ship owners, and the latter is the exception, and it is required to be shown specially." MELLEN, C. J., in *Harding* v. *Foxcroft*, 6 Green. 77.

In *Phillips* v. *Purington*, 15 Maine, 427, it was remarked, that, the usual relation of part owners of a vessel is that of tenants in common, but they may become partners. See 3 Kent, (5th ed.,) 155; also 38 Maine, 246, where the distinction between part owners and partners is considered and pointed out.

In this case it is not "specially shown," and it will not be pretended that the co-owners of the vessel were partners.

Indeed, it is specially stated that the outstanding debts against her were contracted while she was engaged in the general freighting business.

Where there is no special relation of partnership existing, and they are merely part owners, one part owner has no lien on the share, or the proceeds of the sale of the share of another, and consequently has no right to require said proceeds to be applied to the payment of the joint debts contracted on account of the vessel.

This arises from the distinction between the relation of part owners and partners, and has been directly decided in the well considered case of the *Larch*, 2 Curtis, 427–433. All the cases which tend to show any different doctrine are those in which the element of partnership is mingled with that of part ownership, and they are all cited in the case of the *Larch*.

If a co-tenancy in a vessel constituted a partnership, all the incidents of a partnership should follow, and the only way the other owners could assume the control and management of the joint property would be to file a bond in the probate office, according to c. 69 of R. S. *Cook* v. *Lewis & al.*, 36 Maine, 340.

B. Freeman, for the defendant, contended:—

1. That the defendant, having been ship's husband when the debts were contracted, and the demands being against the vessel, had the right to appropriate the proceeds of the sale to the payment of them. As to these claims the several part owners constituted, in law, but *one person*. They were responsible, *in solido*, as partners. 3 Kent's Com. 156; Parsons' Mercantile Law, 337.

2. The defendant sold the whole vessel, by authority given to him therefor by all the owners. And, therefore, in the absence of any express promise to account to them severally, he is not responsible to them severally. The sale was entire, and all the part owners should have joined in the action to recover the proceeds. Abbot on Shipping, 92; *Robinson*

v. *Cushing*, 11 Maine, 480; *Blanchard* v. *Dyer*, 21 Maine, 111.

3. The defendant holds the proceeds of the entire sale for the benefit of all the owners, one of whom is represented by the plaintiff. The action, therefore, is equivalent to a suit by one part owner against another, and cannot be maintained. *Maguire* v. *Pingree*, 30 Maine, 508; *Hardy* v. *Sprowle*, 33 Maine, 508; *Dodge* v. *Hooper*, 35 Maine, 536.

4. The defendant was the common agent of all the owners when the debts were contracted; the funds in his hands were the property of all the owners, and, as their agent, he had the right to appropriate them to the payment of the debts. His only liability is in a joint action, for the balance remaining after the debts are paid. Chitty on Pleading, 39; *Sheppard* v. *Richards*, 2 Gray, 424.

The opinion of the Court was drawn up by

TENNEY, C. J.—This suit is for the recovery of the proceeds of the sale of one-sixth part of the bark "A. G. Hill," and is submitted on the following agreed facts:—

The plaintiff's intestate was master of the bark in his life time, and, at the time of his death, was the owner of one-sixth part thereof. He died in July, 1856, and the plaintiff was duly appointed administratrix of his estate, which was represented insolvent, and she was duly licensed by the probate court to make sale of the portion of the vessel belonging to the estate. The whole vessel was sold at the same time, by Blanchard & Smith, who had been ship's husband at the time of the decease of the intestate, and who have since acted as the agents of the other owners, in closing up the affairs of the bark. The agency given by the plaintiff to the firm to sell the bark was distinct from that under which they sold the parts belonging to the other owners; and the plaintiff, after the sale, executed a bill of sale of the portion sold under her authority. The sum received by Blanchard & Smith for the whole vessel was $5250, which came into their hands, Dec. 10, 1856. Blanchard & Smith had no interest in

the vessel, as owners, but the defendant, as surviving partner of the late firm, remains the agent of the owners of the part of the vessel in which the intestate had no interest, for the purpose of closing up their concerns therein. Before the death of the intestate, the owners were six in number, having unequal shares in the vessel. They were indebted, at the time of the sale, on account, in bills for disbursements, commissions, supplies, &c., to third persons, contracted before the decease of the intestate, while she was engaged in general freighting business, extending back for several years, amounting to sufficient to absorb the proceeds of said sale, and the previous earnings of the vessel; these bills were charged to the vessel and owners, and Blanchard & Smith were not liable therefor. These claims, and those between the several part owners, are unadjusted, and the entire proceeds of the sale of the vessel and of a chronometer, have, since the sale, been applied by the defendant in payment of said unadjusted claims, by the direction of the surviving owners. The plaintiff seasonably demanded the proceeds of the sale belonging to the estate represented by her, before any part was paid as above stated, by the defendant, and objected that it should be so applied. The defendant refused to pay the plaintiff upon her demand, without consent of the other owners, which they declined to give.

It is not pretended in defence that the owners of the bark constituted a partnership. The facts disclose nothing which is an essential element in such a relation.

In the sale of the portion of the bark belonging to the estate represented by the plaintiff, the firm of Blanchard & Smith acted as her agents. They having acted at the same time as the agents of the other owners, in the sale of their respective portions of the vessel, cannot, in the least, change their relations with her, or affect their rights or obligations existing under her authority. By accepting the agency from her to make sale of the sixth part in her charge, they were bound to account to her for the proceeds, and they cannot, effectually, set up the adverse claims of other owners to de-

feat this obligation. Story on Agency, § 217, and authorities in note (2.)

The case is before us on a statement of facts, signed by the parties, and we can assume no fact to exist, unless it makes one, agreed by the parties, or is necessarily inferrable from those admitted. It is not agreed that those having bills against the owners, charged to the vessel and owners, have a lien upon the bark, and it certainly cannot be necessarily inferred from any thing in the case. If there was a lien, it may have been waived, so that it cannot be enforced. We must treat the case as it would be treated if it was expressly agreed that, the creditors of the owners had no lien upon the bark.

If the several unadjusted claims of the respective owners, and their liability to third parties, could not be arranged and settled amicably between themselves, it is well established that suits at law for such purpose cannot be maintained. *Maguire* v. *Pingree*, 30 Maine, 508; *Knowlton* v. *Reed*, 38 Maine, 246. *A fortiori*, the plaintiff's agents appointed for the single purpose of making sale of the part of the vessel belonging to the estate, and paying the proceeds thereof to her, cannot constitute themselves receivers, withhold the money from her, and without authority from her, but against her protestation, disburse the same at their pleasure, by virtue of no decree in any process in equity, and undertake to adjust the claims of creditors and other owners, when the plaintiff had no opportunity of being heard in behalf of the estate, which she is bound faithfully to administer.

According to the agreement of the parties, the defendant is to be defaulted for the sum of $875, and interest thereon from April 1, 1857.

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

JOSIAH MITCHELL *versus* GEORGE W. KENDALL *& al.*

One, of several individual creditors, who have legally become parties to an assignment, made under statutes of this State, may maintain an action of covenant broken against the assignees, without joining the others; for, though all look to a joint fund for their dividends, the claim of each creditor, either as an individual, or as a firm, is several and not joint.

THIS is an action of COVENANT BROKEN, on an assignment made under the statutes of this State, by D. Y. Kendall to the defendants of all his property for the benefit of such of his creditors as should become parties thereto. The plaintiff alleges in his declaration, that he and certain other creditors of the assignors became parties to the assignment within the time prescribed by law.

The defendants demurred generally to the declaration, and the plaintiff joined in the demurrer. The case was presented to the full Court and heard on the pleadings.

Shepley & Dana, argued in support of the demurrer:—

The damage which plaintiff claims of defendants, if inflicted, was inflicted upon all who became such parties, and not on plaintiff alone. The right of action which plaintiff has, if any, is jointly with the others, who, as he says, seasonably became parties thereto.

"It never lies in the option of the covenantees to say whether they shall sue for the breach jointly or severally. They must sue jointly if they can." Parsons on Contracts, vol. 1, p. 14.

Though a covenant be joint and several in the terms of it, yet, if the interest and cause of action be joint, the action must be brought by all the covenantees. *Eccleston* v. *Clipsham*, 1 Saund. 153.

"In general, all contracts, whether expressed or implied, and resulting from the operation or construction of law, are joint where the interest in them of the parties for whose benefit they are created, is joint, and separate where that in-

terest is separate." Parsons on Contracts, vol. 1, p. 14, and cases cited; *Slingsby's case*, 5 Coke, 19.

Barrows, contra.

The opinion of the Court was drawn up by

RICE, J. — This is an action of covenant broken, and comes before us on general demurrer to the declaration. The defendants are the assignees of David Y. Kendall, who, on the 14th of September, 1847, assigned his property, under the statutes, for the benefit of such of his creditors as should legally become parties thereto. The plaintiff, in his writ, alleges that he, with others, creditors of said David Y. Kendall, became parties to said assignment, within the time prescribed by law, and charges the defendants with a want of faithfulness and diligence in the discharge of their trust, in not looking after, managing and converting the property assigned into cash, and paying over the proceeds thereof to the plaintiff, according to his just proportion, and also, in paying over to other parties not entitled, &c.

The position assumed in support of the demurrer is that the action should have been joint, in the name of all the covenantees in the assignment.

The rule of law is that the action should follow the interest as disclosed on the face of the deed, without regard to the precise form of the covenant, so that the action must be joint, when the interest in the subject matter of the contract is a joint interest, and several, when the interest of each covenantee is a several interest. Addison on Cont., 267.

When the interest of the covenantees is several, each may sue separately, although the obligation be joint. *Hoskins* v. *Lombard*, 16 Maine, 140.

In general, all contracts, whether express or implied, and resulting from the operation or construction of law, are joint when the interest in them, of the parties for whose benefit they are created, is joint, and separate, when that interest is separate. *Slingsby's case*, 5 Coke, 19; 1 Parsons on Cont., 14, and note.

In this case, though the covenantees looked to a joint fund for their dividends, their claims upon those funds were not joint, but several. Each covenantee, either as an individual or as a firm, presented his several claim against the assignor.

The plaintiff held an individual claim against the assignor, and was in no way connected with his other creditors who became parties to the assignment. His interest is a several, and not a joint interest. *Carter* v. *Carter*, 14 Pick. 424. This is also in accordance with the terms of the assignment.

Demurrer overruled. Judgment for plaintiff.

TENNEY, C. J., APPLETON, CUTTING, MAY, and DAVIS, J. J., concurred.

JEREMIAH BAKER *& al. versus* CYRUS COTTER *& als.*

In a suit between other parties, parol evidence is admissible and sufficient to prove that a person was president of an insurance company, and that he had authority to indorse notes for the company.

If the president of an insurance company is empowered and required, by the by-laws, to adjust and pay all losses, authority to transfer and dispose of the funds of the company for that purpose, including negotiable paper owned by them, may be presumed; for the imposition of the duty implies the grant of authority necessary to its performance.

THIS was an action upon a promissory note, of which the following is a copy:—

"$1250. Boston, June 1, 1855.

"Twelve months after date, we promise to pay the Tremont Mutual Insurance Company, or order, for value received, twelve hundred and fifty dollars. Cotter, Bond & Co."

This was a subscription note, given to the company to be used by them as a part of their capital. The defendants, in consideration of it, became entitled to participate in the profits of the company, and to have policies underwritten on account of it.

November 16, 1855, the company being indebted to the

plaintiffs for a loss, against which they had insured, transferred and delivered to them this note. It was indorsed "John G. Nazro, President."

The case shows that, at the time of this transfer, the company were indebted to the defendants, but this fact was not known to the plaintiffs.

The execution of the note was admitted, but the authority of Nazro, as president of the company, to transfer it, was denied. The other testimony in the case, so far as it is material, is stated in the argument of the counsel for defendants, and in the opinion of the Court. The case was argued by

B. Freeman, for the plaintiffs, and by

Shepley & Dana, for the defendants.

The following is the substance of the argument for defendants: —

The first question that arises is whether the note was so indorsed to plaintiffs as to pass the title to them, and enable them to maintain a suit upon it in their own names.

To prove that the Tremont Insurance Company have transferred the note, the plaintiffs have taken the deposition of John G. Nazro, who states that, on the 16th day of November, 1855, he transferred the note to the plaintiffs, "by authority given to the president by the by-laws and by the uniform usage of the company."

The indorsement of a note is just as solemn an act as the making of a note, and subjects the party bound by it to liabilities of the same nature. It is not enough for any officer of a corporation to say that his act was by virtue of a usage of the company, without showing what that usage was, so that the Court may judge whether, under the charter and the circumstances, the pretended usage gave the authority pretended.

Where a party sets up that his act was authorized by a usage, it is the duty of the Court to examine the nature and extent of that usage. But here is no opportunity or means offered. It is not said how long, uniform or well known, this

usage was, or whether the plaintiffs or defendants or corporators knew of it.

A party cannot show himself authorized to sign or indorse notes, the property of another, by simply saying it was his usage to do so. The assent of the parties to be affected thereby must be shown to give that usage any force.

Especially is that so in the case where a corporation is attempted to be bound by usage. The authority of officers of corporations appears by the charter, by-laws or votes of that corporation; and no usage can control these, or give authority where they are silent, unless it has been well established, long used and acquiesced in by the company.

No such usage or acquiescence is attempted to be shown; and, where an officer's duties and authority are shown by written evidence, we submit that this, his mere word that his act was authorized by usage, is not enough. Let him state the nature and extent of that usage, that the Court may judge whether or not, in opposition to, or in the silence of the organic law of the company, the act was authorized. On this point, see *Sch. Reeside*, 2 Sumner, 567, and cases cited in 2 Greenl. Ev. § 292, n. 2; 2 Greenl. Ev. § 252.

We contend, therefore, that no power is shown by usage, because no usage is in fact shown; and that, if Nazro had any power to indorse this note, it must appear by the by-laws to which he refers.

But the Court will find, upon examination of the by-laws annexed to his deposition, that no authority is given Nazro to indorse notes.

In confining his authority to the power conferred by usage and the by-laws, he shows that he could lay claim to no other pretence of authority; and, if *these* do not confer it, the indorsement was not the act of the company, and the plaintiffs cannot maintain this action.

The Court may notice that, in the copy of the by-laws annexed to the deposition of Nazro, there are two sections marked, apparently by the witness, as those under which he

claims to have acted, viz.: § 6, and § 10. The sixth section clearly gives no authority. The tenth section is in these words: "All notes and obligations given in the name of the company shall be signed by the president, *and countersigned by the secretary*, and bear the written approval of two directors. *No note or obligation shall be given, unless authorized by a vote of the board of directors.*"

The indorsement of a note creates a new liability; it is then in the hands of an indorsee, the same as the note of the company, who agree to pay if the maker does not; it is an *obligation* of the company, and should have been authorized by a vote of the directors.

By signing the note, the defendants promised to pay the Tremont Mutual Insurance Company, twelve hundred and fifty dollars. There is no admission by defendants that Nazro was president; there is no promise to pay to his order; there is no proof that he was president; nor that he was accustomed to bind the company by his acts.

The company keeps a book of records, as is shown, and, if Nazro was president, his election must appear there, and be shown by the record, and cannot be proved otherwise.

The cases do not go farther than to say that the authority of an agent may be proved by parol. But that does not affect the case at bar. The witness undertakes to prove that he was elected president of the insurance company. If he were, this would appear of record, and the record should have been resorted to by plaintiffs, who have no right to the note unless the witness was president; and, when a fact is to be established by record alone, the record cannot be dispensed with.

The opinion of the Court was drawn up by

GOODENOW, J. — The case finds that the defendants admitted the execution of the note declared on, but did not admit the indorsement to the plaintiffs.

They admit, then, the existence of the "Tremont Mutual Insurance Company," as a corporation properly organized to

do business, on June 1, 1855, at the date of the note; and the note was for value received, by its terms. It was for the sum of $1250, payable in twelve months after date, to the company, or order. It was indorsed as follows: "John G. Nazro, Pres." "Pay B. F. Shaw, Esq., cash. or order."

In *Milledge* v. *Boston Manuf'g Company*, 5 Cush. 179, it was held that, "the powers of agents, as well as any other fact necessary to charge a corporation, may be proved by corporate acts, and by acts of persons professing to be their agents and servants, and the tacit acquiescence of the corporation."

"And, inasmuch as the powers of agents may be proved by extraneous evidence, the extent and limitation of their powers may be proved in the same manner."

Nazro deposes that he derived his authority to indorse from the by-laws, and the uniform usage of the company. Corporations can act, usually, only by agents. The means must be proportioned to the end. The agents must necessarily have power to accomplish the business for which they are appointed. The president had power, by the sixth section of the by-laws, "to adjust and pay all losses." For this purpose, he must use the means which the company have placed in his hands. If these means are negotiable notes, in order to be used and transferred, they must be indorsed. If no provision has been made for their indorsement by a treasurer, or other agent of the company specially authorized, it seems reasonable to infer that the company must have understood that it would be the duty of the president, *ex officio*, to indorse and transfer them, from time to time, as they should be needed, in the performance of the legitimate business of the company. From the testimony of the president, we are authorized to conclude that such had been his practice, and that it had been acquiesced in by the company.

There is an essential difference, in our opinion, between the power to contract a debt, and the power to use the means of the company to discharge a debt already existing. In the one case, they are free to act or not to act, as they please. In the

other, the obligation is upon them, and the wide field of unlimited discretion and judgment is taken away. The testimony of Nazro was competent to prove his agency *de facto*.

We are of opinion that the depositions of the plaintiffs were properly admitted in evidence.

A default must be entered, and judgment for the plaintiffs for the amount of the note, and interest from the time it became due, and for costs.

TENNEY, C. J., HATHAWAY, CUTTING, MAY, and DAVIS, J. J., concurred.

SARAH A. PREBLE *& al., petitioners for certiorari, versus* THE CITY OF PORTLAND.

By the charter of the city of Portland, the city council, composed of the mayor, aldermen and common council, have all the powers to locate, widen, or otherwise alter streets and public ways, which, by the general law, is conferred upon the inhabitants of towns and upon the selectmen.

By section third of the city ordinances, the city council are authorized to refer all applications for the location or alteration of streets to a committee, to inquire into the matter and report. Such committee, for this purpose, represent the city council; and all notices to parties to appear and be heard before such committee are regarded as notices to appear and be heard before the city council, to whom every thing material may be expected to be reported. It is not necessary that parties should have notice to appear and be heard before the city council.

The acceptance by the city council of the report of such committee locating or altering a street, is a sufficient compliance with R. S. (of 1841,) c. 25, § 29.

The location or alteration of a street, and awarding damages to parties injured thereby, is not an act for the appropriation of money; and it is not necessary that such act should be approved by the mayor.

PETITION FOR CERTIORARI, praying that the proceedings of the city council, in making certain alterations in Temple street, in the city of Portland, might be quashed. The facts are nearly all stated in the opinion of the Court. Several

errors were assigned, some of which were not relied upon in the argument.

The petitioners claimed title to the premises taken in the alteration of the street, as devisees in the will of the late W. P. Preble, deceased; and their title was admitted.

The petition for the alteration of Temple street was presented to the city council, July 2, 1856, and was referred to the committee on laying out new streets. On the 8th of July, that committee reported, recommending the alteration of the street, and submitting an order "that said committee be authorized and directed to alter said street," according to certain specifications therein contained. After amending the specifications, in some particulars, the order was passed July 9th.

The committee thereupon, July 10th, posted notices of the intention of the city council to alter the street, and appointing a place for the hearing of parties interested, July 18th. These were all the notices that were ever given. After hearing the parties on the day appointed, the committee made their report, altering the street according to the specifications contained in the order; and this alteration, with the admeasurements and boundaries, was filed in the city clerk's office, July 24th. The subject was brought before the city council on July 31, with no final action. On the 4th of August, a remonstrance against the alteration, from W. P. Preble, was presented to the city council, and referred to the committee on new streets. And, on the 5th of August, the report of the committee, making the alteration and fixing the amount of damages to be paid to the parties injured thereby, was adopted by both branches of the city council.

Barnes, for the petitioners:—

Contended that the proceedings of the city council were not such as the law required, and that they ought to be quashed.

1. Certiorari lies against the corporation, and their proceedings in locating or altering a street, if invalid, may be quashed by this Court. *Parks* v. *Boston*, 8 Pick. 218; *Stone*

v. *Boston*, 2 Met. 220; *Baldwin* v. *Bangor*, 36 Maine, 518; *Dwight* v. *Springfield*, 4 Gray, 107.

2. The devisees, though one holds only a life estate, and the other the remainder, are entitled to maintain this process.

3. By the R. S. of 1841, § § 27, 28, 29, before any proceedings for the location or alteration of a street or way, the selectmen must give notice of their intention to make such alteration, that parties interested may appear and be heard. If, upon such hearing, they determine to make such alteration or location, *another notice* must be given by issuing a warrant for a town meeting, stating the admeasurements and boundaries of the location, which is not established until accepted and allowed by the inhabitants at such meeting.

The same proceedings, *mutatis mutandis*, must be had before the city council. In this case, *before* passing an order "authorizing and *directing*" their committee to make the alteration in the street, they should have given notice of their intention to do so, that parties might appear and be heard before them. This was not done. No notice was ever given, nor any opportunity offered for interested parties to appear before the city council. And no notice was given for any hearing before the committee, until after the city council had *directed* the committee to make the alteration. Nor were there afterwards any proceedings by the city council analogous to the acceptance of the alteration, by a meeting of the inhabitants of a town duly notified of the admeasurements and boundaries of such alteration.

4. By a provision of the city charter, special laws of 1833, chapter 325, no bill or act passed by the city council for the appropriation of money is of any validity, unless approved by the mayor. By this alteration, as reported by the committee, damages were "awarded" to various persons injured thereby, to the amount of $6693. This act was never approved by the mayor, and the whole proceeding was therefore void.

The case was argued by —

Fox, for the respondents.

The opinion of the Court was drawn up by

TENNEY, C. J. — The records of the city council are represented by the petitioners, as showing that the petition of Eliphalet Greeley and others, praying that Temple street might be widened, was referred to "the committee on laying out new streets." On July 8, 1856, after this reference, the committee made a report recommending that the street be altered, according to an order which they submitted with the report. After several unsuccessful attempts of the two boards of the city council to agree upon the particular alterations to be made in that street, the report of conferees, who had been appointed by a concurrent vote of the boards, was accepted by both on July 9, 1856. Thereupon, on the same day, the city council authorized and directed the committee to alter Temple street, by widening the same, and in their order for this purpose prescribed the lines and bounds specifically, as the limits of the street after the alteration. On July 10, 1856, the committee duly posted notices of the intention of the city council to widen Temple street, by the lines and bounds prescribed in the order last passed, stating therein the *termini* of the street, and also the particular alterations contemplated, on the 18th day of said July, at the corner of Temple and Middle streets, and that all persons interested would take notice and govern themselves accordingly.

On July 24, 1856, the committee made their report to the city council, therein stating that, having examined the route proposed, they were of the opinion, and did adjudge, that there was occasion and necessity for an alteration of said public way, for the use and convenience of the city, and they altered said street in the manner therein described, conforming to the order of the city council, and that they filed the alteration with the city clerk with the boundaries and admeasurements mentioned in the report. By the clerk's certificate, the report of the committee was filed in his office on July 24, 1856.

Several errors are alleged in the petition to be exhibited

by the records. We are to see whether legal error has been shown to be in the record.

The first errors assigned and relied upon are, that the city council, without giving notice, directed the committee "on laying out new streets," to alter Temple street in the particular manner followed afterwards by the committee, thereby subjecting their land to a servitude, without giving the owner thereof an opportunity to be heard upon that question before the judgment of the city council was fully formed.

By the charter of the city of Portland, section 4, the executive power of said city generally, and the administration of police, with all the powers of the selectmen of the town of Portland, except as provided in the thirteenth section of the Act, 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 the Act, shall be vested in the mayor and aldermen and common council of said city, to be exercised by concurrent vote, each board to have a negative upon the other. These boards constitute and are called the city council. § 2.

By section 6, the city council shall have exclusive authority and power to lay out any new street or public way, or widen or otherwise alter any street or public way in said city of Portland; and to estimate the damages any individual may sustain thereby; and shall in all other respects be governed by, and subject to the same rules and restrictions as are provided in the laws of this State regulating the laying out and repairing streets and public highways.

Section 3 of the city ordinances provides, that the committee "on laying out new streets," when thereto directed by a vote of the city council, shall lay out, widen or otherwise alter any street or public way, and estimate the damage any individual may sustain thereby, and they shall report to the city council the laying out or alteration of such street or way, with the boundaries and admeasurements thereof, together with the names of the persons to whom damages have been assessed therefor.

No question is made, that the alteration attempted to be made in Temple street would have fallen under Art. II, of R. S. of 1841, if Portland had remained a town; which article treats "of location, alteration and discontinuance of town and private ways." By these R. S. c. 25, § 27, the selectmen of the several towns, either personally or by such person or persons as they may appoint, may lay out, alter or widen town ways, for the use of their respective towns, &c.

Section 28 provides, that no such town 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 and alter the same, and stating the *termini* of such road, shall be posted up, &c.

By section 29, no such town or private way shall be established, as laid out or altered, &c., until the same, &c., shall have been reported to the town and accepted and allowed at some meeting of the inhabitants, regularly warned and notified therefor; nor unless such laying out or alteration, &c., shall have been filed with the town clerk seven days at least before such meeting.

From the terms used in section 28, the notices required to be posted up are so to be posted after the selectmen have so far deliberated upon the subject that they have intended to lay out or alter the road which may have been in contemplation. In coming to this stage of their proceedings, no notices to be given are referred to in the statute; and none can be presumed to have been designed, as express provision is made that the notices shall be posted up before the laying out, &c. This intention of the selectmen must be entertained upon some consideration and consultation among the members of the board. The statute does not forbid any informal examination by them of the route, between the *termini* of the way, which it is supposed may be laid out or altered. And if they should proceed so far as to trace out the lines of the road to be laid out or altered, and commit these doings to writing, without the design of making such memorandum the report of the laying out or alteration of the

way, required by the statute to be made and filed with the town clerk, we see nothing in the statute which treats this as so improper, that the subsequent action, according to the provisions of law, are to be held as destitute of authority. The examination of the subject of the way, and the consultation thereon, and the memorandum made as supposed, may together satisfy them what may be proper, in relation to the laying out or altering the road, but still they are not supposed to be thereby disqualified to hear impartially those who may appear before them to be heard upon the subject.

The city council having the power, under the charter, which the selectmen and inhabitants of the town possessed before, it certainly is proper, and believed to be in harmony with the general practice, to refer an application for the laying out or the alteration of a street to the committee "on laying out new streets," (a committee provided for in section 2, of city ordinances,) in order that they may examine the subject matter of the application and collect all the facts appertaining thereto. The reference is made that, through their report and otherwise, the expediency of granting the prayer of the petition may be understood by the city council. And if, from the knowledge thus acquired, the committee report in favor of further action, it is not improper that they should recommend the particular manner in which the laying out or alteration should be made. This certainly the city council might reasonably expect, that they might know fully what it was proposed by the committee should be done, and the attendant expense to be incurred, as the statute interposes no prohibition of such a course. This course is not unlike the examination and consultation referred to, of the selectmen of a town, previous to their giving the notices of their intention to act in the premises; but obviously more proper, as the committee are supposed to have acquired knowledge which the city council have not.

In this case, neither the city council nor their committee had altered Temple street previous to the order to the latter of July 9, 1856; and, before any proceedings took place under

this order, all parties had been legally notified of the time and place where they could be heard before the committee. The notice to appear before the committee is to be regarded as a notice to be heard before the city council, to whom every thing material may be expected to be reported. *Harlow* v. *Pike*, 3 Greenl. 438.

Although the committee were instructed, after they had first reported, to make certain specific alterations, all the opportunity for a full hearing was afforded, which any one could claim as a right. And the alterations made by the committee, under direction of the city council, were by no means conclusive. When the committee made their report, after the opportunity for persons interested to be heard, the way had not been altered in the sense of the statute, and the copies of the record presented show that it was not so regarded. Votes of one board were not concurred in by the other. Some of these votes were in favor of a recommitment to the committee, with instructions to make specific alterations in lines and boundaries. And, when the matter was thus pending before the city council, the lines of the street, as increased in width by the committee, as directed by the boards, were not supposed by them, nor were they, in fact, determined in any respect, but they served as a basis for propositions of amendment. But the right of all persons had then been respected, and provided for; and if any one had presented himself and objected to the alteration made by the committee, he could have been heard, and the grounds of the objection, the committee would have, in some manner, made known to the city council.

The report of this committee was, of necessity, unlike that of the selectmen of the town. That of the latter is the report of the board authorized and required to lay out or alter the way, and when made and filed their power ceased. The former was merely the report of a committee of the city council, who alone had the authority to finally lay out or alter the way.

This case, in this particular, is unlike that where the select-

men lay out a public way in a town, under the direction of the town, as in the case of *Keen* v. *Stetson*, 5 Pick. 492. In that case, the selectmen, who were an independent board and bound to act in the first instance, in order that a town way might be legally established, and lay out the way, in the exercise of their own judgment and sound discretion, if they laid it out at all, acted as the servants of the town, ministerially, in furthering the designs of the town, without exercising their own authority, and their doings in no respect differed from the acts of any other three men whom the town might have employed for the same purpose.

We are not satisfied that the proceedings of the city council, as represented upon the records, in reference to the alteration of Temple street, were erroneous.

Another error assigned is, that a time should be fixed when the city council should act upon the report, which was not done in this instance. This objection to the record does not seem to be relied upon in argument; but it may not be improper to remark that the city council take the place of the inhabitants of the towns, as well as of the selectmen; and that a meeting of the city council took place on July 31, 1856, when the matter of the alteration of Temple street was brought up and discussed, which, we cannot doubt, was a compliance with the statute.

The record discloses no error in relation to the remonstrance of Judge Preble. It was received, read and referred to the committee "on laying out new streets," who, we are to suppose, considered the same and made known their views to the city council, which were not required to be made matter of record, and the original report was finally accepted.

It does not appear that any law, ordinance, or bill, for the appropriation of money, had passed both branches of the city council, having connection with the alteration of Temple street, and, consequently, none could have been presented to the mayor for his approval. No foundation, in fact, is perceived for this objection.

The report of the committee "on laying out new streets,"

having been accepted on July 31, 1856, is to be regarded as "accepted and allowed," within the meaning of R. S., c. 25, § 29. *Mann* v. *Marston*, 3 Fair. 32.

Other errors in the record were assigned, which the petitioner's counsel have not urged as having a sufficient basis to require the writ prayed for, and we do not perceive that they constitute any legal defect. *Writ denied.*

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

BENJAMIN H. MACE, *petitioner, appellant, versus* JABEZ CUSHMAN, *administrator.*

The provision of c. 93, § 16 of R. S. of 1841, by which the husband of one who died intestate was entitled to the residue of her personal property, after the payment of her debts, &c., was not intended to be repealed by the Act of 1848, c. 73, which provides that the real and personal estate of a married woman, who shall die intestate, shall descend or be distributed to her *heirs.*

APPEAL from the decision of the judge of probate for the county of Cumberland.

The petitioner, from the year 1812 to the time of her death in 1855, was the husband of Betsey Mace, who died intestate and childless, (never having had any issue.) At the time of her decease, she was possessed of real and personal estate. There would remain in the hands of the respondent, on the settlement of his final account of administration, a balance exceeding the sum of $1000, which the husband claimed he was by law entitled to. The deceased left brothers and sisters surviving her.

On the petition of said husband, the administrator was cited before the judge of probate, to show cause why he should not settle his final account and pay over the balance that should remain in his hands, to the said petitioner. After hearing the parties, the judge of probate decided that, under the statutes of the State regulating the descent and distribution of intes-

tate estates, the petitioner is not entitled to any share of said intestate's estate, either real or personal, and ordered that the petition be dismissed. From which decision and ruling, the petitioner appealed.

The case is presented for the determination of the full Court, upon an agreed *statement of facts*, which facts, so far as they are material, have already been stated.

S. & D. W. Fessenden, argued for the appellant: —

The person to whom the property, real or personal, goes, at the decease of the owner, is designated by statute; and such person is in law denominated the heir. 1 Coke Lit. c. 6, title Descents, 237, A. And, by the civil law of descents, he is heir, to whom the lands, by law, are appointed to descend.

The law of descents, in this State, is the creature of, and is regulated by statute. R. S. of 1841, c. 93. It is obvious, from a collective view of these provisions of the statute, that it is the positive enactment of the law, by which the descent of estates, in this State, is regulated. Who are, or shall be heirs, depends wholly on the statute and not on the common law. Or, in other terms, he or she is heir of the intestate to whom, by statute, the estate is made to descend from the deceased intestate.

If the provisions of § § 15 and 16, of c. 93, were in force at the time of the wife's decease, it will not be contended that the petitioner is not entitled to the personal estate remaining after the payment of debts. He is the *heir* of his wife, according to the authorities cited, and, by the statute itself, he is heir to whom the property descends.

A law that would take a wife's property, and, for lack of children, distribute it among her brothers and sisters and their descendants, to the exclusion of the living husband, where she had failed to make a will, would be absurd and wicked, a violation of the principles of natural justice, and an outrage on the laws of our nature. The law under which the petitioner claims is so consonant to the genius of our institutions, that it would be difficult to make a sensible man, a man

participating in the common feelings of our common nature, believe that any Legislature of our State would deliberately repeal it, and give a direction to the estate of a deceased wife, under the circumstances in the statute supposed, from the husband to the brothers and sisters of the wife. A Legislature that would enact such a law, by repealing the existing law, would surely use express terms to accomplish the object. No such words of repeal are to be found, and it is only by implication that it can be contended that the 16th § of c. 93 is repealed.

No one would ever suppose, on reading the title of the Act of 1848, c. 73, "An Act in addition to an Act entitled an Act to secure to married women their rights to property," that the Legislature were, under such a title, about to pass a law changing the descent of a married woman's property; and create for her a new heir, in case she should decease without making a will. It is difficult to perceive how the third section of that Act could make her rights more secure than they were by the law as it stood.

Who are the heirs of a married woman, situated as the intestate was at the time of her decease? She was the lawful wife of the petitioner. She had no parent, no child living. She never was the mother of a living child.

By the common law, a man cannot be heir to goods and chattels. 3 Jacob's Law Dic., title Heir, p. 244. It is real estate alone to which a person may come into possession as heir, at common law, if indeed there be such a person as heir, at common law.

By our statute of descents, we have more nearly followed the rules of the civil law. An heir by the civil law is defined by Jacob, before cited. We make him heir of personal estate, on whom the law casts the inheritance of it. The husband is made heir by the 16th section of the statute of descents. "If the intestate were a married woman, the husband shall be entitled to the whole of such residue," makes the husband, *ipso facto,* heir, (and sole heir,) of the wife. That section

stands unrepealed. The statute of 1848 must, and should be construed to be in affirmance of it.

The statute of 1848 should not be considered a repeal of the former statute, by implication. It is a legal maxim that the law does not favor a repeal by implication, nor is it to be allowed, unless the repugnancy be plain. 4 Bacon, title Statute D., 637; 10 Mod. 118.

J. C. Woodman, for the respondent, contended:—

That the law of 1841 was repealed by the law of 1848, c. 73, § 3. This provides that "when any married woman shall die intestate, seized or possessed of any property, real or personal, in her own name, exempt from the debts or contracts of her husband, the same shall descend or be distributed to her heirs." This is the law which was in full force at the time of the death. By this Act the personal property is to be distributed to, or among the heirs, and any thing in the R. S. of 1841 to the contrary is repealed.

If this clause did not repeal the 16th § of the 93d c. of R. S., of 1841, then it did not change the law in any respect. The first rule of interpretation is to construe a statute, so that it shall have some force, make some change in the law. As this statute did not change the law in any other respect, clearly it repealed the section in the statute of 1841 on which the petitioner relies.

The language is technical and precise. It provides for the disposal of the deceased's whole property, and that in critical and precise language. It provides that her real estate "shall descend to her heirs;" and that her personal estate "shall be distributed to her heirs," that is, to the same persons. Those to whom the personal property is to be distributed do not take it as heirs. Personal property belongs to the administrator. But the meaning is, that the administrator shall distribute the personal property to the same persons, who are *heirs*, and those are the persons to whom the real estate descends by law. The use of the word "*distribute*" clearly shows that it was not intended to give the

whole personal property to the husband. The word "distribute" implies that the administrator is to divide it. The word "*heirs,*" which is plural, implies the same thing. And the phrase signifies that the administrator is to divide the personal property, proportionately, among those persons who are *heirs*, namely, those who are entitled to the real estate. If it was intended to give the whole personal property to the husband, as formerly, it would have been clearly and distinctly done by using the language of the 16th § in the statute of 1841; "the husband shall be entitled to the whole of such residue," or the whole of the personal property. Then there could have been no mistake. But, if that was the purpose, there was no occasion to enact this clause at all. The mere fact of enacting it shows an intention to change the law, and that change must have been to withdraw the personal estate from the husband, for it could be nothing else.

Again, so much of the deceased's property as was not "exempt from the debts and contracts of the husband" was not to be distributed. What was that? And why was this exception? The husband was authorized to convey property directly to his wife. Statute 1844, c. 117, § 1; Stat. 1847, c. 27; *Johnson* v. *Stillings,* 35 Maine, 457. And when property comes to the wife from the husband without a full and adequate consideration, it is not "exempt from the debts or contracts of the husband." Being subject to the debts and contracts of the husband, it was provided in the clause of the statute of 1848, c. 73, § 3, under examination, that it should not be distributed among the heirs of the wife, where the husband's creditors might never be able to reach it. But, if the meaning of the statute was to give all the personal property to the husband, there would have been no propriety in making such an exception, and it would not have been made. When it was all paid to the husband, his creditors might readily reach it all.

The fact that the statute of 1841, c. 93, § 16, provided that *the husband* should be entitled to the whole of the wife's personal property; and that, in the statute of 1848, c. 73, § 3,

new words are used, and provision is made that the personal property "shall be distributed to her heirs," shows that the husband was not intended, but other persons under the term *heirs.*

The same is also shown, as the sense of the Legislature, by statute 1856, c. 251, which authorizes the judge of probate to allow, in the account of the administrator of a deceased married woman, all reasonable expenses paid by him to the husband on account of the last sickness of the deceased.

If the law already provided that the husband should be entitled to all the personal property, why should the administrator be authorized to pay him the expenses of his wife's last sickness?

But who are the heirs of a married woman? How shall they be ascertained? And what do her heirs inherit? The petitioner's counsel insists that the petitioner is meant, by the "heirs" of Mrs. Mace; that he inherits her personal property; and that he ascertains this by the statute of 1841, c. 93. We say that heirship or inheritance is confined to real estate; that personal property is not the subject of heirship; that the heirs of a married woman are her children; and, if she has no children, then her lineal descendants; and, if she has no lineal descendants, then her father; and, if she leave no children, lineal descendants, nor father, then her brothers and sisters, and the children of any deceased brother or sister, by right of representation, are her heirs; and that we ascertain this by reference to the common law, and that the statute of 1841 is to the same effect.

According to the doctrine of the petitioner, if the deceased had left children, they could not take this personal property, notwithstanding the statute expressly declares that it shall be distributed to "her heirs." The husband would take it under that title rather than the children of her own body!

There is no express definition of the word *heirs* in the statute of 1841. It is often the case that legal terms are used in statutes which are well understood, and of common occurrence in books upon common law. We then resort to

those books upon common law, in the same manner as we resort to books upon any other science, to ascertain the meaning of technical terms in that science. This is the case with the word *heirs*. By referring to books upon the common law, we find that none can be heirs except those who are related by blood, and so descended from a common ancestor with the deceased. 3 Starkie's Ev. 1099, title "Pedigree;" also, on the same page, note *e*, *Richards* v. *Richards*, B. R. E., 4 Geo. II., Ford's MSS.; *Doe* v. *Griffith*, 15 East, 293; 2 Black. Com. 177, 241. The ancestor during his life beareth in himself all his heirs. 2 Bl. Com. 242, citing Co. Litt. 22. It is represented, in Blackstone, that an inheritance is that which a man acquires by right of blood by descent from any of his ancestors or kindred. Now, inheritance is what a person receives by heirship. Therefore, the heirs are those who are related by blood or consanguinity in the nearest degree.

Again, nothing is the subject of heirship or inheritance except real estate. Personal property is not the subject of inheritance. 2 Black. Com. 201; The titles to c. VII. VIII. II. and III. And, beginning at the second chapter, the whole of the second volume of Blackstone's Commentaries treats of real estate, and here only does he discuss the law of descent and heirship, because personal property is not the subject of inheritance. One may, by will, give his property to his legal heirs. In such case, they do not take it as heirs, but take as purchasers under his will. But for the will, this personal property would belong to his executor, and, even under his will, a specific legacy will not vest in the legatee till the executor agrees to it. 1 Story's Eq. § 542. So a man, who had his father's estate settled upon him in tail before he was born, is a purchaser, for he takes quite another title than the law would have given him. 2 Black. Com. 241. He is an heir, because he is the nearest related by blood, a son. But he does not take as an heir. So with this personal property. Nobody takes it as an heir, for personal property is not an inheritance, is not the subject of heirship. But the heirs are the nearest of kindred by blood,

those who inherit the real estate; and they have a right to this personal property, because the statute directs the administrator to *distribute* it, or, in other words, to divide it proportionately among them.

In order to establish these points further; that personal property is not the subject of heirship; that heirship is confined exclusively to real estate; and that none are heirs except those who have descended from a common ancestor with the deceased, and so related by blood, we further cite 2 Black. Com. 17, 18, 202, 203, 204, 208, 212, 214, 220, 224 and 234. Here the counsel on the other side objects, that we cannot define the word *heirs* by the common law; because, if we do, the right of primogeniture will prevail, and the females will be postponed, both of which are contrary to the policy of our law. We argue that these rules are contrary to the policy of our law, and they are contrary to our law in fact. The law to which we look is the common law of America, and not the common law of England alone. Since the Revolution the common law has been very much modified in America. We have no King. Prosecutions for offences under the common law proceed in the name of the people or the State. The wife is not dowable of wild lands. The right of primogeniture is gone; and there is no preference for the male over the female. This is the common law of America.

Mr. Dane, in his Abridgment, after giving the rules of descent according to the English common law, says, "Our law does not require the intestate to be actually seized; and, in some cases, the father inherits as next of kin, as was the case in the Jewish and Roman laws; and so the mother and other lineal ascending ancestors. Nor does our law make any distinction between males and females, nor between the whole and half blood; nor between paternal and maternal relations * *. Our law gives the males and females, each, an equal share, in an equal degree." 4 Dane's Abridg't, c. 125, art. 4, § 5.

On the same subject I refer to 4 Kent's Com. 371, 374, 378, 379, 386, 389 and 396.

On page 386 he says, "these common law doctrines of descent, (by primogeniture and to the exclusion of females,) are considered incompatible with that equality of right and that universal participation in civil privileges which it is the constitutional policy of this country to preserve and inculcate. The reasons which led to the introduction of the law of primogeniture and preference of males ceased to operate, upon the decline and fall of the feudal system, and those stern features of aristocracy are now vindicated by English statesmen upon totally different principles." 4 Kent's Com. 378.

On page 396 of his fourth volume, Judge Kent gives the fourth canon thus:—"If the intestate dies without issue or parents, the estate goes to his brothers and sisters and their representatives." This is the common law in America, generally, and in Massachusetts and Maine particularly, as I understand it. According to this law, the heirs of Mrs. Mace were her brothers and sisters. But, at all events, the whole doctrine of heirship and descent, relates to real estate only. The real estate is the inheritance. The personal estate goes to the executor, and is the fund for the payment of debts, legacies and expenses of administration. The personal estate does not descend at all, but, if there shall be any surplus after the payment of debts, it is to be distributed, not according to heirship in all cases, but according to certain arbitrary rules provided in the statutes. This is according to all the books and all the statutes. It is according to Blackstone, Dane, and Kent, and all the cases.

Hence, it was formerly often a question, and sometimes is even now a question, whether a thing belongs to the heirs or to the excutor. The question turns on the character of the thing. If it is real estate, it goes immediately to the heirs, and they may dispose of it forthwith, subject to the contingency of its being wanted for the payment of the debts of the deceased. But, if it is personal property, it belongs to the executor for the purpose of administration. Whatever descends to the heirs, passes instantly to them, and does not pass through the administrator's hands. But personal pro-

perty cannot pass directly to the distributees, but can only go through the hands of the administrator by distribution. If it could pass to them as heirs, it would come to them directly, on the death, like real estate, and not from the administrator by distribution. The husband did not take the residue of his wife's personal property as an heir under R. S. of 1841, c. 93, § 16, because he could only receive it after administration, and from the hands of the administrator. So, in no proper sense, could he be considered as the heir of his wife under that section 16. So the petitioner could not have been an heir to his wife's personal property under the statute of 1841. Much less can he be her heir under statute of 1848, c. 73, § 3.

To show further that heirship relates wholly to real estate, and cannot be of personal property, I refer to a few cases. *Lawrence* v. *Wright & al.*, 23 Pick. 129; *Gibson* v. *Farley & al.*, 16 Mass. 285, 287; *Foster* v. *Gorton*, 5 Pick. 185.

We have gone to the American common law for the meaning of *heirs*, but if we look into the statute of 1841, c. 93, we find it must have the same meaning; that it can only refer to those who are descended from a common ancestor and so related by blood; and that the heirs are those, and those only, who take the real estate. § § 1 – 6. 1 Bl. Com. 458, 459.

But it is said that the word *heirs* is used in a popular sense, and so means the husband, because he was entitled to the residue of the personal estate, under statute of 1841, c. 93, § 16. This cannot be, for all the reasons before given. It cannot be, for we know of no popular sense which would make the husband of a married woman her "heirs," and give him property to the exclusion of her children. It cannot be, for the language is clearly used in a technical sense. It is said the real estate is "to descend," and the personal property "to be distributed." It cannot be, because, clearly, the real estate and personal property are to go to the same persons under the name "heirs." It cannot be, because the brothers and sisters are made heirs, and take the real estate, both by the American common law, and the R. S. of 1841, c. 93, § 2; and so they must take the real estate by descent under statute of

1848, c. 73, § 3, and the personal estate by distribution, under the same section.

The opinion of the Court was drawn up by

HATHAWAY, J.—An appeal from a decree of the judge of probate, disallowing the claim of the appellant to the personal estate, which was of his wife Betsey Mace, who deceased intestate, Sept. 19, 1855, never having had a child, but leaving brothers and sisters alive.

Chapter 93 of R. S. of 1841, entitled, "of title by descent," after having designated to whom, and in what proportions the *real* estate of persons deceased intestate, should descend, enacted in the fifteenth section, that, after the payment of the debts of the intestate, and the charges of his funeral, and settlement of his estate out of the personal estate, "the residue shall be distributed to the same persons in the same proportions, to whom the real estate should descend, subject to sundry provisions specified in subsequent sections, one of which, section 16, is, "if the intestate were a married woman, the husband shall be entitled to the whole of said residue." The question presented is, substantially, whether or not this section of the statute was repealed by the third section of the statute of 1848, c. 73, entitled "An Act in addition to an Act to secure to married women their rights of property," which provided that, "when any married woman shall die intestate, seized or possessed of any property, real or personal, in her own name, exempt from the debts or contracts of her husband, the same shall descend or be distributed to her heirs."

That section was not a repeal of the former Act, unless by implication. A construction which repeals a former statute, by implication, is not to be favored in any case.

Statutes are not considered to be repealed by implication, unless the repugnancy between the new provisions and a former statute be plain and unavoidable. 1 Kent's Com. 524, (9th ed.,) note C.; *Com.* v. *Herrick*, 6 Cush. 465.

Technically, in the common law use of terms, in relation to

the estates of deceased persons, and those to whom such estates shall descend and be distributed, *heirs* are such, by kindred blood, they inherit real estate *only*, and *descent* is hereditary succession. But the descent and distribution of property, in this State, is regulated by statutes. There may be, and are persons who are made heirs by statute, who would not be heirs at common law. Hence, it is not remarkable that technical words, upon the subject of inheritance, should be occasionally used in statutes with a meaning not technically accurate, according to the rules of the common law.

The title of R. S. of 1841, c. 93, is "of title by descent," and its index to section 15, is, "how personal estate shall descend," and, yet, the subject of the statute is of title by decent and distribution, and, technically, title to personal estate does not come by descent, and, although the title of an Act and its preamble are, strictly speaking, no parts of the statute, yet, they may sometimes aid in the construction of it, and, to that end, in ascertaining the meaning in which technical words therein were used. But we can derive no such aid from the title of the statute of 1848, c. 73, for its title does not indicate that the statute embraces any such provision as is contained in the third section of the Act.

Legislators, in the statutes which they enact, frequently use technical words in their common and popular meaning.

In the common use of language, the children of a deceased intestate leaving personal property only, would be called his heirs, and such use of the term would be justified by the definitions of the word *heir*, by lexicographers, but, technically, they would not take the estate of the deceased, as heirs, they would take it as distributees, according to the rules established by the existing laws.

In the construction of statutes the intention of the lawgiver, when accurately ascertained, will prevail over the literal use of terms, and a statute is not to be construed according to technical rules, unless such be the apparent meaning of the Legislature. The general system of legislation upon the subject matter, and other statutes, in *pari materia*, may be con-

sidered, and when a statute is made in addition to another statute, upon the same subject, without repealing any part of it, the provisions of both must be construed together. 1 Kent's Com., (9th ed.,) 516–521, and notes; *Whitney* v. *Whitney*, 14 Mass. 92; *Holbrook* v. *Holbrook*, 1 Pick. 248; *Pease* v. *Whitney*, 5 Mass. 380.

The legislation upon this subject, before and after the statutes of 1848, does not favor the conclusion that the Legislature intended, by the third section of the Act of 1848, to repeal any part of the law then in force, concerning the descent and distribution of the estates of persons deceased intestate. By the word heirs, as used in that section, was evidently intended those persons who were entitled to the property of the deceased, according to the laws then in force. The same word with that meaning was adopted in the last revision of the statutes, in 1857, in which, c. 61, § 5, "when a married woman dies intestate, her property descends to her heirs," and in c. 75, § 9, if the intestate "leaves a widow and issue, the widow takes one-third, if no issue, one-half, and if no kindred, the whole; and the widower shall have the *same share* in the wife's estate." In these two contemporaneous Acts, it is certain that the word heirs, as used in c. 61, § 5, includes the "widower," named in c. 75, § 9, and there is no reason to doubt, that the same word was used in the same sense in the statute of 1848, c. 73, § 3. Nor is this any unusual meaning to attach to the word heirs. It has been often held that, to carry into effect the intentions of a testator, the word heirs may be construed to mean those entitled under statutes of distribution. *Morton* v. *Barrett*, 22 Maine, 264.

The fact that "the word heirs in the plural form" only, was used in the statute of 1848, is immaterial. There is no doubt that the estate, which was of a deceased person, and which, by law, goes to his heirs, if he leave but one heir, goes to that one; and, besides, by R. S. of 1841, concerning "the construction of statutes," "any word importing the plural number only, may be applied and confined to the singular number."

The appellant is entitled to the whole of the residue of the personal estate, which was of his deceased wife, according to the provisions of the R. S. of 1841, c. 93, § § 15 and 16, and the case must be remanded to the Probate Court for further proceedings. *Remanded to the Probate Court.*

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

PHILIP CASSIDY *versus* KEN. AND PORTLAND RAILROAD CO.

Upon a petition for a jury to determine the damages caused by the location of a railroad, the County Commissioners issued their warrant, returnable before themselves, when the statute required it to be made returnable to the Supreme Judicial Court. And, although the warrant and the verdict of the jury, were *in fact* returned to this Court, as required by law, *it was held*, that the proceedings were invalid.

IN 1857, a change was made in the location of the railroad of the respondents, running through the city of Portland, by which a portion of the petitioner's land was taken. The County Commissioners awarded him the sum of one hundred dollars as a compensation for the damages sustained by him, of which he had due notice. Being dissatisfied with the amount awarded, he thereupon presented a petition to the County Commissioners, praying that a jury might be summoned to determine the damages. Upon this petition a warrant was issued.

The following are copies of the warrant and of the officer's notice thereon to the respondents: —

"State of Maine. — Cumberland ss. — To the sheriff of our said county of Cumberland, Greeting: —

"Whereas, upon the petition of Philip Cassidy, of Portland, in said county, representing that, at a Court of County Commissioners for said county, begun and holden at Portland, on the first Tuesday of June last past, (A. D. 1857,) at an adjournment thereof, held at Portland, on the thirtieth

day of September last, upon the petition of Allen Lambard, President of the Kennebec and Portland Railroad Company, they allowed and approved of the location of said company's railroad, referred to in said petition, and awarded and determined that said Kennebec and Portland R. R. Co., should pay to said Cassidy the sum of one hundred dollars, as a full and just compensation for all damages by him sustained in consequence of said location, and that notice of their said determination and award was served on him, the said Philip Cassidy, on the twenty-seventh day of October last past. And further representing, that he is aggrieved by the doings of said County Commissioners, inasmuch, as the amount awarded as aforesaid, was not a full and just compensation, and equivalent for all damages by him sustained as aforesaid, and praying that a jury may be summoned to hear and determine the matter of damages in question.

"And, whereas, on the twenty-fifth day of November, A. D. 1857, a jury was ordered to hear and determine the matter of damages in question:—

"This, therefore, is to command you forthwith to summon, as the law directs, a jury of twelve good and lawful men of said county, who shall hear and determine the matter of complaint, and particularly the damages set forth in said petition, and to decide all such matters and things that shall legally come before them at said hearing.

"And you are hereby required to give reasonable notice to the parties interested, of the times and purposes specified for the view and hearing aforesaid.

"Hereof fail not, and make return of this warrant with your doings, and also the doings of the jury thereon, to our Court of County Commissioners, next to be holden at Portland, within and for said county, on the third Tuesday of December, A. D. 1857.

"Witness, Anson Jordan, Esq., chairman of our board of County Commissioners, at said Portland, this twenty-eighth day of November, A. D. 1857.

"Obadiah G. Cook, *Clerk.*"

"State of Maine — Cumberland, ss. —

"To the President and Directors of the Kennebec and Portland Railroad Company, in said State of Maine. By virtue of a warrant to me directed from the Court of County Commissioners for the County of Cumberland, you are hereby notified that the tenth day of December, instant, at nine o'clock in the forenoon, and the court house in Portland, in said county of Cumberland, are the time and place, when and where, I shall cause to be empanneled and sworn, a jury of good and lawful men to inquire into the matter, as to the damage that has been sustained by reason of said Kennebec and Portland Railroad Company's track having been located over lands belonging to Philip Cassidy, of said Portland, he having appealed from the decision of the County Commissioners on your petition for estimating damages done him by the location of your road over his premises. Of all which you will please take notice, and govern yourselves accordingly. Henry Pennell, *Sheriff of County of Cumberland.*

"December 5th, 1857."

At the time appointed, a jury were empanneled, who, after examining the premises and hearing the parties, made up their verdict, awarding the petitioner damages to the amount of four hundred and twenty-five dollars.

The verdict was sealed up and delivered to the sheriff, who, according to the directions in the warrant, returned it, with the warrant, to the County Commissioners at their December term, 1857. It was opened and put on their files by their clerk. Afterwards, they discovered that, by an Act passed April 15, 1857, the warrant and verdict should have been made returnable to the next term of the Supreme Judicial Court. They, thereupon, sent for the foreman of the jury, who took the verdict, sealed it up again, and delivered it to the sheriff. The sheriff returned it to the Supreme Judicial Court at the next term, in January, and it was opened by the clerk and put on file; and afterwards, on motion of petitioner, it was confirmed.

E. H. Davies argued for the respondents.

Shepley & Dana argued for the petitioner: —

There can be no pretence but the papers were finally returned to the right Court, and the only question is, were the rights of the petitioners, under the proceedings, lost by the erroneous direction of the clerk of the County Commissioners, for the sheriff to return the papers to that body instead of the Supreme Judicial Court?

If the warrant had directed the sheriff to make return to the Supreme Judicial Court, and he had, in point of fact, at first delivered it to the Court of County Commissioners, and then received it back, and returned it to the proper tribunal, this action of the sheriff would not in any way have affected the rights of the petitioners. The mere fact that, before the verdict is received by the Supreme Judicial Court, it has been seen by another body, changes nothing, if, when it *finally* reached the Supreme Judicial Court, it does so in the form prescribed by law.

The only apparent defect in the proceedings, therefore, consists in the mere direction to the sheriff to make return to the County Commissioners.

This direction, we have seen, the sheriff disregarded, for we find him, on the first day of the term following the rendition of the verdict, returning it to the Supreme Judicial Court.

The County Commissioners had the authority to direct a jury to be summoned to act on this petition. The sheriff summoned them, and their action was regular. The parties were notified, heard, and the jury delivered their verdict to the proper officer to be returned, where? Wherever the law directed. The jury having been properly summoned, and having discharged their duty, it was not in the power of the County Commissioners, by directing the verdict of the jury to be returned to the wrong Court, to deprive the petitioners of their rights under the verdict.

The case would have been quite otherwise had there been a misdirection as to the mode of summoning the jury, or a

misstatement of the objects to be acted upon by them when together.

But there is no error suggested or perceived in the entire proceedings, save this irregularity in the order to return.

This order the County Commissioners had no authority to give to the officer, who was justified in following the directions in the warrant, so far as they were in accordance with law; and the action of the jury so empanneled was strictly legal. But when, after this proceeding, the sheriff was directed to do a void act, it was his duty to disregard the order, to act in such a manner as would be in conformity to law, and so as to preserve the vested rights of the petitioner.

The case of *Canal Company* v. *Ashley*, 15 Pick. 496, though in some respects like the case at bar, is not sufficiently parallel to be at all conclusive. That was a case of novel impression, and it will be observed that neither counsel nor the Court there cited any authorities in support of the matter finally decided.

In the case at bar, the process was undoubtedly returned to the proper Court by the sheriff, without any order or interference on the part of the County Commissioners. Upon this return to this Court, the parties were before a Court of competent jurisdiction, by a proper return of process, and, if there had been any irregularity in the proceeding, it would have been corrected by the order of the Court. (See opinion of SHAW, C. J., in above case, on p. 499.)

In that case the entire decision of the Court is based upon the fact that the warrant was not properly returned. That was not the case here. The warrant was duly returned by the sheriff to the Supreme Judicial Court, at the term next after the hearing, in accordance with the law.

The opinion of the Court was drawn up by

DAVIS, J. — The petitioner appealed from the determination of the County Commissioners in assessing the damages sustained by him in consequence of the location of the K. & P. Railroad across his premises. He entered his peti-

tion before the Commissioners, at an adjourned term, in Nov. 1857, to have his damages assessed by a jury. A warrant was issued thereupon, directed to the sheriff, and a jury duly summoned. No suggestion is made that the proceedings of the jury were not in conformity to the requirements of the statute. Their verdict was sealed up, directed to the County Commissioners, and delivered to the sheriff, who returned it to the Commissioners, according to the directions of his warrant. It was afterwards ascertained that the warrant and verdict should have been returned to the Supreme Judicial Court. The verdict had been opened; but it was handed back to the foreman of the jury, who again sealed it up, and directed it to this Court, where it was subsequently returned at the next term, as the statute requires. R. S., c. 18, § 13.

The petitioner caused the case to be duly entered, and, upon his motion, the verdict was confirmed. There was no hearing upon the motion; but the respondents claimed that, the warrant being returnable before the County Commissioners, this Court had no jurisdiction of the case. For the purpose of presenting this question to the full Court, the case is brought forward on exceptions.

The direction in the warrant to the sheriff was as follows: "Hereof fail not, and make return of this warrant, with your doings, and also the doings of the jury thereon, to the Court of County Commissioners, next to be holden at Portland, within and for said county, on the third Tuesday of December, A. D. 1857."

This was in accordance with the statute prior to 1857. But an Act was passed that year making such warrants returnable to this Court. It is said, however, in argument, that since the sheriff disregarded the directions in his warrant, and returned it to this Court, it is not material that he was directed to return it elsewhere; that, because the statute required the warrant and verdict to be returned to this Court, the respondents were bound to take notice that it would be so returned.

This, at first view, appears plausible; but it will hardly bear examination. A petition for increase of damages is a distinct proceeding, by which the party respondent is impleaded in a suit at law. The warrant must not only provide for summoning a jury, but also for notice to the adverse party. What this notice shall be is not particularly prescribed by statute; but it would appear to be reasonable that the respondent should be notified, either by a copy of the warrant or otherwise, not only of the time and place of the hearing before the jury, but also of the tribunal before which the process would be returned, and the time and place of hearing thereon. Such notice does not appear to have been given in this case. If we may infer that any notice was given in regard to the time and place of return, we must presume that it was in accordance with the warrant, which was by its terms returnable to the County Commissioners.

Nor can the fact that the statute prescribed a different time and place of return, and a different tribunal, remedy the defect in the warrant. The respondents had no reason to suppose that the sheriff would return the process to any other Court than the one to which he was directed to return it. There they might go to answer; they were bound to go nowhere else. It was held, in Massachusetts, that a writ returnable before "the next term" of the Court of Common Pleas, in which the day specified was a week earlier than the day of the term fixed by the statute, could not be amended; and that no judgment could be rendered upon it. "As this is the foundation of all further proceedings, and the only mode of notice to the adverse party that he is impleaded, it seems reasonable that he should be distinctly informed, as well of the time as of the place at which his appearance is required to save his rights." *Bell* v. *Austin*, 13 Pick. 90.

In cases like the one before us, the warrant issued upon the petition is, in some respects, analogous to an original summons. Upon it, the respondents receive their first notice. They answer to it as in other suits at law. If, in a suit at common law, a writ should be issued by this Court and be made re-

turnable before the County Commissioners, the defendant could not be held to answer thereon in this Court, if the writ should be returned and the case entered here. Nor would it make any difference that the statute requires such a writ to be returned to this Court. The difficulty would be, that such a process would contain no notice to the adverse party to appear here to answer thereto. So the warrant in the case at bar gives the respondents no notice to appear before this Court. The warrant and return were but preliminary; the foundation of further proceedings. "If a mistake of the *time* of the return of a process is a fatal error, *a fortiori* is a mistake of the *forum* before which it is returnable." *Canal Company* v. *Ashley*, 15 Pick. 496.

The exceptions must be sustained, and the verdict be set aside.

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

ALMIRA WORTHING *versus* SIMON WEBSTER.

The recitals in a tax deed, unless made so by statute, are not, in themselves, evidence of a compliance with the statute in making the sale; but the burden is upon the party claiming title under such deed to prove, by other evidence, a full compliance with the requirements of the statute.

No lapse of time will afford presumptive evidence of the regularity of a tax sale, when the purchaser, and those claiming title under him, have had no possession under the deed. But an ancient deed and its recitals, with subsequent, long continued and uninterrupted possession, are evidence from which a compliance with the requirements of the statute may be presumed. The question so raised is one of fact, to be determined by the jury, upon all the evidence in the case.

THIS was a real action, to which the tenant pleaded the general issue, with a brief statement of the statute of limitations.

The testimony was reported by DAVIS, J., at the April term,

1858. The demandant was a grand-daughter of Salter Soper, who died in 1807, leaving eight children. The mother of the demandant, Margaret Soper, was married to Isaac Oakman, before the death of her father; and she died, also, in November, 1807, leaving two children, the demandant, and a sister, who died a few weeks afterwards, without issue. The demandant, therefore, became the owner, by inheritance, of one-eighth part of the premises claimed in the writ.

The demandant was born in 1805, and was married to Jonathan Worthing in 1823, being then only eighteen years old. Her husband lived until 1854. This suit was commenced in June, 1856.

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

Shepley & Dana argued for the demandant:—

1. This action is not barred by the statute of limitations, notwithstanding the lapse of time, for the following reasons:

The right of Margaret Soper to the share of the estate of her father, Salter Soper, was suspended by her coverture with Isaac Oakman, from 1807. Statute of Mass. 1786; Laws of Mass. 328.

The share of the infant sister of the demandant, descended to the demandant and not to the demandant's father. Laws of Mass. 338; Stat. 1821, c. 38, § 17.

The demandant's right of action was suspended from November 3, 1823, until the death of the husband in 1854, she being a minor in 1823, and under coverture from that time. Stat. 1821, c. 62, § 4.

The demandant is, therefore, entitled to recover, unless her right is barred by the proceedings under the direct tax of 1815.

2. The case shows that Salter Soper, *Sen.*, was seized and possessed of the premises in controversy in 1808; that Sept. 14, 1808, his son Salter Soper, *Jr.*, was appointed administrator of his father's estate; that from that time, as administrator, he was in possession of the premises; and that, at the time when the tax was assessed, levied, and the estate sold,

he was in possession, as administrator, and was indebted to the estate for funds in his hands, to the amount of some $500, without including the rents and profits of the premises.

While thus in possession as administrator, owing the estate of his father more than $500, Salter Soper, jr., suffered the homestead, appraised in 1808 at $1500, to be sold on a tax of $6,74.

Assuming, for the sake of the argument, that the tax is proved to have been legally assessed, (though that point is open to demandant and all objections reserved,) still the transaction shows on its face an attempted cheat on the part of the administrator, who, instead of guarding the interests of the estate, makes a corrupt agreement with his own father-in-law, (for fraud burrows under the cover afforded by relationship,) by which the administrator was to suffer the estate to be sold for the taxes, and the father-in-law to buy it in for the administrator's benefit.

That this was the case, is too plain to need argument, for we see, that on the same day the deed from the collector to his father-in-law is acknowledged, the same witness attests a conveyance of the same property from his father-in-law back to him.

The parties living in different towns, one in Gray, the other in Minot, both come to Portland, and Nash takes a deed from Storer, and the same day, and at the same time, acknowledges before Storer a conveyance back of the same property to the one who should have seen to it that the property had not been sold. It was one transaction, and, when the deed from Nash had been given, Salter Soper held the premises the same as if he had never suffered this pretended break in the title. He held the whole in trust for the legal heirs, and he could give no better title after this than he could have done before.

To put the construction most favorable to the good faith of the administrator, who is shown to have been indebted to the estate, and to have had funds of the co-heirs in his hands at the time of the tax-sale, the law will presume that the

money he paid Nash, if he paid any, was the money of all the heirs, and for their benefit. See 2 Williams on Executors and Administrators, pp. 801, 1566; *Wiley's Appeal*, 8 Watts & Sargeant, 246; *Chronister* v. *Bushey*, 7 ib., 152, and cases cited by counsel; Story's Agency, § § 210, 211; 4 Kent's Com. 438, (5th ed.;) *Myers' Appeal*, 2 Barr, 463. "Where the general agent of heirs purchases their lands which have been sold for taxes, instead of redeeming, the purchase inures to their benefit."

"An executor or administrator, being a mere fiduciary, is bound not only to perform his duty with fidelity, but with proper skill and reasonable diligence, so as to promote the interests of those interested in the estate of the deceased." Wiley's Appeal.

The title of demandant was not lost, unless it was by the fraud or negligence of the administrator, who is now claimed to have taken and transmitted a good title, by means of this very fraud or negligence, and the tenant seeks to take advantage of and perpetuate that wrong. *Rankin* v. *Porter*, 7 Watts, 390; *Smiley* v. *Dixon*, 1 Penn. 441. In this last case, the Court cite Judge KENT as saying, "that one of two devisees cannot purchase an encumbrance on their joint estate, and use it to sell the land and strip the other of his property."

There is no evidence whatever in the case of any assessment of a tax on the premises. The collector's deed is not admissible until after the foundation has been laid by the other proof of the assessment of the tax and compliance with the other provisions of law. The deed itself cannot prove these facts, because, without preliminary proof of these facts, the deed is not admissible.

"The recitals in a tax deed are not evidence against the owner of the property, but the facts recited must be established by proof *aliunde*, nor is the conveyance itself, because of its solemnity, or upon any conceivable principles, *prima facie* evidence that the prerequisites of the law had been complied with by the various officers of the law who conducted the proceedings." Blackwell on Tax Titles, p. 93, and cases

cited; *Nally* v. *Fenwick*, 4 Randolph, 585; *Nancarrow* v. *Weatherbee*, 6 Mart. (La.,) 347; *Emery* v. *Harrison*, 1 Harris, 317; *Trescott* v. *McDonald*, 22 Maine, 402.

"The fact that they were regular must be proved, and the *onus probandi* rests, in all cases, upon the purchaser, or those claiming under him. He must show affirmatively, step by step, that every thing had been done which the statute makes essential to the due execution of the power conferred upon the officers." Blackwell's Tax Titles, p. 94, and cases cited; *Jackson* v. *Shephard*, 9 Cowen, 88.

Howard & Strout argued for the tenant: —

1. The tax was rightly assessed to Salter Soper, the owner or occupant. 3 U. S. Statutes at Large, pp. 164, 230.

2. The deed of Woodbury Storer, who is admitted to be the collector at the time, is an ancient deed, found in the possession of the owner of the land, the possession having gone with the deed, and, as such, is entitled to all the presumptions in its favor which apply to ancient deeds. The law infers performance of all the preliminaries to its validity. 1 Greenl. Ev. § § 20, 21, 144; *Boothby* v. *Hathaway*, 20 Maine, 256; *Stockbridge* v. *Stockbridge*, 14 Mass. 257; *Colman* v. *Anderson*, 10 Mass. 108; *Pejepscot Proprietors* v. *Ransom*, 14 Mass. 144; *Shilkrucht* v. *Eastburn*, 2 Gill & Joliers, 114; *Battles* v. *Holly*, 6 Greenl. 145; *Phampsam* v. *Carr*, 5 N. H. 510.

2. Storer was a public officer. The law presumes that a public officer observes the law in his official acts. *Bass* v. *Reed*, 1 Wheat. 482; *Rex* v. *Catesby*, 2 B. & C. 814; *Rex* v. *Whiston*, 4 A. & E. 607.

3. The deed of Storer recites all the preliminary proceedings necessary to give it validity. The deed being more than thirty years old is an ancient deed, and recitals in an ancient deed are *prima facie* proof of the facts recited. *Stokes* v. *Dames*, 4 Mason, 268; *Fuller* v. *Lawtan*, 1 Spencer, 61, cited in 4 U. S. Digest, p. 701, § 1009; *James* v. *Letsler*, 8 Watts & Sarg. 192, and cited in 4 U. S. Digest, p. 702, § 1027;

Garwood v. *Dennis*, 4 Binn. 314; *Doe* v. *Phelps*, 9 Johns. 169; *Doe* v. *Campbell*, 10 Johns. 475. There is no evidence in this case to contradict the *prima facie* proof.

4. The deed from Storer to Nash was not made till the right of redemption, from the sale, had expired. The statute so required. 3 U. S. Stat. at Large, p. 174, § 27. At that time the title of Nash was perfect. He then had a right to convey to Salter Soper, or any one else. If the purchase by Soper can give plaintiff any right, it is in equity, on the ground of a trust, and not at law. This defendant is an innocent purchaser.

5. Salter Soper, in his capacity of administrator, had no control over the land, and was under no obligation to redeem from the sale. He was in possession as tenant in fee, of an undivided portion of it. He was not bound to redeem the land for his co-tenants. *Gardner* v. *Gerrish*, 23 Maine, 53.

6. His last account was settled in 1809, and it does not appear that he was acting as administrator in 1815.

The opinion of the Court was drawn up by

MAY, J. — In 1807, Salter Soper died seized of the farm situate in Gray, which is described in the demandant's writ. At his decease he left eight children, or their representatives. Of these children, one named Margaret had then been married to Isaac Oakman. She died Nov. 5, 1807, leaving only two children, the demandant, and a sister who died without issue, about a fortnight after the death of her mother. Isaac Oakman, the father of the demandant, lived until Nov. 12, 1847. It is, therefore, apparent that the demandant, upon the death of her mother and sister, became seized of that share in the farm which descended from her grandfather, Salter Soper, to her mother, subject only to her father's life estate therein as tenant by the curtesy. That share was one undivided eighth, and is the same now demanded in this suit. The demandant's right to recover possession of said share, after the termination of her father's life estate in 1847, is beyond all question,

unless she is barred thereof by reason of the facts relied upon in defence.

The tenant sets up, as his first ground of defence, a title under a tax deed from Woodbury Storer, as collector of a direct tax levied by the United States in 1815, to one Jonathan Nash, through whom he claims by appropriate mesne conveyances. This tax deed is dated Oct. 13, 1818, and was duly acknowledged and recorded on the 14th of November following. It is admitted that said Storer was duly appointed as collector of said tax, but there is no other evidence in the case that said tax was legally assessed, or that said collector, in making sale of said farm for the non-payment of said tax, complied with any of the requirements of the federal statutes authorizing the same, except what arises from the *recitals* in the collector's deed to Nash, and the long continued subsequent possession of the premises by the tenant, and those under whom he claims. It is contended in defence that, from the recitals in said deed, said deed being an ancient one, taken in connection with such subsequent possession, under it, the Court ought to presume a full compliance with the requisitions of the statute, so far as is necessary to give efficacy to the deed.

In determining this question, it becomes important to look into the nature of the possession and all the circumstances attending it. Nash, the grantee in the tax deed, does not appear to have been in possession of the premises at any time. He conveyed them to Salter Soper, his son-in-law, one of the children of Salter Soper, deceased, who was also the administrator upon his father's estate, by a deed of quit-claim bearing even date with the acknowledgment and registry of Storer's tax deed to him. The consideration recited in this deed is only $21, and the case shows that at this time Salter Soper, the grantee, had in his hands, as administrator, several hundred dollars belonging to himself and his co-heirs, which is still unpaid. He appears, also, to have been in possession of said premises after the death of his father, and to have charged

himself, in his account as administrator, settled with the judge of probate in October, 1809, with the sum of $70 for the improvement thereof. The value of the farm appears to have been about $1500, and the direct tax assessed upon it, was only $6,74. The whole farm was sold July 16, 1816, for the sum of $8,09, being the amount of said tax and the incidental expenses of the sale. So far as the case shows, Salter Soper, the administrator and tenant in common with the other heirs, remained in possession of said premises from the death of his father, until Nov. 16, 1843, when he conveyed them to Albert W. Soper. The character of Salter Soper's possession may depend very much upon the purpose and effect of the deed from Nash to him.

In view of the foregoing facts, if this deed to Salter Soper was not intended as an extinguishment of the tax title, it is difficult to reconcile the conduct of said Soper, under all the circumstances of the case, with any other theory than that of an attempt, on his part, to practice a gross fraud upon his co-tenants. If, however, he intended to claim title in the farm as against them, and all the preliminary steps necessary to give effect to the tax deed had been taken, we cannot doubt, in view of the authorities cited, that equity would regard and treat the conveyance from Nash to him, as a conveyance in trust for the benefit of all the co-heirs or tenants in common. In consequence, therefore, of such resulting trust, his possession, down to 1843, would be that of one co-tenant holding in trust for the benefit of all the *cestue que trusts.* Such a holding, for any length of time, would, undoubtedly, have much less tendency to show that all the preliminary steps necessary to make the deed effectual had been taken, than a possession under claim of an absolute title free from such trust. If, upon the other hand, Salter Soper is to be regarded as having been in possession, claiming the whole estate, in no way subservient to the rights of his co-heirs, then the fact that such a possession was continued from the date of Nash's deed to him, to the inception of this suit, is to have such effect in raising a presumption that the recitals contained

in the tax deed are in accordance with the facts stated, as it deserves.

The question then returns to the recitals in the tax deed, and the subsequent possession of the tenant and those under whom he claims, taken in connection with all the other facts in the case, furnish satisfactory evidence of a compliance with the requisitions of the federal statute, and of the performance of such acts on the part of the collector, and all others, as are absolutely essential to authorize and give effect to the deed. This inquiry involves two questions. First, whether these recitals, in view of all the facts, are to be taken as true, and second, if so, whether they are sufficient to make the deed effectual to pass the title.

By the principles of the common law, the recitals in a tax deed are not, in themselves, evidence of a compliance with the requirements of the statute. Blackwell on Tax Titles, 603. In all cases where the statute does not make them evidence, the burden is upon the party claiming title under such deed to show, by other evidence, step by step, a full compliance. Ibid, 94, and cases there cited. On page 97 of the same work, it is said to be the business of the grantee "to collect and preserve all the facts and muniments on which his title depends." It is also well settled that no lapse of time will afford presumptive evidence of the regularity of a tax sale, when the purchaser, and those claiming under him, have not had possession under the deed, and no such presumption can be indulged where the evidence clearly shows upon its face that the proceedings were irregular, and, yet, it is very clear, in view of the authorities cited upon both sides, that an ancient deed and its recitals, with subsequent possession following the deed, and long continued, are facts competent for the consideration of a jury, and should have their proper weight in determining whether the matters and things recited in such deed, as having been performed, were in fact performed. Such facts are not, however, conclusive evidence of such performance. They are merely evidence to be considered with all the other evidence in the case.

In the case before us, authorized as we are to draw inferences as a jury might, we have no hesitancy in coming to the conclusion that the evidence arising from the age of the deed relied upon in defence, and its recitals, with the subsequent possession which is shown as following the deed, when considered in connection with the fact, that the whole farm was sold for so small a sum; that the purchaser immediately conveyed it to his son-in-law, who was then in possession of the farm, and had been for some years before, and who had abundant funds in his hands, as administrator on his father's estate, and arising from the income of the premises, with which he might have discharged the tax; and the further fact, that the grantee of Nash was one of the tenants in common of the farm with the other heirs of his father, and nearly related to them by ties of consanguinity, and that the demandant, if not others of the tenants in common, was, until very recently, under legal disability to test the validity of the deed or titles, is insufficient to establish the fact, that the prerequisites recited in the deed, and required by the statute to make the deed effectual, have been performed. The whole evidence fails to satisfy us of that fact. The title, therefore, under that deed, is not established. Our conclusion upon this question renders it unnecessary to consider whether the recitals contained in the deed, if shown to be true, embrace all the particulars which are essential to give efficacy to the deed.

The only other ground of defence is, that the tenant, and those under whom he claims, have so long been in the open, notorious, exclusive and adverse possession of the premises in controversy, that the demandant, by force of our statutes, is barred of her right to recover. This ground cannot be sustained upon the facts before us. There is no evidence of any adverse possession prior to the tax deed in 1818. Up to this time, the possession of Salter Soper was that of one tenant in common for the use and benefit of all. Whether the deed from Nash to him was regarded by him as conveying an indefeasible title, or an estate in trust; or as extinguishing the

tax title; or whether he thought the tax title altogether unavailing and void, is, in our judgment, wholly immaterial in its effect upon this question of a title acquired by disseizin, because, whatever may have been the character of the possession of Salter Soper, and those claiming under him, it does not seem to have been continued long enough to bring the case within the provisions of the statute cited by the counsel in defence, (R. S., 1857, c. 105, § 15,) so as thereby to cut off by limitation the rights of the demandant. She was born July 17, 1805, and was married to Jonathan Worthing, Nov. 23, 1823. Her testimony shows that his death occurred in 1853 or 1854. The writ in this case is dated June 19, 1856, before the expiration of forty years from the date of the tax deed, which was Oct. 13, 1818. During almost this whole period the demandant was under a legal disability to commence a suit for the recovery of her rights. Her infancy and coverture were not disconnected, and the latter continued until two or three years prior to the date of her writ. The result is, that the tenant must be defaulted, and the demandant is entitled to recover one undivided eighth part of the farm of which her grandfather died seized, and which is demanded in her writ. No claim appears to have been made for rents and profits. *Tenant defaulted.*

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

COUNTY OF YORK.

GEORGE SIMPSON *versus* SAMUEL W. NORTON, *Appellant.*

A motion for a new trial, on the ground that the verdict is against the weight of evidence, will not be considered by the full Court, unless the report of the evidence is duly authenticated by the Judge who presided at the trial.

Amendments may be allowed at the discretion of the Court, when the cause of action can be perceived and rightly understood, although the declaration is inartificially and defectively drawn; thus, the words "convenient privilege of passing" may be construed to mean convenient *way* or *road*, when, from the whole declaration, such is manifestly the sense in which these words are used.

When a party is allowed to amend, on terms which are accepted by him, the full Court will not subsequently modify those terms, though it should appear that the amendment was unnecessary. Whether the full Court has the power thus to interfere, *quære.*

When, from the papers presented, a subject matter apparently falls within the jurisdiction of the Probate Court, and due proceedings have been had therein, without appeal or objection, the final decree of that Court will be conclusive.

What will constitute due diligence in the search for public records and documents, so as to admit secondary evidence in proof of their contents, will depend upon the circumstances of each particular case.—Thus, where the register of probate testified that he had made search of the records in the case of S. N.; that he found but part of the papers in that case; that he found the files in bad order, in very bad condition; that some of the files were broken open and loose, and that he examined the indexes of the records for the year or two spoken of, without finding the papers desired or reference to the record thereof in the indexes, the Court will admit parol evidence to show the contents of such papers, especially when the transaction occurred many years before.

The construction of a deed, or other instrument in writing, is matter of law, and should be determined by the Court; but when a question of law has been improperly referred to the decision of a jury, their verdict will not be set aside for that cause, if it be apparent that the question has been correctly decided by the jury.

ACTION OF THE CASE to recover damages of defendant for obstructing the plaintiff's right of way to his grist-mill. The

writ is dated May 2, 1854, and returnable before a justice of the peace, from whose judgment the defendant appealed. Plea, general issue, with a brief statement of special matter of defence: — (1.) If plaintiff had any such right of passage as he sets forth, which defendant does not admit, he did not obstruct the same as plaintiff alleges; (2.) that, at the times alleged in plaintiff's writ, he was the owner of certain land situated, &c., between the main road and the grist-mill occupied by plaintiff, and, that he kept open an unincumbered, &c., "a convenient privilege of passing and repassing to and from the mill," &c.; (3.) that plaintiff had no right of way or passage over or across defendant's land, &c.

The trial of the action was commenced at the September term, 1856, before RICE, J. The plaintiff put in his evidence and stopped. Thereupon, the defendant moved the Court to direct a *nonsuit.* The Court, after argument of counsel, ruled that the action could not be sustained upon the evidence.

The plaintiff then moved for leave to amend his writ by adding another count, to which the defendant objected, and, among other reasons, urged that it set out a new cause of action. The Court ruled that the amendment might be made, upon the terms that "the plaintiff shall recover no costs since the entry of the appeal, to and including the present term." EXCEPTIONS were taken by the defendant to this ruling of the presiding Judge, allowing the amendment. The case was then continued, on motion of defendant, to the next January term, thence to the April term, (1857,) when the plaintiff moved to amend his writ by adding an amendment which had been filed at the January term, and of which defendant was notified. The action proceeded to trial, DAVIS, J., presiding, and, after the plaintiff had introduced all his evidence, the defendant moved the Court to direct a *nonsuit,* which motion was argued; and, thereupon, the plaintiff moved for leave to amend his writ again, which was granted against the objection of the defendant. (The last two amendments are descriptive of the way claimed by plaintiff.)

To sustain his case, the plaintiff introduced,—

1. The will of Samuel Norton, and probate proceedings thereon. By the will, after the payment of certain legacies, the testator devised and bequeathed all the residue of his estate to defendant, when he should arrive at the age of twenty-one years. Joseph Weare and John Norton were nominated and appointed executors, who were to have the sole care of the estate until the defendant should arrive at the age of twenty-one years. The will was proved, Nov. 27, 1820.

2. License of Probate Court to the said executors to sell real estate of the testator, issued in May, 1829.

3. The depositions of said executors, to prove that before sale they gave the notice required by law, and, in other respects, complied with the directions contained in said license.

4. The deed of said executors to Moody & al., of the gristmill, &c., and passage way, the material parts of which are recited in the opinion of the Court.

The defendant objected to the introduction of this deed, because the plaintiff had not proved the authority to convey, and had given no evidence of having taken the oath required by law, before fixing upon the time and place of sale, and had given no evidence of posting notices as the law required; but the Court allowed the deed to be read.

5. Plaintiff then proved the due appointment of George Moody as guardian of the defendant, Nov. 27, 1820.

6. Deed of mortgage from said Moody to Thayer & als., also deeds from said Rice and from Thayer & als., to plaintiff.

The report of the evidence, at the trial, is voluminous; and, as the portions of it bearing most immediately upon the questions determined in the case appear in the opinion of the Court, a further detail of the evidence and testimony is deemed unnecessary.

The verdict was for the plaintiff, and the defendant filed exceptions to the rulings of the presiding Judge, in the admission and exclusion of evidence, and also to instructions given to the jury in matters of law, which rulings and instructions sufficiently appear in the opinion of the Court.

The defendant also filed a motion to set aside the verdict, as being against evidence; the report of the evidence was not authenticated by the presiding Judge, but was certified to be a full and correct report of the evidence by the counsel of both parties.

The questions presented by the two bills of exceptions, and by the motion to set aside the verdict, were argued by

Bourne, for the plaintiff, and by

Tapley, for the defendant.

The opinion of the Court was drawn up by

RICE, J.—This case is presented on two bills of exceptions, and also upon a motion for a new trial, on the ground that the verdict was against the weight of the evidence in the case. The evidence reported is not duly authenticated by the presiding Judge, as required by law. The motion, therefore, will not be considered.

The first bill of exceptions was allowed and filed at the September term of the Court for the county of York, 1856, at which time the case was partially heard, when the plaintiff asked leave to amend his writ, which was granted on terms, and the action then continued.

To the allowance of the amendment, the defendant excepted, on the ground that the plaintiff therein set out a new cause of action.

Section 10, c. 82, R. S., provides that no process or proceedings in courts of justice shall be abated, arrested, or reversed, for want of form only, or for circumstantial errors or mistakes which by law are amendable, when the person and case can be rightly understood. Such errors may be amended, on motion of either party, on such terms as the Court orders.

This is substantially the same provision as is contained in § § 9 and 10, c. 115, R. S. of 1841.

The original count in the writ was inartificially drawn, and is very defective. But, on inspection, the cause of action in-

tended to be therein set out, may be perceived and rightly understood.

Thus, it is stated in the original count, that the plaintiff, "in 1854, and long before, and ever since was, and yet is possessed of a certain grist-mill, in said York, and then had and still ought to have a convenient privilege of passing to and from said mill, from the main road on the north-east side of Cape Neddick river, and also of passing to and from a shed near said mill, with horses, wagons, on foot or otherwise, yet the said Norton, contriving injuriously and unjustly to vex the plaintiff, and exclude him from the use of said road, on, &c., piled on said way large quantities of wood," &c.

Now, it is contended that, according to grammatical rules of construction, the words, "said road" and "said way," must refer to the *main road* as their antecedent, and that consequently the obstructions complained of are alleged to have been placed on that road, whereas, in the amended count, the allegation is, that the defendant obstructed a pass-way leading from the main road to the plaintiff's mill.

But when we consider the leading facts set out in the original count, to wit: that the plaintiff was possessed of a mill, and, also, that he had and ought to have a convenient privilege of passing to and from said mill to the main road, it becomes apparent that the words "convenient privilege of passing" are used as tantamount to the words convenient way, or road, and that the words "said road" and "said way" refer to the phrase "convenient privilege of passing," as their antecedent, and not to the words *main road*, which, like the word *mill*, is referred to as a monument to indicate one of the *termini* of the way leading to the mill.

That such is the true import of the language is apparent from the declaration taken as a whole. By reference to the executors' deed, under which the plaintiff holds, the same facts will also appear, as language is used therein almost precisely the same as that used in the original declaration to designate a pass-way, or right of way from the plaintiff's mill to the main road.

Other parts of the original declaration are also defective, but, within the principle of *Pullen* v. *Hutchinson*, 25 Maine, 249, are clearly amendable.

These exceptions are therefore overruled.

The plaintiff now claims that he should be relieved from the terms imposed by the Court when the amendment was allowed. These terms do not appear to have been very onerous. If they were so, it was optional with him whether he would accept them and amend, or try out his legal rights on his original declaration. We see no reason to modify the rulings of the presiding Judge, if it were competent for us to do so at this time.

The second bill of exceptions was filed and allowed at the April term of the Court, 1857, when the case was finally tried and a verdict rendered.

The plaintiff derives his title to his mill, and the right of way in question, under an executors' deed from Joseph Weare, Jr., and John Norton to George Moody and Alexander Rice, Jr., dated July 5, 1829. Weare and Norton were the executors of the last will of Samuel Norton, deceased, who was the father of the defendant.

The defendant objected to the introduction of the deed aforesaid, on the ground that it did not appear by competent evidence that the executors were authorized to convey the real estate of their testator thereby.

These objections are twofold. First, that the Judge of Probate, who granted the license under which the sale was made, had no jurisdiction of the subject matter, and secondly, that there is no competent evidence to show that the executors complied with the directions of the Court preliminary to the sale.

The objection founded on the want of jurisdiction originates in the allegation that the debts, for the payment of which the sale was decreed, were contracted by the executors long after the death of the testator, and for objects not legitimately pertaining to the settlement of his estate.

To this objection it is sufficient to reply that the case be-

fore us discloses no such facts. The principal item in the account, a copy of which is in the case, appears to be the balance of a former account. Of what that former account consisted, does not appear.

The case and the subject being apparently within the jurisdiction of the Probate Court, and due proceedings having been had thereon, without objection or appeal, the final decree of that Court is conclusive, so far as this objection is concerned.

The next objection to the authority of the executors was, that the plaintiff had given no evidence of their having taken the oath required by law, before fixing upon the time and place of sale, and had given no evidence of posting notices as required by law.

To meet these specific objections, the plaintiff called the present register of probate, who testified that "he had made search of the records in the case of Samuel Norton; that he found no bond on the license of 1829, but found an earlier bond; that he found no perpetuation of notice, original or record; that he found some files in bad order, some in very bad condition. He could not give the date of the files found in bad order. Some of the files were broken open, and some of the files were loose. Accommodations were very limited. He did not examine all the records and files of the court for these papers. Examined only the files for 1829. Have not made an extended search among the records. Made a search among the papers for a year or two connected with the time of the proceedings of sale. Only examined the indexes for the year or two spoken of."

On cross-examination, the witness stated, "for the perpetuation of notice, I looked in the file when the license was granted. This is the only file I looked in at all, for the perpetuation."

The Court thereupon admitted, against the objection of the defendant, parol evidence tending to show that notice had been given by the executors according to law, and also that they had duly taken the oaths prescribed by the statute.

Upon this evidence, the Court instructed the jury that they

might, by reason of the evidence relative to the records in the probate office, from the lapse of time, exceeding twenty years, and the acquiescence of the defendant since the conveyance of Norton & al. to Moody & al., infer that the oath necessary to be taken by said Norton and Weare, jr., and the notices of sale, were all seasonably and correctly taken and made, and that all the acts necessary to make a valid conveyance had been done and performed as required by law.

The degree of diligence that is required to establish the destruction or loss of a written instrument, or to prove the non-existence of a record, will depend much upon the circumstances of the case. When the transaction to be established is of ancient date, and only one appropriate place of deposit exists for the preservation of such instrument or record, and there is no suggestion that they may be found elsewhere, and the appropriate place of deposit is carefully examined without success, an inference of irrecoverable loss or destruction would thereupon arise, while, if the transaction were of recent date, such an inference might not be authorized, though the surrounding facts were of similar character.

Although, in this case, the search for the missing papers and records does not appear to have been of a very extended character, yet, when we reflect that it referred to a transaction which transpired nearly thirty years ago, and that the files relating to the estate were found in bad order, but containing the most important papers in the case, and that the indexes examined were those which referred to the records of the year when the case was before the Probate Court, the evidence of the loss or non-existence of the missing papers and records was such as would authorize a resort to evidence of an inferior character.

But the evidence produced, independent of the parol testimony, was sufficient to authorize the instruction of the Court upon this point. The will of the testator; the qualification and acts of the executors under that will; the license to sell the real estate; the return of the doings of the executors under that license, and the approval thereof by the Court;

when considered in connection with the fact, that under the deed of the executors, the estate in question has been held by the plaintiff or his grantors for a period of nearly thirty years, under the eyes of the defendant, without objection from him, and that during a large portion of that time he had been under no legal disability, but in a condition to assert and maintain his rights to the estate in controversy, if any he had, would, with the testimony of the register of probate, above recited, fully authorize the presumption that all the preliminary acts required by the statute, to constitute a valid sale, had been performed. The rulings of the Court on this part of the case, are well sustained by the case of *Battles* v. *Holley*, 6 Maine, 145, and the other cases cited by the counsel for the plaintiff.

The Court further instructed the jury that, "as to the extent of the way declared on, the plaintiff must, under the pleadings in the case, prove his way as laid in width and extent. That they would take the deed, and if they found the plaintiff's title good under that, determine, from that what right of way was given, how extensive it was, its width, and whether or not the plaintiff had a right to travel the whole distance from the road to the mill with horses, teams and wagons, or whether he was confined to the use of said way in this manner to the place where the old shed stood."

The deed, under which the plaintiff claims title, is an instrument in writing. Its construction was matter to be determined by the Court and not by the jury. But, when a question of law is improperly submitted to the determination of a jury, the verdict will not be disturbed for that cause, if it be apparent that the question thus submitted has been correctly decided by the jury.

The executors' deed, after describing the mill, dam, &c., proceeds thus: "together with a convenient privilege of passing and repassing to and from said mill from the main road on the north-east side of said river, also the privilege of passing to and from said shed standing on said premises, with teams, horses, wagons or otherwise."

The privilege herein granted, consists, it will be perceived, of two parts. First, of a privilege of passing and repassing to and from said mill from the main road, on the north-east side of said river, and, second, of passing to and from said shed standing on said premises, with teams, horses, &c.

From the terms of the deed these privileges or easements, would seem to be entirely distinct and independent of each other, and designed for different purposes. But, from the evidence reported and from the statements in the arguments of counsel, we infer that the way or privilege first granted and used, extended from the mill to the main road, passing directly by the shed, and that the privilege of passing to and from the shed, as used, was over a portion or the whole of the way used from the main road to the mill. But whether the privilege of passing with teams, &c., to and from the shed extended from the mill or the main road to the shed, or from both points, does not appear in the deed, nor does the deed define the location nor width of the way from the main road to the mill, or to the shed, either by measure or monuments.

In determining the rights of parties to a contract in writing, the primary object is to ascertain their intention. That intention is to be sought from the language used by them in the instrument itself. If, however, there is such uncertainty, or ambiguity in the language used, as to render it impracticable to ascertain the intention of the parties to the instrument, then, for that purpose, recourse may properly be had to their situation at the time of the contract, and the facts and circumstances surrounding and connected with the transaction which is the subject of controversy.

The principal subject of grant in the deed of the executors is a grist-mill, located upon the land of the testator at a distance from the highway or main road. Connected with this mill, and necessary to its beneficial use, is the privilege of passing therefrom to the main road. Now what would constitute a convenient privilege of passing, within the meaning of the parties, not being defined in the deed, is a matter of fact to be found by the jury. To determine that question,

they would be authorized to ascertain, from evidence aside from the deed, not only what description of way would be convenient for the purposes of the grant, but also to ascertain the character of the way, which actually existed, if any, at the time of the grant, as indicating what the parties then understood to be a convenient way. The intention of the parties being thus ascertained, the law would so construe the deed as to carry that intention into effect. Such is the general principle applicable to this class of cases, and such must have been the result under the first clause referred to, had it stood alone. But the introduction of the second clause, giving the authority to pass with teams, &c., being admitted by the parties to cover some portion or the whole of the same location, must be taken as a limitation upon the first clause, otherwise the second clause is wholly meaningless. It is therefore apparent, that under the first clause, the grantors did not intend to give the right of way from the road to the mill, with teams, &c.

Hence arises a necessity for a construction of the second clause, "also a privilege of passing to and from said shed, standing on said premises, with teams," &c. From what point, did the grantee, under this clause of the deed acquire the right of passing to the shed? Upon this point the deed is silent. Resort, therefore, must be had, as in the former case, to the situation of the parties and the circumstances surrounding the case, to aid in the construction. What would the convenient and beneficial use of the mill require? What portion of the way was actually in use at the time of the conveyance? These are pertinent inquiries to be answered by the jury, and upon the answers which they may return would depend, in a great measure, the true construction of this clause in the deed.

Now, whether the defendant has suffered by the error of the Judge in submitting to them the determination of a question of law, or rather, as it is in this case, under the circumstances, a question of law and fact, will depend upon the

rules which were laid down by the Court for their direction in the examination of that question.

Upon this point the Court instructed the jury, that if they should find the title of the plaintiff good under the deed, that where the grant, as in this case, did not set out the way by metes and bounds, they would, in determining the extent of the way, and the character of the use granted, look to the evidence of the use of the same before and at the time of the conveyance, and, although such use was not conclusive evidence of the extent of the grant, yet, such evidence was important to determine the width and extent of the way granted, and also the particular use of it, whether on foot or otherwise, in whole or in part.

This rule, though not covering the whole ground of ligitimate inquiry on the part of the jury, is undoubtedly correct, as far as it goes, and there seems to have been no desire for additional instructions upon this point, nor is there any suggestions that the jury were too much restricted by the Court in their inquiries as to what would constitute a convenient privilege of passing under either clause of the deed.

A part of the instructions of the Court already referred to, became important in this connection, to wit: "that the plaintiff must, under the pleadings in the case, prove his way as laid in width and extent."

The plaintiff, in his writ, claimed a right of way from the main road to the mill, or to a post near the mill, one rod and one-tenth of a rod in width, to be used by horses, wagons, and on foot.

Under all the instructions, the jury must have found that the plaintiff's convenient privilege of passing, gave him an easement, or right of way, not only for persons on foot, but for horses, teams, &c., from the main road to the mill, and that such way was at least one and one-tenth rods wide. If there be error in the rule thus laid down, it is error of which the defendant should not complain, for it imposes upon the plaintiff the burden of proving his whole case, the whole extent of his alleged injury, or wholly fail in his suit.

On the questions of adverse possession or prescription, as well as to this rule of damages, we think the defendant has no cause of complaint. The rulings were not in conflict with the cases cited by counsel for defendant.

For these reasons the motion and exceptions must be overruled, and judgment go upon the verdict.

TENNEY, C. J., APPLETON, CUTTING, MAY, and DAVIS, J. J., concurred.

JOSEPH G. DEERING *& als. versus* RUFUS M. LORD.

Where an attachment of a vessel is made on a writ to preserve a *lien*, given by the statute, if, in the plaintiff 's account sued, are embraced items for which he has no lien, the attachment is not, for that cause, void; but, if a non-lien item should be included in the *judgment* rendered in the suit, the attachment will be thereby vacated.

If such writ contain no direction to the officer to attach *the ship*, but only "to attach the goods and estate of" the debtor, the attachment of the ship will be invalid, as against one who, previous thereto, had become the purchaser of it, from the builder.

So, if a mortgagee hold the ship, and there is no specific direction in the writ to attach it, an attachment of it will be void, unless the attaching creditor make to the mortgagee the tender required by c. 114, § 70, of R. S. of 1841.

REPLEVIN of a ship. The defendant pleaded *non cepit*, and, in his brief statement, avows the taking and prays return, setting forth in proper form, that he took the ship as a deputy of the sheriff of this county, by virtue of a writ of attachment in favor of Page & als. of Boston, against E. & E. Perkins of Biddeford, in which writ the plaintiff claimed to recover of said defendants for iron, &c., used in the building of said ship, which was attached on said writ, within the time prescribed for preserving the liens, given by statute to persons who work upon and furnish materials for a vessel while in process of building.

At the trial, before RICE, J., the plaintiffs introduced a contract, made between the plaintiffs and said E. & E. Perkins, for building the ship, dated Dec. 9, 1853.

Also a mortgage bill of sale of the ship, (then in the process of building,) from said E. & E. Perkins to plaintiffs, which had been duly recorded in the town clerk's records of Biddeford.

The defendant introduced the writ on which he attached the ship; the action instituted by it being still pending.

There was evidence tending to show, that some of the items in the account annexed to the writ, were for materials which were not used in the construction of this ship. It appeared, that while the said E. & E. Perkins were building this ship, they were also building another of the same description in the same yard; that Messrs. Page & Co., furnished the iron for both ships, charging the same to the builders in general account, as the orders of the builders did not distinguish for which ship the iron ordered was to be used. The ship in controversy, was launched some time after the other had been completed; and the purchasers of the other ship had paid to Page & Co., more than one-half of the amount of their account against said E. & E. Perkins.

The case was withdrawn from the jury, the parties agreeing that the presiding Judge should REPORT the evidence for the decision of the full Court.

There was much testimony introduced by either party as appears by the report, but none of it bears upon the questions which are determined by the opinion of the Court.

The case was argued by

T. M. Hayes, for plaintiffs, and by

Eastman & Leland, for defendant.

The opinion of the Court was drawn up by

TENNEY, C. J. — The right of the plaintiffs to the vessel in question, is under a mortgage to them from E. & E. Perkins, duly recorded on March 14, 1854. The only interest

in the same property, or right thereto as disclosed in the pleadings, claimed by Page, Briggs & Babbitt, in whose favor a writ was made against said E. & E. Perkins, and an attachment returned by the defendant on Nov. 7, 1854, to secure a lien on the same property for materials alleged to have been furnished by them, and in the construction thereof, is said lien and attachment.

The case shows that, at the time of the trial, Page, Briggs & Babbitt had not taken judgment in their action against E. & E. Perkins; and, if a lien existed upon the property in their favor, to any amount, the vessel being indivisible, it might be secured by an attachment duly made, notwithstanding the account annexed to the writ, may embrace some items not covered by the lien. These items can be stricken from the writ, which would be amended accordingly, by leave of Court, at any time before judgment. *Spofford* v. *True*, 33 Maine, 283.

The statute gives a lien to any person who shall furnish materials, for or on account of any vessel building or standing on the stocks, for such materials. And this lien is not defeated by a mortage of the same vessel, made before or after the materials are furnished, provided the materials are actually used in the construction of the vessel. The provision that the attachment to secure the lien, shall take precedence of all other attachments, does not imply that it shall not take precedence of mortgages upon the same property, inasmuch as the lien is to attach without any qualifying language. R. S. of 1841, c. 125, § 35.

Another material question involved in this case is, whether Page, Briggs & Babbitt took the steps to make their lien available under the statute. The mode of obtaining the benefits of liens under the statute invoked in this case, does not substantially differ from that provided by the statute of 1848, c. 72, § 1, entitled "An Act, giving to laborers on lumber, a lien thereon." Both these Acts provide that, the liens are to be eventually secured by attachments of the property, subject to the liens, though the time when those attachments

are to be made are not the same, under the two statutes, if the property is owned by a person who is not the debtor of the party claiming the lien.

In the case of *Redington & al.* v. *Frye*, 43 Maine, 578, CUTTING, J., in delivering the opinion of the Court, says: "The officer had no concern with the averments in the declaration, or with the indorsements of an attorney on the writ, when inconsistent with the express commands within dictated."

The defendants in the writ of Page, Briggs & Babbitt, had parted with their right in the vessel by their mortgage of March 14, 1854, to the plaintiffs in this action, subject only to the right to redeem, according to the condition in the same mortgage. The legal title of the property was in these plaintiffs. No steps were taken by Page, Briggs & Babbitt to secure this right to redeem, under the R. S. of 1841, c. 114, § 70, but they rely exclusively upon their lien under the statute, by their pleadings and the argument of counsel.

The directions in the writ to the Sheriff and his deputies, of *Page, Briggs & Babbitt* v. *E. & E. Perkins*, partners in trade, is to attach the goods and estate of the defendants named in the writ, and nothing else. The writ contains no direction to attach the property of those who are strangers to that suit, and hence the attachment by the defendant in this action was inconsistent with the commands of the precept to him. And there is no foundation for the judgment *in rem* against the vessel in question. *Bicknell* v. *Trickey*, 34 Maine, 283.

According to the agreement of the parties, the plaintiffs being entitled to maintain this action, judgment must be entered in their favor.

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

GEORGE STACKPOLE *versus* CYRUS KEAY.

K. and D. were jointly interested in carrying the United States mail on a certain route for four years from July 1, 1853. They were also joint promisors upon a note held by the plaintiff; and they mutually agreed that the plaintiff might collect the quarterly payments accruing on said contract, and apply the same to the note. — *It was held* that this fund was thereby set apart for that purpose; and that a subsequent agreement, between the plaintiff and *one* only of the parties, to appropriate the fund differently was void; and that the sums, as they were collected, quarterly, by the plaintiff, operated as payments upon the note.

ASSUMPSIT upon a joint and several promissory note, payable by defendant and Cyrus K. Drake, to plaintiff, or order, for $1313,50, in six months from its date, (Sept. 14, 1854,) with interest.

The case was tried before GOODENOW, J., at the April term, 1858. It appeared in evidence that the plaintiff had contracted with the United States government to carry the mail on route number 115, from July 1, 1853 to July 1, 1857. Afterwards, Sept. 14, 1854, he transferred his interest in said contract to Keay & Drake, jointly, and sold to them his stage stock, for which he took the promissory note in suit. The contract with the post-office department still remained in his name, and he only could collect the quarterly payments. By an arrangement between all the parties, on or before Sept. 30, 1855, the plaintiff was there afterwards to collect the amount due on the contract, quarterly, and apply it upon the note.

The plaintiff testified that, subsequently, an arrangement was made between himself and Drake that the amount to be collected should be applied, not upon the note given by Keay & Drake, but upon another note held by the plaintiff against Drake alone; and that he had applied what he had collected accordingly.

The defendant filed an account in set-off for the amount so received by the plaintiff, and contended that it should be applied to the note in suit. This account was allowed by the

jury to the amount of $525, and they returned a verdict for the plaintiff for the balance due on the note, after deducting that sum, together with other payments which had been indorsed. Whereupon, the plaintiff moved for a new trial, on the ground that the verdict was against law and the evidence in the case.

Appleton & Goodenow, for plaintiff.

Drew, for defendant.

The opinion of the Court was drawn up by

HATHAWAY, J.—The mail pay was due quarterly, the last quarter due July 1, 1857.

It could be collected only through the plaintiff, he being the mail contractor. It was the joint property of the defendant and Drake, the defendant's joint promisor in the note sued. The amount unpaid on the mail contract was five hundred and twenty-five dollars, which was all received by the plaintiff, or paid to his order; he should equitably allow it, on the joint note.

The jury might well have found, from the circumstances and evidence in the case, that the mail pay was a fund set apart and appropriated for the payment of this note, (unless it should be otherwise, subsequently, appropriated by the consent of all the parties,) and, if so, the receipt of each quarterly payment of the mail pay, by the plaintiff, was a payment on the note. The verdict was right. *Motion denied.*

TENNEY, C. J., CUTTING, MAY, GOODENOW, and DAVIS, J. J., concurred.

GREENLEAF WEBBER *versus* INHABITANTS OF SCHOOL DISTRICT NO. 9, IN SHAPLEIGH.

After the plaintiff had closed his testimony, the defendants offered a paper, claiming that it was a written contract between them and the plaintiff, and called and examined a witness to prove the execution of it; but failing to prove it, it was excluded. They then offered a book, claiming that it was their book of records, and called and examined a witness to prove it; but failing in this, the book was excluded. After this, upon their motion, the presiding Judge ordered a nonsuit; *and it was held* that no evidence had been put into the case by the defendants, and that the nonsuit was properly ordered.

When a person performs labor for another under a written contract, and, though not performed according to its terms, the other party has waived it, the person performing the labor can recover only *upon the contract.* Though not fully performed, it is the basis of the estimation of damages; and, if it appears by the plaintiff's testimony that such labor was performed under a written contract, which is not proved, a nonsuit may properly be ordered.

ASSUMPSIT upon an account annexed to the writ. The writ also contained a special count upon an alleged contract between the plaintiff and the school district, by which the plaintiff agreed to build a school-house for the district of certain specified dimensions, and for a stipulated price. It was alleged, in this count, that the plaintiff built said house according to said contract, and that it was thereupon accepted and occupied by the defendants.

The case was tried at the Sept. term, 1857, before HATHAWAY, J. The plaintiff called a witness by whom he proved the performance of the labor on the school-house; and, upon cross-examination, it appeared that this labor was performed under a written contract. The same witness testified that, since that time, the school-house had been used and occupied as such by the defendants. The plaintiff here rested his case.

The counsel for the defendants then opened the defence to the jury; and offered in evidence a paper, which he alleged to be a contract between the parties, under which the labor was performed. The plaintiff objected to the admission of the paper until its execution was proved. The

defendants proved the handwriting of the persons who signed the alleged contract for the district; but, there being no evidence that they were authorized to sign it, the paper was excluded.

The defendants then offered in evidence a book, purporting to be the book of records of the school district; and they called Joseph Hasty as a witness, who testified that he had formerly been the clerk of the district, and that the book contained the records of the district. But, it appearing that the said Hasty was not clerk of the district, at the time of the trial, the book was excluded.

The counsel for the defendants then presented a motion for a nonsuit, which was ordered by the Court.

Tapley & Kimball argued for the plaintiff, contending that evidence had been introduced by both parties; and therefore, in ordering a nonsuit, the presiding Judge exceeded his authority. *Lyon* v. *Sibley*, 32 Maine, 576.

Appleton & Goodenow, for defendants.

The nonsuit was properly ordered. The plaintiff could not take the first step in his case without introducing the contract *declared on in the writ.* Because the plaintiff is not entitled to the actual value of the work, *per se*, but only to the *contract price*, minus such a sum as would complete the work according to the contract.

The contract price is indispensable to determine the proper measure of damages. If the proof had been that the labor was performed, and the materials furnished, according to the contract, the plaintiff would have been entitled to the *whole* of the contract price.

If, as we contend, the work and materials were *not* according to the contract, but of less than the stipulated value, then was the plaintiff entitled to the *agreed price*, deducting therefrom so much as the house was worth less on account of the variations from the contract. *Jewett* v. *Weston*, 2 Fairf. 346; *Hayden* v. *Madison*, 7 Greenl. 76; *Hayward* v. *Leonard*, 7 Pick. 180; *Thornton* v. *Place*, 7 M. & R. 218; *Phelps* v.

Sheldon, 13 Pick. 50; *Wadleigh* v. *Sutton*, 6 N. H., 15; *Ellis* v. *Hamlin*, 3 Taunton, 53; *Cutler* v. *Clen*, 5 Car. & Paine, 337; *Marshall* v. *Jones*, 2 Fairf. 54; Chitty on Contracts, (5th Am. ed.,) 569; 1 Parsons on Contracts, 387; *Norris* v. *School District No.* 1, *in Windsor*, 3 Fairf. 293.

Where, upon the trial of a cause, there is no proof except what is offered by the plaintiff, and that is insufficient to warrant a verdict for him, a nonsuit may be ordered. *Sandford* v. *Emery*, 2 Greenl. 5; *Perley* v. *Little*, 3 Greenl. 97; *Pray* v. *Garcelon*, 17 Maine, 145; *Head* v. *Sleeper*, 20 Maine, 314; *Hoyt* v. *Gilman*, 8 Mass. 336.

The opinion of the Court was drawn up by

TENNEY, C. J.—It is a settled rule of this Court, in practice, that after the plaintiff in the trial of a cause has introduced evidence in its support, and the other party in defence has offered to the jury evidence in his behalf, a nonsuit cannot be directed by the Court without consent of the parties.

This rule was not violated in this case. No evidence was presented to the jury by the defendants. They attempted to show that a written contract was made between the parties, but failed in that attempt. Again, for the same purpose, they introduced evidence for the purpose of proving that a certain book was the record book of the defendants, and contained the records of their transactions, but the witness offered for this object was objected to, as not having the requisite knowledge of the matter to render him competent; whereupon the plaintiff withdrew his offer of the book. At this stage of the proceedings, the only evidence adduced by the defendants was to the Court, and this pertained wholly to that which was not shown to be admissible before the jury. The Court, thereupon, directed a nonsuit. *Lyon* v. *Libbey*, 32 Maine, 576; *Emerson* v. *Jay*, 34 Maine, 347; *Bragdon & ux.* v. *Ins. Co.*, 42 Maine, 259; *Frye* v. *Gragg*, 35 Maine, 29.

The action was for the recovery of certain work alleged to have been done upon the defendants' school-house, for which he attempted to recover the value of the labor and materials

expended. But it having appeared distinctly, from the evidence introduced by him, that there was a written contract between the parties, under which he was to do certain work upon the house for a gross sum, a nonsuit was directed by the Court, the contract not having been introduced, and the non-production thereof in no way accounted for.

Exceptions overruled.

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

ROYAL EASTMAN *versus* BENJAMIN FLETCHER *& ux.*

The proceedings should be by bill in equity, and not by writ of entry, for the recovery of land, by one who claims title under a levy thereon of an execution against a debtor, who never had the *legal title* to it, but had only an *equitable interest* therein.

Where a judgment creditor causes his execution to be levied upon land, the *legal title* to which is in the debtor, if, prior to the attachment of it on the original writ, he had actual notice that the debtor held the land *in trust* for the benefit of a third person, as against the rights of such equitable owner, the levy will be invalid.

WRIT OF ENTRY, in which Benjamin Blaisdell was joined as defendant with said Fletcher and wife. At the second term, after entry, the said Blaisdell disclaimed all title to, and interest in, the premises demanded; whereupon, the demandant amended his writ by striking out his name as a defendant.

The demandant claims to recover of the said Fletcher and wife a tract of land situate in Berwick, containing about forty acres. The said Fletcher and wife pleaded the general issue.

At the trial, before HATHAWAY, J., the plaintiff introduced a judgment recovered by himself against said Blaisdell and Fletcher, at the September term of this Court, 1852; the execution which issued thereon, and the levy of the same on a part of the premises demanded, which levy was duly recorded.

Also a judgment recovered at the same term, by Bartlett & al. *v.* said Fletcher, and the levy duly recorded of the execution that issued thereon, upon the other portion of the demanded premises.

Also a deed to himself from said Bartlett & al., of their interest under their levy.

Also copy of a deed from Aaron Maddox to said Blaisdell, of the premises sued for, dated April 19, 1847, acknowledged same day, and recorded Oct. 20, 1851.

The demandant also put in testimony showing that, at the times of the levies, the said Benjamin Fletcher was in possession of the premises, claiming title.

Benjamin Blaisdell, introduced by defendants, testified that he never took a deed of the premises from Aaron Maddox; that he and Fletcher were sued by plaintiff, some time ago, for a bill for services he claimed; "before he sued us, he was told by me that the land belonged to Mrs. Fletcher, and not to put that deed on record;" that he (witness,) never claimed to own the land, never authorized the deed to be made to him, knew nothing about it.

The defendants also introduced testimony tending to show that, prior to and at the time of their marriage, the female defendant was possessed of money of her own, which, after her marriage, she loaned to her husband to pay, in part, for a farm he had agreed to purchase, and which he purchased and occupied a few years, and afterwards sold it; and, on receiving payment therefor, he paid to his wife the note he gave her for the money loaned him. That, with the money thus paid her, the premises in controversy were purchased, and that the husband, who transacted the business for her, requested the deed to be made by Maddox to Blaisdell, and that it was never delivered to Blaisdell.

The premises in controversy were bargained to one Drew, to whom possession was given. Drew failed to pay, and Fletcher employed the plaintiff to prosecute a suit in the name of Blaisdell, for the recovery of the land, and placed in plaintiff's possession the deed from Maddox to Blaisdell.

It also appeared in testimony that plaintiff caused the deed to be recorded. The plaintiff introduced evidence tending to show that the land was purchased by Fletcher of Maddox, with means of his own, and the deed thereof made to Blaisdell, to save it from attachment by the creditors of Fletcher, and that Fletcher's wife never made any claim to the land until after it had been levied upon.

The case was withdrawn from the jury, the parties having requested the presiding Judge to report the evidence in the case for the decision of the full Court, who were authorized to draw inferences from the evidence as a jury might. So much of the evidence as is inadmissible, if seasonably objected to, to be excluded.

The case was argued by

Eastman, pro se, (with whom was *Wells,*) and by

Bourne, Jr., for defendants.

The opinion of the Court was drawn up by

DAVIS, J.—The evidence in this case is somewhat conflicting. The demandant claims under two levies of executions, one against Fletcher, and the other against Fletcher and Blaisdell. At the time of these levies, the legal title to the premises was in Blaisdell. But Blaisdell held the title merely in trust, either for Fletcher or for his wife. The purchase money was paid by Fletcher, and the deed taken in Blaisdell's name. It is uncertain whether the money really belonged to Fletcher, or to his wife. The parties seem to have made contradictory statements about it; but, though it is unnecessary for us to express any opinion in regard to it, the preponderance of testimony seems to favor the conclusion that, whatever the parties may at other times have said about it, the purchase money, in fact, belonged to Fletcher's wife.

But, admitting that Blaisdell held the legal estate in trust for Fletcher, the levy upon it of the execution of Bartlett & al. *v.* Fletcher, at most, only passed the *equitable title* to the creditors. *Russell* v. *Lewis,* 2 Pick. 508; R. S. of 1841, c.

94, § 10. The interest acquired by such a levy is not sufficient to sustain a writ of entry. The demandant declares on his own seizin, in fee, and must prove a subsisting right of entry. R. S. of 1841, c. 145, § § 4, 5, 7. To support these allegations, he must prove that he had the *legal estate* in the premises, at the time of the demise laid in the declaration. 2 Greenl. Ev. § § 303, 533; *Howe* v. *Bishop*, 3 Met. 26; *Goodwin* v. *Hubbard*, 15 Mass. 210.

In the case before us, if the demandant, by his deed from Bartlett and Carter, has acquired whatever interest Fletcher had in the premises, and the equitable interest was in Fletcher, his remedy is not by an action at law, but by a bill in equity. *Shaw* v. *Wise*, 10 Maine, 113; *Houston* v. *Jordan*, 35 Maine, 520.

The demandant also claims under a levy upon an execution in his own favor, against Blaisdell and Fletcher. But Fletcher and Blaisdell both testify that, before the commencement of the suit against them, the demandant had actual notice that Blaisdell held the land in trust for Fletcher's wife, to whom the purchase money belonged. The demandant denies having had any such notice; but the testimony of Blaisdell and of Fletcher that the demandant had the deed in his hands long before that time, with notice that it was never delivered, and that he caused it to be recorded without any authority therefor, involves the matter in great doubt, as between the parties themselves. And, in view of the whole case, we are not satisfied that the demandant is entitled to recover. According to the agreement of the parties, a nonsuit must be entered.

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

GEORGE V. JORDAN *versus* JEREMIAH MCKENNEY, *Appellant.*

A recognizance conditioned "to pay all *intervening damages* and costs" entered into to prosecute an appeal to this Court, from a judgment of a justice of the peace, in an action of trover, is unauthorized and void, and furnishes no security to the adverse party for costs; and the Court, on motion, will dismiss the appeal.

ACTION OF TROVER, commenced before a justice of the peace, who, on Feb. 20, 1853, rendered judgment for plaintiff; from which defendant appealed, and entered into a recognizance to prosecute his appeal, "and pay all intervening damages and costs."

The defendant entered his appeal at the next term of this Court in this county, and the action was continued from term to term until April term, 1857, when the plaintiff moved that the appeal be dismissed, because the defendant had not legally recognized. But, on the refusal of GOODENOW, J., to dismiss the appeal, the case was submitted to a jury, who returned their verdict for the appellant. The plaintiff thereupon excepted to the denial of his motion, and to other rulings during the trial.

The questions presented by the bill of exceptions, were argued by—

Goodwin & Fales, in support of the exceptions, and by

Wiggin, contra.

The opinion of the Court was drawn up by

DAVIS, J.—The condition of the recognizance required in case of an appeal from the judgment of a justice of the peace, was, by the statute of 1821, to pay all intervening damages and costs; by the statute of 1841, to pay the *costs* only.

The recognizance in this case, was taken under the statute of 1841; and the condition was "to pay all intervening damages and costs." This, not being such a recognizance as the statute required, was void. The magistrate had no right to require it; as it was void, it furnished no security to the ad-

verse party; and the appeal was improperly allowed. *French* v. *Snell*, 37 Maine, 100. The exceptions are sustained; the verdict must be set aside, and the appeal dismissed.

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

FRANKLIN EASTMAN *versus* CARROL COUNTY M. F. INS. CO.

A void policy of insurance is not rendered valid by an assignment of the holder's interest therein, approved by the directors of the company that issued it; and the assignee cannot maintain an action upon it.

ASSUMPSIT upon a policy of insurance.

On the last day of January, 1851, Ira Ramsell applied to the defendant corporation for insurance upon his buildings, representing them to be free from incumbrance, and guaranteeing a lien thereon. The company issued a policy thereon February 3, 1851.

At the time when this policy was issued, Ramsell was not the owner of the property, but the title was in one John Jameson. On the 8th of February, Jameson conveyed the property to the plaintiff, and the policy of insurance was assigned to the plaintiff by Ramsell, with the consent of the directors of the company. The following is a copy of the assignment.

"Carrol County Mutual Fire Insurance Company. Having sold and conveyed the buildings within mentioned, and the land whereon they stand, to Franklin Eastman, I hereby assign to him the policy of insurance within written, to hold the same, subject to all the liabilities and entitled to all the benefits to which I am liable and entitled by virtue thereof.

"Ira Ramsell.

"The directors consent.

"D. H. Folsom, Daniel Hoit, *Directors.*

"Dated March 27, 1851.

"Attest: M. H. Marston, *Secretary.*"

The property described in the policy was destroyed by fire June 9, 1852, and the defendants were duly notified thereof; but they declined to pay it on the ground that the policy was void, Ramsell, to whom it was originally issued, having never had any insurable interest therein. Sept. 19, 1853, the company assessed upon the premium note given by the plaintiff $1,50, which he paid Nov. 10, 1853.

Hammons, for the plaintiff:—

Contended that the policy, though originally void in the hands of Ramsell, was made valid as to the plaintiff by the ratification of the assignment to him.

The contract between the company and an assignee of a policy, is an independent contract. It is a new promise made to a new party, upon a new consideration. It is not essential, therefore, that the original promise should have been binding. It is on the ground that the contract is entirely new, that an assignee may maintain an action against the company in his own name. *Crocker* v. *Whitney*, 10 Mass. 316; *Wilson* v. *Hill*, 3 Met. 69; *Kingsley* v. *N. E. Mut. Fire Insurance Co.*, 8 Cush. 400.

The company also ratified the contract as between themselves and the defendant, by making an assessment upon the premium note given by him, and collecting the same. The contract was mutual. The premium note given by the plaintiff was the consideration of the new promise made by the defendant corporation to him. They will not be permitted to collect the note and then deny their liability upon the contract for which it was given.

John N. Goodwin argued for the defendants.

The policy, when issued to Ramsell, and, while held by him, was void.

First:—It was void by the provisions and stipulations of the application, upon which the policy was issued, and by the by-laws of the company.

Article 10, of the by-laws provides, that "the applicant for insurance shall be required to make a true representation in

writing of the situation of the property on which he asks insurance, and of his title and interest therein." And, by article 15, of the by-laws, it is provided, that "in case of alienation, the policy shall be void."

Section 1st, of the Act of incorporation, authorizes the company to make such by-laws, not being contrary to the laws of the State, as may be necessary.

In the application for insurance, made by said Ramsell, which is made part of the policy, in answer to the question, whether "the buildings are incumbered by mortgage or otherwise," said Ramsell replies, "not incumbered."

He also, in the application, gives the company a lien on the property insured.

It is quite clear that the 15th article of the by-laws requires the applicant to state, in answer to the last question, his title to the property; and, it is equally plain, that the applicant's representations of title, made in his answer, were false and *fraudulent.* This avoids the policy. *Davenport* v. *N. E. Insurance Co.,* 6 Cush. 340; *Warren* v. *Middlesex Assurance Co.,* 21 Conn. 444; *Brown* v. *Williams,* 28 Maine, 252; *Burritt* v. *Saratoga M. F. Insurance Co.,* 5 Hill, 191.

Second:— That it is essential to every contract of insurance, that the assured should have an interest at risk. If he has no interest, or if his interest is not at risk, he can be liable to no loss, and, accordingly, there is nothing against which the insurer can agree to indemnify him. 1 Phillips on Insurance c. 3, § § 172, 346.

There can be no question that the policy, while in the hands of Ramsell, was void; and we contend that, if void in the hands of Ramsell, it is also void in the hands of his assignee. *Barrett* v. *Union Mutual Fire Ins. Co.,* 7 Cush. 175.

The right to assign a policy of insurance, is given to a member of the company; it is for his advantage and is his privilege. He has paid, in advance, to the company the cost of taking an application, survey, &c., the fee for his policy during the whole term of insurance, and, in disposing of the property so insured, this provision gives him the right to

transfer these benefits to his grantee, and, in that way, to recover from the assignee of the policy the sums so advanced by him.

This privilege can only be exercised by a member of the company, and one legally insured therein, and that alone constitutes membership.

But Ramsell's policy was void; he never was a member of the company, and is not entitled to this privilege.

The right to assign is based upon an alienation by the insured. The insured in this case, did not alien, or sell the property to the assignee. He had no interest in it or right to assign it.

The representation made by Ramsell in the assignment, "having sold the buildings and the land whereon they stand, to Franklin Eastman, I hereby assign," &c., is false, and was known to be so by said Ramsell and by the plaintiff. The plaintiff takes the assignment subject to the provisions of the charter and by-laws. The law presumes him to be acquainted with them, and, if an assignment by Ramsell to him was, by the charter and by-laws, void, he is presumed to know that fact.

He is not an innocent party in the transaction. He knew that Ramsell's policy was void; that he was not a member; that he had no right to assign.

The company and its agents were not acquainted with the facts.

By one of the liabilities to which the said Ramsell was subject, the policy was void. The assignee then, with the director's consent, agrees to take a void policy. The assignee is entitled to all its benefits, and those only to which said Ramsell was entitled by virtue of the policy.

Ramsell was entitled to no benefit from the policy, if void, and his assignee, consequently, is entitled to none.

The effect of the assignment to the plaintiff, was to put him in the same situation, and to confer upon him the same rights, as to the future, as if he had been the original assured. *Hooper* v. *Hudson River Fire Ins. Co.*, 15 Barbour, 414.

An assignment makes no new contract; it places the assignee in the same, but in no better situation, than that in which the assured stood, prior to the assignment.

If the policy had not been assigned, and said Ramsell had acquired a title to the property, instead of the assignee, and the policy had remained in his hands until the loss happened, he could not recover.

A fire policy can be made only upon an interest subsisting at the time. Phillips on Ins. vol. 1, (4th ed.) 117.

The policy was void in its inception. It was a fraud upon the company; no act of theirs could bind them, and render them liable to him, unless with a full knowledge of the forfeiture, and by an express ratification. How then can they be made liable to the assignee, who takes only the rights which the assignor had?

Any defence which would have been available against the assignor of the policy, as a contract of insurance, or without an alienation of the property, will be equally so against the assignee; and, therefore, it does not appear to be essential to guard by stringent provisions, against a transfer merely of the policy. Angell on Fire & Life Insurance, § 214.

It is contended by the plaintiff's counsel, that an assessment made by the defendant corporation against the plaintiff upon this policy, and a payment by him, are a waiver of all forfeitures, and a ratification to him of the policy. This position is not sustained by the authorities. The question, whether the forfeiture in such case is susceptible of being waived by an assessment, is fully discussed in *Neely* v. *The Onondaga M. Fire Ins. Co.*, 7 Hill, 49; and the opinion of the Court was strong against the possibility of such a waiver.

It has been considered, that "whatever may be the sounder view on this point, it is well settled that no act can have the effect of a waiver, unless it is shown to have been done with the full knowledge that the forfeiture existed, when it is alleged to have been waived. Angell on Insurance, § 219; 2 Am. Leading Cases, 522; *Allen* v. *Vermont M. Fire Ins.*

Co., 12 Vermont, 366. No such knowledge is shown on the part of the defendants in this case.

The opinion of the Court was drawn up by

MAY. J. — The defendants are a Mutual Fire Insurance Company, a corporation created by the Legislature of the State of New Hampshire, and this action is brought upon a policy of insurance originally given to one Ira Ramsell, a resident of this State, and by him assigned to the plaintiff. It appears from the application of said Ramsell, which forms a part of the policy, that when the insurance was procured he represented that the property insured was not incumbered by mortgage, or otherwise, and a lien was given to the company thereon, for the payment of all assessments. It turns out, however, that said Ramsell had no title or interest in the property; and that the title then was, and continued to remain in one John Jameson until he conveyed to the plaintiff, Feb. 8, 1851.

It is conceded, in the argument for the plaintiff, that the policy, by reason of the fact before stated, was void while it remained in the hands of said Ramsell; but, it is contended, that it became valid and binding upon the company by virtue of an assignment from said Ramsell to the plaintiff, bearing date, March 27, 1851, the same having been consented to in writing by the defendants, or their agents, when made. The plaintiff claims to recover as assignee of the policy, the property insured having been consumed by fire on the ninth day of June, 1852, at which time he was the owner.

The policy was issued subject to the by-laws of said company. By article 15 of these, it is provided that, "in case of the alienation of any house or building by sale or otherwise, or in case of removal, where furniture or goods only were insured, the policy shall thereupon be void, and shall be surrendered to the directors to be canceled; and, on such surrender, the insured shall be entitled to recover his deposit notes on payment of such proportion of all losses and ex-

penses prior to such surrender, provided that the grantee or alienee above named, having the policy assigned to him, may have the same ratified and confirmed for his benefit on application to the directors within thirty days, and giving security to their satisfaction for the remaining term of the policy; and, in such case, he shall be entitled to all the privileges, and incur all the liabilities of the institution equally with other members." It was, undoubtedly, the intention of the parties to said assignment, and of the defendants' agents in consenting thereto, that it should have effect under and by virtue of said by-law. No other clause is found, either in the charter or by-laws of the defendants, which confers upon their directors any authority to bind the company by reason of any assignment of a policy not made in pursuance of said by-law. The directors, therefore, can bind the company only when acting in accordance with its provisions, and in the cases therein provided.

In the case under consideration, were the acts of the directors authorized by the by-laws? or, in other words, was the assignment relied on, as a ratification or confirmation of the original policy, made in pursuance of its provisions? Was there an *alienation* of the property insured such as the by-law contemplates, and, if so, was the application for consent to the assignment of the policy seasonably made? The policy was issued upon the understanding that the assured was the owner of the property insured. It is so in all cases. When, therefore, the by-law speaks of an alienation by sale, or otherwise, it manifestly means an alienation by the party insured. The conveyance, therefore, from John Jameson to the plaintiff, was not an alienation within its meaning. He had no interest in the policy, and the defendants were in no way responsible to him. The alienation by him could not render the policy void, because, while Ramsell held the policy, the rights of the defendants would not be affected by the sale. It was a matter of indifference to them whether Jameson or his grantee were the owners of the property insured. If the party insured, at the time of the issuing of the policy, had no interest

in the property covered by it, then the policy was void. He must, therefore, have had an insurable interest in the property when insured, to make the policy valid; and it is an alienation of that interest which alone can render the policy void; and the authority of the directors, under the by-law, to ratify and confirm assignments in cases of the sale or alienation of the property insured, applies only to policies which are made void by such an alienation, and not to such as were originally void. The alienation, therefore, referred to in the by-law, must of necessity be made by the party who is insured. If, however, the contingency upon which the directors are empowered to act had occurred, as no application was made to them within thirty days after the conveyance from Jameson to the plaintiff, the power conferred by the by-law had, by express limitation, ceased to exist long before the action on their part upon which the plaintiff relies. For the reasons before stated, the assignment of the policy was inoperative, and no new force was imparted by it to the policy in suit.

If, however, the difficulties which have been suggested could be avoided, there is still an obstacle in the way of the plaintiff's recovery. The assignment itself recites that the plaintiff is to hold the policy "*subject to all the liabilities and entitled to all the benefits to which he, the said Ramsell, was entitled by virtue thereof.*" It does not profess to create any new rights, but simply to transfer subsisting ones. The defendants, when they consented to its transfer, do not appear to have been aware that Ramsell was not the owner of the property to which the policy was designed to attach. They must have supposed from the language of the assignment, (in which he speaks of having sold and conveyed the buildings to the plaintiff,) that he was the owner, and that it was therefore subject to the lien which was referred to in his application for insurance. From this application, and from the recitals in the assignment, the directors, at the time they consented to the transfer, had good reason to believe that the policy was then valid, and that the title to the property insured was in Ramsell, and that it remained in him until his conveyance to the

plaintiff. They might, therefore, well conclude that the lien provided for in the policy, inasmuch as the plaintiff took the policy subject to all the liabilities of Ramsell, would continue upon the property insured, notwithstanding its conveyance, and be sufficient security for all assessments then and subsequently to be made. Hence the defendants neither took nor required any new note or security therefor, and the plaintiff gave no lien upon the property after it was conveyed to him. The lien, therefore, which was contemplated by the parties to the policy, and which was then understood to exist, never did, in fact, attach. In this, the defendants or their agents were deceived, being led into error by the misrepresentations of Ramsell, in regard to his title, as contained in his application to be insured, and repeated in the assignment with the knowledge and assent of the plaintiff. Under such circumstances, we think, it cannot properly be said that the defendants, by the written consent of their directors to the assignment upon the policy in suit, have either ratified or confirmed the same, so as to make the policy, which is conceded to have been originally void, a valid contract in the hands of the plaintiff; and, for this reason, this action cannot be maintained.

Plaintiff nonsuit.

[This case was submitted to the full Court upon an agreed statement of facts; and TENNEY, C. J., HATHAWAY, CUTTING, GOODENOW, and DAVIS, J. J., concurred in the opinion that the action could not be maintained.]

JOSEPH B. PALMER, *Petitioner, versus* GIDEON TUCKER *& al., Assignees.*

One who had cut and hauled to his mill a quantity of timber, from the land of another, under a contract with the owner thereof, has a *lien* at common law for his labor upon the lumber in his possession, which was manufactured from the timber, and also upon the logs which are unsawed.

And if a part of the lumber has been delivered to, and taken away, by the owner, his whole claim for cutting, hauling and sawing, is a *lien* upon that part which remains in his possession.

Although his lien accrued prior to the enactment of the law of 1856, c. 273, he is entitled to the provisions of that statute for the enforcement of his lien.

Nor will he be considered as having abandoned or waived his claim, if, previous to the passage of that law, he had caused his demand to be sued, and the lumber attached, if he retained possession of it, insisted on his lien, and no judgment had been rendered in that suit.

PETITION for enforcing a common law lien under the provisions of c. 273 of the laws of 1856. The petitioner sets forth that he has in his possession forty thousand feet of pine boards and two thousand feet of pine logs, cut and manufactured from timber, which, at the time of the cutting and hauling and sawing of the same, was the property of Thomas Cutts, but which boards and logs are now the property of Thomas M. Hayes and Gideon Tucker, as the assignees of said Cutts thereof, for the benefit of his creditors, &c.; that the lien of the petitioner had accrued before the said Cutts assigned as aforesaid.

The petitioner then specifies the claim, which he alleges to be a lien on said boards, and also his demand, that is a lien on the logs; alleges that the said assignees have refused to pay his claim; and prays that legal process may issue to enforce his lien, and that the boards and logs may be sold in satisfaction of his lien, according to the statute in such case provided. The petition is dated Aug. 29, 1856.

The case is presented on a STATEMENT OF FACTS, assented to by the parties; the material part of which is, that the plaintiff, in the fall of 1854, agreed with Cutts, one of the respondents, but who does not defend in this case, to cut,

haul and saw into boards a quantity of pine timber, then standing on the land of said Cutts, in Lyman, in said county, the timber to be cut and hauled by the plaintiff to the plaintiff's mill in Lyman and there sawed by him into boards; no particular quantity was agreed upon to be cut, hauled and sawed, except that plaintiff might cut, haul and saw what he conveniently could the ensuing winter and spring, and was to be paid therefor at the rate of two dollars and sixty cents per thousand feet, for cutting and hauling, and two dollars per thousand feet, for sawing into boards.

In pursuance of this agreement, the plaintiff cut and hauled to his mill 67,937 feet of lumber, board measure, which were by him sawed into boards, and 2171 feet in logs that remained at his mill unsawed at the time Cutts failed and assigned to his creditors, and at the time of the filing in Court of this petition.

No particular time was agreed upon for the payment by Cutts for the work to be done. There was an understanding that money should be paid by Cutts to the plaintiff as the work progressed if the plaintiff desired it, but no particular amount specified.

The lumber specified in the petition, and on which the lien is claimed, has continued ever since it was cut at the mill of the plaintiff, in Lyman, which is situated within a few rods and in sight of the plaintiff's dwellinghouse.

Sometime about the last of May, 1855, just after the failure of Cutts, the plaintiff commenced an action against Cutts, in the Supreme Judicial Court for the county of York, on a demand for the cutting, hauling and sawing of said logs, and gave the writ to a deputy sheriff for service, at the same time asserting and claiming a lien on said lumber, boards and logs, at common law, for his pay for the cutting, hauling and sawing, and directed the officer to return an attachment of said lumber on said writ, subject to his said lien, he not waiving the same, stating to the officer, that if he had to take possession of said lumber he might do it only on condition that he would hold said lumber as his, (the plaintiff's) servant, to

hold and retain said lien, and make his attachment subject to that, which the officer consented to do. The officer made a return of an attachment on the writ, and filed a certificate thereof in the town clerk's office in Lyman, but never took actual possession of said lumber, or in any way interfered with, removed or controlled the same. On the writ, and in the officer's certificate of attachment, returned to the town clerk's office, was a written notice of the plaintiff's claim of a common law lien, and that he did not intend to waive the same or give up his possession of the lumber. In said suit, Cutts was defaulted and trustees discharged, but the plaintiff has never taken judgment, and the same is still pending.

A part of the boards sawed were hauled away by Cutts from the plaintiff's mill before Cutts failed, and part since that time have been hauled away by his assignees, (who alone defend in this case,) not, however, with the consent of said Palmer, but against it, he forbidding it unless he was first paid for his work.

The allegations in the petition are to be considered as true, except so far as modified by this statement of facts.

If, in the opinion of the Court, the plaintiff has a lien on said lumber, he is to have judgment for the amount due him, and his legal costs, to be satisfied out of the proceeds of said lumber, so far as the same will go, which, by the agreement of parties, may be sold by the plaintiff as soon as may be, and the proceeds be kept, (after paying expenses of sale,) to abide the result of this case, and to follow their legal appropriation on the final judgment herein.

Goodwin & Fales argued for petitioner:—

That the main point raised upon the petition and statement of facts in this case is whether the plaintiff has a lien upon the boards and logs as claimed by him in the petition; and, to this point, cited *Grinnell* v. *Cook*, 3 Hill, 485; *Morgan* v. *Congdon*, 4 Com. 552; *Blake* v. *Nicholson*, 3 M. & S. 168; *Chase* v. *Westmore*, 5 M. & S. 180; *Moon* v. *Hitchcock*, 4 Wend. 77; *Partridge* v. *D. College*, 5 N. H. 286; *Gregory*

v. *Striker*, 2 Denio, 628; *Hostler's case*, Yelverton, 66, (in note;) *Judson* v. *Etheridge*, 1 Cromp. & Mees. 743; *Bevan* v. *Waters*, 3 C. & P. 520; *Jackson* v. *Cummings*, 5 Mees. & Wels. 342; *Scarfe* v. *Morgan*, 4 ibid. 270; *Sewall* v. *Nichols*, 34 Maine, 582; *Hodgdon* v. *Waldron*, 9 N. H. 67; *Forth* v. *Simpson*, 13 Queen's Bench R. 680; *Lord* v. *Jones*, 24 Maine, 442; *Spaulding* v. *Adams*, 32 Maine, 212; *McIntyre* v. *Carver*, 2 W. & S. 618.

The petitioner claims a lien for his whole demand on the boards and logs in his possession. All of the boards sawed by him, and all the logs hauled, were sawed and hauled under one contract, establishing separately the price for the hauling and for the sawing.

That his lien attaches for the whole amount due upon the boards and logs remaining at his mill, and in his possession, is fully settled in the cases of *Partridge* v. *D. College*, 5 N. H. 286; *Morgan* v. *Congdon*, 4 Com. 552; *Blake* v. *Nicholson*, 3 M. & S. 168; *Chase* v. *Westmore*, 5 ibid. 180; *Mount* v. *Williams*, 11 Wend.

The petitioner did not waive his lien by suing his demand. *Beckwith* v. *Libbey*, 11 Pick. 482, 484; *Townsend* v. *Newell*, 14 Pick. 332; *Whitaker* v. *Sumner*, 20 Pick. 399; *Snow* v. *Thomaston Bank*, 19 Maine, 269; *Elder* v. *Rouse*, 15 Wend. 218; Story on Bailments, § § 315, 365; *Houlditch* v. *Desange*, 2 Starkie, 337.

Hayes, for assignees, submitted the case without argument.

The opinion of the Court was announced by

MAY, J. — In view of the facts contained in the petition, as modified and assented to in the agreed statement of facts, the Court, (authorized to draw such inferences as a jury might,) are of opinion that the petitioner had a *lien*, as is claimed by him, which he has neither abandoned nor waived by any proceeding on his part. In addition to authorities cited by his counsel, see also *Danforth* v. *Pratt*, 42 Maine, 50.

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

STATE OF MAINE *versus* LORENZO D. STAPLES.

In a complaint for selling intoxicating liquors in violation of law, an allegation that a glass of liquor sold was "the second glass" sold by the defendant to the same person on the same day is not descriptive; and such allegation may be rejected as surplusage.

THIS was a complaint against the defendant for selling intoxicating liquors in violation of law. He was tried before the municipal court of the city of Biddeford, and, being convicted, appealed to this Court.

The complaint was in the following words:—

"State of Maine — York ss:—

"To Samuel W. Luques, Esq., one of the justices of the peace within and for the county of York. Ebenezer Emerson, of Biddeford, in said county of York, police officer, in behalf of the State of Maine, on oath complains that Lorenzo D. Staples, of said Biddeford, heretofore, to wit: on the eighth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, at said Biddeford, in said county of York, not being authorized by the aldermen and city clerk of said city of Biddeford to sell therein intoxicating liquors, did sell a quantity of intoxicating liquor therein, to wit: one glass of brandy, to wit: one glass of rum, being one glass of intoxicating liquor, to one Nathaniel Tibbetts, *and being a second glass of intoxicating liquor*, by said Lorenzo D. Staples, then and there sold and delivered, at said Biddeford, to said Nathaniel Tibbetts, against the peace," &c.

The case was tried before GOODENOW, J., at the January term, 1858. There was evidence of one sale, only. The counsel for the defendant requested the Court to instruct the jury "that the allegation in the complaint, that the glass sold by the defendant to Tibbetts was the second glass then and there sold by him to said Tibbetts, was descriptive of the offence, and must be proved as thus alleged." This the Court declined to give, but instructed the jury that it was not to be regarded as descriptive, but might be rejected as surplusage;

and that the proof of one sale only would authorize a conviction.

The case is presented to the full Court, on EXCEPTIONS taken by defendant to the instruction of the Judge at *Nisi Prius*.

Goodwin & Fales, for the defendant.

Appleton, Attorney General, for the State.

The opinion of the Court was drawn up by

GOODENOW, J.—The exceptions in this case present the single question, whether the words in the complaint, "being a second glass of intoxicating liquor, by said Lorenzo D. Staples then and there sold and delivered, at said Biddeford, to said Nathaniel Tibbetts," may be lawfully rejected as surplusage.

It is admitted that the complaint would have been sufficient had not these words been inserted therein. But it is contended that they contain matter of *description*, and, therefore, the proof must accord with the allegation. The allegation, if proved, was intended to aggravate the offence, and augment the punishment; like an allegation of a former conviction of larceny. If not proved, the increased penalty could not be inflicted. If a person is indicted for murder, he is charged with malice prepense, yet, upon such an indictment, he may be convicted of manslaughter only, without proof of malice prepense.

It is no defence to an indictment for manslaughter, that the homicide therein alleged appears by the evidence to have been committed with malice aforethought, and was therefore murder; but the defendant, in such case, may be properly convicted of the offence of manslaughter. 3 Cush. 181. See the reasoning of DEWEY, J., upon this point.

In *State* v. *Smith*, 32 Maine, 369, one count in the indictment charged that the deceased was *quick* with child. It was held that, "if the fact stated was merely in aggravation, so that it may be stricken out, and yet leave the offence fully described, it may be rejected as surplusage; and that it was

not requisite to be either alleged or *proved* that the deceased was *quick* with child.

Judgment, in this case, will be a bar to a prosecution for selling liquor, on the day alleged in the complaint, to Nathaniel Tibbetts. *Exceptions overruled.*

TENNEY, C. J., HATHAWAY, CUTTING, MAY, and DAVIS, J. J., concurred.

STATE OF MAINE *versus* JOHN G. TAYLOR.

In an indictment upon the statute providing for the punishment of any person who shall *burn* any building, it is sufficient to allege that he "set fire to" such building, — the terms being equivalents.

In an indictment upon c. 119, § 3, of the R. S. of 1857, for burning a barn "in the day time," it is not necessary to allege that the barn was within the curtilage of a dwellinghouse, that fact being immaterial, except where the burning is in the night time.

Proof of actual occupation and possession is sufficient evidence of the allegation of ownership.

THIS was an indictment against the defendant for maliciously, &c., setting fire to "a certain barn of one William D. Cook and one Sylvester Cook." The case was tried before GOODENOW, J., at April term, 1858.

To prove the allegation of ownership, the county attorney offered a copy of the record of a will, in the office of the Probate Court, by which the premises were devised to William D. Cook by one John Cook; and also an office copy of a deed of one undivided half of the premises from William to Sylvester Cook. These records were seasonably objected to by the counsel for the defendant, but were admitted.

Before introducing these records, the county attorney called William D. Cook as a witness, and he testified that he and his son, Sylvester Cook, occupied the premises together, and that they were in the actual possession and occupation of the barn at the time it was burnt.

The defendant was convicted, and he filed exceptions to the admission of the record evidence. He also filed a motion in arrest of judgment, alleging that the indictment was insufficient, in that it did not charge the defendant with having maliciously, &c., *burnt* the building, but only with having *set fire to it*; and also that it was insufficient in not alleging that the building was within the curtilage of a dwellinghouse. The motion in arrest was overruled, to which the defendant excepted.

The exceptions were argued by *Tapley*, for the defendant, and by *Appleton*, Attorney General, for the government.

Tapley, argued as follows: —

Chapter 119 of the R. S., § 1, creates and enumerates certain offences, among which is the offence sought to be charged in this case. If the indictment does not properly set forth any of these offences, judgment ought to be arrested.

It is apparent, from an inspection of the indictment, that none of the offences mentioned in the first two sections are there set forth. It was under some other provision of the statute that the indictment was framed.

Section three provides, "whoever willfully and maliciously sets fire to any meeting-house, court-house, jail, town-house, college, academy, or other building erected for public use, or to any store, shop, office, barn, or stable of another, within the curtilage of a dwellinghouse, so that it is thereby endangered, and such public or other building is thereby burnt in the night time, shall be punished by imprisonment for life, or any term of years;" so far, the section proceeds to declare the offence.

What are the offences declared in this section?

1. The burning of public buildings wherever situated.

2. The burning of private buildings within the curtilage of a dwellinghouse.

It may be argued that the words "within the curtilage of a dwellinghouse," apply only to the stable therein mentioned, and not to the other private buildings.

We say, in answer to this proposition: —

1. The grammatical construction of the section is such as to forbid such a conclusion. Language can hardly make it plainer than now. If the words "store, shop, office, barn," are disconnected from the words "curtilage of a dwelling-house," they are also from the words "of another."

If the words "curtilage of a dwellinghouse" apply only to the word "stable," so do the words "of another," and the construction would forbid the burning of one's own buildings, within the curtilage of his own dwellinghouse, although an hundred miles from any other building.

2. Such a construction would place a stable upon different grounds from that of a barn or other building, without any reason or cause whatever, and would be a most ridiculous provision of law.

3. This section of the statute was from R. S. of 1841, c. 155, § 3, which provides: "If any person shall willfully and maliciously set fire to any meeting-house, court-house, jail, town-house, college, or academy, or any other building erected for public use, or to any store, barn, stable, shop or office of another, *being* within the curtilage of a dwellinghouse," &c. This uses the phrase "being within the curtilage of a dwellinghouse," while the present statute omits the word *being*. The statute of 1841 also makes a comma after the word "another," and before the word "being," showing clearly that the phrase applies to all the buildings named of a private character.

It cannot be supposed that there was, in the revision of these statutes, any design to change the law, and, if the sense is more plainly indicated by the phraseology of the statute of 1841 than by that of 1858, it is competent to refer to it for explanation.

4. The statute under consideration requires, in order to complete the offence, that the dwellinghouse shall be endangered; the language is "so that it is thereby endangered," plainly indicating the neighborhood of a dwellinghouse, (that

is, the curtilage of it.) The section proceeds still further, and reads "and such public or *other* building is thereby burnt," &c., coupling the public buildings together as one class, and the private buildings as another, under the term "other building." We therefore conclude, —

1. That the burning of a barn, without the curtilage of a dwellinghouse, is not provided for in this section.

2. That, to commit the offence here charged, it must be within the curtilage of a dwellinghouse, "so that it is thereby endangered." The offence is not committed, if within the curtilage of a dwellinghouse, if the house is not endangered, or if without the curtilage of a dwelling.

It may be argued that the last clause of the section touches the case of a barn, without the curtilage of a dwellinghouse.

Burrill, in his Law Dictionary, says curtilage is "a yard, courtyard, or piece of ground lying near to a dwellinghouse, and included within the same fence." The inclosed area around a dwellinghouse. He says, "in its most comprehensive and proper legal signification, it includes all that space of ground and buildings thereon, which is usually inclosed within the general fence immediately surrounding a principal messuage and out-buildings and yard closely adjoining to a dwellinghouse."

Taking this as a correct definition of the term, let us examine the last clause of section three, and see what its provisions are. It reads, "but if such offence was committed in the day time, or without the curtilage of, and without endangering a dwellinghouse, by imprisonment not less than one nor more than ten years."

"If such offence;" what offence? Where are we to go to determine what offence? What provisions of law are to govern us in determining whether the offence was committed? Why, most clearly, the first part of the section. Does the latter clause purport to be a declaration of an offence? Certainly not, but on the contrary expressly refers to another. We cannot go below the semicolon to ascertain what offence is meant by "such offence."

Now what offences have we found are there described?

1. The burning of public buildings, wherever situated.

2. The burning of private buildings, within the curtilage of a dwellinghouse.

Now to which of these must the last clause in this section necessarily refer? Most manifestly to the public buildings. It can refer to no other, for the other buildings are those within the curtilage of a dwellinghouse; and we have seen that, to constitute an offence under this section, they must be within the curtilage of a dwelling.

The statute of 1841 had no such rider to it as this. The law upon the subject, prior to the present revision, was embraced in sections 3 and 4 of chapter 155 of R. S. of 1841, and chapter 95 of laws of 1849. The terms of these statutes were plain and intelligible.

The commissioners have noted the statute of 1849, as embraced in section 3; whereas, in fact, it is in section 4 of chapter 119.

Under the old revision, the burning of public buildings, or private ones, within the curtilage of a dwellinghouse, in the night time, was punished by provisions of § 3, c. 155.

The burning of such buildings in the day time was punished by provisions of § 4 of the same chapter.

In the present revision, they undertook to embrace the whole within § 3, c. 119.

Under the old revision, and prior to 1858, the burning of private buildings, without the curtilage of a dwellinghouse, was punished by provisions of § 5, c. 155, and c. 95 of laws of 1849. These are now embraced in § 4, c. 119, R. S. of 1857, which is the section under which proceedings must be had in such cases.

Section 4, of chapter 119, provides that "whoever willfully and maliciously burns any building of another, not mentioned in the preceding section," (that is, any building not a public building, and not within the curtilage of a dwellinghouse,) "shall be punished," &c.

Under this section, we say, it is necessary to allege that

the defendant *willfully and maliciously burned* the building. In this the offence consists, and it must be declared in plain and unequivocal terms. It is material, and must be alleged, as well as proved.

This indictment charges that the defendant feloniously, willfully and maliciously set fire to the barn, and that by the kindling of such fire the barn was burnt.

The section we are considering requires the government to allege and prove that defendant willfully and maliciously burned the building, while the indictment charges only that he set fire to it.

No provision is made in this section for the case of setting fire to, whether maliciously or otherwise.

The indictment does not charge that anybody willfully and maliciously burned the barn, or that it was willfully and maliciously burned. For aught that appears in the indictment, the barn was burned accidentally.

It declares that it was willfully and maliciously set fire to, and afterward, by the kindling of such fire, it was burned. By whom? By accident or design? The indictment is silent. It does not even allege that it was burned by reason of the setting fire to it as alleged, which certainly would be necessary under section 3, if that was applicable to the case. The language of that section is, "and such public or other building is thereby burnt." The offence is not complete unless it is thereby burnt, that is, by the setting and not by the kindling of it afterwards.

The indictment charges that sometime in the day time the fire was set, and that by the kindling of such fire the barn was burnt and consumed in the day time of said day. For aught which here appears, the fire may have been set at 5 o'clock before noon, and kindled at 5 o'clock in the afternoon. So it may have been set by defendant and kindled by some one else.

We have thus far procceded upon the proposition that the indictment not charging the barn to be within the curtilage of

a dwellinghouse, it is presumed to be without. We suppose there can be no question of this.

We say, therefore, —

I. The barn was without the curtilage of a dwellinghouse.

II. That the offence is not punishable by R. S., c. 119, § 3.

III. That burning such a barn is punishable by § 4, same statute.

IV. That, under § 4, it is necessary to allege that the barn was willfully and maliciously burnt by the defendant.

V. That the indictment does not so allege.

VI. That, under § 3, it is necessary to allege that the buildings were either public buildings, or private buildings within the curtilage of a dwellinghouse, and that they were maliciously and willfully set fire to, and that they were thereby burned, and that a dwellinghouse was thereby endangered.

VII. If our construction of this section is incorrect, it was necessary to allege that it was willfully and maliciously set fire to and was thereby burned, which the indictment does not formally or substantially allege.

The offence at common law is like that of the statute, and consists in willfully and maliciously burning the property of another; and the indictment must distinctly aver this fact.

This indictment purports to be founded upon the statute, and can receive no aid from the common law; maliciously setting fire to a building, at common law, was, at most, but a misdemeanor, if there was no malicious burning. It was not a felony. This indictment charges this act to have been done feloniously.

We believe the indictment in these respects is fatally defective, and good neither at common law nor by statute.

The opinion of the Court was drawn up by

Davis, J. — The indictment in this case charges that the defendant, "in the day time, maliciously, &c., set fire to a certain barn," &c., and that, "by the kindling of such fire, said barn was then and there burnt and consumed."

It is argued that the indictment is founded upon the R. S., c. 119, § 4; "whoever willfully and maliciously *burns* any building," &c. And, it is said, that "setting fire" to a building is not the same as "burning" it.

The indictment was evidently drawn from a form based on the Massachusetts statute of 1804, c. 131, which was followed by our statute of 1821; "if any person shall willfully, &c. set fire to any building, and, by the kindling of such fire, such building shall be burnt," &c. But, if it is the same to "set fire to" a building as to "burn it," the indictment is sufficient, assuming that it is founded on the fourth section of the chapter referred to.

It is not necessary, to constitute arson, that any part of the building should be consumed. If there is actual ignition of any part, however small, though the fire immediately go out of itself, the offence is committed. 1 Hale, P. C. 568; 1 Gabbett, 75. It can hardly be contended that "setting fire to" a building signifies any less. The words "set fire to" and "burn" are generally understood as equivalents. 1 Bishop's Crim. Law, § § 188, 189. And it is very evident that they are used synonymously in our statutes.

But if it were otherwise, it would not affect this case. We are satisfied that the indictment is well drawn upon the third section of chapter 119 of the Revised Statutes. The "offence" referred to in the second clause is that of "setting fire to" any building previously mentioned. This offence is of two grades. If the building set fire to is a meeting-house, court-house, jail, town-house, college, academy, or other building erected for public use, and it is burnt in the night time, it is an offence of the higher grade. So, if it is a store, shop, office, barn, or stable, and is within the curtilage of a dwellinghouse, so that such dwellinghouse is endangered, and it is burnt in the night time, it is an offence of the higher grade. But if any such building, of either class, is burnt in the day time, it is an offence of less magnitude. Or, if it is a building of the class last named, and is without the curtilage of any dwellinghouse, and no dwellinghouse is endangered there-

by, it is a less offence, though burnt in the night time. Such, we believe to be the plain and obvious construction of the statute.

It follows that, if the building is alleged to have been burnt in the day time, it is not necessary to allege whether or not it was within the curtilage of a dwellinghouse; for that fact is entirely immaterial.

The building which was burnt is alleged, in the indictment, to have been the property of William D. Cook and Sylvester Cook. It was necessary to prove this ownership as alleged. 3 Greenl. Ev. § § 10, 57. It was proved, at the trial, to have been in the actual occupation and possession of the persons named. This was sufficient evidence of the allegation in the indictment. R. S., c. 131, § 10. The defendant was not injured by the admission of the records.

Exceptions overruled. Judgment on the verdict.

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

COUNTY OF OXFORD.

MARY W. TOBIN *versus* JOSEPH C. SHAW.

A plaintiff, who had received from the defendant letters, which, if existing, would be admissible in evidence, may prove their contents by secondary evidence, where the destruction of them is shown to have arisen from misapprehension, and was without any fraudulent purpose; notwithstanding their destruction was the plaintiff's own voluntary act.

To repel the inference of fraud, a witness, who was present and advised the destruction of the letters, may be allowed to state his declarations made to the party at the time; such declarations being admissible as a part of the *res gestæ*, and as explanatory of the motive which influenced the party to destroy them.

The destruction of the letters was a question for the determination of the Court; and, from the evidence, the *Court* was also to determine that their destruction was not the result of a dishonest purpose.

In an action for breach of promise to marry the plaintiff, her anxiety of mind, if produced by the defendant's violation of his promise, is an element to be considered in the estimation of damages; and it will not be deemed improper that a witness was permitted to testify as to the *mental difference* he observed in the plaintiff, after the defendant had ceased to visit her.

The non-production of a writing, shown to be in the hands of a party who has been duly notified by the opposite party to produce it at the trial, is a circumstance that may properly be considered by the jury; and is also a proper subject for the comment of counsel in argument.

ASSUMPSIT for an alleged breach of promise to marry the plaintiff.

The trial, before CUTTING, J., at the August term, 1857, resulted in a verdict for the plaintiff. The case is presented to the full Court, on EXCEPTIONS to various rulings and instructions of the presiding Judge at the trial.

It appears by the bill of exceptions that at the trial the plaintiff called Harriet Bishop, who testified that she was plaintiff's sister; had seen letters from defendant in plaintiff's possession, some twenty or more; she, (witness,) had the bundle of letters in her possession at her father's, in 1848, or

1849. Received them from plaintiff, and kept them a long time at her own house, in Wayne. When she was about to leave Wayne and the State, she went home on a visit to her father's; carried the letters with her and gave them to plaintiff. Witness had read some of these letters. They were burned.

Plaintiff's counsel here asked witness what she said to plaintiff at the time the letters were burned, to which defendant's counsel objected, but the Court overruled the objection, and the witness answered: — "I advised her to burn them. The plaintiff burned them. I told her, probably if she prosecuted Mr. Shaw, they would not be needed, or used, in Court; don't recollect which. I told her they might be mislaid and fall into the hands of some one who we would prefer should not have them. I mentioned a case to her where letters were not used."

Benjamin Tobin was called as a witness by the plaintiff, and testified that he was plaintiff's father. That the last time he recollected of defendant's being at his house was in May, 1849. That his, defendant's, brother Wilson was with him, and that they dined with them that day. That his impression was, that the last time defendant had been there, before that, was in January, 1848.

Plaintiff's counsel here asked the witness, if he observed any mental difference in Mary after he left, to which defendant's counsel objected; but the Court overruled the objection, and the witness answered as follows: —

"After he, defendant, left, my impression was that she appeared more melancholy, and of less life and animation. At one time I found her weeping without knowing the cause."

Plaintiff here called for all letters written by plaintiff to defendant, but only one was produced.

Charles C. Tobin, called by plaintiff, testified: — "I heard defendant state how many letters he received from plaintiff, when on the stand as a witness in this case at the other trial. He said he had received nineteen letters, I think, and, I think, he said he had written her as many as she had him. I think

I heard defendant say at that time that the letters were here, but will not state positively. I saw a bundle of papers, which I supposed to be letters, in possession of defendant, or Mr. Walton. I saw one or the other take from amongst others what purported to be her letter, and read as such in Court to the jury."

Plaintiff's counsel here asked the witness to state what Mr. Smith, counsel for plaintiff, then said, to which defendant's counsel objected, but the Court overruled the objection, and witness was allowed to testify as follows:—

"I heard Mr. Smith tell Mr. Walton that he wanted all those letters put into the case. They were not put in to my knowledge. This was in open Court during the former trial."

Sullivan C. Andrews was then called as a witness for plaintiff, and testified:—

"I was one of the counsel for plaintiff, when this case was tried in November last. During the investigation of the trial, perhaps the second day, some discussion took place between the counsel, about the introduction of the letters from the plaintiff to the defendant.

Witness then narrated what was said by the counsel respectively, tending to show that the letters were in Court at the former trial, and that the counsel of plaintiff desired their production, but was not permitted to use, or to see them.

Plaintiff identified two or three letters which were presented to her by defendant's counsel. They refused to let all but one go into the case, which one went to the jury with the other papers. After the jury returned, it was withdrawn by them.

This testimony was admitted against defendant's objection.

Sampson Reed was called as a witness by plaintiff, and, among other things, testified:—

"I have known the family of the defendant thirty years, and have been acquainted with the plaintiff from a small child. I saw her in the winter of 1849, at my house. She came to do some work, and remained from a week to ten days. I did not know of her being sick while there."

Plaintiff's counsel here asked the following question:—

"What was her, (plaintiff's,) condition, mentally, and her appearance?" To which the witness answered:—

"She appeared sober and melancholy. I saw her in tears a number of times."

Plaintiff's counsel then asked the following question:—

"State whether you dismissed plaintiff from your service, and for what cause you dismissed her," which was answered by the witness as follows:—

"I dismissed her from service because the state of her mind was such she was not capable of doing her work."

To both of the foregoing questions, and the answers thereto, defendant's counsel seasonably objected, but the Court overruled the objections and admitted the answers.

Mary W. Tobin, plaintiff, (called by plaintiff,) among other things, testified:—"Our correspondence was kept up until 1848. I received twenty-five letters in all from defendant. I received two letters from him previous to 1845, which I did not answer. I answered all his letters except three. * * * All the letters I received from him have been destroyed. * * * After he left me, he wrote me a letter, and I answered it, and I have not written since. He wrote the last letter that passed between us. His last letter I have burnt up with the others. All the letters that I received from him have been destroyed. I think in 1854."

Plaintiff's counsel here put the following interrogatory to the witness:—"Relate the whole contents of a letter, if you received any in 1847, relating to a Thanksgiving ball." The witness answered as follows:—

"I can't recollect the whole, but can the substance. It was as follows: he said he should not be able to come to Hartford on Thanksgiving, but if I had an opportunity to go to a ball, to go. This was not his own language, it was this — he said, I shall not be able to go to Hartford at Thanksgiving, but if you want to go to a ball with any one, I want you to go."

When the above interrogatory was put, defendant's counsel objected to the plaintiff's being allowed to prove, by parol,

the contents of the letters written by defendant to her, and to the foregoing interrogatory in particular; but the Court overruled the objection, and ruled that plaintiff might prove by parol the contents of all, or any of those letters; and the foregoing answers were admitted; but no further evidence was offered by plaintiff of the contents of any of said letters. It was admitted that Thanksgiving day of that year was November 25.

Joseph C. Shaw, defendant, (called by defendant,) testified in the case. On cross-examination, the counsel for plaintiff proposed, and afterwards put to the witness, the two following interrogatories: —

1. "Was there any thing in those letters (written by plaintiff to you,) in relation to a conditional engagement?"

2. "State the language, in substance, of all the letters delivered by you to your counsel, written to you by plaintiff, and relating to any condition in any engagement heretofore existing between you and the plaintiff, before the first of January, 1848."

To both of which questions defendant's counsel seasonably objected upon two grounds.

First, because they call for only a part of these letters. Secondly, because plaintiff had destroyed his letters to her, and had not proved or attempted to prove their contents. But the Court overruled both objections, and the witness answered as follows: —

"I don't know as there is. I never have read the letters since I was sued. I cannot answer the second question. I don't know as there is any thing, in the letters prior to 1848, relating to a conditional engagement. I can't remember any thing about it."

Plaintiff put into the case a letter from her to the defendant, dated February 6, 1848, which is to make part of the case. No further evidence of the contents of any letters from plaintiff to defendant was offered or put into the case by the plaintiff. The defendant was notified in writing, the day before the trial, to produce all letters in his possession

written by the plaintiff, to him, that the same might be used in evidence at the trial, but they were not produced. It was admitted that those letters were in Court, in possession of defendant's counsel.

There was evidence on the part of the defendant, other than the letter above referred to, tending to prove that the alleged contract, if any, between the parties, had been rescinded by mutual consent. And the plaintiff testified that she never had consented, and stated particularly what was said between the parties at the interview referred to in said letter.

The Judge instructed the jury, among other things, that both parties rely upon the letter in the case from plaintiff to defendant. The defendant relies upon it as conclusive evidence that the contract, if any such was ever made between the parties, was rescinded or absolved by mutual consent. The plaintiff relies upon it as a recapitulation of what took place between them at their interview on the first of January, 1848. I instruct you that you may take the letter into consideration, in connection with all the other evidence in the case bearing upon this point, and give it such consideration as it deserves. That is the only letter written by plaintiff to defendant which is in the case. In respect to the others, written by plaintiff to defendant, they have not been exhibited, and hence arises an important consideration. When a party withholds paper evidence of importance to the other party, after due notice to produce it, the contents of the papers may be proved to the jury. The non-production of the letters, under such circumstances, is a subject for your consideration. The plaintiff contends that the letters, if produced, would prove an unconditional promise by the defendant; the defendant contends that the contents might have been proved by plaintiff or defendant, and that they had been allowed to do so by the Court; and therefore that no inference should be drawn against defendant by reason of their non-production; which respective positions I instruct you are a subject matter for your consideration.

Record & Walton, in support of the exceptions, argued:—

1. That the statements of Harriet Bishop in a private conversation between her and the plaintiff, ought not to have been received. They cannot be regarded as *res gestæ*.

The admission of such evidence will open a door to all the evils which the rule excluding hearsay evidence is intended to guard against.

The opinion of the witness, whether the letters were of much or little importance in the case, was not admissible; and, to allow her to testify what opinion she had expressed at another time, was still more objectionable. It was hearsay evidence of an opinion expressed by her, whether the letters would be needed or not, in case the plaintiff prosecuted the defendant. In view of a prosecution against the defendant, the plaintiff had voluntarily destroyed his letters to her, which are always the most satisfactory evidence of the true relations existing between the parties in such cases, and to influence the minds of the jury with the belief that they were of no importance, and that such cases were tried without using the letters, the opinion of the witness, and her statements to that effect, were allowed to go to the jury. Not only the manner of getting this witness' opinion before the jury, but the opinion itself was objectionable and prejudicial to the rights of the defendant, and the testimony ought not to have been received. 1 Greenl. on Ev. §§ 108, 123–4; *Mima Queen* v. *Hepburn*, 7 Cranch, 290, 296; *Kingsley* v. *Slack*, 5 Cush. 585; *Battles* v. *Batchelder*, 39 Maine, 19.

2. Both the question and the answer excepted to in the testimony of Benjamin Tobin, are objectionable.

The witness might have been rightfully asked how plaintiff appeared before and how she appeared after the event referred to, but not as to any mental difference.

The answer being the witness' *impression* only, should have been excluded. Not being an expert, the witness was not competent to express his opinion, and the word impression, as he used it, can mean nothing more. He should have been limited to the statement of facts.

3. Plaintiff was allowed to prove to the jury, by Charles C. Tobin and S. C. Andrews, a conversation, or, as the witness Andrews called it, a discussion, which had taken place between counsel at a former trial, the witnesses sometimes stating what was said, and sometimes stating only the conclusions that were arrived at.

Upon what principle can the admission of this evidence be sustained? They were not the statements of the defendant, nor were they statements made in his presence, at least, there is no evidence of his being present. And, if he was, it was not a proper time or place for him to make any reply, and his silence, under such circumstances, could not render them admissible.

This evidence, both upon principle, and by reason of the form in which it was given, ought not to have been received. *McKeen* v. *Gammon*, 33 Maine, 187; *Frye* v. *Gragg*, 35 Maine, 29; *State* v. *Bonney*, 35 Maine, 105; *Crowell* v. *Western Reserve Bank*, 3 Ohio, (N. S.) 406, (cited in 15 U. S. Dig. p. 255, § 320;) *Sheridan* v. *Smith*, 2 Hill, 539; 13 U. S. Dig. p. 303, § 282, p. 307, § 373; 2 U. S. Dig. p. 261, § 1305; 1 Greenl. on Ev. § 197, and note 2, citing *Melen* v. *Andrews*, 1 M. & M. 336, and other cases; 1 Greenl. on Ev. § 199.

4. The questions and answers excepted to in the testimony of Sampson Reed were inadmissible; and especially the question and answer in relation to dismissing the plaintiff from his service, and his motive for so doing.

5. The plaintiff deliberately and voluntarily destroyed the letters from defendant to her, and was then allowed to testify as to their contents. We respectfully contend, that the admission of this testimony, was not only erroneous, but in conflict with the plainest principles of justice. The plaintiff contemplated a suit against the defendant, for an alleged breach of promise to marry her. The defendant denied any such promise. He had written her twenty or twenty-five letters, and they had all been preserved. In the very nature of things, these letters must contain the best evidence of the true relations that had existed between them. She de-

liberately and voluntarily burned these letters, and then offered herself as a witness to prove their contents by parol. Can it be legal, can it be equitable to allow her to do so?

Should not the rule admitting parol evidence of the contents of destroyed letters be received with this qualification, that it shall not avail a party, who has deliberately, voluntarily, and intentionally destroyed them?

If the contents of these letters would aid the plaintiff in her suit, why, upon consultation with her sister, were they destroyed? If the truth would avail, why destroy the only means by which it could be established with certainty, and resort to a species of evidence almost certain to involve error? For who believes for a moment that after these letters had been thus destroyed, their contents would or could be truly stated to the jury by the lips of the plaintiff herself? Without any fault on his part, would not an adverse party be in danger of suffering from such evidence? A candid mind will not doubt.

It may be said, that in destroying these letters, the plaintiff acted under the advice of her sister. No matter. The act was hers. If her sister's advice was good, she had the benefit of it; if it was bad, having adopted it, she must bear the consequences. The defendant ought not to suffer. Such a rule may sometimes work a seeming hardship, but the hardship will be the result of their own ill-advised acts; while a contrary rule would work greater and more frequent hardships upon innocent parties.

6. The plaintiff had no right, under any circumstances, to the contents of a part only of the letters from her to defendant. She had written letters after the first of January, 1848, and yet the question is limited to those written before that time. The whole, if any, should have been included. A part only of each letter was called for. This also was erroneous.

7. After the destruction of the defendant's letters to plaintiff, as before stated, had the plaintiff a right to call for, and use her letters to defendant, as evidence against him? The Court cannot fail to perceive that in any case, and in such a

case as this, in particular, great injustice would be likely to be done by the introduction of the letters on one side only. If they were in answer to letters received, they could not be fully understood, in the absence of the latter. If they were replied to, the defendant would have a right to have the letters in reply read. If they were not replies, and were not replied to, but were letters addressed to the defendant, merely, they were not admissible against him at all. Under these circumstances, was it right to assume that the defendant withheld paper evidence, important to the other party, and that an important consideration was therefore raised? And, to tell the jury that the non-production of the letters under such circumstances, was a subject for their consideration? All that the defendant had ever said in his letters to the plaintiff, was necessarily to be left out, and all that she had ever written to him, was to go in, and because the defendant did not accede to such a one-sided arrangement, the jury were told, substantially, to punish him for his obstinacy, with unfavorable inferences. Was it any worse for the defendant to withhold these letters, than it was for the plaintiff to burn the letters in her possession?

That injustice was done the defendant, in relation to those letters, is too palpable not to be seen at a glance.

If the ruling was right, a party who wishes to get rid of the effect of letters, or rather one who prefers to give his own version of their contents, rather than have the original inspected, will have only to burn them in the presence of a witness, and his object is accomplished. Perhaps it may be said, that if the letters are fraudulently destroyed, parol evidence of their contents will not be received. Such a qualification of the rule may sound well in theory, but it will be of no practical benefit. The motive would be kept secret, and, as fraud is never presumed, how could the other party receive any benefit from the qualification? The better rule is, to exclude parol evidence of their contents, where the destruction of the original letters is deliberate and voluntary, and with a full knowledge that they might be wanted and might

be used as evidence by either party. We make it a point that this suit was in contemplation and was talked about, and the use of these letters, as evidence, discussed, at the very time they were burned.

We contended that, under the circumstances, if the letters in our possession had been produced, they were not competent evidence for plaintiff, and that their non-production was not withholding evidence important to the other party. The Judge ruled otherwise, and that the non-production of the letters, under the circumstances, was of itself, evidence for the consideration of the jury. This was erroneous, because, if the letters were not competent evidence for plaintiff, their non-production was of no importance, and if they were competent, the plaintiff, under the ruling of the Judge, might have proved their contents, and therefore their contents were withheld by defendant no more than by plaintiff.

If letters are offered against a party he may read his replies, (*Roe* v. *Day*, 7 C. & P. 705,) or prove a previous conversation to show the motive and intention in writing them. *Reay* v. *Richardson*, 2 C. M. & R. 422.

And where one party produces the letter of another, purporting to be in reply to a previous letter from himself, he is bound to call for and put in the letter to which it was an answer, as part of his own evidence. *Watson* v. *Moore*, 1 C. C. Hir. 626.

Unanswered letters are not competent evidence against a party, although found in his possession, and notice to produce such letters, will not entitle the other party to give parol evidence of their contents. *Fairlee* v. *Dentone*, 3 C. & P. 103.

And a letter found on the prisoner, was held to be no evidence of the facts therein stated. *Rex* v. *Plummer*, Rus. & Ry. C. C. 264.

If the plaintiff deliberately and voluntarily destroy a note, secondary evidence is inadmissible. *Blade* v. *Noland*, 12 Wend. 173.

S. C. Andrews argued for the plaintiff:—

That the instructions of the presiding Judge were correct, and afforded no ground for exceptions, and cited *Farrar* v. *Merrill*, 1 Greenl. 18; *McKenney* v. *Dingley*, 4 Greenl. 172, *Kelley* v. *Merrill*, 14 Maine, 228; *French* v. *Stanley*, 21 Maine, 516; *Hathaway* v. *Crosby & al.*, 17 Maine, 448; *Camden Railroad* v. *Belknap*, 21 Wend. 354; *Burnham* v. *Toothaker*, 19 Maine, 372; *Gilbert* v. *Woodbury*, 22 Maine, 250; *Dyer* v. *Green*, 23 Maine, 468; *Dodge* v. *Greeley*, 31 Maine, 343; *Ladd* v. *Dillingham*, 34 Maine, 318; *Darling* v *Dodge*, 36 Maine, 374;

The testimony objected to was properly admitted. *Clark* v. *Bigelow*, 16 Maine, 246; *Lewis* v. *Freeman*, 17 Maine, 260; 1 Greenl. on Ev. § § 51, 53, and cases cited in note, § § 102, 107, 108; 14 Mass. 245.

The opinion of the Court was drawn up by

TENNEY, C. J. — This action is for the recovery of damages for the alleged breach of the promise of the defendant to marry the plaintiff. It was proved that letters were written and sent by him to her, one of which was dated in 1848, and all the others were previous to that time. It did not appear that he had visited her subsequent to 1849, and in 1854 she destroyed his letters. At the trial, she offered the secondary evidence of the contents of these letters, which was objected to by the defendant, but received after evidence was introduced to show the circumstances under which the letters were destroyed, which last evidence was received also, subject to objection.

Was the secondary evidence of the contents of the letters competent? It is a general rule that, the best evidence, the thing is capable of, must be produced. The existence and contents of written evidence must be proved by its production, in order that the Court may determine its legal operation; to show that it is genuine, and that it is not made upon condition. *Legfield's case*, 10 Co. Rep. 88 to 96; Gilb. Law of Ev. 93. Exceptions to this rule were formerly confined to

a few extreme cases, such as burning of houses, robbing, or some unavoidable accident which caused the loss or destruction of the written evidence.

This rule was anciently enforced in practice with great strictness, but it has been much relaxed and extended in modern times from necessity, to prevent injustice.

In *Reed* v. *Brookman*, 3 T. Rep. 151, a declaration on a deed was sustained, and the *profert* dispensed with upon the general allegation of a loss by time and accident. In *Beckford* v. *Jackson*, 1 Esp. 337, the plaintiff counted on a deed lost or *mislaid*, upon which issue was taken, and the same was recognized as authorized by law, by Lord KENYON, who sat in the trial.

It may be stated as the doctrine of the law in this State, at the present day, supported by numerous decisions and general practice, that the contents of a writing, which is itself admissible, may be shown by secondary evidence, on proof of its destruction, and of its loss, after a careful and thorough search has been made in all places where there is reason to suppose that it may be found, (1 Stark. Ev. 349, note 1.) unless the proof required is necessarily in writing, under all circumstances.

But, in the case before us, the proof that the letters of the defendant were destroyed by the plaintiff intentionally, being incontrovertible, can their contents be proved by oral testimony?

It is not insisted in behalf of the plaintiff, that a fraudulent destruction of the writing sought to be proved by parol evidence, by the party offering it, is any foundation for the introduction. Such a doctrine would allow one to take advantage of his own wrong, and would be dangerous in its consequences, especially, when the party causing the destruction can be witness in his own behalf. And, when the document has been destroyed by the party moving to prove its contents, the burthen is upon him to show, affirmatively, circumstances, which negative the fraudulent design. *Blade* v. *Noland*, 12 Wend. 173.

In the absence of fraud, can the destruction by the owner, be distinguished in principle, from that of any other accident or mistake? If a bond or promissory note of hand, should be destroyed by the holder, through an erroneous belief, that it was actually paid, or in consequence of the notorious insolvency of the debtor, will this preclude a recovery in an action upon full proof by secondary evidence, that it was really outstanding and in full force?

When the plaintiff was induced to suppose that her letters from the defendant would not be used, in a trial of a suit against him, in her favor, and she yielded to the advice of a sister, in whom she had reposed unlimited confidence, that it would be desirable that they should not be exposed to the perusal of those, who would read them, in her opinion, to gratify a feeling of curiosity, unmingled with any sympathy for her; perhaps, too, from a wish not to be reminded, by their existence, of what she, at the time of their receipt, regarded as a pledge of affection, followed by the unwilling conviction, from his coldness at least, so wounding to her sensibility, that a change had taken place in him in regard to herself, or that he was always untrue, can it be said that this is a case so unlike that when a loss of writings has occurred by accident or mistake, that the contents of such letters cannot be shown by oral testimony, when they have been destroyed? May not her acts, in committing them to the fire, be treated as a misapprehension, an accident, a mistake?

Rawley v. *Ball*, 3 Cowen, 302, was an action on a promissory note of hand, which was shown to have been lost, though after it became payable. It was held, that an action at law could not be maintained, the plaintiff's only remedy being in equity. It was so held by the Court, without proving the destruction of the note; implying, if the note was shown to be destroyed, secondary evidence of its contents would be admissible.

Hughes v. *Wheeler*, 8 Cowen, 77, was an action on a promissory note of hand; the writ also contained the money counts.

It was defended on the ground, that more than the legal rate of interest was embraced therein. On its being shown that the consideration of the note, was a former note free from usurious taint, and which was destroyed by the consent of both parties, it was held that the action might be maintained upon the former note, under the money counts. SOUTHERLAND, J., who delivered the opinion of the Court, remarked, "it is then, in principle, the common case of money had and received, &c., supported by proof of a promissory note, which is shown to have been destroyed by accident or misapprehension, or in any other manner, which does not amount to a legal discharge and satisfaction of it."

In *Livingston* v. *Rogers*, 2 Johns. Cases, 488, a letter of attorney was executed and delivered by the plaintiff to one McEvers, to transfer certain stocks on a condition to be performed by the other party. The attorney having failed to make the transfer, through the alleged omission to fulfill the condition as required by the contract, put the letter of attorney in his iron chest, of which he alone had the key; he never delivered it to the plaintiff, who did not have or see it after the attempt to execute the service, confided to him. It appeared that he searched for the same in his chest and elsewhere, without success, and he verily believed the same to be destroyed, not thinking it of any utility to be preserved. Parol evidence of its contents was offered by the plaintiff and rejected by the Court, on the defendant's objection, and a verdict was taken for the defendant, and judgment rendered thereon. The case was afterwards brought by a writ of error into the Court of errors. Chancellor LANSING was in favor of affirming the judgment, admitting, however, that "since Lord MANSFIELD began to preside in the Court of King's Bench, the decisions of English courts have assumed a degree of liberality, in adapting the ancient principles of jurisprudence, not only to the exigencies which the extent and activity of modern commercial speculations have rendered unavailable, but to every object of commutative justice, which can affect the interests of the members of a great and opulent

community." But he thought the rule, in this respect, had been completely preserved. It was remarked by Senator GOLD, in the same case, that "experience under the rule, has, in the progressive improvements of English jurisprudence, resulted in a relaxation of the law on this subject. The non-production of instruments is now excused for reasons more general and less specific, upon grounds more broad and liberal than were formerly admitted." And he was of the opinion that parol evidence of the contents of the power of attorney was admissible. But he said, on the admission of such testimony, should the trial disclose evidence, or reasonable grounds of suspicion, of a suppression of the instrument, or *mala fides* in the plaintiff, &c., it will be the duty of the Judge to direct and charge the jury for the defendant. A majority of the Court was of the same opinion, and judgment below was reversed.

The decision of the Court of Errors, in the case last cited, was examined in that of *Blade* v. *Noland*, 12 Wend. 173, in an action upon a promissory note of hand, in which there was evidence to show that the note was destroyed by the payee and holder, very soon after it was made, whereupon the secondary evidence of its contents was allowed to be introduced, and judgment was rendered for the plaintiff. The case came into the Supreme Court on a writ of error, and the judgment was reversed. NELSON, J., in delivering the opinion of the Court, after remarking that there was nothing in the case accounting for, or affording any explanation of the act, consistent with an honest and justifiable purpose, said, "such explanation the plaintiff was bound to give affirmatively, for it would be a violation of the principles upon which inferior and secondary evidence is tolerated, to allow a party the benefit of it who has willfully destroyed the higher and better testimony." "It was said by Chancellor LANSING, after an examination of all the leading cases on the subject, that secondary evidence was not admissible to prove the contents of a paper when the original had been lost by the *negligence or laches* of the party, or his attorney. He failed to convince

the Court of Errors to adopt his views in a case where the negligence was not so great, as to create a suspicion of design. Farther than this, I could not consent to extend the rule. I have examined all the cases decided by this Court, where the evidence has been admitted, and, in all of them, the original deed or writing was lost or destroyed by time, mistake or accident, or was in the hands of the adverse party. Where there was evidence of the actual destruction of it, the act was shown to have taken place under circumstances that repelled all inference of fraudulent design."

We are satisfied, that, notwithstanding the party wishing to avail himself of the contents of a writing, which, if in existence, would be admissible, has destroyed it, yet, if it is satisfactorily shown that the act of destruction was not the result of a fraudulent intent, the case is brought within the exception to the rule of law, and secondary evidence of the contents of the paper is admissible.

Has the plaintiff in this case, by legal evidence, repelled all inference of a fraudulent purpose, in burning the letters received from the defendant?

It was a question for the Court to determine in the first place, at least, whether the letters had been lost or destroyed. 1 Stark. Ev. 354. And it was alike for the Court to determine from the evidence that their destruction was not the fruit of a dishonest purpose. And, on this point, no question is presented in the exceptions. But, it is contended in behalf of the defendant, that the evidence received to repel the inference of fraud, was inadmissible.

Mrs. Bishop, the sister of the plaintiff, was allowed to testify, that she had possession of the letters written by the defendant to the plaintiff, about twenty in number, at her own house for a long time; but being about to remove from the State, she carried them to her father's, where she went to make a visit, and that she then advised the plaintiff to destroy them, as, in a prosecution against the defendant, they would not be needed or used in Court, and, under the apprehension of herself and the plaintiff, that they might be mislaid and fall into

the hands of some one, who, they preferred should not have them, the latter burnt them. This evidence was properly received, as a part of the *res gesta*, and as explanatory of the motive which influenced the plaintiff in her acts at the same time. 1 Greenl. Ev. § 110.

The plaintiff's father having testified, that the last time the defendant was at his house was in May, 1849, when he came with his brother and dined there; and the time next before that, when he visited his house, was, according to his best recollection, in January, 1848, was inquired of by the plaintiff's attorney, if he observed any mental difference in the plaintiff after he left. He was allowed to answer against the defendant's objection, that, after the defendant had gone, it was witnesses' impression, that she appeared more melancholy and of less life and animation; and at one time he found her weeping without knowing the cause.

It is very clear, when the proof in a case of this sort, is sufficient to entitle the plaintiff to recover, that anxiety of mind is an element to be considered in the estimation of damages, if produced by the violation of the defendant's promise. Certain affections of the mind, such as joy and grief, hope and despondency, are often made known to an intimate acquaintance without any verbal communication, by the general appearance and conduct of the party, with entire certainty, when the facts on which conviction is founded, in the mind of an acquaintance, cannot be fully disclosed in language, so as to be understood by a stranger. The shedding of tears is evidence of some unusual condition of the mind. The evidence, in this respect, was such as practice has sanctioned, and is not deemed improper.

Evidence was introduced by the plaintiff for the purpose of showing, that the defendant and his counsel were notified to produce the letters of the plaintiff to the defendant. One only was produced, and the counsel for the plaintiff were allowed to testify to facts which occurred in Court at a former trial of the case, tending to show, that the letters so called for, were in Court, and the plaintiff's counsel were

not allowed to use or inspect them. The letters of the defendant being admissible, and the contents thereof being properly allowed to be proved by parol evidence, the letters of the plaintiff may reasonably be presumed to be necessary to render his letters intelligible in many respects. The letters which passed between the parties are species of written conversation, and that this correspondence may be fully understood, the two parts should be read in connection. If produced, they may have been competent evidence. Being withheld, when the evidence objected to showed that they could have been exhibited to the plaintiff's counsel, these facts were proper for the consideration of the jury, under the 27th rule of the code of rules prepared by this Court in 1855, (37 Maine, 576,)—"When written evidence is in the hands of the adverse party, no evidence of its contents will be admitted, unless previous notice to produce shall have been given to such adverse party or his attorney, nor will counsel be permitted to comment upon a refusal to produce such evidence, without first proving such notice."

Sampson Reed testified to his knowledge of the plaintiff from her childhood to the time of the trial; that she was at his house in the winter of 1849, where she remained about ten days and did work there, and, in answer to a question of the plaintiff's counsel not objected to, stated that she appeared sober and melancholy, and that he saw her in tears a number of times. Upon the foregoing statement, he was asked whether he dismissed the plaintiff from his service, and, if so, for what cause. The witness answered that he dismissed her on account of her want of capacity to do her work. This answer was a subject of objection. The material part of this answer is, that the plaintiff was incapable to do her work, to such a degree that he chose to discharge her for that reason. When this is considered in connection with the former part of his testimony, we think it unobjectionable.

The plaintiff, upon inquiry of her counsel, stated, so far as she recollected, the contents of a letter from the defend-

ant in relation to a thanksgiving ball, which was admitted to have occurred on Nov. 25, 1847. This was allowed, under the ruling that the contents of his letters could be proved by parol, and the objection cannot be sustained.

The ruling of the Judge, allowing two questions to be put to the defendant, on cross-examination, touching a conditional engagement between him and the plaintiff, which were objected to, becomes unimportant, because he stated that he had no recollection of the matter to which the inquiries related; and he could not be prejudiced by the questions alone. But, had his recollection been more perfect, we perceive no valid objection to the questions.

The instructions to the jury, in relation to the plaintiff's letter to the defendant, dated Feb. 6, 1848, read in her behalf without objection, were entirely correct. It being evidence, regarded by the defendant as important for him, in making out his defence, it was, of course, a matter of consideration by the jury. The other instructions given were authorized by the 27th rule of this Court, which has been already considered. *Exceptions overruled.*

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

HAZEN W. HARRIMAN *versus* LEONARD F. CUMMINGS.

Where an execution has been levied upon the land of one of the several debtors therein, unless it appears with certainty that the debtor, whose estate has been taken, selected one of the appraisers, or was notified to choose one and neglected, the levy will be void.

Thus, where the return of the officer is indorsed on the back of the execution, and therein he certifies that A. B., one of the appraisers, was chosen by *the debtor* within named, (without stating by which of the debtors,) *it was held* that such return was insufficient.

Whether the certificate of appraisers which is fatally defective is amendable, so that the intervening claim of a third person, who had notice of the levy, may be affected thereby — *quære.*

WRIT OF ENTRY, to recover a parcel of land in the town of Porter. It is admitted that the title to the premises in controversy was formerly in Meshach Pike, from whom each party now claims title; the tenant, under the levy of an execution in favor of Davis & al., against Joseph J. Merrow and said Pike, the creditors in said execution having conveyed to him the title they acquired by the levy; the demandant, under a deed from said Pike to him, made subsequent to the levy.

A STATEMENT OF FACTS was agreed upon by the parties, and the case is thereupon submitted to the full Court. The validity of the levy is controverted. But two of the appraisers signed the return; and, in the agreement of the parties, it is admitted that they will amend their return, if they can legally do so, by adding thereto as follows:—"and we have this day appraised the same upon our oaths aforesaid, at the sum of five hundred and fourteen dollars and fifty-two cents, and no more, in full satisfaction of this execution and all fees, and we have set out the same tract of land by metes and bounds to the creditors within mentioned."

And, if the Court permit said amendment to be made, and the levy shall be adjudged sufficient in law, or if so adjudged without such amendment, judgment shall be rendered for defendant; otherwise, for the demandant.

It appears by the return of the appraisers, indorsed on said execution, and also by the certificate of the officer, that the appraisers were sworn to appraise such real estate of *the within named Meshach Pike* as should be shown to them to be appraised, &c.

The officer, among other things, certifies in his return, on the back of the execution, that, the creditors "thinking proper to levy the execution on the real estate of *the within named Meshach Pike*, to satisfy this execution and all fees, I have this day (May 19, 1846,) caused the appraisers (naming them,) to be sworn, &c., to appraise such real estate of *the within named Pike* as should be shown to them, to satisfy this execution, &c., the said J. W. being chosen by myself, and the said J. H. by L. D. S., the creditors' attorney, and the said G. M. R. *by the debtor within named*, and the aforesaid tract of land," &c.

D. Hammons, argued for the demandant: —

The levy is invalid. It appears that Pike, at the time of the levy, resided in the town in which the estate, levied on as his, is situated. But it does not appear, that he either selected, or was notified to choose one of the appraisers, and declined to appoint one. This should appear affirmatively. R. S., 1841, c. 94, § 4; *Means* v. *Osgood*, 7 Maine, 146; *Thompson* v. *Oakes*, 13 Maine, 407, and ibid, 157; *Pierce* v. *Strickland*, 26 Maine, 411.

The officer returns that "the debtor" chose one of the appraisers. But which debtor, Merrow or Pike? The proceedings do not show.

The appraisers do not state in their return that they entered upon, appraised, or set off the land. R. S. c. 94, § 6. Nor does this appear in the return of the officer. R. S. c. 94, § 24; *Felch* v. *Tyler*, 34 Maine, 463; *Huntress* v. *Tiney*, 39 Maine, 237.

Even if the appraisers' return were amended as proposed, the return of the officer would be fatally defective. The officer refers to their return for one purpose only, that of de-

scribing the land. Their return is not referred to by him to show that they set off the land, nor does he state that they set it off, nor does he in any way adopt their certificate as a part of his return.

Now, after a lapse of twelve years, it is proposed that the appraisers be permitted to amend their return, so as to make valid and effectual their proceedings, admitted to be, as they now appear, wholly ineffectual to pass the estate; thus permitting the appraisers, by their mere certificate, to do what could not be done by a witness under oath; to supply defects in their proceedings, that parol testimony would be inadmissible to supply; and that too, against the intervening rights of third parties. *Means* v. *Osgood*, 7 Maine, 147; *Pierce* v. *Strickland*, 26 Maine, 561.

No authority for such an amendment as that asked for, of a return of appraisers, can be found either in this State or in Massachusetts.

Only two of the appraisers signed the certificate of return; and it does not appear that the third appraiser acted, nor is any reason stated why the return was not signed by him. R. S. of 1841, c. 94, § 9.

Ayer & Wedgwood, for the defendant, contended: —

That by the officer's return it appeared with sufficient certainty that one of the appraisers was chosen by Pike, "the debtor within named." The debtor named within, may well be construed to mean in the return made by the officer. And "within" the return no other debtor is named than Pike. No legal necessity exists requiring the Court to recognize a fatal ambiguity beyond the well defined and unambiguous language of the officer's return.

The return of the appraisers is referred to and adopted, as to the description of the land; all other requirements of the statute appear in his return to have been complied with.

The necessity for the amendment of the appraiser's return, as asked for, is admitted. And, for aught that appears, the appraisers have full data by which to amend. The lapse

of time furnishes no valid objection to the performance of an act, when the principle is admitted upon which the act is founded, if the rules of law which govern the performance are observed. And especially in a case like this, where the admission of the principle is alone in controversy, and the possession of the means to amend is not controverted in the agreed statement of facts. The mode of procedure is correct, if this comes within the class of cases legally amendable.

The rights of third parties have not intervened so far as to prevent the amendment. The record of the appraisers' and officer's return furnishes abundant knowledge to subsequent claimants under the debtor, "that all the requirements of law have, probably, been complied with," and, if after this, in the language of the Court, in *Whittieer* v. *Varney*, 10 N. H. 291, "he will, notwithstanding, attempt to procure a title under the debtor, he should stand chargeable with notice of all the facts, the existence of which is indicated and rendered probable by what is stated in the record, and the existence of which can be satisfactorily shown to the Court."

The existence of such facts in this case is shown to the demandant by the record, and to the Court, by the agreement of facts. If there were nothing else, the record of the officer's return is a sufficient basis for the appraisers in making their amendment. *Fairfield* v. *Paine*, 23 Maine, 498; *Fitch* v. *Tyler*, 34 Maine, 464.

It appears that all the appraisers were sworn, and that all acted in the appraisement, which are all the facts required to be certified in this particular.

The opinion of the Court was drawn up by

TENNEY, C. J.—Both parties claim title to the land in dispute from Meshach Pike; the tenant, under a levy of an execution, (in favor of Dorrance Davis and another against one Merrow and said Pike,) attempted to be made on May 19, 1846; and the demandant, under a quit-claim deed from said Pike, made subsequent to the levy. It is conceded that, if

the levy is not legally sufficient to transfer the estate from the debtor Pike to the creditors in the execution, the title is not in them, as the return now stands.

The officer returns upon the execution that G. M. Randall, one of the appraisers, was chosen "by the *debtor* within named." Whenever a creditor thinks proper to have his execution levied upon the real estate of his debtor, the officer holding the execution, &c., shall cause such real estate to be appraised by three discreet and disinterested men, one to be chosen by the creditor, one by the officer, and another by the debtor. The latter is entitled to notice from the officer, if he lives in the same county in which the real estate is situated, with an allowance of a reasonable specified time, within which to appoint an appraiser, as before mentioned. R. S. of 1841, c. 94, § 4.

It is very obvious that the Legislature intended that the owner of real estate, about to be taken upon execution, should have the opportunity of appointing an appraiser to assist in the proceedings. And if he did not make this appointment, or be so notified that he could do it, provided his residence was such as to be entitled to the notice, the levy would be void, notwithstanding another debtor in the same execution might make the appointment without the authority of the owner of the real estate. This proposition is not controverted on the part of the tenant. But it is insisted that the return shows that G. M. Randall was chosen an appraiser by Meshach Pike, the owner of the land levied upon, and one of the debtors in the execution, and, upon the construction put upon the return, that "by the debtor named" is intended the debtor named in the *return* of the officer.

This construction is not satisfactory. When any instrument is written upon another instrument, and a person named in the latter is intended to be referred to in the former, it is usual to use the language, "the within named A. B.," &c. And so of the subject matter of the instrument upon which some writing is made. The indorsement of the payment of a sum of money upon a promissory note of hand is often in

the words, "received twenty dollars," or whatever the sum may be, "on the within," meaning, unquestionably, the note. It is quite manifest that when the officer returned upon the execution on which the levy was made, that an appraiser was chosen by the debtor *within named*, he referred to the debtor named in the *execution*. For, after dating his return, he says, "the debtors *within named* failing to satisfy this execution," &c. The *debtors*, in the plural number, are not found in the return at all, by their own proper names, the Meshach Pike, one of them, is mentioned by name, and repeated.

Every thing stated in the officer's return may be true, and Meshach Pike not have chosen an appraiser, or have had notice to do so. "The debtor *within* named," may as well be conjectured to have been James J. Merrow as Meshach Pike, as there is no absolute certainty that it was one rather than the other.

The case before us is not distinguishable from that of *Hathaway* v. *Larrabee*, 27 Maine, 449, in respect to the question which we are now considering. The officer having a writ against three defendants, returned as attached all the right, title and interest, the *defendant* has in and to any real estate in the county of Penobscot. It was held by the Court that the language was too vague and uncertain to create a lien by attachment on the estate of either one of those defendants.

The return upon the execution, signed by the appraisers, is so defective that it is not insisted, by the party claiming under the levy, that it is sufficient without an amendment to transfer the estate. And it is agreed by the parties that a specified amendment may be made, if the law will authorize it. That question we have not considered, as it appears from the foregoing that such amendment would not avail the tenant, to pass the title, it not being an amendment showing that Pike chose an appraiser.

According to the agreement of the parties, judgment for the demandant.

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

CYRUS WORMELL *versus* CYPRUS EUSTIS.

In an action, brought upon the statute to recover money lost by betting on the event of an election, if the plaintiff in his writ allege in substance that on, &c., he bet with defendant $50, that A. B., who was then a candidate for the office of Governor of said State, to be voted for by the people at said annual State election, would then be elected by the people; that defendant won the bet and received the money; — these averments, supported by proof, will bring the plaintiff within the provisions of the statute.

But if, in the report of the evidence, it neither appears *what* office it was, to which the parties bet A. B. would be elected, nor that he was a *candidate* for that office, the proof fails to establish material averments in the writ.

ACTION OF DEBT, brought on the statute of 1841, c. 172, to recover money lost by betting on the election of a candidate for the office of Governor.

At the August term, 1857, before CUTTING, J., the case was opened to the jury, and, after the evidence was introduced, the parties agreed that the presiding Judge should REPORT the same for the consideration of the full Court, who were authorized to draw inferences from the evidence as a jury might, and to render such judgment as the legal rights of the parties require.

The evidence bearing upon the questions decided in the case sufficiently appears in the opinion of the Court.

W. W. Bolster, argued for the plaintiff.

Record & Walton, for the defendant.

The opinion of the Court was drawn up by

CUTTING, J.—The first and second sections of the statute of 1841, c. 172, prohibit any person from betting or wagering "any sum or sums of money upon any election, or the event of any election of President of the United States, or Governor of this State, or any member of congress, or of any man to any office," and, among other things, that any sum so lost and paid may be recovered by the losing party, with interest from the time it was received, by an action of debt.

Such an action has been commenced against the defendant. The writ contains two counts, the first of which only is based on the statute, and the only one proper for our consideration. In that count, the plaintiff, in substance, alleges that, "on the blank day of August, 1855, he bet or wagered with the defendant fifty dollars that one Anson P. Morrill, who was then a candidate for the office of Governor of said State, to be voted for by the people, at said annual State election, would then be elected Governor by the people,"—that the defendant won the bet and received the money.

It is incumbent on the plaintiff, in order to bring himself within the provisions of the statute, to prove that he bet a sum of money with the defendant on the event of the election of a Governor of this State, and further, according to his averment, that such candidate was Anson P. Morrill. And the defendant's counsel contend that the plaintiff has failed in those particulars. This brings us to an examination of the evidence bearing upon those points.

Walter S. Chase, called by the plaintiff, testified that the parties were in his store about the middle of August, 1855, that "they then made their statement that, if Anson P. Morrill was elected by the people, the money was to be the plaintiff's, if not, to be defendant's."

"The plaintiff was then called and testified as follows: I and the defendant made the bet as stated by Chase. We stated the bet over to him when we deposited the money, that if Morrill was elected by the people, he was to pay the money to me, if not, to the defendant; he has stated to me that he had received the money on that bet. In November, he spoke to me and asked me if that money belonged to him; I told him I did not know — better wait until Legislature met."

We can infer from the foregoing evidence, that the bet was in relation to the election of Mr. Morrill to some office by the people, but are we authorized to infer that the office was that of *Governor* of this State, when no office is mentioned by either witness. We know, judicially, that Mr. Morrill was acting

Governor in 1855, and that he was not so acting in 1856, but we have no *judicial* knowledge that he was a candidate for *that* office when the bet was made, or that he subsequently received any votes from the people. If the term re-elected had been used by the parties, instead of "elected by the people," it would have been sufficient, but even that expression does not occur. We are, therefore, of the opinion that the averment in the declaration brings the plaintiff within the provisions of the statute, but that the evidence does not support the averment. And the plaintiff must become *nonsuit.*

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

GEORGE P. HOOPER *versus* HORACE CUMMINGS.

In a deed, the words "providing they (the grantees) fence the land and keep it in repair," create a condition subsequent, which is to be taken most strongly against the grantor, to prevent a forfeiture.

Where the land has remained more than fifty years unfenced, it is a breach of the condition; but, if the grantor with full knowledge of the breach of the condition, in the mean time, does not complain, enter or take any action to reclaim the land, it will be evidence tending to show a waiver of the condition.

At common law, none but the grantor, his heirs and legal representatives, can take advantage of a breach of condition subsequent.

When condition is annexed to a particular estate and afterwards by another deed the reversion is granted by the maker of the condition, the condition is gone.

TRESPASS, *quare clausum,* commenced July 25, 1856. Plea, general issue, with a brief statement, the substantial matter of which is:—That, on the 6th day of April, 1803, Jonathan Cummings, the defendant's father, being lawfully seized in fee of the close described in the plaintiff's writ, in consideration of ten dollars, conveyed the same to Nathan Woodbury, and four other persons named, all of Paris, being a committee appointed to build a meeting-house in said town,

and to the proprietors of said house, their heirs and assigns, "provided the said committee and proprietors would fence said land and keep the same in repair." That, on said 20th day of April, 1856, [the day of the alleged trespass,] said committee and proprietors all and each of them neglected and refused to fence said land and keep the same in repair, and, for a long and unreasonable length of time prior thereto, to wit, for fifteen years, had neglected and refused to fence said land, and permitted the same to remain common and unfenced during all that time. Whereupon the said Jonathan Cummings, in his own right, and the said Horace Cummings, by the command of, and as the agent and servant of the said Jonathan, on the said 20th day of April, 1856, entered into said close and took possession thereof, for breach and non-performance of said condition to fence and keep the same in repair, and for the purpose of revesting the estate, title and fee of said close, in the said Jonathan; and the said Jonathan Cummings, in his own right, and the defendant, as his servant, and by his direction, plowed and planted a small portion of said close, which, and the said entry, are the trespasses complained of in the plaintiff's writ.

Moses Hammond was admitted, under the statute, as a co-plaintiff.

At the August term, 1857, CUTTING, J., presiding, the trial of the action was commenced. The plaintiff introduced the following evidence: — Deed from John Porter to plaintiff, dated Dec. 3, 1838, recorded Feb. 13, 1857, conveying to plaintiff pew No. 41, in the new meeting-house on Paris Hill, in Paris, and one undivided sixty-fourth part of the remainder of said house, except the pews, and one undivided sixty-fourth part of the common around the same.

Also, a deed from same to Moses Hammond, of same date, conveying another pew, otherwise, the same. The close described in said deeds is the same described in the writ.

Also, a deed from Jonathan Cummings to Nathan Woodbury, Jairus Shaw, Ebenezer Rawson, Lemuel Jackson, Jr., and Benjamin Hammond, being a committee appointed to

build a meeting-house in said town, and to the proprietors of said house, dated April 6, 1803, recorded Sept. 14, 1804, conveying the close in controversy, "providing the said committee and proprietors fence the said land and keep the same in repair."

Also, a deed from Jonathan Cummings to Jesse Cummings, dated Feb. 20, 1804, recorded Sept. 8, 1806, conveying all the residue of his land, &c.

Also, Sylvanus Jackson, aged 73 years, testified that the meeting-house was built in 1803; that a fence was built at that time on the north side of the lot, and soon after the house was built, there was a fence on the south side, but does not know if there was a fence on the west side until Doct. Hamlin built it, soon after the meeting-house was built, after which, there was always a fence round the lot, except on the road, and, after the county common was laid out and the county buildings were erected, the fence included that. The proprietors have since occupied it, sometimes used as a training field. The witness further stated that he had not examined the fence since 1840, and in 1815, moved to where he now lives, two and one-half miles from this place.

Jonathan Cummings lived on the road directly opposite to the meeting-house. The witness never knew him to claim to own the land since the meeting-house was built.

Also, Moses Hammond, who testified that he was sixty-six years of age, and had lived forty years on Paris Hill. The common has been fenced on the north, west and south sides until the county purchased their lot, when the two commons were fenced together, and, when the county jail was erected, they took the fence away. The new fence round the common was built six years ago, and includes the place of the trespass. The witness never knew Jonathan Cummings to claim any interest in this lot since he conveyed it to the committee. Since 1840, there has not been a fence the whole way from Bemis' to the west line of the lot. I mean the south line of the lot on the plan; on this line, there is no fence now, nor has there been on the whole of it since 1840.

In defence:—

Horace Cummings, defendant, testified that in April, 1856, by direction of his father, Jonathan Cummings, he went on to this lot, plowed up a small part of it, and planted it with potatoes. His father had previously staked it out, and said he claimed the property under the deed. We acted by advice of counsel. My father had given us a quit-claim deed of this land previous to this time.

Plaintiff here offered a copy of a deed from Jonathan Cummings to Horace and George Cummings, dated Dec. 29, 1855. I have not that deed now in my possession. I do not know where it is.

Here, defendant's counsel objected to what the witness had previously stated as to the deed.

Also, George H. Cummings, who testified, I went with my father when he staked out a piece of land, which I and Horace afterwards plowed. When my father was on the land, he said he went there because they had forfeited it. He said he wanted to pre-empt it, or something like it, and then claimed it as his.

Also, Jonathan Cummings, who testified, I am now eighty-five years old. I went on and staked out a piece on this lot for my boys to plow. I claimed it then, because the committee had not fulfilled the conditions in the deed, and directed the boys to take possession of the lot as mine.

After the foregoing evidence was introduced, by agreement of parties, the case was taken from the jury, and, on report of the evidence by the presiding Judge, submitted to the full Court, who are to render such judgment by nonsuit or default, as may be conformable to law and the facts. The writ, pleadings, deeds, and office copies of any other deeds pertinent to the issue, legally admissible, which either party may introduce at the hearing, are referred to and made part of the case.

R. K. Goodenow, argued for plaintiffs:—

1. The words of condition are of no effect, being insufficient to prevent the title from passing without limitation.

Freeman's Bank v. *Vose*, 23 Maine, 98; *Abbott* v. *Pike*, 33 Maine, 204.

2. If of any effect, they are operative on the covenant of warranty, and not upon the title.

3. If they must be regarded as applicable to the grant, they only impose on the grantee the obligation to fence, and to relieve the grantors from fencing. *Newell* v. *Hill*, 2 Met. 280.

4. If they can be regarded as making a condition attached to the grant, the condition is a condition subsequent, and advantage can be taken of a breach only by an entry for that purpose by the owner of the reserved right. R. S., c. 73, § 1; *Bangor* v. *Warren*, 34 Maine, 525; *Maverick* v. *Andrews*, 25 Maine, 505, and cases cited.

5. But there has been a performance to the acceptance of the grantor, and those owning the adjoining lands, for more than fifty years, and a waiver of all objection, and the grantor has, since 1804, ceased to have any interest in the adjoining lands.

Record & Walton, for the defendant:—

1. To the point that the deed was conditional, cited, *Gray* v. *Blanchard*, 8 Pick. 284; *Hayden* v. *Stoughton*, 5 Pick. 528; Taylor's Landlord & Tenant, § 279, p. 178; Comyn's Dig. Condition, A, 2; Webster's Quarto Dictionary, Provided.

2. To the point, that to fence, is to inclose with a hedge, wall, line of posts and rails, or something else that will prevent the escape or entrance of cattle, and that the whole of said land was to be thus inclosed, cited, 1 Greenl. Ev. § 278; Webster's Quarto Dict., Fence, n, fence, v.

3. To the point that Jonathan Cummings, having the *jus disponendi*, had a lawful right to annex this condition, the same not being illegal, repugnant or impossible, cited Taylor's Landlord & Tenant § 280; Broom's Legal Maxims, (4th ed.,) p. 299.

4. To the point that the condition is valid and ought to be regarded, nothwithstanding Cummings, the grantor, may have no special interest in its performance, cited *Gray* v. *Blanchard*, 8 Pick. 284; *Jackson* v. *Brownell*, 1 Johns. 267.

5. To the point, as a matter of fact, that the condition has not been performed, attention is called to the testimony of Moses Hammond, one of the plaintiffs, on cross-examination where he says, "that since 1840, there has not been a fence the whole way on the south line of the lot, and that for about six years, there has been no fence on any portion of it," and, to the deed, where the length of this south line will be found to be 19 rods, and to the fact there is no pretence that there has ever been a fence between this land and the highway by which it is bounded.

6. To the point that the obligation "to fence said land and keep the same in repair," being continuous and the breach continuous, lapse of time will not create a limitation bar, or be evidence of dispensation or waiver of the condition, cited *Bleecker* v. *Smith,* 13 Wend. 530; *Jackson* v. *Allen,* 3 Cowen, 220.

7. To the point that the entry of Jonathan Cummings defeated the estate of the plaintiffs and revested the title in him and he became seized of his original estate in the premises, cited 1 Hill. Ab. p. 264, § 49.

The opinion of the Court was drawn up by

CUTTING, J.—It appears from the report of the evidence in this case, *that* on April 6, 1803, Jonathan Cummings conveyed to Nathan Woodbury and others, all of Paris, "a committee appointed to build a meeting-house in said town," four acres and seven rods of land situated on Paris Hill—*that,* in the deed succeeding the covenants, were these word, "*providing the said committee and proprietors fence the said land and keep the same in repair*"—*that,* during the same year, the meeting-house was built—*that* the land was fenced, except on the highway, and the fence kept in repair until a few years previous to the institution of this suit, when a portion of it, on the south side, was suffered to decay or be removed—*that* the plaintiff is now the proprietor of one sixty-fourth part of the land, including a pew in the meeting-house.

The defendant justifies his proceedings upon the land, which

constitute the cause of action, as the servant of Jonathan Cummings, the original grantor, who, in the spring of 1856, had made a re-entry for a breach of the condition.

We may assume that the *proviso* in the deed created a condition subsequent, and, in this, we are sustained by most, if not all, the authorities, ancient and modern; notwithstanding it is to be construed strictly and most strongly against the grantor to prevent, if possible, a forfeiture of the estate. "If the word *proviso* be the speaking of the grantor, feoffor, donor, &c., and obliges the grantee, &c., to any act, it makes a condition, in whatever part of the deed it stands; and, though there be covenants before or after, is not material." 3 Com. Dig. 84, (Condition.)

And, we may further assume, that the evidence discloses a breach of the condition, inasmuch as the land has never been fenced on the highway, and has remained in that situation for more than half a century. And, in the mean time, the grantor, living in the vicinity, has permitted the meeting-house to be erected and maintained, and the pews and corresponding portions of the lot to be conveyed to members of the parish, at different periods from the date of his deed to the present time. And all this was done without complaint, or any action on his part to reclaim the land. If ever there could be a waiver of a condition evidenced from the conduct of a party, this would seem to be such a case; certainly, as much so as those cases where a person stands silently by and permits property to be conveyed to which he has a legal claim. Lord COKE remarks, 1 Co. Litt. 218, "Regularly, when any man will take advantage of a condition, if he may (can) enter, he must enter; and, when he cannot enter, he must make a claim; and the reason is, for that a freehold shall not cease without entry or claim, *and also feoffor or grantor may waive the condition at his pleasure.*" Vide *Willard* v. *Henry*, 2 N. H. 120, where a non-claim for a much shorter period of time, was held to be a waiver of the condition. See, also, *Commonwealth* v. *Tenth Mass. Turnpike Corporation*, 11 Cush. 174. The cases cited from 13 Wend. 530, and 3 Cow. 220, are not

applicable here; there the Court were giving a construction as to the effect of certain acts under a conditional *lease*, which created a tenancy for years, and not a *freehold* estate. It was only a reiteration of ancient law to be found in Cro. El. 553. "If a condition upon a lease for years be, *for non-payment of rent to re-enter;* the acceptance of rent at a subsequent day, is a dispensation," but only for an antecedent breach, "for he affirms the estate to have continuance." 3 Com. Dig. 132. The condition usually inserted in leases, is for the purpose of securing the payment of rent, and even a strict construction against the lessee, would operate no unnecessary hardship on him, for at most, he would only be obliged to yield up that for the use of which he had agreed to pay an annual compensation.

But we have taken another view of this case, which, to us, appears decisive. It is well settled at common law, that none but the grantor, his heirs and legal representatives can take advantage of a breach of a condition subsequent, and none others can re-enter or claim the estate. And the R. S., c. 94, § 1, has not changed the law in that particular. *Bangor* v. *Warren*, 34 Maine, 324.

Now, it appears in this case, that the grantor, Jonathan Cummings, by his deed dated Dec. 29, 1855, conveyed to Geo. H. and Horace Cummings, all his right, title and interest in and to the premises in controversy; at which time he had not entered. "But, when condition is once annexed to a particular estate, and after, by *another deed*, the reversion is granted by the maker of the condition, the condition is gone." 5 Vin. Ab. 306. Then there is no person capable of making the entry or claim; the grantor cannot, for he has parted with his interest—the grantee cannot, because he is a stranger to the condition.

But it may be contended, that an office copy of the deed was not admissible in evidence. It was not introduced at the trial, but was presented at the argument under the agreement in the report, that "office copies of any other deeds pertinent to the issue, and legally admissible, which either

party may introduce at the hearing, are referred to and made a part of the case." The party offering such office copy in evidence is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs. *Vide* Rule 26, as to the admissibility of office copies.

According to the agreement of the parties, the defendant is to be defaulted, and judgment rendered for $1, damages.

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

INHABITANTS OF HIRAM *versus* DANIEL PIERCE.

The statute that requires kindred, by consanguinity, who are of sufficient ability to contribute to the support of paupers, does not embrace within its provisions an *illegitimate* child who has become chargeable as a pauper.

Where a marriage was valid by the laws of Massachusetts, between persons who were living and were married in that State — if, afterwards, they become residents of this State, the marriage will be held valid here. (*Thus*, if one of the parties was a minor, and married without the consent of his father, the marriage is not therefore void, if regularly made according to the common law, although had in violation of the specific regulation of the statute of that State, prohibiting persons, authorized to solemnize marriages, from marrying minors without the consent of their parents; there being no statute of that State declaring such marriages absolutely void.)

And if, at the time of the marriage, the wife had a former husband living, who, for a period of more than seven years, had entirely deserted her, and had concealed from her his residence, and who, she believed, had long been dead, a marriage under such circumstances is within the exceptions made to the statute of Massachusetts, which declares void any marriage contracted while either party has a former wife or husband living.

It was considered a sufficient allegation that the town had incurred expense, where the complaint set forth that the child had been supported by the complainant town as a pauper, since a certain day therein named.

And such complaint was held to be sufficient, though made and signed by the attorney, in behalf of the town.

THIS is a complaint under the statute, brought by the inhabitants of the town of Hiram, to compel the respondent to

contribute towards the support of his alleged grandchild, who is supported as a pauper by the complainants.

The respondent, in his answer, denies that he is of kindred of the pauper, who, he alleges, has no legal settlement in said town of Hiram, and is not legally chargeable to said town.

The ability of the respondent to contribute was admitted, as was also the necessity for the relief and support of the pauper by the said town.

The case is now presented, on the REPORT of the evidence offered at *Nisi Prius*, HATHAWAY, J., presiding, for the consideration of the full Court, who are to render such judgment, on so much of the evidence as is legally admissible, or give such direction to the case, as the legal rights of the parties may require.

It appears from the evidence reported, that John H. Pierce, a minor son of the respondent, and Fidelia Alden were married in May, 1856, in the State of Massachusetts, where they were then residing; that said John deserted the said Fidelia after they had lived together about one year, and within a short time after the birth of the child which has become chargeable to the complainants.

It further appeared that, in the year 1846, the said Fidelia was married to one Martin Alden, who deserted her in 1849, and who was reputed to be, and, by the said Fidelia, believed to be dead, sometime previous to her marriage to Pierce. There was evidence tending to show that said Alden was living at the time of his wife's marriage to Pierce.

Howard & Strout argued for the respondent: —

The pauper in this case is not the grandchild of the defendant, because Fidelia Pierce, or, more correctly, Fidelia Alden, at the date of her marriage to John Pierce, was the lawful wife of one Martin Alden, then living.

Her marriage to Pierce was therefore void. R. S. of 1841, c. 87, § 4; *Fenton* v. *Reed*, 4 Johns. 52; *Rex* v. *Lubbenham*, 4 Term R. 254; *Rex* v. *Albertson*, Salkeld, 484; Cro. Eliz. 858; 1 Salkeld, 121; 4 Black. Com. 164.

The child of a void marriage is *nullius filius*, and cannot have a grandfather. See cases above cited; 2 Kent, pp. 96, 212; *Queen* v. *Pilkington*, 2 Ellis & Black, 546; *Queen* v. *Collingwood*, 12 Ad. & Ell. N. S., 681.

The child is presumed to be the legitimate child of Martin Alden, the husband of Fidelia. 2 Kent, 210, 211; *Pendrell* v. *Pendrell*, Strange, 925; Salkeld, 123; *Rex* v. *Luffoe*, 8 East, 207–8; 1 Blacks. Com. 457; *Marris* v. *Daveis*, 3 Car. & Payne, 206.

"The wife is not an admissible witness to prove that her legal husband has had no access to her. She is rejected on principles of morality. *Contra bonos mores.*" Reeve's Domestic Relations, 272; *Goodright* v. *Moss*, Cowp. 394; L'd MANSFIELD, Buller's N. P., 112, 113; 1 Greenl. Ev. § 344; *Queen* v. *Mansfield*, 1 Ad. & El. 444; *Rex* v. *Saurtan*, 5 Ad. & El. 181.

The statute relating to bigamy absolves the party from punishment, if, at the time of the second marriage, the former husband or wife had been absent and unheard from for seven years.

The second marriage is void, notwithstanding, if the prior husband or wife proves to have been alive. The statute does not operate as a divorce. See *Fenton* v. *Reed*, and other cases before cited.

If the child is illegitimate, it has the settlement of its mother, which is in Massachusetts. R. S., c. 24, § 1. And, therefore, it has no settlement in Hiram, and may be removed to its place of settlement. R. S., c. 24, § 31.

If so, these complainants cannot recover. *Salem* v. *Andover*, 3 Mass. 436; *Sayward* v. *Alfred*, 5 Mass. 244.

J. H. Pierce, at the time of his marriage, was a minor, and his father or guardian did not consent to his marriage. Pierce has repudiated it since he came of age. R. S. of 1841, c. 87, § 7.

Hammons, for complainants.

The opinion of the Court was drawn up by

DAVIS, J.— The testimony in this case proves, with a reasonable degree of certainty, that Fidelia Temple was married to Martin Alden in 1846, and that they cohabited as husband and wife until 1849, having one child; that, in Feb. 1849, he, voluntarily, and without cause, deserted her; that he afterwards contributed nothing for her support, nor gave her any information of his residence, or that he was alive; that, either with or without his procurement, his wife was informed that he was dead, under circumstances that might well have caused her to believe such information to be reliable.

It further appears that said Fidelia Alden, in May, 1856, a little more than seven years after her former husband had deserted her, was married to John H. Pierce, then a minor son of the defendant; that by him she had a son; that said Pierce soon afterwards deserted her, making no provision for the support of herself or her child; that she called on the defendant, as the grandfather of the child, for assistance; that the child, the defendant having refused to provide for it, has since been supported as a pauper by the town of Hiram; and that the defendant is of sufficient ability, and is liable to support the child, if the mother was legally married to John H. Pierce. But the defendant contends that the marriage was void, and that the child is consequently illegitimate.

By the statute, kindred by consanguinity, living within this State, and of sufficient ability, are liable for the support of paupers. R. S., c. 24, § 9. But an illegitimate child, in the eye of the law, is *filius nullius*, and has no kindred by consanguinity. Such a person, at common law, could have no heirs but of his own body. Co. Litt. 123, a. It is only by express provision of statute that the mother of such a person can inherit his estate. *Cooley* v. *Dewey*, 4 Pick. 93. The reputed father is not recognized, in law, as of kindred blood; and is only liable for the support of the child by special statutes. And such statutes are not to be construed as extending the line of kindred beyond the parties expressly

named. *Curtis* v. *Hewins,* 11 Met. 294. If, therefore, the pauper in this case is an illegitimate child, the defendant is not liable for his support.

And, first, it is said that John H. Pierce was a minor at the time of the marriage, and that his father, the defendant, did not give his consent.

The parties then lived and were married in Massachusetts. Whether the marriage was valid must be determined by the laws of that State; and, if valid there, it will be held valid here. *West Cambridge* v. *Lexington,* 1 Pick. 506; *Sutton* v. *Warren,* 10 Met. 451.

By the common law, females are competent to enter into the marriage contract at the age of twelve years, and males, at the age of fourteen. But persons authorized by law to solemnize marriages are prohibited by statute, in Massachusetts, from marrying minors without the consent of their parents. This statute, however, has not abrogated the common law rule as to the age at which persons may be lawfully married. It was designed to prevent the improper marriages of minors; but it does not declare that such marriages shall be void. "In the absence of any provision of statute declaring marriages between parties of certain ages absolutely void, all marriages regularly made, according to the common law, are valid and binding, although had in violation of the specific regulations imposed by statute." *Parton* v. *Hervey,* 1 Gray, 119.

It is contended, further, that the marriage was void because the wife had a former husband living at the time. And that Alden, the former husband, was then alive, there can be little doubt.

But he had deserted his wife more than seven years before; and she testifies that she had not heard from him during that time, except to hear of his death, and that she verily believed that he was dead at the time of her second marriage. Whether these facts made her marriage with Pierce so far valid that her child is to be deemed legitimate, must also be determined by the laws of Massachusetts. By the Revised Statutes of that State, c. 130, any person, having a former

husband or wife living, is prohibited, under certain penalties, from marrying again. The third section excepts from the operation of the statute, "any person whose husband or wife shall have been continually remaining beyond the sea, or shall have voluntarily withdrawn from the other, and remained absent for the space of seven years together, — the party marrying again not knowing the other to be living within that time."

That the case before us is within the first branch of the exception, there can be no doubt. Alden had voluntarily withdrawn from his wife, and had, at the time of her second marriage, been absent more than seven years.

Did she know, or had she reason to suppose, that he was then living? She had heard various rumors of his death; and had been informed by his sister that he was dead. It had probably been his purpose to keep her ignorant of his residence, that he might not be troubled in regard to her support. And he might, for the same reason, have wished her to think that he was dead. If he was living at the time of her second marriage, we do not think that she had any knowledge of that fact. The witnesses who testify that they have seen him, since his desertion and before her marriage, do not state that they communicated the fact to her in any instance; and, for aught that the case shows, she had no reason to suppose that he was living. We therefore think the case is within the exception; and, consequently, that the marriage was not within the statute prohibition.

But it is argued that, though the statute purges the felony in all cases within the exception, it does not make such marriages valid. So it has been held, under a statute somewhat similar. *Fenton* v. *Reed*, 4 Johns. 52. But there are cases in which it is intimated that whatever may be done with impunity can be done legally. *Rhea & al.* v. *Rhenner*, 1 Peters, 105; *Commonwealth* v. *Marsh*, 8 Met. 472.

By the law of Massachusetts, "all marriages contracted while either of the parties has a former wife or husband living, shall be void." R. S., c. 75, § 4. If this were the

only provision, all such marriages would be void, *ab initio*. But, by the statute already cited, all such marriages are excepted from prohibition, when contracted in good faith, after a desertion and absence of the former husband or wife for the space of seven years. And, by another provision, all such marriages may be annulled. And, "when a marriage is dissolved on account of a prior marriage of either party, and it shall appear that the second marriage was contracted in good faith, and with a full belief of the parties that the former wife or husband was dead, the issue of such second marriage, born or begotten before the commencement of the suit, shall be deemed to be the legitimate issue of the parent who was capable of contracting. Mass. R. S., c. 76, § 23.

These provisions of statute are *in pari materia*, and are to be construed together, as explanatory of each other. *Rex* v. *Loxdale*, 1 Burrows, 447. And, applying them to the case before us, whether we hold the marriage of Pierce to have been absolutely void, or only voidable, in either case he was capable of contracting at the time, and the child must be deemed his "legitimate issue."

It is objected that the statute last cited applies only to cases where the marriage has been actually annulled by a court of competent jurisdiction; and that it cannot be invoked in this case, as the marriage has not been dissolved. But such a construction would defeat, to a great extent, the purpose of the statute. It was designed for the benefit of children, who, without it, would be deemed illegitimate. But such children have no power to procure the actual dissolution of the marriage of their parents; and the parents themselves may be unwilling or unable to do it. And we are of the opinion that it was the intention of the Legislature, by force of all the provisions of statute that have been cited, to make all such marriages so far valid, that the parent capable of contracting, and the children, should sustain the same mutual relation to each other as if the marriage had been actually binding and valid; and this, whether the marriage should be afterwards annulled, or not. So that, whenever the relation between

such parents and their children is involved in any suit, the Court having jurisdiction thereof may, for the purposes of such suit, determine the whole question.

The complaint alleges that the child has been supported by the plaintiffs as a pauper since June, 1856, which is a sufficient allegation that the town has incurred expense. And, though made and signed by the attorney in behalf of the town, we think it is sufficient.

The testimony reported does not show the amount expended previously, nor the probable cost of supporting the child in future. Judgment must be rendered for the complainants, the amounts to be fixed upon a further hearing.

Judgment for plaintiffs. Parties to be heard in damages at Nisi Prius.

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

EPHRAIM S. WOOD *versus* DAVID R. HOLDEN.

Where the parties to a suit entered into a statute submission of the cause of action (which was trespass) set forth in the writ, which was annexed to the submission, the declaration in the writ will be deemed a sufficient specification of the claim submitted, to answer the requirement of the statute.

If the name of the plaintiff's attorney appear on the back of the writ, it will be considered a sufficient signing of the claim. required by the statute, although the words "from the office of" precede the attorney's name.

THE plaintiff, on Jan. 28, 1857, instituted against the defendant an action of trespass *quare clausum*. But, before the return day named in the writ, the parties entered into a submission before a justice of the peace, in which the cause of action set forth in the writ, (which was annexed to the submission,) was referred to the determination of persons therein named. Before the submission was entered into, the writ had been served on defendant. On the back of the writ were the words, "from the office of Virgin & Dunnell."

At the August term, 1857, the report of the referees was offered, and the defendant opposed the acceptance of it, and filed his objections, which were overruled by CUTTING, J., and the report of the referees accepted. The defendant excepted, "because the demand submitted and annexed to the agreement of arbitration is not signed by the party making it."

Gerry, in support of the exceptions, contended:—

That the report of the referees should have been rejected, because a specific demand only was submitted, which was not annexed to the agreement, and signed by the plaintiff, who made the demand. R. S., c. 108, § 2; *Woodsum* v. *Sawyer*, 9 Maine, 15; *Harmon* v. *Jennings*, 22 Maine, 240; *Pierce* v. *Pierce*, 30 Maine, 113; *Bullard* v. *Coolidge*, 3 Mass. 324; *Mansfield* v. *Doughty*, 3 Mass. 397.

Virgin, contra.

The opinion of the Court was drawn up by

TENNEY, C. J.— The parties, in legal form, "agreed to submit the demand with the cause of action set forth in the writ, hereto annexed, to," &c. The action is trespass, and the writ makes a part of the case. The claim is shown clearly by the declaration in the writ, and the words upon the back thereof, "from the office of Virgin & Dunnell," is a sufficient signing of the claim in behalf of the plaintiff. R. S. of 1841, c. 138, § § 2 and 4. *Exceptions overruled.*

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

HANNAH DYER, *Complainant, versus* THOMAS HUFF.

In a case of a complaint under the bastardy Act, where exceptions were taken to the ruling of the Judge at the trial, which the full Court overruled, and ordered judgment on the verdict, a motion to set aside the verdict and grant a new trial on the ground of the discovery of new and material evidence, will not be entertained, though the same be filed before the final proceeding and order are had on the verdict.

THIS case comes before this Court on EXCEPTIONS taken to the ruling of GOODENOW, J., at *Nisi Prius.*

The process is under the bastardy Act. The case was tried at the March term, 1857. The verdict was against the respondent, who filed exceptions to the rulings and instructions of the Judge presiding at the trial. The full Court ordered "exceptions overruled. Judgment on the verdict." The order was received by the clerk of the courts for the county of York, Jan. 30, 1858, and an entry of the same was made on the docket under the action. At the (next,) March term, before there had been any further proceedings of the Court upon the verdict, the defendant filed a motion to set aside the verdict and grant a new trial, alleging the discovery of new and material evidence, which he fully set forth in his motion. The presiding Judge overruled the motion, (1,) because the same was not filed until after judgment rendered; and (2,) for that no good cause was shown for taking testimony, and no allegation is made of any reason for the belief that such new testimony can be procured.

To which ruling the respondent excepted.

Tapley & Ayer, argued in support of the exceptions.

The COURT sustained the ruling of the Judge at *Nisi Prius,* and ordered the *Exceptions dismissed.*

THOMAS G. GOODWIN, *Libelant, versus* JANE GOODWIN.

The statutes of this State do not confer on the Supreme Judicial Court authority to decree a dissolution of the bonds of matrimony between parties who were married in a foreign country, if they have not cohabited in this State after marriage, and only one of them has ever been a resident of the State.

LIBEL of the husband for divorce from the bonds of matrimony for his wife's alleged desertion of him.

On EXCEPTIONS to the ruling of GOODENOW, J., at *Nisi Prius*, that the libel does not present a case within the jurisdiction of the Court, and that the same be dismissed.

The allegations contained in the libel sufficiently appear in the opinion of the Court.

M. H. Dunnell argued for the libelant in support of the exceptions.

The opinion of the Court was drawn up by

GOODENOW, J. — The parties were married in Manchester, England, in the month of October, 1847. The libelant alleges that he came to this country in June, 1848, for the purpose of establishing himself in business, and with the consent of his wife, and according to a mutual agreement between them, he sent her ample means to come to this country in June, 1849, at which time she agreed and promised to come, if he should furnish the means necessary to meet her expenses in coming; yet, wholly regardless of this agreement, she has refused to come, and, since the month of April, 1853, he has been unable to ascertain her whereabouts, although he has made diligent search for her; that ever since June, 1849, she has wholly and absolutely refused to live with him, wherefore, &c.

It does not appear that the parties were married in this State, or cohabited here after marriage; but the contrary appears. It does not appear that desertion is a sufficient cause for divorce from the bonds of matrimony in England.

From the allegation in the libel, we are unable to order a notice on the wife, which would probably reach her. If the husband, by diligent search, has been unable to find her since 1853, we have no reason to suppose that a notice, if ordered by us, would find her.

The proceeding against her is one of grave importance. She should not be condemned and seriously affected in her most important rights, without an opportunity to be heard. She may not have understood the alleged mutual agreement precisely as her husband understands it. What private griefs she may have, we know not. She may fear to expose herself to the perils of the sea alone. She may not have received the necessary remittances from her husband, or her letters to him may have failed to reach their destination. We do not understand that the libelant has been back to England during the whole period of ten years, to make search for her.

It was held in *Harteau* v. *Harteau*, 14 Pick. 181, that the maxim "that the domicil of the wife follows that of the husband," is not applicable to cases of divorce, where the wife claims to act, and by law, to a certain extent, is allowed to act adversely to her husband.

"It is of importance," says the learned Chief Justic SHAW, "that such a question should be regulated, if possible, not by local law or local usage, under which the marriage relation should be deemed subsisting in one State and dissolved in another." * * "So many interesting relations, so many collateral and derivative rights of property, and of inheritance, so many correlative duties depend upon the subsistence of this relation, that it is scarcely possible to overrate the importance of placing it upon some general and uniform principle which shall be recognized and adopted in all civilized States." In this case, the Court refused to decree a divorce on the ground that it had not jurisdiction of the case. It appeared that the parties were married in Berkshire county, where the libel was depending, and resided there for several years after their marriage; then removed into the State of

New York, and there took up their residence, where the alleged desertion and neglect took place.

In *Brett* v. *Brett*, 5 Met. 235, DEWEY, J., says: "while we would give full force and effect to the statute, in cases of our own citizens, and for causes occurring within the Commonwealth, it is equally the imperative duty of the Court to abstain from interfering with the marriage relations existing between persons having a foreign domicil, and from taking cognizance of an application for the dissolution of the bond of matrimony for *causes occurring within another jurisdiction*, to which the parties are more properly amenable."

It is not alleged that the libelee ever had a residence in this country, either before or since the marriage. She could not have been guilty of deserting her husband contrary to the law of this State, if she never resided here. The statute of 1850, c. 171, § 1, gave the wife, as libelant, a privilege, as to the jurisdiction of the Court, which she had not before its enactment. By the R. S. of 1857, the Court has jurisdiction "if the parties were married in this State, or cohabited here after marriage." R. S., c. 60, § 2.

The exceptions must be overruled. Petition dismissed.

TENNEY, C. J., HATHAWAY, CUTTING, MAY, and DAVIS, J. J., concurred.

COUNTY OF FRANKLIN.

IRA H. PLAISTED *versus* JOSEPH HOAR.

The claim of an officer to personal property seized on execution, is extinguished, by his neglect to advertise and sell it, within the time prescribed by statute.

Where an officer takes an accountable receipt for property seized on execution, containing a promise to keep the same beyond the time fixed by law for the sale of it, without the authority of the creditor, and in consideration of the surrender of it, the act of the officer is unlawful and the contract of the receipter cannot be enforced.

The obligation of a receipter to an officer, for the safe keeping and return of property attached, is only an indemnity to the officer, and his release from liability will be, also, a discharge of the liability of the receipter.

ASSUMPSIT, upon a writing signed by the defendant, dated May 31, 1851, of the following effect:—"Received of Ira H. Plaisted, Deputy Sheriff, for safe keeping, [certain goods and chattels, specified,] which property the said officer has taken by virtue of an execution against John Hoar in favor of Joel Wright, and, in consideration thereof and of one dollar, paid, &c., I hereby promise safely to keep said property three months, and, at the expiration of said time, to re-deliver the same to said officer or his order, or his successor in office, on demand, to be delivered at, &c.; and, if no demand be made, I will, within three months from date, re-deliver the said property, that the same may be taken on execution, or pay the said execution and all costs."

The writ is dated April 24, 1857. The defendant pleaded the general issue, and, by *brief statement*, alleged as special matter of defence,—that, if the plaintiff had lawfully seized the said property on said execution, as the property of said John Hoar, he could not lawfully deliver the same to the defendant, as bailee, to be kept for the space of three months, but was by law required to advertise and make public sale

thereof within fourteen days after the day of seizure; that the plaintiff had no legal right to take any such receipt or writing as is set forth in his writ and declaration, and that such writing was unauthorized by law, is illegal and void.

At the trial, before TENNEY, C. J., the plaintiff, without objection, read in evidence the contract declared on. It was admitted, that the plaintiff was, as he alleges, a deputy sheriff; that there was such a judgment and execution, and that the execution was in his hands for collection and service. It was also admitted, that this action was brought and is prosecuted by the creditor in said execution, which still remains wholly unsatisfied.

The plaintiff offered evidence to prove that he took the property described in said contract, by virtue of said execution, as in his writ and delaration is alleged, and that the contract of defendant was made and signed by him at the request of the execution debtor. That the execution creditor, on the next day, assented thereto and ratified the doings of the plaintiff. That the plaintiff duly demanded of defendant the property, on the third day of September, 1851, and that defendant refused then, and has ever since neglected to deliver to plaintiff any part thereof. The defendant objected to the evidence, and it was excluded, the presiding Judge ruling that the facts offered to be proved, with the other evidence in the case, would be insufficient to entitle the plaintiff to recover, and directed a *nonsuit*.

The case is presented to the full Court on EXCEPTIONS taken to the ruling of the presiding Judge.

Abbott, in support of the exceptions, argued:—

That there was no illegality in the transaction. The plaintiff seized the property as an officer. He had the power to advertise and sell it. It was his duty to do so, unless the execution should be paid or some other arrangement made acceptable to the creditor and debtor. There is no law prohibiting such an arrangement as was made. It often is for the interest of both parties so to arrange. An officer may

well act as the agent of the parties in settling an execution; it is often done, and the interests of both parties are promoted by his doing so.

The case of *Bird* v. *Smith*, 34 Maine, 63, in principle, in no respect differs from the case at bar.

The officer seized the property at Dallas Plantation, a long distance from the residence of the creditor. The debtor desired delay. He requested to have that done which was done. The defendant, the debtor's brother, joined in the request, received the property and one dollar from plaintiff, and in consideration thereof, executed the contract. They are all presumed to know the law, to know that the officer could not be required to grant the desired indulgence; and that he could not, against the assent of the parties, delay the sale of the property longer than the statute authorized. They perfectly understood that, in granting the delay and taking the defendant's contract, he was acting as the agent of the parties. What was done by plaintiff was done at the request of the debtor and of the defendant, and they cannot object; and the subsequent ratification of the creditor is tantamount to previous authority.

The error in the defence consists in not discriminating between an act done in violation of law, and an omission by the consent of all parties interested, to resort to the utmost severity of the law, and thereby effecting a fair and satisfactory adjustment with the consent of all.

S. H. Lowell, contra.

The seizure of the goods, on execution, gave the plaintiff only a special property therein, the right to retain them for the purpose of sale on the execution, as provided in R. S. of 1841, c. 117, § 4; *Nichols* v. *Valentine & al.*, 36 Maine, 322.

Neglecting to proceed in the sale of them as the law provides, he acquired no rights against this defendant. *Ross* v. *Philbrick*, 39 Maine, 29.

The receipt given by defendant being unauthorized by law, and against the policy of the law, is wholly void, and no ac-

tion can be maintained upon it. *Ellsworth* v. *Mitchell*, 31 Maine, 247; *Buxton* v. *Hamlin*, 32 Maine, 448; *Low* v. *Hutchinson*, 37 Maine, 196.

The law will not enforce a contract made in violation of the statute, the object and effect of which are to induce the plaintiff to neglect his duty as an officer.

The plaintiff has no equitable claim on defendant, not having paid said execution, or any part of it to the creditor therein, nor rendered himself liable to do so.

The liability of the receipter is limited by that of the officer. *Fisher* v. *Bartlett & al.*, 8 Maine, 122; *Sawyer* v. *Mason*, 19 Maine, 49.

The ratification of the officer's doings by the execution creditor, discharges the officer from all liability to him. The officer is also protected by the statute limitation of four years. R. S. of 1841, c. 146, § 2.

Nor is he liable to the debtor, for the property was not taken from his possession.

The officer can, therefore, maintain no action on the contract.

The fact that the action is prosecuted by the execution creditor, is immaterial. That cannot change the rights of the parties to the instrument. Their rights and disabilities remain the same.

The opinion of the Court was drawn up by

TENNEY, C. J. — The plaintiff, having in his hands, as a deputy sheriff, an execution in favor of Joel Wright against John Hoar, dated April 9, 1851, seized thereon certain personal property, and, instead of advertising and selling the same according to law, delivered it to the defendant, taking therefor his receipt, dated May 31, 1851, which is the contract declared on in this suit. In the receipt, the defendant promised that he would safely keep the property three months, and, at the expiration of that time, deliver the same to the plaintiff or to his successor in office, on demand, free from

expense to the plaintiff or the creditor; and it was agreed therein by the defendant that a demand on him should be binding; and, if no demand should be made within three months from the date of the receipt, he would re-deliver the property, that the same might be taken on execution; or that he would pay the execution and all costs.

The plaintiff offered to prove, but was not allowed to do so, that the receipt was given at the request of the debtor in the execution, and that the plaintiff, the debtor and the defendant were present together when the receipt was made, and the said request was well known to the defendant; and that, soon afterwards, on June 1, 1851, the creditor assented to and ratified the doings of the plaintiff, who duly demanded the property on Sept. 3, 1851, of the defendant, who declined to deliver it.

It is well settled, that when an officer has attached personal property on mesne process, unless the execution obtained upon the judgment, in the same action, is put into his hands within thirty days after the rendition of the judgment, or unless a demand is made upon him to deliver the property attached, by another officer, having the execution, within that time, he is discharged of his liability created by the attachment. This is upon the ground that the attachment is vacated within that time, without the officer's fault.

If the officer takes an accountable receipt for personal property so attached, the receipter will be released, by the discharge of the officer; for the officer can have no interest whatever in the goods, excepting by virtue of the attachment. But, if the officer's liability is fixed, by placing the execution in his hands within thirty days after the judgment, or by a demand upon him, before the expiration of the attachment, and he has duly demanded the property of the receipter, within the same time, so that the latter is liable to the officer, the creditor may, by an arrangement between himself and the officer, enforce the contract in the receipt in the name of the officer.

By R. S. of 1841, c. 117, § 4, goods and chattels taken on execution shall be kept by the officer, for the space of four days, at least, next after the day on which they were taken, exclusive of Sunday, and they shall be sold within fourteen days next after the day of seizure, except as is provided in the same chapter; and the exceptions are not applicable in the present case.

The title of the owner of personal property seized on execution is not divested till the same is sold. He holds it, as before the seizure, subject only to the claim of the officer, by virtue of the seizure. The officer's claim is extinguished at the expiration of the fourteen days, unless the case falls within the exceptions referred to. A voluntary surrender of the property by the officer, so that his interest therein under the seizure is lost, operates as a restoration of all right in the same to the owner, or to whomsoever he may have transferred the title. And, if the officer takes an accountable receipt for the same, at the time of the surrender, containing a promise to keep the property beyond the term of fourteen days from the day the seizure was made, without the authority of the creditor, and in consideration of the surrender, the act of the officer is unlawful, and the contract of the receipter cannot be enforced. If the officer gives up the property absolutely, in the manner supposed, by the consent of the creditor, the latter thereby consents that the claim of the officer shall be relinquished, and the officer's liability is annulled. The receipter's obligation, being only an indemnity to the officer, is discharged when the officer is released.

This suit having been brought and prosecuted by Wright, the creditor in the execution, by his attorney, can give the nominal plaintiff, if he be such only, no greater rights than he could otherwise have. He is the party to the contract as well as to the action, and he can confer no greater rights to an assignee in equity than he possessed himself.

The case of *Bird* v. *Smith*, 34 Maine, 63, is not analogous to the one before us. The officer having the execution dis-

charged it, on receiving the check of the debtor. In this case, it is agreed that the execution was not discharged.

Exceptions overruled.

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

COLLINS PRATT *versus* EBENEZER SKOLFIELD *& al.*

RACHEL A. RICHARDSON *versus* EBENEZER SKOLFIELD *& al.*

A sheriff's deed of an equity of redemption is inoperative if the facts required by statute are not recited.

If the debt secured by mortgage has not been paid, the mortgagee has the right to the possession.

If it has been paid, the remedy is in chancery and not by action at law.

A widow is barred of dower in land conveyed by her husband before the marriage, though the deed has not been registered.

A widow is entitled to dower in an equity of redemption of a mortgage, but the land mortgaged must first be redeemed from the mortgage.

If the heir or person claiming under the husband shall redeem the mortgage, the widow shall repay her proportion of the money paid for the redemption.

THE parties, with the consent of the Court, agreed that these cases should be considered and argued together, as the same evidence, to a considerable extent, is applicable to both cases.

The case of Pratt *v.* Skolfield & al., is a WRIT OF ENTRY. Plea, general issue. The second case is for DOWER in the land of her former husband, John White. Plea, never seized during coverture, and brief statement that plaintiff did not demand her dower one month before suing out her writ, and that she was never joined in lawful matrimony with said John White.

Demandant introduced a deed of the demanded premises

from Charles W. Brown to John White, dated and acknowledged March 4, 1842, recorded Sept. 21, 1842.

Copy of writ, Collins Pratt *v.* John White, on which his real estate in Franklin county, and all right, title and interest therein, was attached July 1, 1845, in which case, judgment was recovered Oct. 3, 1845, and execution and levy recorded Jan. 20, 1856.

Collins Pratt proved the marriage of Rachel A. Richardson, in January, 1844, to John White, who died five or six years ago. And that the income of the premises was worth forty dollars per year.

William W. Mitchell deposed that, on the 4th day of Sept. 1855, as agent of Rachel A. Richardson, and at her request, he demanded of defendants, and in sight of the premises described in her writ, her dower therein, and the assignment thereof, which they refused to assign.

The tenants introduced mortgage deed of demanded premises, from John White to Samuel White, 3d, dated March 4, 1842, acknowledged March 26, 1842, recorded Aug. 15, 1844, of which mortgage the tenant, William S. Skolfield, through mesne conveyances, is the assignee.

Deed of Isaac Park, deputy sheriff, to Samuel White, 3d, dated and acknowledged March 18, 1845, recorded July 5, 1845, of the equity of redemption of the same land mortgaged by John White to Samuel White, 3d. This deed was objected to. It was proved that said Park is deceased, and that the execution referred to is not on file in the clerk's office, but it was admitted that there was such judgment as described in the deed. The recital of the sale by the sheriff, and the notice thereof, was as follows: — "And, whereas, on the 26th day of May, 1845, having duly given notice to said John White, and having duly advertised the right in equity according to law, I sold the same at public auction to Samuel White, 3d, who is the highest bidder."

Upon so much of the evidence as is legally admissible, the parties agreed to submit these cases to the decision of the

full Court, who are to draw such inferences as a jury would be authorized to draw.

Abbott, for demandants.

Belcher & Whitcomb, for tenants.

In Pratt *v.* Skolfield, the opinion of the Court was drawn up by

HATHAWAY, J. — A writ of entry, to recover the south half of two lots of land numbered twelve and thirteen in the fifth range of lots in Weld, in Franklin county.

The demandant shows title to the south half of said lots, excepting a piece of land eighty rods wide on the west end of the west lot, and also excepting a strip forty rods wide on the south side of both lots, by levy upon the same, as the estate of John White, as appears by the officer's return of the levy, Charles W. Brown's deed to John White, and Daniel Wyman's deed to Andrew Dunning, referred to in the case.

John White mortgaged the premises to Samuel White, 3d, by deed of March 4, 1842, recorded August 15, 1844, of which mortgage the tenant, William S. Skolfield, through mesne conveyances, is the assignee, who also claims to have the absolute title, through mesne conveyances, from Samuel White, 3d, who purchased the equity of redemption at sheriff's sale, as by deed to him of Isaac Park, deputy sheriff, of June 18, 1845. The deed of the equity, from Park to Samuel White, 3d, was defective in not reciting the facts required by the statute to authorize him, as an officer, to sell and convey. Hence, it was inoperative. *Wellington* v. *Gale*, 13 Maine, 483; *Williams* v. *Amory*, 14 Maine, 20; *Lumbert* v. *Hill*, 41 Maine, 475. The tenants, therefore, appear to have been in possession, holding no title but that of an assignee of a mortgage, which had precedence, in point of time, to the demandant's title.

If the debt secured by the mortgage has not been paid, the tenants have a right to the possession. If it has been paid,

the demandant's remedy is in chancery, not by action at law. *Howard* v. *Howard*, 3 Met. 557; *Wilson* v. *Ring*, 40 Maine, 116.

The objections urged concerning the name of the tenant William cannot prevail. The Court is, by the report, to draw inferences as a jury, and we think he was equally well known by the names of William Skolfield and William S. Skolfield, and, as he and Ebenezer joined in their plea, the presumption is that he was rightfully in possession under William.

Demandant nonsuit.

In Richardson *v.* Skolfield, the opinion of the Court was also drawn up by

HATHAWAY, J. — The demandant, as widow of John White, claims dower in the land described in her writ. She was married to White in January, 1844, and he died in 1851 or 1852. White became seized of a portion of the premises, March 4, 1842, by deed from Charles W. Brown of that date, and mortgaged the same on that day to Samuel White, 3d, to secure the payment of sundry promissory notes, to which mortgage the tenant, William S. Skolfield, has title through sundry mesne conveyances, as the assignee of Samuel White, 3d; four of the notes specified in the condition of the mortgage were in the tenant's possession, and produced at the trial.

The demandant's counsel insists that she should not be barred of her dower in the whole land, because, at the time of her marriage with John White, she acquired an inchoate right of dower in the land, and White appeared in the registry of deeds to be the owner of it free from incumbrance, his mortgage of the same to Samuel White, 3d, not having been then recorded.

The demandant had no rights in the land which could be affected by the matter of the registry of the mortgage. Her *inchoate right* of dower was no more a *right* of dower in the land, than is an acorn, an oak. It was immaterial to her, so far as her legal rights were concerned, whether the mortgage

was recorded or not. She had no right of dower while her husband was living, and when he was dead, she was dowable, only, of lands of which he had been seized during her coverture, and he was not seized of the land which he had previously conveyed, whether his grantee had caused his deed to be recorded or not.

Another difficulty, urged by the demandant's counsel, is that the notes secured by the mortgage were not assigned with it, by Samuel White, 3d.

There could be no reason for assigning and transferring the mortgage alone, without the evidence of the debts secured by it, unless it were intended that the assignee should take it in trust for those who held the evidence of those debts.

It was not necessary that the notes should have been indorsed or specified in the assignment, although it would have been more regular and much better to have specified them therein. It might have prevented misunderstanding and controversy. But a mortgage, and the debt secured thereby, may be assigned by the mortgagee's quit-claim deed of the mortgaged premises. *Baker* v. *Parker*, 4 Pick. 505; *Hunt* v. *Hunt*, 14 Pick. 374; *Freeman* v. *McGaw*, 15 Pick. 82. The assignment of the mortgage and the delivery of the notes to the assignee were sufficient, and the tenant's possession of them is evidence that they were thus delivered.

It is further contended, in behalf of the demandant, that, if she cannot recover her dower in the whole estate, she can, in this action, recover her dower in the equity of redemption under R. S. of 1841, c. 95, § 15, by which it was provided that, "if, upon any mortgage made by a husband, the wife shall have released her right of dower, or if the husband shall be seized of land, subject to a mortgage made by another person, or made by himself before the intermarriage, his wife shall, nevertheless, be entitled to dower in the mortgaged premises as against every person, except the mortgagee and those claiming under him; provided that, if the heir, or other person claiming under the husband, shall redeem the mortgage, the widow shall repay such part of the money paid by him as

shall be equal to the proportion which her interest in the mortgaged premises bears to the whole value thereof; or else she shall be entitled to dower only according to the value of the estate after deducting the money so paid for the redemption thereof."

The case presents William S. Skolfield's title as that of an assignee of the mortgage given to Samuel White, 3d, by John White, before the demandant's intermarriage with him.

The tenant, William S. Skolfield, claims title to the mortgaged premises from the mortgagee, Samuel White, 3d, not from "the heir or other person claiming under the husband."

Although the tenant, William S. Skolfield, may be assignee of the mortgage of the same premises, from John White to Adolphus Brown, dated August 14, 1844, which, being a second mortgage of the same land, could be only a mortgage of the equity of redemption, of which the demandant may be dowable, yet her right of dower in such equity of redemption cannot be made available in an action at law against the first mortgagee, or those claiming under him, until the incumbrance of the first mortgage is removed. William S. Skolfield's title under the first mortgage remains perfect until his title as such mortgagee is terminated. It may be terminated by foreclosure, and then his title would become absolute; or, it may be terminated by the payment of the debt secured by the mortgage, and then his title as mortgagee under that mortgage would be extinguished, and, until that is done, the demandant cannot recover her dower in the equity of redemption of him, or those claiming under him, in an action at law.

Therefore, a nonsuit must be entered, unless the clerk, upon evidence to be submitted to him, as agreed by the parties, should find that the debt secured by the mortgage of John White to Samuel White, 3d, had been fully paid by John White, and if the clerk should find and determine that that debt had been thus paid, then the demandant will be entitled to judgment for her dower in the land described in the mortgage deed of John White to Samuel White, 3d, with damages

for the detention thereof from the expiration of one month after the demand of dower was made, up to the date of the demandant's writ, to be assessed by the clerk, as agreed by the parties.

TENNEY, C. J., CUTTING, MAY, GOODENOW, and DAVIS, J. J., concurred in these opinions.

ALVAH A. HEALD *versus* JESSE THING.

Where the insanity of the defendant was relied upon to avoid a sale of property, a physician who, a short time before the sale, had visited the defendant in consultation with his attending physician, was not permitted to give in evidence, the declarations made to him at that time, by either the defendant's wife, physician or other attendant, as to his previous symptoms or condition; such statements were clearly inadmissible, and properly excluded as hearsay.

Nor will such witness be permitted to give his opinion of the mental condition of the defendant, at that time, based upon the representations thus made to him, in connection with the symptoms he discovered by personal observation and examination. His opinion should be formed *entirely* from his own observation and examination of his patient's symptoms and condition.

The principles, upon which the testimony of *experts* is made admissible, considered.

REPLEVIN for certain goods and chattels. The trial of the action, at April term, 1856, before MAY, J., resulted in a verdict for the plaintiff. The case is presented to the full Court on EXCEPTIONS taken by the defendant. The matter in controversy, and the rulings of the Judge at *Nisi Prius*, chiefly relied upon to support the exceptions, appear in the opinion of the Court.

J. S. Abbott, for plaintiff.

Webster & Belcher, for defendant.

[No *briefs* or minutes of the arguments of counsel are found on the files of the Reporter.]

The exceptions were argued in 1856. The following, adopted as the opinion of the Court, was drawn up by

RICE, J. — Replevin for a quantity of personal property. Writ dated March 9, 1854. To establish his title to the property described in his writ, the plaintiff introduced a bill of sale, the execution of which was in the handwriting of the defendant, and dated March 14, 1853. The defence principally relied upon was that the bill of sale was executed by the defendant at a time when, by reason of severe illness, he was insane.

To establish this point in the defence, he called Dr. Russell, a physician, who testified that he was called to consult with the attending physician, March 9, 1853, when he found the defendant sick with inflammatory fever, and deranged by reason of it, and dangerous, or in a dangerous condition. It was proved that the attending physician referred to was, at the time of the trial, without the limits of the State, and gone to parts unknown.

The counsel for the defendant then asked Dr. Russell to state what was stated to him during that consultation by the attending physician, and the wife and family of the defendant, concerning the symptoms of his disease, which was objected to by the plaintiff and excluded by the Court.

The defendant then asked the witness to give his opinion, professionally, derived from what symptoms he then discovered, in connection with what he then learned of his symptoms from his nurse or wife, and attending physician, as to the continuance or duration of his insanity, which was objected to by the plaintiff, and excluded by the Court; but the Court permitted the witness to give his opinion derived from the symptoms which he then saw.

To these rulings the defendant filed exceptions, and now contends they were erroneous.

As a general rule, witnesses are permitted to testify only to facts within their own personal knowledge. Hearsay testimony is excluded. Nor are they permitted to give their

opinions upon facts stated or proved before a jury. It is the legitimate province of the jury to make deductions from facts proved.

But to these general propositions there are exceptions. Thus when, from the nature of the case, direct testimony cannot be obtained from living witnesses, hearsay evidence may be resorted to, as in the case of dying declarations, in questions of pedigree, questions concerning public rights, and the like. So, too, as to the representations made by a sick person of the nature, symptoms and effect of the malady under which he is laboring at the time. 1 Greenl. Ev. § 102. So, also, in questions of insanity, the acts and declarations of the party, the condition of whose mind is the subject of investigation, may be given in evidence. *Wright* v. *Tatham*, 7 Adol. & El. 313.

But the declarations, sought to be proved in this case, do not fall within any of the exceptions referred to above, nor any other known to the law. They were the declarations of parties competent to be witnesses, unaccompanied by any acts pertinent to the issue then before the Court. Those declarations, if they related to facts within the knowledge of the persons making them, could only be proved by those persons themselves. As proposed to be proved, they were clearly within the description of hearsay evidence, and were properly excluded.

Another exception to the rule requiring witnesses to state only facts within their personal knowledge is found in the case of experts, who are not only allowed to state facts, like ordinary witnesses, but are also permitted to give their opinion, based upon facts within their own knowledge, or proved by other witnesses upon the stand, or upon hypothetical statements. 1 Greenl. Ev. § 440.

An *expert* is a skillful or experienced person; a person having skill, experience or peculiar knowledge on certain subjects or in certain professions; a scientific witness. Burrill's Law Dictionary.

It is contended that the Judge erred in refusing to permit

the witness Russell to give his opinion, based upon what he learned from the nurse and wife of the defendant and of the attending physician, taken in connection with his personal examination. It is asserted that the information obtained from those sources became a part of the personal examination of the witness, and, as such, formed a proper basis for a professional opinion, which would be competent and legitimate evidence in the case; and, further, that the professional skill which would authorize the witness to testify to his opinions concerning the malady of a patient whom he has examined, authorizes him also to judge of the proper sources, in connection with his personal examination, from which to derive those opinions.

The declarations of the nurse, wife and attending physician, are all clearly inadmissible and were rightly excluded as hearsay. What those declarations were, we do not know. They might have been of facts which the declarants had observed, personally, or they might have been the idle gossip of ignorant and garrulous women. It is because such hearsay cannot be subject to the ordinary tests of truth in courts of justice, that it is excluded, as too uncertain and unreliable to constitute a basis for judicial action.

But in this case, while it is admitted that the declarations above referred to were properly excluded, it is strenuously contended that an opinion based wholly upon them, (for the witness was permitted to give his opinion based upon his own examination and observation,) should go to the jury as competent evidence, upon which they would be authorized to act, on the ground that the witness, being a person of skill, is authorized to determine the proper sources, in connection with his personal examination, from which to derive those opinions.

The proposition contains two fundamental errors. First, it makes the witness decide the question of the competency of evidence, thus putting him in the place of the Court. Next, while it excludes the declarations as incompetent testimony to go to the jury, it receives, as competent evidence, an *opinion*, based upon that incompetent testimony, thus attempt-

ing to elevate the stream above the fountain, to make a corrupt tree bring forth good fruit. The declarations of the nurse and wife may have been only mere inferences on their part, and on those inferences the doctor is desired to draw an inference, and this last inference, being called the *opinion of an expert*, is made to assume the character of competent and substantial evidence. I have not been able to find any authority to sustain such propositions.

The opinion of medical men is evidence as to the state of a patient whom they have seen. Even in cases where they have not themselves seen the patient, but have heard the symptoms and particulars of his condition detailed by other witnesses at the trial, their opinion on the nature of such symptoms has been properly admitted. Thus, on a question of sanity, medical men have been permitted to form their judgment upon the representation, which witnesses at the trial have given of the conduct, manner and general appearance exhibited by the patient. 1 Phil. Ev. 290.

A physician who has not seen the patient, may, after hearing the evidence of others, be called upon to state, on his oath, the general effect of the disease described by them, and its probable consequence in the particular case. Peake's Ev. 190; 2 Russ. on Cr. 623; *Wright's case*, 1 Russ. & Ry. Cr. Ca. 456.

In the case of *Hathorn* v. *King*, 8 Mass. 371, it was decided that a physician may be inquired of whether, from the circumstances of the patient, and the symptoms they observed, they are capable of forming an opinion of the soundness of her mind, and whether, from thence they concluded her mind was sound or unsound; and, in either case, they must state the circumstances or symptoms from which they draw their conclusions. The question in this case was whether the physicians, who were present and examined the patient, should be permitted to give their *opinions;* or whether subscribing witnesses to the will, (it being on a question of the validity of a will,) only, should express opinions as to the sanity or insanity of the testatrix.

In *Dickinson* v. *Barber*, 9 Mass. 225, a question arising on the exclusion of certain depositions, the Court say:— "The deponents state no facts on which they ground their opinion. This is to be required of physicians as well as others. Juries are to judge of facts; and, although the opinion of professional gentlemen, on facts submitted to them, have justly great weight attached to them, yet they are not to be received as evidence, unless predicated upon *facts testified to, either by them or by others.*" The depositions were excluded.

In *Keith & ux.* v. *Lothrop*, 10 Cush. 453, METCALF, J., says: "The witness Smith, who was called as an expert, was rightly allowed to give the reasons for the opinion that he expressed." This point was adjudged in *Com.* v. *Webster*, 5 Cush. 301. And in *Collier* v. *Simpson*, 5 Car. & P. 73, TINDALL, C. J., ruled that counsel might ask a witness, who was called to testify as an expert, "his judgment and the grounds of it." The value of an opinion may be much increased or diminished, in the estimate of the jury, by the reasons given for it.

This is undoubtedly sound law. As a witness cannot be permitted to give his opinion as an expert, until it appears by a preliminary examination that he is a person of skill in the particular department or subject matter in which his opinion is desired; so, too, it must appear that he has reliable information, or knowledge of the facts involved, and upon which his opinion is to be founded, before he can testify as an expert. As remarked by GASTON, J., in *Clay* v. *Clavy*, 2 Iredell, 78, "unquestionably, before a witness can be received to testify as to the fact of capacity, (in a case involving mental soundness,) it must appear that he had an adequate opportunity of observing and judging of capacity."

We permit experts to testify as to the genuineness of handwriting by comparison, but, before an opinion can be given, it must be *admitted* or *proved* that the specimen with which the comparison is made is genuine. Until the genuineness of the standard specimen is established, no comparison can be made, no opinion expressed. The very foundation for the theory of

expert testimony is that of his superior knowledge in relation to the subject matter of which he is permitted to give an opinion, by which he, in a degree, assumes the functions of the jury.

This kind of evidence, though, at times, unquestionably of great value, is frequently open to observation. While the opinion of the experienced, skillful and scientific witness, who has a competent knowledge of the facts involved in the case on which he speaks, affords essential aid to Courts and juries, that of unskillful pretenders, quacks and mountebanks, who, at times, assume the character of *experts*, not unfrequently serves to becloud and lead to erroneous conclusions. The rules under which this class of testimony is received should not, in my opinion, be relaxed. Such, I believe, would be the judgment of every intelligent person who has had any considerable experience in courts of justice.

If it should be said that it cannot be known how much the opinion of the witness might have been based upon what he learned from the nurse or wife of the defendant, the answer would still be the same; the declarations of those persons, thus made, could not properly form an element in the basis of facts, upon which the witness could predicate a legal opinion, to be given as evidence before a jury.

The ruling of the Judge, being in my judgment correct, the exceptions should be overruled. *Exceptions overruled.*

TENNEY, C. J., APPLETON, CUTTING, GOODENOW, and DAVIS, J. J., concurred.

MERRITT W. ATKINS *versus* THOMAS WYMAN.

A judgment will be vacated where an appeal therefrom has been allowed; and an action of *debt* cannot be maintained upon it.

The judgment of the *appellate* court will be conclusive until reversed, although the appeal in the case was improperly taken and prosecuted.

DEBT, on a judgment alleged to have been rendered by the District Court, in the county of Franklin, in the year 1847.

At the trial, before HATHAWAY, J., the plaintiff introduced, (subject to objection of defendant that the record was not authenticated,) a copy of so much of the record of judgment as was extended on the records of said Court, and proved that A. B. Caswell, who was clerk of said Court, in 1847, had not resided in this State within three or four years last past.

Plaintiff also introduced, subject to objection, the docket entries under said action, one of which is "judgment for plaintiff on statement of facts — defendant appeals."

In defence, was introduced, subject to objection, a copy of the record of the proceedings and judgment of the Supreme Judicial Court for the county of Franklin, in an action between the parties, and plaintiff admitted that it was the record of the same case appealed from.

The parties, thereupon, agreed that the case should be submitted to the full Court, on report of the evidence.

The *record* of the District Court does not show that an appeal was taken from the judgment there ordered. No writ of execution was ever issued thereon.

It appears, by the record of the Supreme Judicial Court, that the appeal was entered at the June term, 1857, and the questions of law arising in the case were argued at the next law term, and afterwards the Court ordered that the plaintiff become *nonsuit.* And, thereupon, judgment was entered up, and execution issued for the defendant's costs.

J. H. Webster, for plaintiff, argued that, —

1. An appeal from a judgment upon an agreed statement of facts cannot be taken from the District Court where the action

was originally brought before a justice of the peace. *Phillips* v. *Friend*, 11 Maine, 411; *Giles* v. *Vigereaux*, 32 Maine, 565; *Seiders* v. *Creamer*, 22 Maine, 558; R. S. of 1841, c. 97, § 13; Art. of Amend. § 12; *Simmons* v. *Lord*, 18 Maine, 351; *Kimball* v. *Moody & al.*, 18 Maine, 359; *New Gloucester* v. *Danville*, 25 Maine, 492; *Putnam* v. *Oliver*, 28 Maine, 442; *Holt* v. *Barrett*, 29 Maine, 76; *English* v. *Sprague*, 32 Maine, 243; *Adams* v. *Adams*, 15 Pick. 177.

2. An appeal taken where no appeal lies is a mere nullity, and an execution or an action of debt may be sued out upon the judgment appealed from. *Compbell* v. *Howard*, 5 Mass. 376; *Com.* v. *Messenger*, 4 Mass. 462, 471.

3. The proceedings in the Supreme Judicial Court in the original suit being a mere nullity, were irrelevant and inadmissible. The plaintiff here, therefore, is entitled to recover.

J. S. Abbott, for defendant.

The opinion of the Court was drawn up by

HATHAWAY, J. — An action was pending in the late District Court in the county of Franklin, between these parties, and it appears, by the entries upon the clerk's docket at the March term of the Court, 1847, that the plaintiff recovered judgment therein, from which the defendant appealed to the Supreme Judicial Court, by the records of which Court, it appears that the defendant duly entered his appeal in that Court, at its June term, 1847, and, after continuance and argument, the case was finally disposed of by a nonsuit ordered by the Court, and the defendant had judgment and execution for his costs.

This is an action of debt upon the judgment in the District Court, from which the defendant appealed.

A valid appeal vacates the judgment appealed from.

The presumption is, that a judgment, rendered by a Court of competent jurisdiction, is properly rendered, and upon due preliminary proceedings.

The Supreme Judicial Court was a tribunal of ultimate jurisdiction in the matter. The appeal was duly entered.

The case was argued and final judgment rendered by that Court for the defendant.

If the appeal was invalid and irregularly allowed, as the plaintiff contends, he should have availed himself of the irregularity at the appellate tribunal, whose judgment must be deemed conclusive, until reversed in due course of law.

The doctrine contended for by the plaintiff would leave him with a valid judgment in his favor in the District Court, for his debt and costs, and the defendant with a valid judgment in his favor, in the appellate Court, for his full bill of costs in the same case, a result which would not be in accordance with the symmetry of the law.

Plaintiff nonsuit.

TENNEY, C. J., CUTTING, MAY, GOODENOW, and DAVIS, J. J., concurred.

CYRUS H. BRETT *versus* DANIEL MARSTON *& als.*

Where one, not the payee of a note, at its inception signed on the back of it, under the words "holden on the within," he thereby became a joint promisor with the other makers of the note.

An erasure of his name *by mistake* does not discharge him.

Where a nonsuit had been entered in an action upon a note, a second suit instituted on the same note will not be affected thereby, unless it appear that such entry of nonsuit was a decision upon the validity of the note.

A traveling pedler, (without license,) when not engaged in that business, may make a valid sale and delivery of goods.

THE three defendants are declared against as original promisors of a note, dated May 30, 1850, for $200, payable in lumber on demand.

The action was commenced May 21, 1856, and tried before HATHAWAY, J., at the October term, 1857. The verdict was for plaintiff. The case comes before the full Court on EXCEPTIONS taken by the defendants.

The note was signed "Marston & Tilton, by C. A. Mars-

ton," and said C. A. Marston signed his own name upon the back of it.

It appears, by the bill of exceptions, that, at the trial, "it was proved that at the date of the note, and for some time previous, the defendants, Daniel Marston and Jacob Tilton, were co-partners in business under the name and firm of Marston & Tilton, and that the defendant, C. A. Marston, was in their employ in their store as clerk or agent. When the note was made, it was signed by defendant (C. A. Marston,) on the back thereof, in these words: "Holden on the within, C. A. Marston," which words appeared to have been partially erased. Payment of the note was duly demanded before the commencement of this action.

"There was much evidence in the case concerning the authority of Charles A. Marston to sign the name of the firm of Marston & Tilton to the note, upon which subject the jury were properly instructed by the Court."

E. Kempton, introduced by plaintiff, testified that he commenced a suit upon this note, and also a suit upon a note for $100 in favor of Reuben B. Dunn, payable as this is; that he was authorized by Dunn to release C. A. Marston in his suit, to make him a witness; that the two notes were together in his pocket; that he took out this note and erased the name of C. A. Marston, supposing it to be the other note; that he had no authority to erase it and that it was done by mistake; and there was evidence in the case, from which defendant argued to the jury, that they would be authorized to believe it was erased intentionally, and not by mistake.

The Judge instructed the jury that, if the name of C. A. Marston was intentionally erased from the note in suit, by plaintiff or Kempton, his attorney, such erasure would be a discharge of C. A. Marston, and this action could not be maintained. But if, without any intention to do so, Kempton, by mere accident, erased the name of C. A. Marston from the note, such accidental erasure would not affect the validity of the note or the liability of the parties who signed it; and they would treat it precisely as if the erasure had not been made.

It was proved that the consideration of the note sued, was $40 or $50 worth of boots and shoes, gold and silver watches, and silver spoons to make up the amount of $200, which went into defendants' store, as testified by the plaintiff Brett, who was introduced by defendants, who also testified that he was agent for Dunn in collecting debts due for scythes, &c., that he had previously sold some watches to one Elliot, a dealer in Farmington, and $100 worth to C. A. Marston, and had sold to no others; that when he sold the $100 worth to C. A. Marston, he, (Marston,) wanted to buy the articles, (the consideration of the note in suit,) and pay in lumber for them; that he told Marston he would ask Mr. Dunn about it, and that he did inquire of Dunn, and Dunn assented to it; that Dunn kept a store at North Wayne, and, agreeable to Marston's request, he carried the property to Mt. Vernon to Marston for which the note in suit was given, and that the articles all went into defendant's store; that the note was Dunn's property and the articles for which it was given.

Defendants contended, in argument, that Brett, who had no license, was traveling about from town to town, and place to place, pedling out goods in violation of law, and that such sales were void, and, if such articles so sold constituted a part or the whole of the consideration of the note, the plaintiff could not recover.

The Judge instructed the jury that plaintiff had no legal right to travel about from town to town, or from place to place, for the sale of such goods, without being duly licensed therefor, and if the goods, for which this note was given, were thus sold by Brett, traveling from place to place, or town to town for that purpose, the action could not be maintained.

But if Brett made a contract, in pursuance of which the exchange of the boots and shoes, watches and spoons, was to be made for the lumber, and, in fulfillment of that contract, the articles were brought and delivered and the note given therefor, the note will be valid, and that it would be immaterial, in this case, whether or not Brett had been in the habit

of pedling to other persons or not, provided this transaction was a legal one.

It appeared in evidence that an action had been brought by plaintiff upon this note, in the District Court in Kennebec county, against two of the defendants, Daniel Marston and Tilton, and the note used in evidence as it now is, and that the action was carried to the Supreme Judicial Court, and plaintiff was nonsuited.

The Judge presiding instructed the jury fully concerning the various matters of law presented by the case. To which instructions no exceptions were taken, and which are not reported in the bill of exceptions.

And, after he had closed his charge to the jury, the counsel for defendants requested him to give the following instructions, to wit: —

1. That if the plaintiff, in this case, traveled from any other town or place to Mt. Vernon for the purpose of selling articles of jewelry, or any articles not manufactured in this State, having no license therefor, and did sell the same, it was an illegal transaction, and, if the jewelry or goods so sold form any part of the consideration of the note in suit, the note is void.

2. Conversation with Charles A. Marston at Farmington about a trade would not constitute a contract. Where neither the quantities, kinds nor prices of the articles were agreed upon, but to be fixed by the parties subsequently, it would be no contract.

3. Also, if the plaintiff in this case prosecuted a suit on this note against Daniel Marston and Jacob Tilton, and, when a trial was had on the same, presented the note and tried it with the names of Daniel Marston and Jacob Tilton upon it, and when, in the said trial, it would have been a defence to that action if the name of Charles A. Marston had appeared as one of the makers, the plaintiff should now be estopped from restoring his name, and claiming to recover against him in this action.

4. If the erasure was by mistake, still, if the counsel let the erasure remain and used him as a witness at the other trial, it makes the erasure valid, even if originally made by mistake; the subsequent use of the erasure for his own benefit by the plaintiff, in the trial of his case, would be a ratification of it.

Which requested instructions the Judge refused to give any further than they are embraced in the instructions he had previously given.

S. Belcher argued in support of the exceptions.

J. S. Abbott, contra.

The COURT sustained the rulings and instructions of the Judge at *Nisi Prius*, and ordered an entry of

Exceptions overruled.

INHABIT'S OF NEW-VINEYARD *versus* INHABIT'S OF PHILLIPS.

Where a town had relieved persons therein, who had fallen into distress, and legal notice thereof had been given to the town in which such persons had a legal settlement, if, afterwards, another notice be given, the last notice will be no waiver of any right acquired under that previously given.

ASSUMPSIT, for the support of paupers alleged to have their settlement in the defendant town. The writ is dated January 6, 1857. The case is thus stated by the parties:—

"The overseers of the poor of the town of New-Vineyard legally notified the overseers of the poor of the town of Phillips, January 12, 1855, that the alleged paupers, named in the plaintiffs' declaration, had fallen into distress and become chargeable in New-Vineyard as paupers of said Phillips. Which notice was not answered by the overseers of the poor of said Phillips, in terms rejecting said paupers, as required by law. That the overseers of the poor of said New-Vineyard, subsequently, to wit, April 11, 1855, gave the overseers

of the poor of said Phillips a new and independent notice that said paupers had fallen into distress, &c., in New-Vineyard, without, in any way, referring to their former notice, which last notice was seasonably and properly answered according to law, rejecting said paupers, by the overseers of the poor of said Phillips; that, again, the third time, the overseers of the poor of New-Vineyard, on the twenty-first day of April, 1856, gave the overseers of the poor of said Phillips a new and independent notice, that said paupers had fallen into distress, &c., in New-Vineyard, without, in any way, referring to either of their former notices. Which last and third notice was not seasonably answered by the overseers of the poor of said Phillips. But the inhabitants of Phillips, by James E. Thompson, one of the selectmen and overseers of the poor of said Phillips, afterwards, to wit, September 18, 1856, settled and paid the inhabitants of New-Vineyard the sum of $59,56, being in full for the removal of said paupers and their support from January 21, 1856, to July 5, 1856; which settlement was in full for all claims of the inhabitants of New-Vineyard against the inhabitants of said Phillips, on account of said paupers, from said twenty-first day of January, 1856, up to the date of the plaintiffs' writ in said action. Said settlement was not intended to deprive said defendants of any legal rights they acquired, or of any presumptions in their favor, by the means of the giving of said second and third notices to the overseers of the poor of said Phillips, by the overseers of the poor of said New-Vineyard; nor to deprive the inhabitants of said New-Vineyard of any of their legal rights to collect of the defendants the expense of supplies furnished said paupers by them prior to said 21st day of January, 1856, if they did not, by operation of law, waive said legal rights by reason of the giving of said second and third notice as aforesaid.

"If the full Court shall be of opinion, upon the foregoing statement of facts, that the plaintiffs are entitled by law to maintain their said action, upon proof of the legal settlement of said paupers in said Phillips, and upon proof of furnishing

the supplies, as alleged in their said writ, then the defendants are to be defaulted, and the amount of damages to be audited and determined upon by some suitable person, to be appointed by said Court. But if the Court should be of the opinion that the plaintiffs are not entitled by law to maintain this action, then the plaintiffs are to become nonsuit."

S. H. Lowell, for the defendants, contended: —

1. That the first notice given by plaintiffs to defendants was waived by plaintiffs' giving a new and independent notice of April 11, 1855, and both of these notices were waived by the plaintiffs' giving the notice of the date of April 21, 1856. *Kennebunk* v. *Buxton*, 26 Maine, 61.

2. Because all cause of action which the plaintiff had against the defendants, under or by reason of their last notice, viz., the notice of April 21, 1856, including the costs and expenses of removing said paupers, was settled, paid and extinguished by the defendants, Sept. 18, 1856, said settlement was in full for all claims of the plaintiffs against the defendants, for or on account of said paupers, for a space of time extending three months back of said notice, and forward to the date of plaintiffs' writ. The plaintiffs, therefore, having, by operation of law, as well as by manifest intention, waived their first and second notices, and having received payment in full for all their claims, by reason of or under their third and last notice, had no cause of action left against the defendants at the time this action was commenced, and must, according to the agreement of the parties, become nonsuit.

Again. The three notices were all exactly alike in substance, differing only in their dates by being given by different boards of overseers. And each of said notices would have been good and continued valid had it alone been the only notice given.

It will not be seriously contended that all three of said notices were good, April 21, 1856, and that the plaintiffs had three causes of action accruing Jan. 12, 1855, April 11, 1855, and April 21, 1856, respectively. The plaintiffs caused said

paupers to be removed between April 21, 1856, and July 5, 1856. This they did under their last notice, thus electing which notice they should consider valid, and, having so elected which they should be required to do, they are now estopped by their own acts, and by operation of law, to claim any benefit from either (or both,) of their first and second notices, and cannot, therefore, maintain this action.

S. Belcher argued for the plaintiffs, and cited *Green* v. *Taunton*, 1 Maine, 228; *Palmer* v. *Dana*, 9 Met. 587; R. S. of 1841, c. 32, § 43.

The COURT *held* that no good reason had been shown why the plaintiff should not recover; and directed an entry of *default.* *Defendants to be heard in damages.*

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

LUCY ANN CHILDS, *Administratrix, versus* THE INHABITANTS OF PHILLIPS.

A physician will not be entitled to recover of a town of which he is not a resident, for medical services rendered to its inhabitants while sick with the small pox, unless there had been an express contract with him for such service by the proper officers in behalf of the town.

ASSUMPSIT, for medical services, alleged to have been rendered the defendant town in 1851, by plaintiff's intestate, who was then a resident of the town of Jay. The case is presented for the determination of the full Court on REPORT of the evidence offered at *Nisi Prius.* The questions arising in the case, and the evidence bearing thereon, sufficiently appear in the opinion of the Court.

Cram, for plaintiff.

Lowell, for defendants.

The opinion of the Court was drawn up by

MAY, J.—This is an action of assumpsit brought to recover compensation for certain medical services and attention rendered by plaintiff's intestate, in the family of one Grover then resident in the town of Phillips. The testimony shows that some of said family were sick with the small pox, and that the plaintiff's intestate was a physician then residing in the town of Jay, duly qualified to practice under the laws of this State, that he was sent for by said Grover, and came up to Phillips at his request; but on arriving there, found that the selectmen of said town had fenced up the road near said Grover's house. Thereupon, Doct. Childs, the plaintiff's intestate, refused to go to Grover's without the permission of the selectmen. The case further shows that said Grover was a man of small means, and that he was unable to pay all the expenses occasioned by the sickness of his family.

It is conceded by the counsel for the plaintiff, that if the plaintiff can recover in this action, it must be upon the ground of an express contract between Doct. Childs and the selectmen, for the performance of the services rendered. The plaintiff's intestate, not being at the time an inhabitant of Phillips, is not entitled, under the R. S. of 1841, c. 32, § 48, to recover upon notice and request to the overseers of the poor. *Windham* v. *Portland*, 23 Maine, 410.

Does the evidence in the case satisfactorily show an employment of Doct. Childs by the officers of Phillips? It is contended on the plaintiff's side that it does, on the other, that it does not. The burden is upon the plaintiff. If there was an employment, it must have been by the overseers of the poor. In 1851, when the services were rendered, they consisted of Benjman F. Eastman, William H. Josselyn, and Enoch Winship. Neither of them appear to have had any direct connection with the employment of Doct. Childs, unless it is Mr. Josselyn. Daniel L. Pickard testifies that, on the evening when the Doctor came, he heard said Josselyn direct him to go to Grover's and do the best he could. Bradford

A. Thompson testifies that, the Doctor refused to go without the permission of the selectmen, and that he heard Josselyn direct Pickard, that same night, in the presence of the Doctor, to tell him to go and do the best he could. Whereupon, the Doctor spoke and said I am the man, and shall not go without the permission of the selectmen, and that Josselyn then told him to go and do the best he could. On the other hand, Josselyn testifies directly that he made no such employment. That the overseers of the poor employed Doctor Blake, and refused to employ any other physician. It appears that the services were charged to the defendants upon the books of the intestate, but he does not appear to have taken any measures to enforce his claim before his death. In view of all the testimony and circumstances in the case, we are of opinion that the plaintiff has failed to show any contract of employment between her intestate and the defendants. We think the difference in the testimony of the witnesses arises mostly from not distinguishing between an employment and a permission to go. *Plaintiff nonsuit.*

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

COUNTY OF ANDROSCOGGIN.

TIMOTHY LUDDEN *& al. versus* DAVID KINCAID *& al.*

The purchaser of goods sold by an officer on execution, will acquire title thereto, notwithstanding the officer, in his proceedings, has not conformed strictly to the requirements of the statute.

TROVER, for a house built by one Higgins upon the land of another, with the consent of the owner.

This case is presented on REPORT of the evidence at *Nisi Prius*, MAY, J., presiding. The facts bearing upon the question decided by the case, sufficiently appear in the opinion of the Court.

T. & M. T. Ludden, for plaintiffs.

Record & Walton, for defendants.

The opinion of the Court was drawn up by

CUTTING, J. — Both parties claim title to the property in controversy, under one Charles Higgins — the plaintiffs by a bill of sale from Higgins to Elbridge G. Fuller, of August 31, 1855, and from Fuller to themselves of Dec. 27, of the same year; the defendants by virtue of an attachment on mesne process, and a subsequent sale on the execution in favor of Isaac G. Field and Marshall Ford against Higgins, made on July 19, 1854, when the judgment creditors became the purchasers, who, afterwards, it is said, conveyed to these defendants, which must be presumed, otherwise, the facts reported and the documents referred to, are wholly variant, for the case finds that the sale by the officer was to the defendants directly.

The sale on the execution being prior to that by Higgins, the defendants' title must prevail, unless the plaintiffs can suc-

cessfully impeach the return of the officer, which they attempt to do, for informalities in advertising and adjourning his sale from time to time.

In *Tuttle* v. *Gates*, 24 Maine, 395, which was likewise trover for a dwellinghouse, where the same questions arose, this Court decided that "the sale of goods, made by an officer on execution, must be regarded as a legal transfer of the property, although he may not have conformed to the requirements of the statute in making the sale." That case is decisive of the present, and, according to the agreement of the parties, the plaintiffs must become *Nonsuit.*

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

JOHN MARSTON *versus* JOHN W. MARSTON.

Where a mortgagee has acquired the title of the mortgager, it is tantamount to a foreclosure.

If the value of the property mortgaged and foreclosed, be not equal to the sum due on the notes secured by the mortgage, the holder has a claim on the maker and indorser of the notes, for the balance.

ASSUMPSIT against the defendant, as guarantor and indorser of a promissory note for $150, dated Nov. 21, 1853, payable to the defendant, and by him indorsed and guarantied on the back in the following words:—"I hold myself responsible for the payment of the within note, agreeable to the mortgage by which the note is secured. (Signed,) John W. Marston."

At the trial, before MAY, J., the signatures were admitted; also, demand and notice in due form. It appeared in evidence, offered by the defendant, that the note in suit was the third of a series of seven notes, six for one hundred and fifty dollars, and one for one hundred dollars, amounting in all to one thousand dollars, all of same date, and secured by a mortgage of real estate in Falmouth, given by D. D. Nichols, the

maker, to said defendant; which mortgage is dated November 21, 1853.

The defendant assigned said mortgage and indorsed and guarantied said notes to the plaintiff, for a valuable consideration, in the manner aforesaid, March 6, 1854.

The defendant offered in evidence a warranty deed in common form, from said D. D. Nichols to William H. Wilson, dated October 20, 1856, duly recorded, for the consideration appearing in the deed, of one hundred dollars. Also, an assignment of said mortgage from the plaintiff, dated January 29, 1857.

D. D. Nichols, called by the defendant, testified that he was the maker of said mortgage and notes secured thereby; that the plaintiff urged him for payment of the mortgage debt, and threatened to, and finally did, give notice to foreclose; that various negotitaions were entered into between them as to the plaintiff's releasing his claim upon the property; that the witness offered him, at one time, $900; and, at another, $900, and an additional hundred dollars out of his shop, but these negotiations amounted to nothing, and no bargain was made; that, afterwards, the witness agreed to leave the premises in thirty days; and that the plaintiff told him that said Wilson was going to take the premises at the end of that time; that witness went to Bath, the residence of the plaintiff, to see him about the business; that the plaintiff expressed his surprise that witness had not left and that Wilson had not taken possession; that, a few days afterwards, the plaintiff came to Falmouth and the witness told him he could do nothing, and plaintiff then went to see Wilson.

William H. Wilson, called by defendant, testified that he was acquainted with the plaintiff a short time before he took the deed from Nichols, that he told the plaintiff the most he would give for the place; that he went to Portland and took the assignment of the mortgage and a transfer of all the notes, except the note in suit, which the plaintiff retained; that he still holds the notes and mortgage undischarged; that the consideration of the warranty deed from Nichols to him

was, that he, (Nichols,) should remain till spring on the place; that at, or about, the time he took the deed from Nichols, he bargained with the plaintiff for the transfer of the mortgage and notes, afterwards transferred for $1000, and paid him $600, at the time taking an agreement from the plaintiff to transfer the same when the balance was paid, and that he paid said balance on said 29th of the next January; that he did not agree to take up all the notes, but he was only to take up the notes to the amount of one thousand dollars and no more; that a thousand dollars was the full value of the mortgaged property. The case was taken from the jury by consent of parties, to be submitted to the full Court, upon report of the evidence, or so much of it as may be admissible, and judgment to be entered, either by nonsuit or default, as the rights of the parties demand.

The case was argued by

Fessenden & Butler, for plaintiff, and by

Cilley, for defendant.

The opinion of the Court was drawn up by

TENNEY, C. J.—On Nov. 21, 1853, D. D. Nichols conveyed to the defendant, in mortgage, certain real estate for the security of the sum of $1000, for which he gave seven promissory notes of hand, one payable in one year from date, and the others in successive years afterwards, with interest. Six of these notes were for the sum of $150 each, and the other, which was payable in seven years, for the sum of $100. The mortgage was assigned, and the notes transferred to the plaintiff on March 6, 1854, by the defendant, who made upon each of the notes, over his signature, the following: — "I hold myself responsible for the payment of the within note, agreeable to the mortgage, by which this note is secured."

On or about Oct. 20, 1856, no payment having been made on the notes, the plaintiff entered into a contract with William H. Wilson to transfer all the notes, excepting the one which was to become payable in three years from date, and the same

now in suit, and the mortgage, for the consideration of the sum of $1000, and received the sum of $600 at that time, the transfer to be made when the balance should be paid. The transfer of the notes and the mortgage, in pursuance of the contract, was made on January 29, 1857; and, in that assignment of the mortgage, the plaintiff stipulated that he was to hold no right or title in and to said real estate, as security for the note so retained.

By the evidence, the value of the mortgaged premises at the time of the transfer of the mortgage to Wilson was the sum of $1000, and no more. It is admitted, that demand upon the maker of the note in suit and notice of the non-payment was made and given in due form.

The counsel for the defendant contends that, upon a proper construction of the writing signed by the defendant upon the back of the note, if payment cannot be obtained by the plaintiff in full from the mortgage, he is bound to pay the balance and no more.

The defendant was not privy to any of the proceedings touching the transfers of the notes and the mortgage, conveyance of the right in equity of redeeming the premises, &c. The construction, therefore, to be given to the contract on the back of the note, independent of those proceedings, is to determine the question, whether or not the defendant is liable, and, if liable, to what extent.

An unqualified indorsement of the note by the defendant, at the time the one in controversy was made, with such demand and notice as is required ordinarily to fix the liability of an indorser, would render him liable on this note in the same manner that he would be if the mortgage had not been given.

But he contracts that he will be responsible for the payment, agreeably to the mortgage by which the note is secured. The design, in the use of this language, is not very apparent. The note described in the mortgage corresponds with that in suit in every particular. By the condition of the mortgage, if the maker did not make payment of all the notes, the deed

was to be absolute. And the argument of the defendant's counsel is, that, as the maker of the note was not bound by any thing in the mortgage alone, to make payment, if he chose to forfeit the estate described therein, the defendant intended to put himself in that condition and no other. We think this view cannot be admitted. The mortgager had the right to three years, from the time possession should be taken for condition broken of the mortgaged premises, in which to redeem. The condition could not be broken before the lapse of one year from the date of the notes; and, if two notes payable in one and two years from date should be paid, possession for condition broken by the non-payment of the note in suit could not be taken until three years from the date of the notes had expired. Hence, the mortgage would be open for the term of three years, at least, from the time when this note matured. And, during this period, the holder could not make the mortgage deed absolute, or enforce payment from the defendant of the note in suit. And, all the seven notes having been indorsed in the same terms by the defendant, the liability on this construction could not be fixed till there should be a foreclosure, which might be postponed for three years, at least, after the maturity of the note for the sum of $100. Such a result is not reasonable, and is unauthorized by the indorsement itself.

But, upon the construction contended for in defence, the plaintiff must prevail. Wilson became the owner of the mortgagee's title on Jan. 29, 1857. He had previously acquired the right of the mortgager. The defendant was a stranger to both these interests, and to the conveyances thereof he could make no objection. The union of these titles in Wilson may be treated as tantamount to a foreclosure of the mortgage, and was payment of the notes to the amount of the value of the premises. *Haynes* v. *Wellington*, 25 Maine, 458. The balance was a personal claim against the maker of the note, and the defendant, as indorser. The sum due upon the notes, on Jan. 29, 1857, was not far from $1190. There being no evidence that the mortgager had not continued in

possession, no deduction could be made for rents and profits. The balance, over and above the value of the premises, (being the sum of about $190,) of the amount due on the notes, is still outstanding and unpaid. This is a greater amount than that of the note in suit. *Defendant defaulted.*

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

STEPHEN SCRUTON, *petitioner for review, versus* JOEL MOULTON.

Exceptions will not lie to the denial of a review by a Judge at *Nisi Prius*, in the exercise of his discretion, and where there is no direction, opinion or judgment given in matter of law.

PETITION FOR REVIEW of a judgment of this Court, recovered by the respondent against the petitioner in the year 1856. The petition was filed at the August term, 1856. At the April term, 1858, a hearing was had thereon before GOODENOW, J., who denied a review. The counsel for the petitioner thereupon alleged EXCEPTIONS to the decision of the presiding Judge, making a report of the evidence adduced at the hearing, a part of his bill.

The exceptions were argued by

Webster, for petitioner, and by

T. A. D. Fessenden, for respondent.

The opinion of the Court was drawn up by

TENNEY, C. J. — By the statutes of 1821, c. 57, § 1, the Justices of this Court were empowered, (if they saw fit,) to grant reviews of causes. By the revision of the statutes of 1841, c. 123, § 1, the power is given to the Justices, &c., to grant reviews in all civil suits, &c., whenever they shall judge it reasonable, and for the advancement of justice. It was a matter of discretion with the whole Court, under these statutes, to grant or to refuse the reviews.

By the statutes of 1852, c. 246, § 13, all petitions for review may be determined by the presiding Justice, &c., subject to exceptions to any matter of law, by him decided and determined. By the revision of the statutes of 1857, c. 89, § 1, the Supreme Judicial Court may grant one review in civil actions. It is provided in the statutes of 1857, c. 77, § 27, that when the Court is holden by one Justice, a party aggrieved by any of his opinions, directions or judgments in any civil or criminal proceeding, &c., may, during the term, present written exceptions, &c. This is similar to the provision in R. S. of 1841, c. 96, § 17. And it has always been held that this embraced only opinions, directions and judgments which were such in matters of law.

The case of *Murphey* v. *Glidden*, 34 Maine, 196, is relied upon by the petitioner as favoring, at least, a different construction of the statute. In that case, the question was whether the complainant, in a bastardy process, was competent to testify as a witness, she being objected to on the ground that she had not continued constant in her accusation against the respondent. This was a question for the Court, and not the jury. The evidence was reported, without the conclusion of the Judge upon the evidence introduced, in relation to the question, whether the complainant had continued constant or otherwise. The evidence being reported, it was for the Court to determine whether, upon that evidence, she was competent or not, as a question of law.

In other cases referred to, upon petitions for review, the Judge has decided as matter of law, certain questions, and exceptions have been regarded as properly taken to such decisions, and have been entertained and heard by the law Court.

In the case presented, all the evidence adduced upon the hearing of the petition has been reported; and it does not appear that the Judge expressed any opinion, or gave any direction or judgment in matter of law; but he denied the

review, in the exercise of his discretion, upon the facts adduced in evidence. *Exceptions dismissed.*

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

CORNELIUS JONES *versus* INHABITANTS OF OXFORD COUNTY.
HOOPER CONANT *versus* Same.

Where a highway had been duly located by the joint adjudication and action of the County Commissioners of several counties, their subsequent action, under the original petition, declaring a portion of such location discontinued, because the damages awarded by a jury or committee, to the land owners, were excessive, is unauthorized and void.

Nor, can the Commissioners of the County in which a portion of such highway is located, legally discontinue any part thereof, if they deem the damages awarded to the owners of land excessive.

The county in which procedings for the location of a highway were commenced and closed, are alone liable for damages to the land owners, although, before the road was completed, that part of the county embracing the location had been set off and annexed to another county.

DEBT, upon judgment rendered by the County Commissioners for the county of Oxford. The actions were commenced March 27, 1857. The averments in the writs are the same, and are in substance that Alvin Leavitt and others, by their petition in writing to said Commissioners, at their session held in September, 1851, prayed for certain alterations, new locations and discontinuances in the highway leading from Farmington, in the county of Franklin, to Livermore Falls, thence on the westerly side of Androscoggin river, by the way of Turner bridge and Lewiston Falls, to Portland; and the said Commissioners being satisfied, that inquiry into the merits of their application was expedient, requested a meeting of the other counties affected, and having given legal notice of the time and place of the meeting, met the Commissioners of the counties of Cumberland, Kennebec and Franklin, and other persons interested; and the said Com-

missioners, by their joint action and adjudication, adjudged and determined, that the prayer of the petitioners be granted in part, to wit, &c., &c.

Whereupon the said Commissioners of said County of Oxford proceeded to lay out, alter and discontinue said highway agreeably with said joint adjudication and the requirements of law, and awarded damages to individuals sustaining damages thereby, to wit, &c.

And the Commissioners ordered that said damages be paid out of the treasury of the county of Oxford, in two years from the time when proceedings on the aforesaid petition should be closed, or when said road should be opened; a report of which doings of the Commissioners of the several counties above named, jointly, and of the doings of the Commissioners of the county of Oxford, was made at the May term of the Commissioners' Court of said county of Oxford, A. D. 1852, and said petition continued to the May term of said Court, A. D. 1853, when Hooper Conant, Cornelius Jones, (and others,) being aggrieved by the decision of said Commissioners, in estimating damages, presented their petitions for redress, and the original petition was further continued till the September term of said Commissioners' Court, for said county of Oxford, A. D. 1853; at which time, said petitioners, for increase and redress of damages, having severally agreed with the parties adversely interested, to have the same determined by a committee, and said committees having been duly appointed under the direction of said Commissioners; and, after due notice to all parties interested, and to whom notice by law is required, said committees having met and heard the several parties; and, having estimated and determined the damages to the several petitioners, to be as follows, to wit: — to Cornelius Jones, fifty dollars, to Hooper Conant, forty-five dollars, to, &c., &c.

And, having made and duly returned to said Commissioners, reports of their doings, and of the aforesaid estimates and awards of damages, at their regular term held in September, A. D. 1853; said report and award of damages in favor of

the plaintiff, was accepted by said Commissioners, and duly recorded; and the proceedings on the original petition of Alvin Leavitt and others, were closed, and the record of the proceedings on said original petition completed; as by the record thereof, now remaining in said Court of County Commissioners, within and for said county of Oxford, will fully appear. And the plaintiff avers that two years from the time when proceedings on said original petition of Alvin Leavitt and others, were so closed, have long since elapsed; that said road has been opened, and his land actually taken for the same; of which, the defendants have had due notice; that after said two years had elapsed, and after said road had been open, and the plaintiff's land actually taken therefor; and thirty days, at least, before the bringing of this suit, to wit: on the seventeenth day of February, A. D. 1857, demand for the payment of said damages, due to the plaintiff as aforesaid, was made on the treasurer of said county of Oxford, and he neglected and refused to pay the same. Whereby an action of debt hath accrued to the plaintiff to have and recover of the said defendants, the aforesaid sum of fifty dollars, together with all costs taxed in his favor.

At the April term, 1858, the parties agreed upon the following report and statement of facts: —

"All the facts stated in the first count of the plaintiff's declaration are true, with this qualification, that, at the said September term of said Commissioners' Court, 1853, the said Commissioners, being of opinion that that portion of the foregoing location, described in the proceedings hereinafter set forth, ought not to be laid out subject to such high damages, and they therefore ordered it to be entered of record, that they consider and adjudge that the prayer of the petition of Alvin Leavitt and others be, for the reason aforesaid, denied in part, as is set forth in the following report, to wit:

"Pursuant to a notice given to the joint boards of the Commissioners of the counties of Oxford, Cumberland, Kennebec and Franklin, to meet at the house of Hooper Conant, in Turner, in the county of Oxford, for the purpose of taking

into consideration the excessive damages awarded to individual land holders by the several committees agreed upon for the purpose of increasing the award of the Commissioners, who located or altered the road on petition of Alvin Leavitt and others. And we, the Commissioners of the several counties abovenamed, having met at the abovenamed place on the 20th day of September, 1853, and duly considered the matter of excessive damage in the above premises, do hereby adjudge and determine that the damage awarded by the said committees is in part excessive, and that the road located on said petition be discontinued in part, viz.: commencing at Seth Bradford's north line, in Turner, and extending said discontinuance to the northerly line of land formerly owned by Lazarus LeBarron, in said Turner. Given under our hands this 21st day of September, 1853. [Signed by the Commissioners of the counties of Cumberland, Oxford, Franklin and Kennebec.]

"Pursuant to the foregoing joint adjudication, we, the County Commissioners of Oxford county, hereby revoke all damages awarded to owners and occupants of land on the foregoing described discontinued road alterations. [Signed by the Commissioners of Oxford county.]

"This report was made at the present term, accepted and ordered to be recorded. It is, therefore, considered by the Court that the prayer of the petitioners be denied as to that portion of the road lying between Seth Bradford's north line, in Turner, and the northerly line of land formerly owned by Lazarus LeBarron aforesaid, and that the remainder of the foregoing location be established as a 'public highway;' which appears by, and is a part of said record mentioned in plaintiff's writ.

"The land of the plaintiff Jones, is affected only by that portion of the aforesaid location that was discontinued, or attempted to be discontinued, by the aforesaid order of the Commissioners."

[The location that was attempted to be discontinued, did not affect the land of the plaintiff Conant.]

"It is the object of the parties, by this report and agreed statement of facts, to present to the Court, for a decision, the following questions, to wit: —

"*First*, was it competent for the Commissioners, in manner and form aforesaid, to reject or discontinue a portion of said location, for excessive damages?

"*Second*, if such order and adjudication for discontinuance was illegal, would the entire location stand, or would the whole be thereby defeated?

"*Third*, if entitled to recover damages at all, should these damages be paid by the county of Oxford, or Androscoggin?

"If these questions are determined favorably to the plaintiff's right to recover of Oxford county, then the defendants are to be defaulted, otherwise a nonsuit is to be entered."

(*State* v. *The Inhabitants of Turner.*)

It further appeared, by copies of records presented, that at the August term, 1855, of the Supreme Judicial Court for the county of Androscoggin, an *indictment* was found against *The Inhabitants of the town of Turner*, for a bad road, (which road was that part of the location attempted to be discontinued,) and, at the next (January,) term, (the county attorney for Oxford appearing for the defendants,) the case was submitted to RICE, J., presiding, upon facts agreed; and, thereupon, the Judge decided that no part of the located road had been legally discontinued, and directed a default.

The plaintiffs contended that thus, by judgment of law, their lands had been taken for public use without compensation.

The several questions of law presented by the case, were argued by

Record & Walton, for plaintiffs, and by

S. C. Andrews, (county attorney for Oxford,) for defendants.

The opinion of the Court was drawn up by

MAY, J. — The highway, for the location of which the plaintiffs' lands were taken, appears to have been adjudged, in ac-

cordance with the statute, "to be of public convenience and necessity," by the County Commissioners of the several counties of Oxford, Cumberland, Kennebec and Franklin, and, also, in pursuance of such adjudication, and the statute, to have been duly located by the Commissioners of said county of Oxford, by whom damages were awarded to the several owners of the land taken for said highway, and lying within said county; and the several sums so awarded were ordered to be paid out of the treasury of said county in two years from the time when the proceedings on the petition for the location of said highway should be closed, or when said road should be opened. R. S. of 1841, c. 25, § § 23, 24, 25 and 26. These land owners, or some of them, among whom were the plaintiffs, being aggrieved at the action of the Commissioners of Oxford, in relation to the amount of damages awarded them, duly petitioned for an increase and redress of damages, and subsequently agreed with the parties adversely interested, upon a committee to estimate the same, which committee made due report of their proceedings at the regular term of their Court held in Sept. A. D. 1853. The damages of the petitioners were somewhat increased by the report of said committee, and their report in favor of the plaintiffs, *was then duly accepted and recorded by said County Commissioners*, and the proceedings on the original petition for the location of said highway were closed, and the record thereof completed. These facts are distinctly stated in the first count of the plaintiffs' writs, and are admitted.

The foregoing adjudications and proceedings being in conformity to the requirements of the statute, must stand, unless they have been in some way legally modified, annulled or reversed; and this, it is contended in defence, has been done by certain other proceedings which appear in the case.

It is admitted that the County Commissioners of Oxford, at their regular term held in September, 1853, "being of opinion that that portion of said location described in the proceedings hereinafter set forth, ought not to be laid out subject to such high damages, and they, therefore, ordered it

to be entered of record that they consider and adjudge that the prayer of the petition of Alvin Leavitt and others, be, for the reason aforesaid, denied in part, as is set forth in the following report." Then follows the report of the action of the joint boards of County Commissioners, which acted upon the original petition, made at a meeting held by them September 20, 1853, at the house of the plaintiff Conant, for the purpose of considering the excessive damages allowed by the committees, in which they say, that, having duly considered the matter, "they do hereby adjudge and determine that the damage awarded by said committees is in part excessive, and that the road located on said petition be discontinued in part, viz.: — commencing at Seth Bradford's north line, in Turner, and extending said discontinuance to the northerly line of land formerly owned by Lazarus LeBarron, in said Turner;" and, it further appears by said report, that the Commissioners for the county of Oxford, at the same time certified under their hands, as follows, viz.: — "Pursuant to the foregoing joint adjudication, we, the County Commissioners of Oxford county, hereby revoke all damages awarded to owners and occupants of land on the foregoing described road alterations." This report was made at the September term of said County Commissioners, and then accepted and ordered to be recorded, and the record shows that it was thereupon considered by the Court, that the prayer of the petitioners be denied as to that portion of the road lying between Seth Bradford's north line, in Turner, and the northerly line of land formerly owned by Lazarus LeBarron, aforesaid, and that the remainder of the foregoing location be established as a public highway.

In view of the evidence in the case, three questions are presented to the consideration of the Court. 1. "Was it competent for the Commissioners, in manner and form aforesaid, to reject or discontinue a portion of said location for excessive damages?" 2. "If such order and adjudication was illegal, would the entire location stand, or would the whole be thereby defeated?" 3. "If entitled to recover damages at all, should these damages be paid by the county

of Oxford or Androscoggin?" It is agreed, that if these questions are answered favorably to the plaintiffs' right to recover of the county of Oxford, then the defendants are to be defaulted, otherwise, a nonsuit is to be entered.

It is contended by the plaintiffs that, the first question should be answered in the negative. The defendants rely upon the provisions of the R. S. of 1841, c. 25, § 21, to justify such action. That section, in substance, provides that it shall be the duty of the County Commissioners, in cases where the land damages allowed by them, have been increased by the verdict of a jury on the report of a committee, *on inspection of any such report or verdict duly returned*, if they shall be of opinion that the alteration, location or discontinuance of the highway, as determined by them upon the hearing of the petition therefor, ought not to be made subject to such high damages, "*instead of accepting such report or verdict in full to enter upon the record of proceedings under the original petition, a judgment that the prayer of said original petition for such road to be laid out, altered or discontinued, shall not be granted for the reason aforesaid.*" By the very terms of the statute, jurisdiction over such reports or verdicts, is given to the County Commissioners of the county in which the lands lie; and this is so when the road is established and located through the joint action of several boards of County Commissioners, as in the present case. Such boards, when acting jointly, have nothing to do with the estimation of damages, except, so far as they may be influenced thereby, from a general view, in their adjudication upon the question of the convenience and necessity of the highway at the time of its alteration, location or discontinuance; nor have they any power over verdicts or reports of committees determining the amounts which shall be allowed. By the statute, this is all left to the action of the Commissioners for the county in which the lands lie, and by which the damages are to be paid.

It is apparent, therefore, from the language of the statute, as used in section twenty-one, above referred to, that the Commissioners who are authorized, under certain circumstances,

on inspection of any report or verdict relating to damages, to revoke or disaffirm *their* former proceedings, by denying the prayer of the original petitioners for the road, are the same Commissioners who are to pass upon the acceptance of such report or verdict, because they are to enter upon the record of proceedings, that said prayer shall not be granted, *instead of accepting any such verdict or report.* These Commissioners are the County Commissioners acting for their county alone.

There is no statute which authorizes the joint boards of Commissioners, after they have once performed their official duty in adjudicating upon the public convenience and necessity of the highway, to revoke their former decision, or any part of it, in this summary manner. Such subsequent action, whether for the reason of excessive damages or any other cause, is altogether unauthorized. *It is coram non judice.* The moment they had completed their duty as required by sections 23, 24, and 25 of the same statute, their joint power over the subject matter, ceased, and they could act no further, except upon a new petition. The action, therefore, of the joint boards of Commissioners, in Sept. 1853, relied upon in defence, by which they determined that the damage awarded by the committees, was in part excessive, and that the road as located, be discontinued in part, was null and void, and by reason of it, no part of the highway as originally located, was discontinued.

Nor, did the action of the County Commissioners of Oxford have any effect to annul or discontinue any part of said highway. This highway having been established by the joint action of several boards of County Commissioners, could not legally be discontinued by the separate action of any one of them. It is true, a literal construction of the statute, c. 25, § 21, before cited, may confer such power, but such action, if allowed, might render nugatory the joint action which is fully authorized by the subsequent sections of the statute. The authority to disaffirm all former proceedings by reason of excessive damages, extends to the whole highway as located, and not to a part of it. It is the entire prayer of the peti-

tioners which is to be denied, and not for the specific portion of the highway only, where excessive damages may, in the judgment of the Commissioners, have been assessed. An opposite construction might occasion great injustice to such land owners as had had their land taken for the road, and small damages allowed them, by reason of the advantages to them arising from the establishment and location of the highway as fixed upon and determined in the original proceedings. The expectation of such advantages may have made them satisfied with the damages as awarded by the Commissioners; and, for this reason, they may have taken no action for an increase of damages within the time allowed by the statute, when they certainly would have done so but for the personal benefits arising from the anticipated enjoyment of the highway as located, and perhaps entirely from that part attempted to be annulled or discontinued.

It is plain that the Commissioners of a single county cannot disaffirm the proceedings of two or more boards of Commissioners in establishing and locating a highway in different counties, so far as said highway is not within the limits of the county for which they are appointed; and, it is unreasonable to suppose that the Legislature intended, in cases of highways so established, to confer upon a minority of the same tribunal which established such highway, the power to annul or discontinue that part of it which was located within the general jurisdiction of such minority. Such a power would be sufficient to overthrow or defeat the deliberate adjudication of the majority. The summary power, therefore, which is conferred upon a single board of County Commissioners by the sections of the statute now under consideration, can be exercised only over such highways as were established and located by such board alone. There is nothing in the language of this section which extends it to such highways as require, in their establishment and location, the action of Commissioners of more than one county. If it had been the legislative intention to confer such extraordinary power over the action of a tribunal composed of different boards of Com-

missioners, upon a single constituent board, we cannot doubt that such intention would have been plainly expressed in the statute. *Banks & als., appellants,* 29 Maine, 288. The attempt, therefore, on the part of the Commissioners of Oxford, to discontinue a portion of the highway established by the joint action of the several boards, as set forth in the agreed statement of facts, was wholly inoperative. Our answer, therefore, to the first question, is, that it was not competent for the Commissioners to reject or discontinue a portion of said location for excessive damages.

It appearing from the foregoing discussion, that the order and adjudication for a discontinuance of a part of the highway, by reason of excessive damages, was wholly unauthorized by the statute, our answer to the second question is, that the entire original location stands, and no part of said highway is defeated, by any subsequent action appearing in the case.

The third and only remaining question is, whether the damages which the plaintiffs are entitled to recover, should be paid by the county of Oxford or Androscoggin. It appearing that all the proceedings, by which the lands of the several plaintiffs were taken and appropriated for said highway, were commenced and closed before the incorporation of the county of Androscoggin, and that the judgments on which these suits are founded are against the county of Oxford, the defendants alone are liable for the damages which were finally awarded, and which are sued for in these actions. R. S. of 1857, c. 18, § 29.

The only difference in the two cases now before us, consists in the fact, that the land of the plaintiff Conant, was affected only by that portion of the highway which was not attempted to be discontinued, while that of the plaintiff Jones, was upon the part so attempted to be discontinued. From the view we have taken, this fact is wholly immaterial, and the result is, that both plaintiffs are entitled to recover, and judgments are to be entered in their favor for the several

sums awarded by the committee, with interest from the time the same became payable. *Defendants defaulted.*

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

LEVI DENNEN *versus* CHARLES H. HASKELL.

A promissory note, payable on demand, which was negotiated within thirty days after its date, to a *bona fide* purchaser, will not be considered as having been overdue and dishonored, so as to subject the indorsee to any equities existing between the original parties to it.

Where a party excepts to the admission of any testimony given at the trial of his action, and such testimony was admissible, in the case, for any purpose, the exceptions will not be sustained, unless it appears affirmatively, by the bill of exceptions, that the testimony was admitted for an unauthorized purpose.

ASSUMPSIT on "a promissory note, [of $100,] signed by defendant, dated April 20, 1857, and payable to Benjamin Ryerson, or order, on demand, with interest, and by said Ryerson indorsed."

The case was tried at April term, 1858, GOODENOW, J., presiding; and was brought to the law court on EXCEPTIONS taken by plaintiff. The matters excepted to appear in the opinion of the Court.

Frye, of counsel for plaintiff, argued in support of the exceptions.

Record & Walton, contra.

The opinion of the Court was drawn up by

MAY, J.—The exceptions in this case are very inartificially drawn. It does not appear from them which was the prevailing party, unless the fact may be inferred from the circumstance that the plaintiff is the excepting party. Whether the

cause was submitted to a jury or to the presiding Judge, is not stated. There is, therefore, nothing in the case from which we are enabled to determine, whether the plaintiff was an aggrieved party, in any such sense as of right to be entitled to exceptions.

The note in suit appears to have been indorsed before the expiration of thirty days from its date. In the absence of all evidence, tending to justify a different conclusion, we are not prepared to say, that a note like the present, payable on demand, is overdue and dishonored, at the expiration of thirty days. We think it is not, and that an indorsement, made to a *bona fide* holder, at any time within that period, will shut out any equities that may exist between the original parties. *Ranger* v. *Carey & al.*, 1 Met. 369; 3 Hill, 582.

The testimony of Downer Harris, that, on the morning of May 17, 1857, he inquired as to the note, and Ryerson, the payee, informed him that he had found a man to take it, does not appear to have been objected to. If it had been, it is not perceived upon what ground it was admissible. Ryerson was not then the holder of the note, and no testimony is recited in the case showing that he had any interest in it at the time, that would make his declarations admissible. The testimony, therefore, is simply hearsay. It is not perceived, however, how the plaintiff could have been injured by it, as its direct tendency was to show the truth of the plaintiff's proposition, that the note was indorsed previous to the expiration of thirty days. The fact, that Ryerson sought a man to take it, would not affect the holder, unless he had some reason to know or suspect that some equitable defence to the note then existed, which does not appear.

A contract between Ryerson and the defendant, bearing even date with the note in suit, is a part of the case. By this it appears that Ryerson agreed to sell and deliver, and the defendant to purchase, all the horses, carriages and harnesses then used by said Ryerson in the hack business, at a price to be determined by James Dingley, of Auburn, and Alvin Howard, of Lewiston, they being authorized, in case of

disagreement, to select a third man, and the contract further provided that, in case either party should fail to perform the agreement, he should "pay to the other the sum of one hundred dollars as liquidated, fixed and settled damages." This contract, and the note in suit, are both witnessed by the same person. It was claimed by the plaintiff, that the note in suit was a settlement of said forfeiture.

The defendant introduced James Dingley, one of the appraisers, as a witness, for the purpose of showing that misstatements were made to the appraisers at the time of the appraisal, by Ryerson; and he testified that Ryerson said, one pair of the horses was as good and sound as when he purchased them. This testimony was objected to, on the ground that the appraisers were not a tribunal to *try* the value of the horses, and listen to evidence, but were to make up their judgment as experts from an examination of the property. The objection was overruled. Upon looking into the contract, no such limitation upon the powers of the appraisers is found. They seem to have been left to ascertain the value of the property in such manner as they might deem best. It was, undoubtedly, the intention of the parties, that they should make up their judgment from their knowledge of such property, and such facts in relation to it as they might learn. No objection to this mode appears to have been made at the time of the appraisal. Under these circumstances, the objection urged against the admission of the testimony is invalid.

There was also testimony from Timothy E. Fogg, tending to show that one of the horses, agreed to be sold, had been foundered while in the possession of Ryerson, and before the appraisal. This testimony was objected to by the defendant, not only for the same reason urged against that of Dingley, but also on the ground that there was no evidence to show that, if the horse was foundered, the fact was unknown to the appraisers and was not considered by them in their appraisal. The purpose for which this testimony was admitted, does not distinctly appear. If it was simply for the purpose of showing that the appraisers had erred in their estimation of the

value, it was not admissible, because their judgment as to that, in the absence of fraud, was final upon the parties. If, on the other hand, it was admitted for the very purpose of showing fraud to have been practiced upon the appraisers by Ryerson, so as to obtain an over valuation of the property, then it might have had a tendency, in connection with other facts, such as an affirmation of the soundness of the horse, and knowledge of its falsity by Ryerson, to establish such fraud, and the establishment of such fraud might have imposed upon the plaintiff the necessity of proving that he came by the note in the usual course of business, for a valuable consideration, and unattended with any circumstances justly calculated to awaken suspicion; and this would be so, nothwithstanding Ryerson had found a man to take it before it was dishonored. *Perrin* v. *Noyes*, 39 Maine, 384.

As the testimony, therefore, might have been admissible, and the facts recited in the exceptions do not affirmatively show that it was not, the exceptions cannot be sustained. If a party excepts to the admission of testimony, and it is apparent that it was admissible for any purpose, the excepting party has no ground of complaint if his exceptions are overruled, unless he shows affirmatively that it was in fact admitted for an unauthorized purpose, and this should appear upon the face of the exceptions. We are, therefore, brought to the conclusion that, if the exceptions in this case were allowable, they must be overruled. *Exceptions overruled.*

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

WILLIAM B. CUMNER *versus* MANLY O. BUTLER.

The plaintiff took goods from the store of B. & D., under an agreement with the defendant, assented to by B., one of the firm, that they should be received in part payment of his demand against defendant. The goods were charged to plaintiff on the firm's books, which were afterwards assigned to a creditor of the firm. The assignee and D., claimed to hold the plaintiff therefor: — *Held*, that the defendant alone was responsible to the firm for the amount of the goods, although they had been charged to the plaintiff.

ASSUMPSIT upon account, amounting to $105,35. Plea, general issue, with set-off $26,98. The account is for labor performed on the dwellinghouse of defendant.

The parties agreed upon the following statement of the case for the decision of the full Court: —

"The account in set-off is for groceries, &c., taken up at the store of Butler & Dakin. The firm of Butler & Dakin was composed of Charles V. Butler and Dakin. M. O. Butler, the defendant, acted for, and was the agent of Charles V., without any written authority. M. O. Butler agreed with the plaintiff that whatever articles he took at the store of Butler & Dakin, should go in payment of labor done and performed on the house, which agreement Charles V. ratified. The plaintiff took up the goods in the set-off in pursuance of said agreement. Dakin, the partner of Charles V. Butler, understood that the plaintiff was to have a longer credit than usual, (which was one month,) upon the goods purchased at the store of Butler & Dakin, so that M. O. Butler might raise the money and pay the plaintiff, in order that the plaintiff might pay the firm of Butler & Dakin. The goods were charged to the plaintiff, and Dakin looked alone to the plaintiff for pay; after the account in set-off accrued, Butler & Dakin stopped payment, and made an assignment of their books containing that account, which the assignee claims. The account of the assignee accrued after the agreement between M. O. Butler and W. B. Cumner.

"It is agreed, that if the amount in set-off cannot be allow-

ed, judgment is to go by default; otherwise, judgment for the balance due to the plaintiff, to wit, $78,37."

W. P. Frye, for plaintiff.

H. G. Cilley, for defendant.

The decision of the Court was announced by

DAVIS, J. — That, it was competent for M. O. Butler to make such contract with the plaintiff as they could agree upon. If, "whatever articles the plaintiff took at the store of Butler & Dakin were to go in payment of the labor," then the plaintiff's account has been paid by such articles to the amount of $26,98. Though the articles were charged to the plaintiff, the defendant, and not the plaintiff, is responsible to Butler & Dakin for them, or to their assignee.

Judgment for the plaintiff for the sum of $78,37.

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

STATE OF MAINE *versus* JOHN CASEY.

Where the same section of an Act prohibits an offence, and specifies the acts of which it consists, an indictment for its violation must, by express words, bring the offence substantially within the statute description. In such case, the circumstances mentioned in the statute, to make up the offence, cannot be dispensed with, by the general conclusion *contra formam statuti.*

But when the offence is prohibited in general terms in one section of the statute, and in another section, entirely distinct, the acts are specified of which the offence consists, it is not necessary that any thing but the general description should be set out in an indictment.

An indictment under the statute of 1856, alleging that J. C., at a time and place named, "did keep a drinking-house and tippling-shop contrary to the form of the statute," is sufficient.

INDICTMENT under the statute of 1856, for keeping a drinking-house and tippling-shop. After verdict against him, the

defendant moved in arrest of judgment, for reasons which sufficiently appear in the opinion of the Court. The motion was overruled by GOODENOW, J., before whom the case was tried, and the defendant filed exceptions.

The EXCEPTIONS were argued by

Guiney, for the defendant, and by

Appleton, Attorney General, for the State.

The opinion of the Court was drawn up by

DAVIS, J. — This is an indictment against the defendant upon the statute of 1856, c. 255, § 15, "no person shall keep a drinking-house or tippling-shop within this State."

The only charge in the indictment is, that the defendant did, at the time and place named therein, "keep a drinking-house and tippling-shop, contrary to the form of the statute."

There is another section of the same statute, defining the offence, and providing that it shall consist of certain specified acts; and it is contended that this description should have been set out in the indictment. That this is in accordance with the usual practice, cannot be denied; and if the prohibition and the definition were both in the same section, we should have no doubt that the offence ought to be charged in the language of the description in the statute. For it is well settled that the indictment must, by express words, bring the offence within the substantial description made in the statute; and those circumstances mentioned in the statute to make up the offence, shall not be supplied by the general conclusion "*contra formam statuti.*" 2 Hale, P. C., 170; *Rex* v. *Cox*, 1 Leach, 83; *Rex* v. *Taylor*, Shower, 190.

But where the offence is prohibited in general terms in one section of the statute, and a penalty prescribed, and in another section, entirely distinct, there is a particular description of the elements which shall constitute the offence, we perceive no reason, upon principle or authority, why the indictment should contain any thing more than the general description. That

gives the defendant sufficient notice of the charge he is to meet, as effectually as if the whole description should be incorporated into the indictment. The indictment in this case sets out the time, and the place, and the offence, with sufficient certainty. *Commonwealth* v. *Ashley*, 2 Gray, 356.

Exceptions overruled.

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

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1858.

COUNTY OF SAGADAHOC.

SYLVESTER ROACH *& ux. versus* ELBRIDGE RANDALL.

The promissory note of a married woman cannot be legally enforced.

And where she joins with her husband in a note for money loaned to him and gives a mortgage of her real estate as security therefor, which note is afterwards paid with money obtained upon another note, in which she joined with her husband, (to secure which, she gave another mortgage of the same estate,) the husband *only* is entitled to the action provided by statute to recover back from the payee of the first note a sum taken as usurious interest.

An amendment of a writ by striking therefrom one or more of the several *plaintiffs*, should not be allowed, especially where the relations of the parties and the character of the claim have not been changed since the suit was instituted.

ASSUMPSIT to recover an excess of interest beyond the legal rate, paid by the plaintiffs to the defendant upon a loan of money.

Plea, general issue, and brief statement of the statute of limitations. Writ dated March 11, 1856.

At *Nisi Prius*, before GOODENOW, J., Sylvester Roach, one of the plaintiffs, testified, (being objected to but admitted,) that in February, 1852, he obtained of the defendant, on a loan for three years, the sum of $416,66, that he gave to the

defendant a note of hand, signed by himself and his wife for the sum of $541,66, payable in three years, with interest annually, which note was secured by a mortgage of the same date, of real estate belonging to his wife, and executed by both plaintiffs to defendant; that the sum of $125, included in the note, beyond the amount received of defendant, was for "bonus interest," as the defendant called it, being at a rate of ten per cent. per annum for the period of three years, beyond the rate of six per cent., that this was the rate which he agreed to pay.

Cross-examined. Some of the payments of interest which are indorsed on the note, were made by him and some by his wife; did not know whether the payments by his wife were from his money or her own. Interest was paid annually on the whole note, as appeared by indorsements, and payments amounting to $300 of principal, also, were made as indorsed. One Groves first applied to defendant for the money, and reported the terms upon which defendant would furnish it, and witness agreed to the terms.

Joseph Huse, called for plaintiffs, testified that, early in Feb. 1856, went with Mrs. Roach, one of the plaintiffs, to defendant's house; she paid him $241,66, being the balance then due on a note of $541,66, which defendant held against her and her husband. I handed him the money at her request. He gave up the note and discharged the mortgage which he held as security.

I furnished the money to plaintiffs to make this payment, and took a note for the amount signed by both plaintiffs, which I now hold, and a mortgage of same estate which defendant held as security.

In defence:—

Henry Groves testified, in February, 1852, Roach, and one White, and myself agreed to go to California; applied to defendant to loan us money for that purpose; White and I went to see him; he did not know that he could furnish the whole; said he would see if he could get it for us and let us know in a short time. In a few days he came to Bath and met us;

said he could let us have $1250, but should exact ten per cent. for getting the money for us. We agreed to take it on his terms. The $1250 was divided equally among us. We received $416,66 each. I went to California; Roach did not. On my return, I paid my note in full. It was $541,66.

Cross-examined. The excess of the note beyond the amount received, was "for extra interest for three years for getting the money for us." It was ten per cent. a year for three years.

The case was then taken from the jury to be submitted on REPORT to the full Court, who are to have all the powers of a jury. The parties agreed that, if the action is maintainable upon the evidence legally admissible in the case, the defendant is to be defaulted, and judgment entered up by the Court; otherwise, plaintiffs to be nonsuit. If, however, the Court should be of opinion that the action is not maintainable by the plaintiffs jointly, but is maintainable by either alone, and that the writ is legally amendable, the case shall be remanded for trial with liberty to plaintiffs to move to amend the writ, by striking out one of the plaintiffs, which motion shall be determined by the presiding Judge as to law shall appertain.

Evans, senior counsel of plaintiffs, argued: —

That assumpsit is the proper remedy to recover back an excess of interest beyond the legal rate given by statute c. 69, § 5; R. S., 1857, c. 45, § 3; *Webb* v. *Wilshire,* 19 Maine, 406; *Pierce* v. *Conant,* 25 Maine, 33.

The statute makes a clear distinction between "receiving" and "taking," § § 2 and 7. Excessive interest is not *paid* until it is "taken." There is no action given against one, who "receives" the excess merely. It is only for *payment* to recover back money actually paid and "taken." The excess claimed here was not *paid* until the final settlement, "early in February, 1856." The action was commenced March 11, 1856.

"If the Court shall be of opinion, that the action is not maintainable by the plaintiffs jointly," then, &c. This only

means, that if, in the posture in which it is presented to the Court, it is not maintainable. Now, many actions are maintainable and maintained, because, what would have been a fatal objection was not presented in a proper way and at a proper time, as in cases where abatement should have been pleaded.

In the case at bar, if the question was intended to be raised, whether the plaintiffs could join in the action, it should have been presented in the specifications of defence, or, being a question of mis-joinder, by plea in abatement. There being no such statement or plea, the Court will not come to the conclusion that the action is not jointly maintainable.

But, we maintain, that the action is rightly brought by both plaintiffs. It is given by statute to the party who pays the excess. "Whoever shall pay," is the language. If the plaintiffs *jointly* paid, the action, not only *may* be, but *must* be by both, although one be under coverture, and ordinarily disqualified to sue.

The actual payment was from a joint fund, obtained on a joint note, secured by mortgage of the wife's property. Sureties, who pay for their principal by a joint note, are entitled to join in an action for indemnity.

It is no sufficient answer to say that the note to Huse, upon which the money was obtained, was void, as to the female plaintiff, she being under coverture. That is a matter between her and Huse, with which defendant has no privity and no concern. *Ellsworth* v. *Mitchell*, 31 Maine, 247.

The money was obtained upon the mortgage of the wife's property, executed by husband and wife. This was sufficient to convey her estate.

The statute of Maine, regarding the rights of married women, makes no other alteration in this respect, except to permit her "to sell and convey" as well as "to manage," without "the joinder or assent of the husband." What she may do without, she may do with. She may mortgage, to secure her husband's debts, and thus become surety for him and will be subrogated to the rights of a surety. *Van Horne*

v. *Emerson*, 13 Barb. 526; *Ventee* v. *Underwood*, 18 Barb. 561; *Damarest* v. *Wynkoop*, 3 Johns. Ch. 144.

An action to foreclose a mortgage, given by husband and wife, of the wife's estate, must be against both, or her equity will not be barred. *Swan* v. *Wiswell & ux.*, 15 Pick. 125; *Nash* v. *Spofford & ux.*, 10 Met. 193; 2 Hilliard on Mortgages, p. 97, § 83.

Undoubtedly, also, a bill in equity to redeem in such case, must be in the name of both.

So, if payment be made to redeem, embracing excess of interest, by the wife, being made to protect her interest, why may she not, though under coverture, have an action to recover back?

If she may redeem and "manage," as by statute she may, why not borrow money and give a note binding on herself to obtain the means of redemption?

If she is entitled to the action alone, having herself made the actual payment by money obtained by her means, it is no objection that the husband is joined in the suit. R. S. of 1857, c. 61, § 3; *Ballard & ux.* v. *Russell*, 33 Maine, 196.

We maintain, then, that the action is maintainable by both plaintiffs, if the payment was made jointly, or if made by the wife alone, from her own means. If the Court shall be of opinion that it is maintainable by the husband alone, it is to be remanded for further proceedings.

Upon the question of amendment, by striking out the name of one of the plaintiffs, the following cases were cited and commented upon. *Rehoboth* v. *Hunt*, 1 Pick. 224; *Thayer* v. *Hollis*, 3 Met. 369; *Johnson* v. *Huntington*, 13 Conn. 47; *Chadbourne* v. *Rackliff*, 30 Maine, 359; *Treat* v. *McMahon*, 2 Greenl. 358; *Cutts* v. *Gordon*, 13 Maine, 474; *Davis* v. *Saunders*, 7 Mass. 62.

J. Smith, for defendant, argued: —

That the testimony of the *husband* was inadmissible. The legal evidence in the case shows that the excess was not *for the use of the money*, but for defendant's trouble and expense in obtaining it.

But, were it otherwise, this action cannot be maintained. The statute upon which it is brought, provides that, "whoever, on any such loan, shall in any manner pay a greater sum or value than is by law allowed to the creditor, may recover," &c. Such action is remedial, not penal. *Darling* v. *Murch*, 22 Maine, 184. The person who has suffered is entitled to the remedy. Was the money paid, either the money of the wife, or of the husband and wife? If neither, she has no remedy, nor does she need any.

The money was borrowed for the husband: Her signature to the note imparted no additional security. As to her, it was absolutely void. Chitty on Bills, 33; Story on Prom. Notes, § 85, p. 91. The statutes of this State do not authorize a married woman to make such a contract. *Howe* v. *Wildes & ux.*, 34 Maine, 566, 41 Maine, 242; *Davis* v. *Millette & ux.*, 34 Maine, 429.

The money obtained of defendant was on the note of the husband alone, for he alone was liable to pay it. So of the note given to Huse. If, then, the money received of Huse was the husband's, it was paid by *him* to defendant, and he alone was entitled to the statutory remedy.

The writ cannot be amended by striking out the name of either of the plaintiffs. The case at bar is distinguishable from *Windsor* v. *Lambard*, 18 Pick. 57. Here, the rights of the parties would be changed. A new action would be barred by the statute. The amendment would deprive the defendant of the right which the statute limitation gave him.

The opinion of the Court was drawn up by

TENNEY, C. J.—The plaintiffs gave to the defendant their joint note, which is alleged to have been for an usurious consideration, and the money which was paid for the excess beyond the sum actually received from the defendant, and legal interest thereon, is sought to be recovered in this action.

The mortgage of the real estate of the wife was for the security of the note. But the money, for which the note was given, was received by the husband; and it does not appear

that the mortgage was ever resorted to, on the part of the defendant, for the purpose of obtaining payment, or an indefeasible title to the estate.

The note which the wife signed, created no legal obligation on her to pay it. A suit against her, either alone or jointly with her husband upon it, could not be maintained. 1 Black. Com. 442; *Howe* v. *Wildes & ux.*, 34 Maine, 556.

The obtaining of the money from Huse upon the note of the plaintiffs, secured by a mortgage of the same land held by the defendant, as security, for the purpose of paying the note to him, could not affect the case. This was a matter foreign to the transaction, which is alleged to be illegal. This money was borrowed on the personal security of the husband, and the wife was not liable thereon.

The action cannot be maintained in the name of the two plaintiffs.

In the case of *Chadbourne* v. *Rackliff*, 30 Maine, 354, which was a real action, the writ was allowed to be amended by striking out the name of one of the demandants, but this was upon the ground that the tenant had acquired the title of one of the original demandants, after the commencement of the suit. The same has been done in suits where one of the defendants was an infant, at the time he executed the contract, and he relied upon that as a defence. *Woodward* v. *Newhall & al.*, 1 Pick. 500; *Cutts* v. *Gordon*, 13 Maine, 474. The same has often been done, where one of two or more defendants has become a bankrupt pending the suit. It was held, in *Minor & als.*, v. *The Mechanics' Bank of Alexandria*, 1 Peters, 46, that where there are several defendants, and they sever in their pleadings, a *nolle prosequi* ought to be allowed.

In this State, a plaintiff can strike from his writ, one or more defendants, and proceed against others, and can insert new defendants on certain conditions. R. S. of 1841, c. 115, § § 11 and 12; R. S. of 1857, c. 82, § 12. But our attention has been called to no case where one of two or more plaintiffs has been allowed to retire from the suit, when all of them had full opportunity to know who should constitute the prose-

cuting party, and nothing has taken place since the commencement of the suit to change the relations of the parties, or the character of the claim. It is believed that such permission by the Court would be inconsistent with well established principles and general practice.

In the case at bar, the plaintiffs must have known, before the institution of the suit, whether the wife had, in her own right, any ground of action, and when it is found, after a full hearing, that the action cannot be maintained in the name of the two, their condition in reference to the proceedings having undergone no change, we think the amendment cannot with propriety be made. *Plaintiff nonsuit.*

RICE, HATHAWAY, MAY, APPLETON, and DAVIS, J. J., concurred.

CHARLES THOMPSON, *App't, versus* CHARLES E. WHITE, *Adm'r.*
SAME *versus* MARGARET SMALL.

Where a master of a vessel, who had loaned a part of the money received for freight, and taken a promissory note therefor, payable to himself, died before the note was paid, his administrator will not be entitled to retain it; such note being the property of the owner of the vessel, held by the master in trust, and clearly distinguishable from the other assets belonging to his estate.

If the administrator, after the owner had demanded the note of him, collect it, he will become *personally* liable to the owner for the money.

CHARLES E. WHITE, the appellee, in the case first named, as administrator of the estate of George H. Small, presented an account of administration, which was approved by the Judge of Probate for the county of Sagadahoc.

At the same Court, the Judge of Probate, on application of said Margaret Small, the widow of said intestate, decreed to her an allowance of $700, out of the personal estate of the deceased.

The said Thompson, as a party interested and aggrieved,

appealed from the allowance made to the widow, and also from the approval of the administrator's account by the Judge of Probate.

At *Nisi Prius*, MAY, J., presiding, the parties agreed to submit the cases to the full Court on report of the evidence.

The cases were heard and considered together. The material facts reported, and the questions presented, appear in the opinion of the Court.

Barrows argued for appellant.

Bronson & Sewall, for the appellees.

The opinion of the Court was drawn up by

DAVIS, J.—The appellee, in the case first mentioned, is administrator of the estate of George H. Small. From the evidence reported, it appears that Small was master of a vessel owned by the appellant, and that, in Havre, in January, 1856, he received freight to the amount of 38,450 francs. This money was paid by him to Messrs. Barbe & Morisse, the consignees, by whom the vessel's accounts were kept.

While in Havre, Capt. Small loaned to one Alexander three hundred dollars of the money belonging to the vessel, taking a promissory note therefor, payable to himself. He died on his return, and this note was in his hands, unpaid, at the time of his decease. The appellant claimed it of the administrator, into whose possession it had come, but he refused to give it up; and it was appraised as part of the estate, and was afterwards paid by Alexander. The administrator charged the amount to himself; the whole of the personal estate, except $78,24, was given to the widow as her allowance, and the administrator's account, crediting himself with this payment, was approved by the Judge of Probate.

We cannot doubt that the money loaned by Capt Small, for which the note was given, was the property of the appellant. The note was, therefore, the property of the appellant, and was held by Small in trust. It was distinguishable from the other assets of the deceased; the administrator had no-

tice that it belonged to the appellant; and, the proceeds having come into his hands, he is personally liable therefor. *Chesterfield Manufacturing Co.* v. *Dehon*, 5 Pick. 7. It is important, therefore, for his own protection, that the proceedings in the Probate Court should be made to conform to the rights of the parties. Before any allowance is made to the widow, he should credit himself with the amount received on the note, that the amount of personal property may be known.

The decree in each of the cases is reversed, and they are remitted to the Probate Court for further proceedings.

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

CONCORD UNION MUT. F. INS. CO. *versus* CHARLES WOODBURY.

The publication of notice by a mortgagee, that he claims to foreclose the mortgage for condition broken, is no bar to an action afterwards brought, to obtain possession of the mortgaged premises.

In an action for possession against a mortgager, he is estopped by his deed to deny his title to the mortgaged premises at the time of making the mortgage.

If a mortgagee insures his own interest, without any agreement between him and the mortgager therefor, and a loss accrues, the mortgager is not entitled to any part of the sum paid upon such loss, to be applied to the discharge or reduction of his mortgage debt.

Where the mortgagee effects insurance at the request and cost, and for the benefit of the mortgager, as well as his own, the mortgager has the right, in case of loss, to have the money appropriated to the discharge of his indebtedness.

Whether a company, which has insured mortgaged property *for the mortgagee*, are entitled to be subrogated to the rights and claims which he has to the property and mortgage debt, upon payment of the loss which had accrued; — *quære*.

WRIT OF ENTRY, dated Feb. 27, 1856. The demandants counted on their own seizin of the demanded premises in fee

and in mortgage as assignees of a mortgage given to one J. P. Morse. Plea, general issue and brief statement.

At *Nisi Prius*, GOODENOW, J., presiding, the plaintiffs produced a deed of mortgage of the demanded premises from defendant to said Morse, dated Oct. 1, 1853, to secure the payment of a note of same date for $280, payable in one year from date, and interest, duly acknowledged and recorded, also an assignment of the same on the back thereof, from Morse to plaintiffs, dated May 7, 1855, which had been recorded; also the note indorsed by Morse.

The plaintiff also exhibited in evidence, that Morse, on the 7th day of December, 1854, caused notice to be published, conformably to the statute, claiming to foreclose said mortgage for breach of the condition thereof, and that the same was duly recorded.

In defence, was offered a deed of the premises from Jeremiah Robinson to Martha Woodbury, wife of defendant, dated April 3, 1852, duly acknowledged and recorded, and it was contended, by counsel of defendant, that he had no title to the premises at the date of his deed of mortgage. The defendant not claiming to hold under any conveyance from his wife, the presiding Judge ruled that defendant could not controvert the plaintiff's title derived from his own deed of mortgage, and was estopped from setting up title in Martha, his wife.

The defendant, thereupon, moved the Court to order a nonsuit, and contended that, it appearing from evidence adduced by the plaintiff that the mortgagee had duly published his notice of foreclosure agreeably to the statute, for conditions broken, the demandants could not maintain this action; but the presiding Judge, being of opinion that the action was maintainable, declined to direct a nonsuit.

Whereupon, by consent, the case was taken from the jury and referred to the full Court; and, if the Court shall be of opinion that the ruling and refusal of the Judge were correct, and that the action is maintainable upon the evidence in the case,

the defendant is to be defaulted, otherwise, the action to stand for trial.

On a subsequent day of the term, the counsel for the defendant, filed an affidavit, setting forth in substance, that, at the trial, the junior counsel of plaintiffs, in the opening statement of the plaintiffs' case to the jury, was understood by him to say, as a matter of fact, that the defendant and said Morse procured a policy of insurance, *for their joint benefit*, on the house and buildings on the premises in controversy; that, a loss by fire having occurred, the company refused to pay so much of the loss to the mortgagee as would cover the mortgage, unless the mortgagee would assign the mortgage to the company; that, therefore, he did so assign the mortgage and the plaintiffs paid him the amount secured by the mortgage; that, regarding these statements as admissions, on the part of the plaintiffs, he waived, as unnecessary, other proof, which he intended to offer to establish the facts stated. He therefore moved that the case might be re-opened and an opportunity be granted to the defendant to produce the evidence of the facts stated, that the same might appear in the report of the evidence in the case, so that the rights of the parties might be adjusted by the Court upon evidence of all the facts existing and intended to be shown to the Court.

Whereupon the counsel of plaintiffs consented that the statement of defendant's counsel might be annexed to, and made a part of the report of the case; and if, in the opinion of the Court, the facts so supposed to be admitted, would, if proved, constitute a defence, then the action shall stand for trial.

Evans, for plaintiffs, argued:—

1. That the defendant is estopped, by his own deed, from controverting the plaintiffs' title. This principle is sustained by numerous authorities, of which a few only need be referred to. *Ham* v. *Ham*, 14 Maine, 353; *Heard* v. *Hall*, 16 Pick. 459; *Comstock* v. *Smith*, 13 Pick. 120; *Johnson* v. *Murray*, 12 Johns. 201; *Jackson* v. *Ball*, 1 Johns. Cases, 91; 4 Kent's

Com. 260, note c, 6th ed.; *Wilkinson* v. *Scott*, 17 Mass. 257; *Nash* v. *Spofford*, 10 Met. 192.

2. The action is maintainable notwithstanding prior publication for foreclosure. The object of the suit is to *obtain possession*, which is not obtained by publication. *Merriam* v. *Merriam*, 6 Cush. 91; *Fay* v. *Valentine*, 5 Pick. 418; 2 Hill. on Mort. 131, § § 16, 17; *Smith* v. *Kelley*, 27 Maine, 237.

3. The matter stated in the affidavit of counsel, if true, furnishes no defence.

The policy was running to Morse, and payable to him in case of loss. His interest was that of mortgagee of the premises. He could insure nothing and receive nothing beyond the value of that interest, the amount secured to him by mortgage. Nor was he entitled to be paid that, but upon an assignment of the debt and security to the insurers. Angell on Ins. § 59; ib. § 66, note 2, p. 109, citing 2 Phil. on Ins. 282; *Etna Fire Ins. Co.* v. *Tyler*, 16 Wend. 397, and others beside.

4. The proof alluded to in the affidavit would not be admissible to vary the contract contained in the policy, or to show that it was intended to cover the interest of the mortgage. The rule, that a written contract cannot be varied by parol, is too familiar to need authorities. Angell on Ins. § 21, citing Duer on Ins. 216; *Higgins* v. *Dale*, 13 Mass. 99.

If, by mistake, accidental omission or fraud, the policy is not what it was intended to be, it might be reformed in equity. Angell on Ins. § 22.

5. But if, as suggested, the policy was intended to cover, and does actually cover the interest of the mortgagee in the premises, it furnishes no defence to this action. Morse had no interest beyond the amount due him, secured by mortgage. That he was bound to assign, and has assigned. The mortgage has not been canceled or discharged, is in full force, and plaintiffs are entitled to possession.

Gilbert, for the defendant, argued: —

If the deed of Robinson was properly excluded, then the respondent is to be regarded as the tenant of the freehold.

And, for the purposes of this trial, it is to be considered that he, as mortgager, and the mortgagee procured the insurance on their premises for their mutual benefit. Thus, in case of loss, the mortgagee would still have security for his debt, and, at the same time, the mortgager would have the benefit of the insurance by the extinguishment of the mortgage.

In the absence of such an arrangement, it would have been necessary for both mortgager and mortgagee to have insured independently of each other, or else he who neglected to insure would have no benefit of insurance.

Having thus procured insurance by their mutual action, the mortgagee had but a mortgage interest in the money, payable in case of loss. Receiving that in diminution of the amount equitably due to the mortgager, his mortgage is *ipso facto*, in legal operation, discharged. Its functions ceased, and it was no longer assignable.

The attempt on the part of the underwriters to become assignees of the mortgage, by a refusal to pay Morse's part of the loss without an assignment, was a fraud upon Woodbury's rights. The loss having accrued, their obligation was to pay the stipulated amount, and that without indemnity. That obligation was for the ultimate benefit of Woodbury, since the amount of the mortgage being received by Morse, it would thereby become extinguished, and so, in effect, Woodbury would have received so much.

By the method attempted, instead of payment of a loss, the underwriters purchase a mortgage, and, upon it, undertake to enforce a re-payment by Woodbury of the amount which they have paid upon a policy intended for his benefit.

If this scheme could prevail, the underwriters would, by it, escape the payment of so much of the loss as is embraced in the amount of the mortgage debt. This is against good conscience. It is fraud.

We contend, therefore, 1st, the insurance having been procured by the mutual action of mortgager and mortgagee for their mutual benefit, the payment of the amount of the mort-

gage to Morse, operated as a discharge of the mortgage. This alone is fatal to the action.

2d. The attempt to compel Woodbury, who had, by concurrent action with Morse, secured himself against loss by fire, to repay that part of the loss embraced in the amount of the mortgage, was a fraud. And this alone is fatal to the action.

The opinion of the Court was drawn up by

APPLETON, J.—It appears that one Morse having a mortgage from the tenant to secure two hundred and eighty dollars on the premises demanded, on Oct. 5, 1853, effected an insurance thereon at the office of the plaintiffs. In his application he stated his interest to be that of a mortgagee, and the amount due upon the mortgage, and obtained insurance for five hundred dollars. In December, 1854, Morse advertised in due form, a foreclosure of his mortgage. A loss afterwards ensued, and the plaintiffs declined payment, unless Morse would assign his mortgage. The amount due him was thereupon paid, and he assigned his mortgage and the note thereby secured, to the plaintiffs, who commenced this action to recover possession of the mortgaged premises.

It appeared in the defence, that one Robinson, on April 3, 1852, conveyed the demanded premises to Martha Woodbury, the wife of the tenant, in whom the title thus acquired, remains.

If the deed to the tenant's wife conveyed to her the legal title, it may well be doubted whether the plaintiffs might not have avoided the insurance, on the ground of misrepresentation as to the title. In such case, the payment to the mortgagee of his debt, would be a sufficient consideration for the assignment of the mortgage. If the deed conveyed no title, it could not, for that cause, be invoked by the tenant by way of defence. But it is unnecessary to discuss this question, as the tenant has no title derived from his wife, nor does it appear that he claims to be in possession in subservience to her title. He is estopped in this action, by his deed of mortgage,

to deny his title. The present suit is by the assignee of the mortgage against the mortgager. The wife of the mortgager is no party thereto, nor are her rights to be affected by its result. The judgment, if in favor of the demandant, would be no bar to her title, for it is not in any way in issue.

The statute provides for a foreclosure by publication in a newspaper, but such publication is no bar to an action for the possession of the premises mortgaged.

The mortgager and mortgagee have several distinct interests in the premises mortgaged, which either may insure for his own benefit.

When a mortgagee insures his own interest without any agreement between him and the mortgager therefor, and a loss accrues, the mortgager is not entitled to an allowance of the sum paid upon such loss, to be applied to the reduction or discharge of his mortgage debt, but the mortgagee may, notwithstanding, recover the whole amount due. *White* v. *Brown*, 2 Cush. 413; *King* v. *State M. F. Ins. Co.*, 7 Cush. 1; *Cushing* v. *Thompson*, 34 Maine, 496.

It is true, it has been repeatedly held where the mortgagee effects an insurance for his own benefit and a loss accrues, which is paid by the insurers, that they are entitled to have the mortgage and note assigned to them, which they may enforce against the mortgager. *Etna Fire Ins. Co.* v. *Tyler*, 16 Wend. 397; *Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet. 495.

This right of the insurers to subrogation, has been questioned in Massachusetts. It was held in *King* v. *State M. F. Ins. Co.*, 7 Cush. 1, that a mortgagee insuring his interest in mortgaged property against loss by fire, at his own expense, is entitled in case of loss, before payment of the mortgage debt, to recover the amount of such loss without first assigning his mortgage. "We are inclined to the opinion," remarks SHAW, C. J., "both upon principle and authority, that when a mortgagee causes an insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to recover the total loss

for his own benefit; that he is not bound to account to the mortgager for any part of the money so recovered, as a part of the mortgage debt; it is not a payment in whole or in part; but he has still a right to recover his whole debt of the mortgager. And so, on the other hand, when the debt is thus paid by the debtor, the money is not, in law or in equity, the money of the insurer who has paid the loss, or money paid to his use."

But the right of subrogation and the time when, and the mode in which that right may be enforced, does not arise in the present case, because the insured has made an assignment. If the mortgager had no interest in the insurance, he cannot complain of any disposition the mortgagee may make of the mortgage, for no rights of his would be injuriously affected thereby. As between the insurers and the insured, there is no controversy. The question of subrogation is left to be hereafter determined upon reason and the weight of authority, whenever it may arise.

While it is well settled that the mortgagee may insure for himself and at his own cost, and that when so insuring the mortgager is not to be benefitted thereby, it is equally clear, when the mortgagee effects an insurance at the request and cost, and for the benefit of the mortgager, as well as his own, that the latter has a right, in case of loss, to have the insurance money appropriated to the discharge of his indebtedness. When the mortgagee, at the request of the mortgager, effected an insurance on the mortgaged premises, and paid the premium, it was held, that the premium so paid was a charge upon the premises in addition to, and equally with the original debt. *Mix* v. *Hotchkiss*, 14 Conn. 32. If a loss accrues, the money, in payment, extinguishes the same amount of the mortgage debt. *King* v. *The State M. F. Ins. Co.*, 7 Cush. 1. The insurance in such case, is for the benefit of both parties, it being effected by the mortgagee in his own name, but at the cost of the mortgager, and at his instance, and for their mutual protection.

Whether the tenant will be able to prove, by competent

evidence, the facts set forth in the affidavit of counsel, is not the question now before us. They are material, in one aspect of the case, and by the agreement of parties, the case is to stand for trial.

TENNEY, C. J., RICE, HATHAWAY, MAY, and DAVIS, J. J., concurred.

CITY BANK *versus* BENJAMIN ADAMS AND BATH MUT. MARINE INSURANCE COMPANY, *Trustee.*

Where a company has issued a policy of insurance upon a vessel *for whom it concerns*, and a loss has accrued, the share of money payable by the company to one of the several owners, may be held by attachment on trustee process, by a creditor of such part owner of the vessel, although his name is not in the policy.

Parol evidence is not admissible to show that a promissory note was intended as a receipt.

THE question, in this case, is the liability of said corporation as the trustee of said Adams. The company, by one of its directors, after the general declaration that the corporation, at the time of service, had no goods, effects, or credits of the said Adams, further disclosed that on the 6th day of Nov. 1854, S. H. Fuller obtained for himself, and for whom it should concern, an insurance by the said company for twelve thousand dollars on the ship called Lavinia Adams, and a policy was issued. A loss of the ship occurred. The company denied their liability on the policy. Fuller commenced a suit, which was referred by a rule of Court. The report of the referees was made and filed, and the action was continued to this [December, 1857,] term. By compromise, the company has settled the loss and paid to William Purrinton, to whom the said Fuller had assigned the policy, the sum of $10,783,60, being seven-eighths of the sum agreed to be paid by the company to settle the loss, (and also as costs, the sum

of $238,45,) the remaining eighth part has been paid to the assignees of Joseph Berry, the said Purrinton consenting thereto.

The said Benjamin Adams was owner of three-sixteenths of said ship when the insurance was effected, and so continued to the time when the loss happened. That it appeared at the hearing before the referees, and may be assumed as a fact, for the purposes of the disclosure, that the insurance was effected for all interested in the ship.

That, at the time of payment to Purrinton, he gave his written agreement to indemnify the company against any claim the plaintiffs have by reason of their trustee process. The order or assignment of Fuller, is made a part of the disclosure. The loss of the vessel occurred before the service of the writ upon the company, which service was while the suit of Fuller was pending, and before the award of referees was returned to Court.

At the April term, 1858, MAY, J., presiding, the parties and said Purrinton, assignee, agreed to submit the question of the liability of the said insurance company, as trustee, to the full Court, on the disclosure made, the policy of insurance and certain depositions specified, to make part of the case.

The material evidence contained in the depositions, sufficiently appears from the opinion of the Court. On another policy, Adams had received a sum greater than his share; a part of which he had *loaned*, as he deposes, to Berry, one of the other owners. The plaintiffs contend that the money received by Berry, should be regarded as a payment of so much towards the sum he was entitled to, and not as a loan.

Gilbert, for plaintiffs, argued: —

That on a policy, such as is in this case, effected for whom it concerns, the party interested is entitled to recover the money for himself. Fuller had no interest in it. He was not an owner at the time of the loss.

Pacific Ins. Co. v. *Cattell*, 4 Wend. 75, in which case it was decided that one who had *a special interest* in the subject in-

sured, may maintain an action. For a still stronger reason, the general owner may, on a policy intended for his benefit, although his name is not in the policy.

The following cases were cited and commented upon:— *Farrar* v. *Com. Ins. Co.*, 18 Pick. 55; *Gardner* v. *Bedford Ins. Co.*, 17 Mass. 613; *Rider* v. *Ocean Ins. Co.*, 20 Pick. 259.

Fuller had no title to the money. Neither had Purrinton. He was simply authorized to receive it. And the order for that purpose was made by the agreement of the owners, treating this as the money of all the owners, Adams included. The debtor corporation is, therefore, the trustee of Adams, unless that relation is divested by other means.

It was further argued, from the evidence, it did not appear that Adams had received the amount of insurance to which he was entitled.

Bronson & Sewall, for trustees and for Purrinton.

The opinion of the Court was drawn up by

APPLETON, J.—The defendant was the owner of three-sixteenths of the ship Lavinia Adams. The owners had effected several insurances upon her, one of which was at the office of the trustees. The vessel was lost, and the defendant received from insurance companies, in which policies had been effected and in adjustment thereof in part, the sum of $7428,50, which was more than his share of the whole loss.

It appears from the deposition of the defendant, which, by agreement, is made a part of this case, that the defendant loaned the firm of J. Berry & Son, of which firm Joseph Berry, who owned one-sixteenth of the ship, was a member, the sum of three thousand dollars, and took from them their note for that amount.

After all this, and before the adjustment of the policy effected upon the Lavinia Adams, at the office of the trustees, by Samuel H. Fuller, for whom it should concern, service was made in this process upon the defendant and the trustees.

It is conceded that the defendant has received more than his share of the different insurances effected upon the ship, unless the three thousand dollars loaned to Joseph Berry & Son is to be treated as a payment to Joseph Berry towards his share of the moneys paid upon the loss. If that sum is to be regarded as an advance to Joseph Berry toward his proportion of the insurance, and should be accounted for in that way, then the defendant would not have received his share; but if that is to be treated as a loan out of his own funds, then the trustee should not be charged, for the defendant Adams would have been overpaid.

The authorities are conclusive that parol evidence is not admissible to show that a promissory note was intended as a receipt. *Billings* v. *Billings*, 10 Cush. 178. The defendant testifies that the thousand dollars which are in the hands of Berry & Son, was a loan to the firm. In the adjustment of the policy with the trustees, it was so treated, and the amount due Joseph Berry thereon, was paid to his assignees. Whatever may have been the secret understanding between the parties, the insurance company cannot, upon their disclosure and upon the other evidence, be charged as trustee, without entirely disregarding their statements.

Trustee discharged.

TENNEY, C. J., RICE, HATHAWAY, MAY, and DAVIS, J. J., concurred.

MARY JANE FLOWERS *versus* CHARLES H. FLOWERS *& als.*

Where a bond, given by a debtor for his release from arrest on execution, is not for just double the sum for which he is liable, and there is no evidence that the mistake was occasioned by accident or misapprehension, the case is not within the provision of § 43 of c. 148 of R. S. of 1841; and it will not be regarded as a statute bond.

Where a debtor, who had given bond on execution, has taken the oath, according to the terms of the bond, which is invalid as a statute bond, this will be considered a performance of one of the alternative conditions specified, although the proceedings in taking the oath were not in conformity to the requirements of the statute.

DEBT upon a bond, given to release Charles H. Flowers from arrest on execution. The case is presented to the full Court on REPORT of MAY, J.

Plaintiff introduced office copy of the execution and officer's return upon the same, and of the judgment upon which the execution issued. Plaintiff also introduced the bond declared on. The principal was arrested in the county of Lincoln by an officer of that county, and gave the bond.

In defence, was introduced the certificate of two justices of the peace and of the quorum of the county of Sagadahoc, that the said C. H. Flowers had been admitted to the benefit of the oath provided by statute "for the relief of poor debtors," by which certificate it appeared that they had administered the oath to the debtor within six months from the date of the bond.

The defendants contended that this constituted a performance of one of the alternative conditions of the bond.

Gilbert, for plaintiff, argued: —

That the proceedings of the magistrates of the county of Sagadahoc, were unauthorized by statute, (the arrest having been made in the county of Lincoln,) and constituted no defence to this action; nor do they authorize the chancery of the bond.

Baker, for the defendants, contended: —

That, as the bond was not for double the amount for which the debter was liable, it was not a statute bond, and created no obligation on the part of the debter to comply with the requirements of the statute, any further than the terms used in the condition of the bond stipulated. R. S. of 1841, c. 148, § 20; *Howard* v. *Brown & als.*, 21 Maine, 385; *Barrows* v. *Bridge & als.*, *idem*, 398; *Clark* v. *Metcalf*, 38 Maine, 122; *Dyer* v. *Woodbury*, 24 Maine, 546.

The case does not fall within the provisions of R. S. c. 148, § 43, because there is no evidence of "mistake, accident or misapprehension," and, in the absence of all evidence, the Court will infer none.

The opinion of the Court was drawn up by

TENNEY, C. J. — The bond declared upon in this action, was not for just double the sum for which the debtor, the principal obligor was arrested on execution, and therefore not conformable to the R. S. of 1841, c. 148, § 20. The case discloses nothing which shows that this departure was by reason of any mistake, accident or misapprehension, and, consequently, is not brought within the provision of § 43 of the same chapter. The bond, therefore, cannot be treated as a statute bond. *Dyer* v. *Woodbury*, 24 Maine, 546. And the other provisions of the statute, c. 148, before cited, were disregarded without effect upon the obligor. *Clark* v. *Metcalf*, 38 Maine, 122.

The first condition in the bond is shown to have been performed, and judgment must be entered for the defendants.

RICE, HATHAWAY, APPLETON, MAY, and DAVIS, J. J., concurred.

COUNTY OF SOMERSET.

ABIGAIL KIDDER *versus* D. AUGUSTUS BLAISDELL.

An action for the recovery of dower is an action touching the realty; and *office copies* of deeds are admissible under the 26th rule of this Court, to establish the title and seizin of the husband.

Where, to support her action to recover dower of certain lands, the wife introduced a mortgage deed of the premises, given many years before, by her husband, on which deed appeared an assignment thereof, by the mortgagee, to one, from whom the tenant, through several mesne conveyances, derived title, if there be no evidence that the assignee ever claimed title under the mortgage, or had any knowledge of the assignment to him, the tenant will not be estopped thereby from denying that the husband had title during coverture.

That proprietors of common lands, (such as the Proprietors of Kennebec Purchase,) may alienate their lands *by vote*, is an established principle of law in this State.

It is a general rule in proving *to the Court*, the loss or destruction of a deed or other instrument, so as to make secondary evidence of the contents of the lost paper admissible, that the party should show diligent search made therefor in those places where, under the circumstances, it would probably be deposited; and, in the absence of proof or circumstances strongly tending to show the contrary, the presumption is, that those legally entitled to the custody of the paper, actually have such custody.

The *deposition* of a *party* may be taken in the same manner as that of any other witness, and may be used in a case where his testimony, as a witness upon the stand, is admissible.

This Court will take judicial notice of the towns composing the different counties in this State, and the times when, and the places where its sessions appointed by law, are to be held; and, where a deposition taken within any county in the State, which, by its caption, is returnable before this Court at a time and place appointed by law within such county, it will not presume that such deposition is, or may be, returnable before the Court in any other county and State, but the contrary: —

Thus, where it appeared from the caption that a deposition was taken within the county of Somerset and State of Maine, to be used in an action of dower pending between those parties before the Supreme Judicial Court, and to be tried *at Norridgewock on the 16th day of March*, 1853, it was held to be sufficient.

Kidder *v.* Blaisdell.

The caption of a deposition which states, "the adverse party was duly notified to attend and was not," (omitting the word *present*,) may be clearly understood, and cannot be regarded as substantially defective.

THIS is an action of DOWER. The writ, (which is dated Sept. 1, 1856,) contains two counts; in the first count, the demandant claims that she is dowable of a tract particularly described, and in the second, she claims as dower, one-third part of one-seventh of a tract described, containing about 140 acres. The land described in the last count includes that embraced in the first.

The defendant pleaded in bar, (1,) that plaintiff was never married to John Kidder, (her alleged husband,) and concludes with a verification. To this, plaintiff replies, alleging marriage, and tenders an issue to the country, which is joined.

Defendant, in his second plea, alleges that said John Kidder was not seized of the lands and tenements aforesaid, of such estate as that plaintiff could be endowed thereof, and tenders an issue to the country, which is joined.

Plaintiff introduced,—

1. Copy of deed, Proprietors Kennebec Purchase to Isaac Kidder, of lot 64, in Norridgewock, Feb. 13, 1812, acknowledged Feb. 17, 1812, recorded May 8, 1818.

2. Copy of deed, John Kidder and others to Isaac Kidder, dated Feb. 1, 1816, acknowledged Feb. 17, 1816, and recorded Aug. 13, 1817.

Ezekiel Heald, testified that Isaac Kidder, senior, died before Feb. 1, 1816. That he knew the farm, No. 64, in Norridgewock, on which he lived; that the persons named in the deed of February, 1816, except the persons described as husbands, were the surviving children of said Isaac, and all the children of said Isaac living Feb. 1, 1816.

Plaintiff then introduced mortgage deed, John Kidder to John Ware, dated April 21, 1819, acknowledged and recorded same month. Also assignment of the same from said Ware to Isaac Kidder, and certificate of proof of execution of same in Court with the registry thereof, March 10, 1858.

Deposition of plaintiff; also, her affidavit. Depositions of

Isaac Kidder and Bezer Bryant. Also, attested copy from records of marriages of the town of Anson.

Said Heald further testified, that John Kidder married his sister. He went to Michigan, has been reported to be dead for ten or twelve years at least.

There was other testimony of the same effect. The plaintiff's evidence to be subject to all legal objections.

In defence, were introduced sundry deeds showing title in defendant, derived from Isaac Kidder, (the younger.)

The case was withdrawn from the jury, to be submitted to the full Court, on REPORT of TENNEY, C. J., who presided at the trial. Judgment to be rendered according to the legal rights of the parties, upon the proofs, so far as they are legally admissible. If for the plaintiff, damages to be determined as agreed upon.

The case was argued by *J. S. Abbott,* for the demandant.

D. D. Stewart, for the defendant, argued:—

The defendant is not estopped, as is contended by plaintiff, by the deed of John Kidder and others to Isaac Kidder, to deny the seizin of John Kidder. It is only a deed of *quitclaim,* purporting to release only all the right, title and interest which the grantors had, with no affirmation that they had any; and, according to the late authorities in this State and Massachusetts, would not estop even John Kidder himself, much less any body else. It is no proof of any seizin in John Kidder, during the coverture. 2 Greenl. 226; 1 Fairf. 383; 14 Maine, 351; 6 Greenl. 243; 28 Maine, 259; *Coe, petitioner,* v. *persons unknown,* 43 Maine 432.

The plaintiff's evidence being expressly subject to all legal objections, it is contended that an action of dower is not a technical action *touching the realty,* and is not, therefore, within the rule of this Court admitting *copies* of deeds. *Sellars* v. *Carpenter,* 27 Maine, 497; *Croude* v *Ingraham,* 13 Pick. 33.

The copy of the paper, which is called a *deed,* from the Proprietors Kennebec Purchase to Isaac Kidder, is merely a *copy* of a certificate of what a person, who calls himself clerk,

says, was voted by those proprietors. The Court cannot take *judicial notice* of the Proprietors of the Kennebec Purchase, any more than of any other proprietary or corporation. The instrument does not purport to convey any title to Isaac Kidder. There is no legal evidence of the existence of such corporation; that such corporation ever owned the land or ever conveyed it to Isaac Kidder. The proprietors have always been required to prove their title in actions in which they have been parties. *Proprietors Kennebec Purchase* v. *Call*, 1 Mass. 483; *Winthrop* v. *Curtis*, 3 Greenl. 110; *Proprietors Kennebec Purchase* v. *Laboree*, 2 Greenl. 276.

Those claiming under them can be in no better condition. *Dolloff* v. *Hardy*, 26 Maine, 545.

The mortgage deed from John Kidder to John Ware, is inadmissible. It is between other parties. The assignment was never recorded until long after this suit was commenced. That mortgage might have estopped John Kidder in a suit by Ware or his assignee, but no one else would be estopped by it. That mortgage was made and recorded, April 21, 1819. More than thirty-two years had elapsed after the mortgage became due, before the defendant took his deed. He had a right to presume it paid. The assignment had not been recorded; and there is no proof that it ever took effect — that Isaac Kidder ever knew of it, or ever assented to it.

The plaintiff offers the deposition of Isaac Kidder, to prove a conveyance from him to John Kidder, of 56 acres of the land in controversy, and claims dower of one-third thereof. But it is not pretended that the deed was ever recorded, and therefore has no validity against the defendant, who purchased the land without knowledge or notice of it. *Blood* v. *Blood*, 33 Pick. 89; *Young* v. *Tarbell*, 37 Maine, 513; *Purrinton* v. *Pierce*, 38 Maine 447; *Emerson* v. *Harris*, 6 Met. 475.

Whatever defeated the title of John Kidder, if he ever had any, will also defeat his wife's claim to dower.

The *deposition* of plaintiff, in her own case, is inadmissible.

The affidavit of plaintiff is also objected to. If her *deposition* is objectionable, *a fortiori* is her affidavit.

The affidavit of a party is admissible, it is true, in some cases, to prove the fact of loss of a paper. But this rule is understood to extend only to cases where the paper itself, alleged to be lost, is properly to be found in the custody of the party making the affidavit. The alleged deed in the present case, was never in the custody of the plaintiff. At least, the case does not show it ever in her possession. After the death of John Kidder, it would properly belong to his heirs, and would properly be in their custody and not in the plaintiff's. For aught the case shows, it is in their custody still. No attempt is made by the plaintiff to ascertain the fact, and, we contend, her affidavit is wholly inadmissible. And its recitations of other matters not relating to the deed, are, of course, equally inadmissible.

There is, therefore, no legal evidence in the case of the loss of the alleged deed. And, upon this ground, also, the deposition of Isaac Kidder is wholly inadmissible to prove its alleged contents.

But we object to the deposition of Isaac Kidder for defects in the caption. The magistrate certifies that the adverse party was duly notified to attend, and was not." Now this leaves the caption without any statement, which the statute requires, as to whether the adverse party was notified. The magistrate certifies that the adverse party was and was not notified. One statement negatives the other, and leaves the caption silent upon the subject. Besides, the statute requires the magistrate to state in his caption whether the adverse party attended or not. This caption is silent on that subject. But again, the statute requires the magistrate to state in his caption the court in which the action is to be tried, and the time and place of trial. Neither of these provisions is complied with. The caption shows that the deposition was taken in Somerset county. But it is wholly silent as to the county or State where the court sits which is to try the case. Every word of the caption might be strictly true, and yet the court be the Supreme Judicial Court of Michigan, to be held at Norridgewock in that State.

We object to the deposition of Bezer Bryant for the same reasons, and also, because it does not appear by the caption that the "adverse party" was notified to attend. Nor does it appear that he attended or did not attend.

There is no legal and sufficient proof of the marriage of the plaintiff with John Kidder. The depositions of the plaintiff and Bezer Bryant, are inadmissible for the reasons already given. No other proof is offered for that purpose but the record of the town of Anson. This record does not contain the plaintiff's name at all, and if it did, it would not be sufficient without proof of the identity of the parties named in the record with those before the Court. *State* v. *Wedgwood*, 8 Greenl. 75.

There is no legal and sufficient proof of the death of John Kidder.

The opinion of the Court was drawn up by

RICE, J. — Real actions are those which concern the realty only, by which the demandant claims title to have any lands or tenements, rents or other heraditaments, in fee simple, fee tail, or for term of life. 3 Black. Com. 117. Dower is an estate for life created by law. 4 Kent's Com. 35. Dower *unde nihil habet*, is a writ of right in its nature. Com. Dig. title Dower, G. 2. An action for the recovery of dower is necessarily an action touching the realty.

To the consummation of the title to dower, three things are requisite, viz.: marriage, seizin of the husband, and his death. Co. Lit. 31, A.; 4 Kent's Com. 36.

The fact that the demandant was lawfully married to John Kidder, sufficiently appears from the records of the town of Anson, and the deposition of Bezer Bryant, independent of her own deposition. The marriage occurred in June, 1808.

To establish title and seizin in her husband, during coverture, office copies of deeds are admissible under the 26th rule of this Court.

The copy of the deed or grant from the Proprietors of the Kennebec Purchase to Isaac Kidder, was properly admitted.

It is a principle of law, well established in this State and Massachusetts, that towns and proprietors of common lands may alienate their lands by vote. *Thorndike* v. *Barrett*, 3 Maine, 380; *Adams* v. *Frothingham*, 3 Mass. 352; *Springfield* v. *Miller*, 12 Mass. 415.

In *Thorndike* v. *Barrett*, the Court say: "all the conveyances of property in severalty, by the Proprietors of the Kennebec Purchase, are effected by their vote, by which, as they express it, they 'vote, grant and assign,' to A. B., &c.; and, by another vote, a mode of certifying such vote, or grant, and perpetuating the evidence of it, for the use and in the possession of the grantee, or person to whom the land is voted, is designated; to which mode the clerk of the proprietors conforms by giving an instrument in the nature of a certificate of the vote, and in some degree resembling a deed; being under the seal of the company, and signed and acknowledged by the clerk before a justice of the peace." Instruments of this character, which are in all respects similar to the grant or deed to Isaac Kidder, have uniformly been held by the Courts, both of this State and Massachusetts, to pass an indefeasible title from the Proprietors of the Kennebec Purchase. It is believed that all their lands on the Kennebec river were granted by similar proceedings, and that the large territory formerly owned by that company on that river is now held under deeds in all respects like the one now under consideration. That grant, or deed, conveyed to Isaac Kidder an indefeasible title to the land now in controversy. The evidence shows that Isaac Kidder, at the time of his decease, resided on the land thus granted.

John Kidder, the husband of the demandant, was one of the children and heirs of Isaac Kidder, senior, and, on the first day of February, 1816, with his co-heirs, conveyed the estate of their late father to his brother Isaac Kidder. It is conceded that Isaac, senior, left seven children at his decease.

The testimony of Messrs. Heald and Allen is sufficient to establish, in the absence of conflicting testimony, the death of John Kidder, the former husband of the demandant.

Under the pleadings in this case, these facts entitle the demandant to judgment for her dower in one-seventh part of that portion of the Kidder farm of which John Kidder was not sole seized during her coverture.

In the first count in her writ, the demandant alleges that John Kidder was, during her coverture, sole seized of that portion of the Kidder farm which is particularly described therein, and being the same land covered by the mortgage from said John to John Ware, dated April 21, 1819, his title thereto having been derived by deed from Isaac Kidder, his brother, in the year 1817, or 1818, which deed, it is alleged, is lost.

To establish this proposition, the mortgage deed to John Ware is introduced by the demandant, with an assignment thereof to Isaac Kidder, from whom, through sundry mesne conveyances, title to the "Kidder farm" is traced to the tenant, and by which the demandant now claims that the tenant is estopped to deny the title of John Kidder.

Such cannot be its legal effect. There is no evidence in the case that Isaac Kidder ever claimed title under this mortgage, or, in fact, that he had any knowledge that it had ever been assigned to him. It was not recorded until March 10, 1858. From whence the demandant obtained this instrument does not appear, nor does it appear that the tenant had any knowledge of its existence before it was produced on trial. Under this state of facts, he is not affected thereby.

The demandant then attempted to establish the loss of the deed from Isaac to John Kidder, for the purpose of introducing parol testimony of its contents.

For this purpose, the affidavit of the demandant is introduced. Her deposition is also in the case. To the introduction of this deposition, the defendant objects, on the ground that the depositions of parties are not admissible in their own behalf. A majority of this Court are of the opinion that, under the law of 1856, c. 266, the depositions of parties may be taken and used in the same manner as the depositions of other witnesses, subject only to the limitations provided in

said chapter, and made applicable to parties when testifying as witnesses upon the stand.

In this deposition, she states: "the name of my late husband was John Kidder. I was married to him about forty years ago, at Anson, in the county of Somerset, by Bezer Bryant, justice of the peace. My said husband died in the State of Michigan, at a place called the Grand Rapids, nineteen years ago last August. I knew very well that my said husband held a deed of a part of the Kidder farm, so called, in Norridgewock. Said deed was from Isaac Kidder. My husband built a house on the land so deeded to him by Isaac Kidder, and got out a frame for a barn. I lived upon said land with my husband for a number of years. Said deed contained, according to the best of my recollection, about thirty-four or thirty-five acres. There was no administration upon the estate of my said husband. I saw said deed repeatedly before the death of my husband, but have not seen it since his death. I have hunted for it a great deal, but have not been able to find it. I am satisfied that it is not among any of my things and papers, and am satisfied it is lost." In her affidavit, she also states that she has carefully searched for said deed among the effects of her late husband, but has not been able to find it, and is satisfied that it is lost. The defendant objects that her statements, if admitted, do not sufficiently show the loss of the deed to authorize proof of its contents by other testimony.

Preliminary evidence of this character is addressed to the Court. There are but few general rules bearing upon the question of its admissibility. Much, ordinarily, depends upon the discretion of the presiding Judge. It is a general rule, however, that diligent search for the instrument, alleged to be lost or destroyed, must be made in those places, where, under the circumstances, it would probably be deposited; and, in the absence of proof, or circumstances strongly tending to show the contrary, the presumption is that those legally entitled to the custody of a deed, or other instrument in writing, actually have such custody.

In the case at bar, as we have already seen, there was no administration on the estate of John Kidder; he died in a distant State, far from his place of residence; there is no evidence that he left any children, and the inference is that he left little if any estate. From the facts in the case, it would seem that the mortgage to Ware was made to secure a sum nearly, if not quite, equal to the value of the estate covered thereby, and, therefore, that the deed from Isaac to John Kidder may have been deemed of little value. There is no cause shown to suspect that the deed has been fraudulently or intentionally concealed or destroyed. Under these circumstances, we are of the opinion that a careful search among his papers and effects, by his wife, would most probably be successful in discovering the deed if it were in existence, and that the evidence of its loss was sufficient to authorize the admission of secondary evidence of its contents.

That such a deed as is alleged from Isaac to John Kidder existed; that it was duly executed and delivered to John, and that he was in possession of the land described therein during the coverture of the demandant, fully appears, not only from her deposition, but also from the deposition of Isaac Kidder.

It is, however, objected that the depositions of Isaac Kidder and of Bezer Bryant, are inadmissible in consequence of defects in their captions. If this were so, it would not affect the result, as there is sufficient evidence to establish the material facts in this case without their production. But these captions are not substantially defective.

In the case of the deposition of Bryant, the objection is that it does not appear in what county or State the court to which it is returnable was to be holden. It appears by the caption that this deposition was taken in the county of Somerset and State of Maine, and was to be used in an action of dower, pending between these parties before the Supreme Judicial Court, and to be tried before said Court at Norridgewock, on the sixteenth day of March, inst., (1858.)

The Court will take judicial notice of the existence of the towns comprising the different counties in the State, and of

the times when, and places where its sessions appointed by law are to be held; and, when a deposition is taken in any county within the State, and by its caption is made returnable before the Supreme Judicial Court, at a time and place appointed by law, within such county, it will not presume that such deposition is, or may be returnable before any other Supreme Court, in any other county and State, but the contrary.

The objection to the deposition of Isaac Kidder, is that it does not appear that the adverse party was notified to attend. The language of the caption is, "the adverse party was duly notified to attend, and was not." It is contended that this language is repugnant, and self destructive, leaving the question in doubt whether the adverse party was in fact notified to attend; that is, that he was notified and was not notified. Manifestly, the word *present*, or some word of similar import, was omitted by the scrivener in writing the caption. As it stands, however, it cannot fail to be understood. We will not say that the objection is hypercritical, but there being no room for reasonable doubt as to the meaning of the language used, the objection cannot prevail.

The result is that the demandant is entitled to judgment under the first count in her writ, for her dower in the land therein described; and, under the second count, for her dower in one undivided seventh part of the residue of the Kidder farm, now in possession of the tenant. Damages for detention to be ascertained as agreed by the parties.

Defendant defaulted.

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

STEPHEN G. LOVEJOY *versus* AUGUSTA MUTUAL FIRE INS. CO.

Where one, in his application to a Mutual Insurance Company, requested insurance for a certain sum on his store, and a further sum on his stock of goods therein, and a policy was made accordingly, and one note was given for the premium on both sums, it was *held* that the contract of insurance was entire; and, if the representation of the insured, that he was the owner of the building, was false, the policy will be *wholly* void.

ASSUMPSIT upon a policy of insurance of the defendants. Plea, general issue, and brief statement that plaintiff voluntarily and willfully burned the property insured.

At the trial, GOODENOW, J., presiding, the plaintiff offered the policy of insurance declared upon, the Act incorporating the company, and the by-laws, forming a portion of it. *Also*, offered notices of loss. *Also*, proof of the amount of goods burnt. The destruction of the store by fire was admitted. The deposition of Thomas A. White was introduced.

In defence, it was contended that the goods were fraudulently taken from the store and secreted, by the plaintiff, on the night of the fire.

The defendants read the application of the plaintiff for insurance, and the premium note given by plaintiff. They also proved that, at the time the application was made, the store and the lot of land upon which it stood were the property of Olive Emery of Massachusetts, who, on the 30th of July, 1853, conveyed the same to said Thomas A. White, who continued the owner thereof to the time the store was burnt.

"The defendants were then about to offer evidence to the jury of the willful burning of the store and the secreting of the goods by the plaintiff, when the Judge intimated that the misrepresentation, by plaintiff, as to the ownership of the store, would render the policy void, and he should so instruct the jury." Whereupon, by consent, the case was withdrawn from the jury, to be submitted to the full Court on report. If, in the opinion of the Court, upon so much of the evidence as is legally admissible, the action is maintainable, it is to stand for trial; otherwise, judgment to be for defendants.

Hillard, for plaintiff.

D. D. Stewart, for defendants.

The opinion of the Court was drawn up by

HATHAWAY, J. — Assumpsit on a policy of insurance, by which the defendant company insured the plaintiff two hundred and fifty dollars, on a store, and five hundred dollars on a stock of goods in the same store, as his property, against loss by fire, on his application of the same date with the policy. The store was destroyed by fire, Dec. 5, 1854.

The charter of the defendant company, their by-laws and the plaintiff's application, are parts of the policy.

In his application the plaintiff represented himself to be the owner of the store and goods. He requested insurance on *his* store and goods. He stated that the store was occupied by the owner, and that there was no incumbrance on it, and added, "I have given the above description knowing that any misrepresentation or suppression of material facts, will destroy my claim upon the company for indemnity."

By article 10 of the by-laws, "in cases where no permanent lien can be created on merchandize, or other personal property, the directors shall require a surety on the deposit note." No surety was given on the plaintiff's deposit note, and none seems to have been required.

The case finds "that, at the time when the application was made, the store in question and the lot of land on which the same was situate, were the property of Olive Emery, and that, July 30, 1853, she conveyed the same to Thomas A. White, who remained the owner of the same up to the time the store was burned.

The contract of insurance was entire, and the representations made by the plaintiff, in his application for insurance, of his ownership of the store, being of a material fact, and being false, the policy was, therefore, void; (*Fiersmuth* v. *Agawam Mut. Fire Ins. Co.*, 10 Cush. 587; 11 Cush. 280; 6 Cush.

340; *Battles* v. *York Co. Mut. Fire Ins. Co.*, 41 Maine, 208,) and this action cannot be maintained.

As agreed by the parties, there must be

Judgment for the defendants.

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

REUBEN E. LYON *versus* SAMUEL PARKER.

The defendant became bound by his bond, jointly and severally to A. C. and others, owners of certain mills, dam and water power, and also unto the *grantees* of either and all of them, (naming the obligees in the bond,) to complete, and keep in repair for twenty years, the dam. In an action of covenant broken, brought by a *grantee* of some of the owners, for damages for defendant's non-performance of his covenant; — *It was held*, — *That*, as the defendant was a stranger to the title, his covenant was personal; — *That*, as the plaintiff was no party to the bond when it was executed, there is no privity of contract between him and the defendant; and, there being neither privity of contract nor of estate, the action is not maintainable.

ACTION OF COVENANT BROKEN. In his writ, which is dated December 1, 1856, the plaintiff declares, in substance, that on the 4th day of April, 1849, the defendant by his deed, for a valuable consideration, received of Abner Coburn and others, (named,) owners of mills, dams and water power on Skowhegan Falls, bound and obliged himself to, and with each of the before named persons, and to and with each of the grantees of either and all of them, and therein and thereby covenanted and agreed jointly and severally with each and all of the before named persons, and with each and all of the grantees of either and all of them, that he would build a dam from, &c., and would keep the same in perfect repair for the term of twenty years.

That plaintiff afterwards became part owner, by purchase

from Abner Coburn and others, of a paper mill and of a saw mill, and of the water power aforesaid; that defendant has failed to perform his covenants, whereby the said plaintiff has been damnified.

The defendant pleaded the general issue and by brief statement set forth, — (1) that the plaintiff is not a party to the obligation declared upon; (2) that his co-tenants are not joined with him, nor, (3) are the obligees in said bond joined in said action; (4) the performance of said writing; (5) a waiver and discharge of his covenants by the obligees in said obligation before the commencement of this suit.

At the trial the plaintiff introduced, without objection, a copy of the obligation declared upon; also deeds, from some of the obligees named in the defendant's writing, conveying to plaintiff an undivided part of certain of the mills, and of the dam and water power. Whereupon the case was withdrawn from the jury to be submitted to the full Court, on REPORT of the case by TENNEY, C. J. And if, in the opinion of the Court, the action is maintainable, it is to stand for trial; otherwise, the plaintiff to become nonsuit.

Abbott, for plaintiff, contended: —

That *covenant broken* is the appropriate action, where the writing declared on is under seal and contains covenants and agreements. It is made in express terms "jointly and severally" with the persons named, and with "the grantees of either or all of them."

It is apparent that the contracting parties intended that any person who then was, or who might thereafter become an owner in the mills, dams or water power described in the writing, and who should sustain damage by reason of the non-performance, on the part of defendant, of any of his covenants, should be entitled to redress.

The case shows the plaintiff to be such owner, and that there was "evidence tending to prove non-performance on the part of defendant, whereby the plaintiff suffered damage.

Coburn & Wyman, for the defendant, contended: —

That the action could not be maintained, because, —

1. The plaintiff is not a party to the agreement declared on. There were no grantees in existence when the contract was made, and, therefore, none could have been contracted with. Agreement, *mutuality of assent* is the essential element of a contract.

2. The agreement is a chose in action, not assignable at law. The only exceptions are negotiable instruments included in the statute of Anne, and covenants running with the land. This case is not within either of the exceptions. There was no privity of estate between the covenanting parties. *Plymouth* v. *Carver*, 16 Pick. 183; *Hurd* v. *Curtis*, 19 Pick. 458. Covenants do not run with a water privilege merely. *Wheelock* v. *Thayer*, 16 Pick. 68.

3. The plaintiff shows not even an equitable interest in the agreement; no assignment. It constituted no part of his title deeds. It was not recorded; nor does it appear that plaintiff had any knowledge of its existence when he purchased. Both legally and equitably, so far as appears, he is a stranger to the contract.

4. The action should be joint — the consideration and penalty being joint. The thing to be done by defendant was one and the same for all. So the things to be done by the obligees. 1 Chitty's Plead. 8, 10; Broom on Parties, 8.

5. Tenants in common should have joined, though the covenants were several, as respects other parties. 5 Ba. Ab. 301, 303; 1 Chitty's Plead. 12, A., and note 1, and cases cited.

The plaintiff claims to maintain this action, because the agreement is made "in express terms jointly and severally with the obligees and with their grantees."

Bonds, and other non-negotiable instruments, are often made payable (in express terms) to "order," to "assigns," or "assignees," or even to "bearer," but it has never been held that, on that account, a suit could be maintained in the name of any other than the original party to the contract. *Coolidge* v.

Ruggles, 15 Mass. 357; *Clark* v. *King*, 2 Mass. 524; *Jones* v. *Fales*, 4 Mass. 245; *Mathews* v. *Houghton*, 11 Maine, 377.

But the covenant on which this action is founded, is not made "in express terms" with "the grantees." The penalty in the bond is made payable to the "owners," and to their "grantees," but the agreement is with the owners alone.

The dam is to be built for the benefit of the owners, under an agreement of prior date with said owners.

Abbott in reply: —

The plaintiff is a party to the agreement. He is a grantee of persons named in it. The defendant covenanted with sundry persons, named, owners of certain mills, &c., and "the grantees of either and all of them," * * * "of any part of said mills," &c.

It is unnecessary that plaintiff's name should have been inserted in the contract. That is certain, which can be made certain. The contract is made "with the grantees of either or all of them."

Suppose A. is about to convey his mill to B., and the defendant had, for a full and satisfactory consideration received by him, entered into an agreement or covenant "with the grantor of A., whoever he might be," could not such grantee maintain an action? Would it be necessary that his name should be inserted in the agreement? or that the consideration should have been paid by the grantor? No case has been cited that sustains any such doctrine. And there is a manifest and wide distinction between this contract and any one relied on in defendant's argument.

The answer to the position taken, that all the tenants should have joined, is found in the contract. The defendant contracted with them "jointly and severally." It is for the Court to enforce the contract, not to annul or modify it.

The opinion of the Court was drawn up by

APPLETON, J. — It appears that the defendant, on April 4, 1849, by his bond of that date, "became bound and obliged

jointly and severally," to Abner Coburn and others, "owners of mills, dams and water power on Skowhegan Falls," and also "unto the *grantees* of either or all of them," (naming the obligees in the bond,) "to complete, maintain and keep in good and perfect repair, at all times, for and during twenty years from the first of April, A. D. 1849, said dam," &c., &c.

The plaintiff, as grantee of some of the obligees named in the bond, brings this action to recover damages for the injuries he has sustained by reason of the defendant's failure to perform his covenants.

It is a familiar principle of law, that a bond or contract under seal, cannot be assigned so as to enable the assignee to maintain an action in his own name. If the bond had been made to Coburn and others, and their assigns, it would not be pretended that an assignee could maintain an action on it in his own name. It does not strengthen the plaintiff's right of action because his only claim as assignee arises not from an assignment upon the bond, but by deed from some of the assignees.

The defendant is a stranger to the title. He contracts with certain individuals to do work upon a dam belonging to the obligees in the bond. The covenant is personal. There is no privity of contract between the plaintiff and the defendant, for the plaintiff was no party to the bond when it was executed.

Neither is there any privity of estate. "It is not sufficient," says Lord KENYON, in *Webb* v. *Russell*, 3 T. R., 402, "that a covenant is concerning the land, but in order make it run with the land, there must be a privity of estate between the covenanting parties." There being neither privity of contract nor of title, the action is not maintainable. *Plymouth* v. *Carver*, 16 Pick. 183; *Hurd* v. *Curtis*, 19 Pick. 458.

Plaintiff nonsuit.

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

DANIEL BEALE *versus* WILLIAM KNOWLES.

The husband has a life estate in the real property of the wife acquired prior to the statute of 1844, which may be taken in execution for his debts.

Simultaneously with her acquisition of title to the estate, the rights of her husband therein, were perfected; and their rights remain unaffected by the subsequent statutes securing to married women their rights of property.

The deed of a married woman of her real estate acquired prior to the enactment of the statute of 1844, is void, if the husband did not join her in the conveyance.

WRIT OF ENTRY. The material facts in the case as agreed upon, appear in the opinion of the Court.

J. H. Webster, argued for plaintiff, and

B. Adams, for defendant.

The opinion of the Court was drawn up by

HATHAWAY, J.—A writ of entry to recover a lot of land, upon which, April 30, 1855, the demandant duly levied his execution against Nathaniel D. Richardson, as his estate.

Richardson and Clarissa, his wife, were married in the summer of 1842, and are now living. In October, 1842, William King conveyed the demanded premises to Richardson's wife, and she, by her deeds of Oct. 21, 1846, and of March 12, 1853, in which deeds her husband did not join her, conveyed the same premises; under which deeds from her, through mesne conveyances, the tenant derives his title. When William King conveyed the land to the wife, her husband acquired therein a life estate. He became seized of the freehold, the usufruct was his during their joint lives. He had a lawful right to sell and convey his life estate. It was liable to be taken in execution for his debts. *Litchfield* v. *Cudworth*, 15 Pick. 23. The life estate was the husband's freehold. The inheritance belonged to the wife. Such was the law when Clarissa Richardson received her deed from William King, and her husband's rights therein were perfected simultaneously with hers, and those rights are not affected

by the provisions of the statute of 1844, c. 117, entitled "an Act to secure to married women their rights of property," nor by the subsequent additional and amendatory statutes upon that subject, which were all enacted after the rights of Richardson and his wife, in the demanded premises, had been established under the laws existing at the date of William King's deed to her. And, besides, her deed of Oct. 21, 1846, was void, because, being a married woman, she had no power at that time, in such case, to convey her land separate from her husband; and the statute of 1852, c. 227, only authorized the wife's separate deed of estates acquired subsequent to the Act of 1844, c. 117. Hence, her deed of March 12, 1853, being a deed of real estate acquired previous to 1844, was unauthorized by the statute, and therefore void.

The statute of February 12, 1855, c. 120, provided that, "any married woman seized and possessed in her own right of any real estate situated within this State, (might) sell, convey and dispose of the same by her separate deed in her own name," and that "no *action* shall be maintained by the husband of any such married woman, or by any person claiming under or through him, for the possession or value of any property *held* or disposed of by her, as aforesaid," and the defendant's counsel insists that this action is thereby prohibited.

The deeds of the wife being inoperative, as before stated, the tenant shows no title. But, the tenant being in possession, the demandant cannot disturb him, unless he shows title, in himself, and *this* he has done. The demandant shows title by his levy, to the husband's life estate. The wife did not *hold* it; she was not "seized and possessed" of her husband's life estate, his freehold, of which he was seized. She could not join him in a suit for an injury to the profits of the land. 2 Kent's Com. 131. If he had sold and conveyed it, she could not lawfully enter or interrupt his grantee's possession during her husband's life. *Mellus* v. *Snowman*, 21 Maine, 201.

Tenant defaulted.

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

SIMON PIERCE *versus* JACOB WEYMOUTH.

The plaintiff, having an equitable interest in certain real estate, with the consent of the legal owner, sold the same to the defendant for a specified sum, the amount due to the holder of the title to be paid to him, and the balance to the plaintiff. The defendant paid the amount for which the land was held and received a deed; the consideration therein named was the sum paid. On the refusal of the defendant to pay the balance to him, the plaintiff brought his action of assumpsit therefor, and *it was held:* —

That the parol agreement of defendant to pay a further consideration, additional to that expressed in the deed, is binding and may be enforced: —

That the equitable interest of plaintiff, which passed to him with the legal title, was a sufficient consideration for such promise.

ASSUMPSIT to recover a sum due from defendant to plaintiff, for his equitable interest in a house and lot in Fairfield, sold and conveyed to plaintiff.

At *Nisi Prius*, TENNEY, C. J., presiding, after the evidence was introduced, the case was taken from the jury, by consent, to be submitted on REPORT to the full Court, who were authorized to exercise jury powers.

The report of the evidence is somewhat voluminous; the nature and substance of it appear in the opinion of the Court. The case was argued by

Abbott, for the plaintiff, and by

Snell, for defendant.

The following authorities were cited to the point that parol testimony is inadmissible to contradict the deed and bond which is in the case: — *Chadwick* v. *Perkins*, 3 Maine, 399; *Elder* v. *Elder*, 10 Maine, 80; *Osgood* v. *Davis*, 18 Maine, 149; *Hilton* v. *Homans*, 23 Maine, 136; *McLellan* v. *Cumberland Bank*, 24 Maine, 566; 2 Kent's Com. (7th ed.,) 719, 720; *Steele* v. *Adams*, 1 Maine, 1; *Emery* v. *Chase*, 5 Maine, 232; *Tyler* v. *Carlton*, 7 Maine, 175; *Linscott* v. *Fernald*, 5 Maine, 496; Chitty on Contracts, (7th ed.,) 59, 99.

There was no consideration for the defendant's alleged promise. 2 Kent's Com. (7th ed.,) 586, 594; *Miller* v. *Wyman*, 3 Pick. 207; Chitty on Contracts, (7th ed.,) 59.

The opinion of the Court was drawn up by

DAVIS, J.— The plaintiff, in 1856, had an equitable interest in certain real estate, of which Fanny Osborne and William Osborne had the legal title. By an arrangement between him and the Osbornes, the plaintiff negotiated a sale of the property to the defendant, for the sum of five hundred dollars. The plaintiff contends, and we are satisfied from the testimony, that the defendant was to pay off an incumbrance amounting to ninety-five dollars, and pay the Osbornes the amount of their claim on the property, and the balance of the five hundred dollars he was to pay to the plaintiff. The contract was not reduced to writing.

The defendant paid off the incumbrance; and then, on payment of the sum due to the Osbornes, they gave him a deed of the property, in which they acknowledged the receipt of three hundred and twenty dollars as the consideration for the conveyance. The defendant afterwards refused to pay the plaintiff the balance of the five hundred dollars; and he contends that the acknowledgment in the deed is conclusive, and that the plaintiff is estopped from denying that the whole consideration for the property has been paid.

But the plaintiff does not deny that the consideration named in the deed has been paid. He contends, however, that the defendant made a parol agreement to pay a further consideration additional to that expressed in the deed; and we have no doubt, notwithstanding the conflict of testimony, that the defendant so agreed. Such an agreement is valid and binding, and may be enforced. *Nickerson* v. *Saunders*, 36 Maine, 413. The equitable interest of the plaintiff, which passed to the defendant with the legal estate, was a sufficient consideration for the promise. The defendant must be defaulted for the sum demanded, with interest thereon from the date of the writ.

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

COUNTY OF LINCOLN.

JACOB BENNER *& als. in Error, versus* MATTHIAS WELT.

In a suit *in error*, where the cause assigned for the reversal of the judgment is, that a part of the defendants in the original suit were minors and did not answer by guardian or next friend, and the defendant in error pleads *in nullo est erratum*, the fact alleged, not being traversed by that plea, is to be treated as admitted; that plea putting in issue only such errors as appear on the face of the record.

If a judgment against several defendants is reversed for error as to a part of them, it is reversed wholly, for it cannot be affirmed as to the others.

WRIT OF ERROR, brought by Jacob Benner, the second, Isaac Oliver, Lewis Benner, the second, Edward Benner, the second, and Isaac Schwartz, the last three plaintiffs in error sueing by Rufus J. Feyler, their guardian and next friend, they being minors and under the age of twenty-one years, to reverse a judgment of this Court rendered against them at the January term, 1856, in favor of Matthias Welt, the present defendant in error. The error specified is stated in the opinion of the Court.

The defendant in error pleaded *in nullo est erratum*. A hearing was had at the October term, 1857, before TENNEY, C. J., who decided that the judgment be reversed as to all the defendants therein named. To which decision the defendant in error filed EXCEPTIONS.

Bulfinch, for plaintiffs in error.

Oakes, for defendant in error.

The opinion of the Court was drawn up by

TENNEY, C. J.—This is a writ of error, to reverse a judgment recovered by Matthias Welt, against the plaintiffs in error in this Court. The errors assigned are that Lewis Benner, 2d, Edward Benner, 2d, and Isaac Schwartz, were

minors and under the age of twenty-one years, at the time of the rendition of said judgment, and did not answer by their guardian, or next friend, or by a guardian *ad litem*, appointed for them by the Court as by law was required, and judgment was illegally rendered against said Jacob Benner, 2d, Lewis Benner, 2d, Isaac Schwartz and Isaac Oliver. The defendant in the present suit pleads *in nullo est erratum*, without putting in issue any fact alleged in the writ of error.

The plea *in nullo est erratum* is in the nature of a demurrer, putting in issue only such errors as may be shown on the face of the record. *Goodridge & al.* v. *Ross*, 6 Met. 487. Therefore the alleged fact that three of the plaintiffs in error were minors at the time the judgment was rendered, not being traversed in the pleadings, is to be treated as admitted.

If the judgment is reversed as to a portion of the present plaintiffs, it cannot be affirmed as to the others. *Richards & al.* v. *Walton*, 12 Johns. 434; *Arnold* v. *Sandford*, 14 Johns. 417.

Exceptions overruled.

RICE, HATHAWAY, APPLETON, MAY, and DAVIS, J. J., concurred.

NANCY FORD *versus* CHRISTOPHER ERSKINE.

An action of dower cannot be maintained before demand has been made to assign the dower claimed.

The demand should contain such a description of the estate as will give notice of what land dower is demanded; and this may be in terms or by reference to a deed under which the tenant claims.

But reference to a deed executed forty years before, to a third person, and not recorded, is no notice to the tenant of what was conveyed; and, such description of the premises, is insufficient.

Thus, a demand "of all lands of which W. F., my late husband, was seized, at any time during my coverture with him, and of which you are now seized of the freehold, and particularly of the land conveyed to J. T., by my said husband, by deed dated Oct. 19, 1819," was considered too vague and indefinite.

DOWER is demanded in this action of two parcels of land in Jefferson, described in distinct counts in the writ, which is dated September 18, 1857. Plea, demandant not dowable.

At the trial, before MAY, J., a demand of dower of the defendant was proved to have been made by W. H. Ford, agent and attorney of demandant, on April 9, 1857, which demand was in writing, signed by demandant and addressed to defendant, and was as follows:—

"I hereby demand of you my dower and just third part of all lands, tenements and hereditaments of which William Ford, my late husband, late of said Jefferson, deceased, was seized, at any time during my coverture with him, and of which you are now seized of the freehold, and particularly of the land conveyed to James Thomas, by my said husband, by deed dated Oct. 19, 1819, and I hereby require you to assign and set out the same to me, by metes and bounds, according to the intendment of the law in such cases provided.

"Jefferson, April 9, 1857."

The defendant objected to this demand, because there was no sufficient description of the premises.

The demandant introduced testimony as to the condition of the estate at the time of the alienation of it by the husband of the demandant.

The case was withdrawn from the jury, and submitted to the full Court on REPORT.

The questions arising in the case were fully argued; but, the sufficiency of the demand being the only question considered in the opinion of the Court, the arguments and evidence applicable to the other points are omitted.

H. Ingalls, for the demandant, argued:—

That no form of demand for dower is prescribed or required. All that is necessary is that the defendant should have notice of what land dower is demanded. Even by parol, dower may be demanded and assigned. *Baker* v. *Baker*, 4 Maine, 67; *Curtis* v. *Hobart*, 41 Maine, 230; *Conant* v. *Little*,

1 Pick. 189; *Jones* v. *Brewer*, 1 Pick. 315; *Atwood* v. *Atwood*, 22 Pick. 283; *Shattuck* v. *Gregg*, 23 Pick. 88.

Gould, for defendant, argued: —

The demand was not sufficient. (1.) It contains no description of the premises out of which the demandant claims dower.

The object of a demand is to give the tenant notice of the demandant's claim. This she cannot do without describing the lot or premises. She might do it by metes and bounds, or by reference to a description in the tenant's possession; but it is not sufficient to refer to a deed in the possession of a third person.

Reference to a deed upon the public records is not sufficient, because the tenant is not to be put to the trouble and expense of going to consult them, much less is a reference to a deed which was in the possession of James Thomas in 1819, without informing the defendant where it may now be found. Who has that deed? We know not. Whether it was ever recorded, so that information might thus be obtained, we are not informed, and, if recorded, we are not told where.

The first part of the demand is still more defective in the matter of description. How is defendant to know when the "coverture" spoken of commenced, and when it was terminated? And how is defendant to get information of what lands the plaintiff's "late husband was seized at any time during her coverture with him?"

The tenant is entitled to such a description as will enable him to proceed at once, and set out her dower, and thus save to himself cost and rent. Could he have done so in this case, without seeking other information than that contained in the demand? and that, too, without being informed where to look for it? There are two lots, the title of which he must trace.

(2.) R. S. of 1841, c. 144, § 2, provides that demand shall be made of the person who is seized of the freehold at the time of making the demand, if he be in the State, otherwise,

of the tenant in possession. It does not appear that defendant was "seized of the freehold" at that time, or that he was "tenant in possession." He may not, on the pleadings, be permitted to deny his tenancy at the time the action was brought, but, to make the notice good, it must appear that he was then tenant, or that he was seized.

In the case of *Baker* v. *Baker*, 4 Greenl. 67, the demand referred to a deed to the tenant. The Court say, "the tenant readily understood what was intended to be communicated." That cannot be said in this case.

The opinion of the Court was drawn up by

APPLETON J. — By R. S., c. 44, § 2, a demand must be made upon the tenant in possession, to assign dower, before an action can be maintained for its recovery. It is the duty of the tenant, thereupon, to assign dower in the premises in which it is demanded, if the demandant be thereto entitled. To enable him to do this, the demand must contain a description of the premises. But all that is required, says WILDE, J., in *Atwood* v. *Atwood*, 22 Pick. 283, "is that the description of the land should be such as to give notice to the tenant to what land the demand referred."

The demand in the present case is most vague and indefinite. It embraces all lands of which the husband was seized during coverture, and of which the tenant is now seized, without describing what or where those lands may be. The tenant, to know of what lands dower was demanded, must first ascertain when coverture commenced and ended, and whether his title to any lands of which he is in possession accrued between those dates. It is, substantially, a general demand of dower in all lands of which she is dowable. "A demand of dower in all lands of which the husband was seized during coverture," says WILCOX, J., in *Fulton* v. *Fulton*, 19 N. H., 168, "or of all lands in which she had a right to dower, would not probably be sufficient."

Neither is the indefiniteness of the demand aided by refer-

ence to the deed given by the husband to James Thomas, dated Oct. 19, 1819. Either the premises, in which dower is demanded, should be described, or a reference should be made to the deeds under or through which the tenant derives title. In *Baker* v. *Baker*, 4 Greenl. 68, the demand on the tenant was of dower in land purchased of the husband, and it was held sufficient, because the tenant could not but know to what the demand referred. In *Atwood* v. *Atwood*, 22 Pick. 283, the demand was of dower in land conveyed in common to the husband of the widow and to the tenant. As the tenant was a party to the conveyance, he could not be regarded as ignorant of what was thereby conveyed. So, if the demandant claim dower in the whole of certain premises, when she is legally entitled to dower in but a moiety, she may recover according to her title. *Hamblin* v. *Bank of Cumberland*, 19 Maine, 66. But, in the present case, no description of the premises, in which dower is demanded, is given, nor is any reference made to the deed under which the tenant derives title. The demand refers to a deed to a stranger, executed nearly forty years ago. The contents of that deed are not disclosed. It does not appear that it was ever recorded, or, if recorded, that the tenant claims title under it. A reference to a deed to a third person forty years ago, and not recorded, is no notice to the tenant in possession of what was thereby conveyed, and gives no such description of any premises that he can assign dower therein.

As the demand, neither in terms nor by reference, contains any sufficient description of the premises in which dower is claimed, the demandant must become nonsuit.

Plaintiff nonsuit.

TENNEY, C. J., RICE, HATHAWAY, MAY, and DAVIS, J. J., concurred.

LEWIS D. WRIGHT *versus* ELIAS HASKELL.

Where the defendant had contracted to sell to plaintiff a house, to be paid for in labor by plaintiff, which the plaintiff, with defendant's knowledge, and without objection from him, put in repair, and also performed labor for defendant in payment therefor, — if, afterwards, he is prevented from completing his contract, by the fault of the defendant, he may recover of him, in an action of assumpsit, for the improvements made, and for the labor performed.

Every breach of a special contract by one party, does not authorize the other to treat it as rescinded; but if the act of one party be such as necessarily to prevent the other from performing on his part, according to the terms of the agreement, the contract may be considered as rescinded by the other.

ASSUMPSIT on account annexed. Defendant duly filed an account in set-off. The case is presented on EXCEPTIONS taken by the defendant to instructions given by APPLETON, J., the jury having rendered a verdict for the plaintiff.

It appears from the bill of exceptions that testimony was introduced tending to show that defendant, in the year 1848, contracted to sell to plaintiff a small dwellinghouse in Jefferson, to receive his pay in blacksmith work; that the defendant thereupon went into possession of the premises, and made alterations and improvements in the house and outbuildings; that these repairs were put on without instructions from the defendant, and without having any consultation with him, but were done by the plaintiff on his own account, under the expectation that the property would become his; that plaintiff continued to occupy the premises until 1855, and, during such occupancy, had done the blacksmith and other work sued for in this case, towards the payment for the house; that in the spring of 1855, by mutual agreement, the plaintiff gave up the premises to the defendant.

There was contradictory proof on these points.

There was no evidence that defendant agreed either to pay for the work thus done, or to pay the plaintiff for the improvements which he had put upon the property, nor that there was any agreement for rent, but there was proof tending to show that when plaintiff demanded payment for his labor and re-

pairs and improvements, the defendant replied that he did not owe the plaintiff any thing, and that the defendant was knowing to the different improvements made by plaintiff, and that the house was untenantable when the plaintiff entered it.

The defendant claimed rent of the place during plaintiff's occupation. There was evidence of notice to quit to tenant. There was also testimony tending to show that when plaintiff gave up the house, three men were selected, by parol agreement, to view the premises and determine what the plaintiff was entitled to for his betterments, with liberty to either party not to abide by their determination by paying five dollars, and that they examined the premises and made an appraisal of the betterments of the plaintiff, and the sum to which he was entitled, with which defendant was dissatisfied and said he would pay the forfeiture, and paid plaintiff five dollars.

There was testimony tending to show that plaintiff was to pay two hundred dollars for the premises, fifty dollars a year in labor; and testimony that there was no such agreement. Whatever agreement there was, if any, was in writing.

Defendant's counsel contended, and asked the Court to instruct the jury that, under such circumstances, the plaintiff could not recover for the labor thus done in part payment for the premises, nor for his item for betterments and repairs on the buildings. The Court gave the requested instruction and also instructed the jury that if there was a contract of sale of the premises, and the improvements were made under that contract by the plaintiff on his own account, and the work was done in part payment, that the plaintiff could not recover if the non-performance of the contract was through his fault; that, if through the fault of the defendant, and he prevented the performance of the same, the plaintiff would be entitled to recover what his repairs were reasonably worth, and for his bill for blacksmith work.

That if the contract was rescinded by mutual agreement, the plaintiff would be entitled to recover for his bill for blacksmith work, and the reasonable value of his improvements

upon the house, deducting the fair rent of the place, in the absence of any agreement on the subject to the contrary.

Gould & Kennedy argued in support of the exceptions.

Ruggles, contra.

The opinion of the Court was drawn up by

RICE, J. — Assumpsit for iron work done for the defendant and for labor and materials and improvements upon the house and land of the defendant.

In view of the whole evidence in the case, the *tendency* of different portions of which only is reported, the counsel for the defendant requested the presiding Judge to instruct the jury "that, under such circumstances, the plaintiff could not recover for the labor thus done in part payment of the premises, nor for his item for betterments and repairs on the building," which requested instruction the Court gave, and also instructed the jury that if there was a contract of sale of the premises, and the improvements were made under that contract by the plaintiff, on his own account, and the work done in part payment, that the plaintiff could not recover if the non-performance of the contract was through his fault; that if through the fault of the defendant, the plaintiff would be entitled to recover what his repairs were reasonably worth and for his bill for blacksmith work.

This last instruction, which he did not call for, the defendant contends is erroneous, and insists if there was a contract, which the plaintiff was prevented from fulfilling through the fault of the defendant, his remedy is by a special action upon that contract, and not in assumpsit for labor performed and materials furnished.

There is an apparent discrepancy between the requested instruction, which was given, and the one which immediately follows it, unless the latter be deemed, as it was probably intended, as a qualification of the former. If the qualification is in conformity with the law, then the defendant has no cause for complaint.

The instruction is predicated upon the hypothesis that the jury might find that there had been a contract of sale of the premises from the defendant to the plaintiff, that the plaintiff had made improvements thereon under the contract, and had done certain blacksmith work in part payment therefor, but had been prevented from completing the contract by the fault of the defendant.

There would seem to have been evidence on which to base such an hypothesis; and, also, that whatever improvements had been made by the plaintiff were made with the knowledge of defendant and without objection on his part.

Every breach of a special contract, by one party, does not authorize the other to treat it as rescinded; but there are some breaches that do amount to an abandonment of it. There is not, perhaps, any precise rule, which, when applied to the breach of a contract, certainly settles the question whether it is thereby abandoned or not; but if the act of one party be such as necessarily to prevent the other from performing on his part, according to the terms of the agreement, the contract may be considered as rescinded by the other. His remedy in such case is upon the common counts. *Dubois* v. *Delaware and Hudson Canal Co.*, 4 Wend. 285; *Canada* v. *Canada*, 6 Cush. 15; 2 Greenl. Ev. § 104.

The instruction complained of was in strict conformity with this principle, and is well sustained by authority, and is certainly not inequitable, as the defendant now has his house with the improvements.

Exceptions overruled and judgment on the verdict.

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

SARAH G. MOORE *versus* ALFRED ROLLINS.

A widow is dowable of a lime quarry which was owned by her husband, and had been opened and wrought during her coverture.

Where one has received a deed of an estate and given back a mortgage of the same, to secure the payment of the purchase money, if the deeds are of the same date, have the same attesting witnesses, and are acknowledged before the same magistrate, and the notes secured are of the same date with the mortgage, in the absence of all proof to the contrary, the deeds will be regarded as one and the same transaction. And, as against *the mortgagee or his assignee*, the widow of the mortgager will be dowable only of an equity of redemption.

And the circumstance that the mortgager included in his deed other land than that conveyed to him by the mortgagee, does not change or affect the rights of the parties, in her suit for dower.

DOWER is sued for by the demandant in a lime-rock quarry, of the whole of which she alleges her late husband, Abel Moore, was seized during her coverture with him.

The action was tried at January term, 1857, APPLETON, J., presiding. Verdict for plaintiff for dower, in one undivided half-part of the premises. The case is presented on EXCEPTIONS taken by each party. The evidence was also reported on motion for new trial.

The facts necessary to an understanding of the case, and questions of law, which were argued, appear in the opinion of the Court.

Gould & Robinson, for demandant.

L. H. Howes, for tenant.

The opinion of the Court was drawn up by

APPLETON, J. — Each party alleges exceptions to the rulings of the presiding Judge at *Nisi Prius*.

The defendant is dissatisfied, because the jury were instructed that the widow was entitled to dower in a lime quarry, if the same had been opened and wrought during coverture.

The law is well settled, in England, that a widow is dow-

able of her husband's mines which had been opened and wrought during coverture, and in which he had an estate of inheritance. *Stoughton* v. *Leigh*, 1 Taunton, 412. The Court of Massachusetts, in *Billings* v. *Taylor*, 10 Pick. 460, which was the case of a slate quarry, say "that it would be too narrow a construction to say that no part of this quarry was opened, except that portion which had been actually dug; but it must be considered that the whole lying together as one tract, belonging to one estate, and wrought in the manner above described, was opened, and that the widow was entitled to dower in that as well as in the other estate of her husband." The same doctrine was affirmed in *Coates* v. *Cheever*, 1 Cow. 460.

The jury must have found, under the instructions given, that the quarry had been opened and wrought during coverture, and, if so, the tenant has no cause of complaint.

The demandant claims that she is entitled to dower in the whole of the disputed premises.

That the instructions given were correct will be apparent by recurrence to the title of her husband, under whom she derives her right to dower.

The evidence shows that Ambrose Seiders and Abel Moore, the husband of the demandant, were, on October 14, 1831, seized as co-tenants of the premises in which dower was demanded. This being during coverture, her claim to dower in a moiety of the estate is fully established, and so the jury were instructed.

The remaining question is whether the demandant has shown a right to be endowed of the other moiety.

It appears that Seiders, on Dec. 10, 1832, conveyed his half of the premises in question to Moore, taking back from Moore a mortgage including the premises then conveyed and the half of which Moore was the undisputed owner. The deed and mortgage are of the same date, have the same attesting witnesses, are acknowledged before the same magistrate, and the notes secured are of even date with the mortgage, and, in the absence of all proof to the contrary, must be regarded

as part of one and the same transaction. *Cunningham* v. *Wright*, 1 Barb. 399; *Keller* v. *VanDyck*, 1 Sandf. Ch. 76.

If the deed from Seiders to Moore, and the re-conveyance back in mortgage, at the same time, had been only of the moiety conveyed to Moore, it would not have been questioned that this was a case of instantaneous seizin, and that the widow, as against the mortgagee or his assignee, was dowable only of the equity of redemption. *Smith* v. *Stanley*, 37 Maine, 11. But the circumstance that Moore included in the same mortgage other land than the moiety which Seiders conveyed, as security for the purchase money, does not affect the question. It was none the less a case of instantaneous seizin of the Seiders moiety, because the purchaser saw fit to secure him with other land in addition to that which was then conveyed. As against the mortgage, the widow was not dowable of this moiety, except upon its payment. *Hastings* v. *Stevens*, 9 Foster, 565.

On Aug. 23, 1834, Moore conveyed the whole estate to the tenant. The demandant is dowable of the same against all, except the mortgagee or his assignees, and against him, she is dowable as to the Seiders moiety of the equity of redemption.

It appears that, shortly after this conveyance, the tenant acquired, by assignment, the mortgage Moore had given Seiders. The tenant thereby succeeded to the rights of Seiders. The widow was not entitled to dower as against the mortgagee, and such was the instruction given. In the recent case of *Young* v. *Tarbell*, 37 Maine, 508, the right of a widow to dower was before the Court, and it was determined, where land is conveyed to the husband, and a mortgage taken back at the same time to secure the purchase money, that the widow, as against the mortgagee or his assignee, is dowable only of the equity of redemption, but as against all others, she is dowable in the land. The tenant, in that case, did not hold the mortgage, but the superior right of the mortgagee was recognized. In the case before us, the tenant is the assignee of the mortgage, and invokes it in bar of dower to the extent only of the Seiders moiety.

The mortgagee having been in possession more than twenty years, as against the mortgager, the mortgage is to be regarded as foreclosed, within the case of *Blethen* v. *Dwinal*, 35 Maine, 556. Whether the demandant in such case would be estopped as to dower in the equity, is not now before us. The instructions affirmed her right, and of that the demandant cannot complain.

Exceptions and motion overruled.
Judgment on the verdict.

TENNEY, C. J., RICE, CUTTING, MAY, and DAVIS, J. J., concurred.

WILLIAM MITCHELL *versus* CITY OF ROCKLAND.

Neither a town nor its officers have any right to appropriate or interfere with private property, except so far as that right is conferred by statute.

Where a vessel is subject to quarantine regulations, the officers of the town are not authorized to appropriate *any part thereof* for a hospital, or to exclude the owner from the possession or control of any part of the vessel.

The Legislature intended to subject vessels to quarantine regulations only — not to require their seizure and conversion into hospitals.

THE trial of this action, which was granted by this Court, [see *Mitchell* v. *Rockland*, 41 Maine, 363,] was had before RICE, J., presiding at *Nisi Prius*. The verdict was for plaintiff. The case is now presented on motion to set aside the verdict as being against law, and also on EXCEPTIONS to various instructions given to the jury.

This action is to recover for injury sustained by plaintiff from the partial destruction of his vessel and cargo by fire, through the alleged carelessness of the board of health of the city of Rockland.

One of the instructions which the presiding Judge was requested to give the jury was, "that the authorities of the city, or the board of health, had no legal right to take the absolute

possession or control of the vessel or the cabin thereof, to use as a hospital or otherwise, and, if they did, the city would not be liable for such act or its consequences."

This was given with this qualification, that "they might lawfully take possession or control of the cabin, so far as was necessary for the relief of the sick man, if he could not be removed without imminent danger."

"That the health committee, in case there was no hospital in the city, or in case the condition of the man, who was infected with the small pox, on board the schooner, did not admit his removal without imminent danger, to appropriate such portion of the vessel, for the accommodation of the infected person, as they should deem necessary for his relief, and to subject the portion of the vessel, thus appropriated, to the same regulations as they would be authorized to apply to hospitals."

The several questions presented by the case were fully argued by the counsel of the parties, but, as only one of them is considered in the opinion of the Court, further notice of the others is omitted.

Thacher, for defendants, in support of the exceptions, argued:—

That the doings of the persons who assumed to act as a health committee were unauthorized by law, and the corporation is not liable for the consequences. The law regulating quarantine was not observed. R. S. of 1841, c. 21, § § 20, 24; *Mitchell* v. *Rockland*, 41 Maine, 363, and cases there cited by defendants' counsel.

The health officers had no legal right to take possession, and make a hospital, of the cabin of the vessel. The instruction requested should have been given without qualification. R. S., c. 21, § 32.

A. P. Gould, contra.

1. When this case was before the Court, upon a former occasion, the rights, duties and liabilities of the parties were

made to depend wholly upon the laws of quarantine. The duties of the health committee, in relation to the care of the sick and infected, and the prevention of the spread of contagious diseases, when such diseases break out in a town or city, are now also to be considered.

For the duties of health officers in this State, both in relation to vessels and buildings on land, we are to look to our statutes; and, in relation to vessels, we contend that a larger power is conferred upon them than would be implied from the use of the term "quarantine," as found in the Law Dictionaries. All the duties prescribed for the preservation of the public health are found in the statute. The object of the statute, is as much to secure the performance of the offices of humanity towards those who may fall into distress, in boats and vessels, within the limits and jurisdiction of the town, as those in dwellinghouses. There exists the same necessity for the preservation of human life, and the protection of the public health, in the one case, as in the other. R. S., c. 21, § § 1, 15, 16, 17, 18, 20, 26, 32, 37.

Section 1 provides that, when any person coming from abroad, &c., shall be infected with any disease dangerous to the public health, the committee shall provide for the safety of the inhabitants in the manner they shall judge best, by removing such person, if it can be done without danger to his health, and by providing nurses, and other assistance and necessaries.

Section 15 makes it their duty to remove all filth of any kind, which shall be found in any place within the limits of their town, which in their judgment may endanger the lives or health of the inhabitants.

Section 16 authorizes them to remove or discontinue any cause of sickness which may be found upon private property within the town. By section 17, all persons on board of vessels, where any infection may then be, are submitted to the jurisdiction of the health committee. By sections 18 and 20, vessels arriving at any port within the State are requir-

ed to anchor at a convenient place below the town, of such port, and there to perform quarantine, under the direction of the health committee.

It will be observed that the duties imposed on health officers, in these two sections, (18 and 20,) are not required to be exercised within the limits of the town. Their quarantine duties and jurisdiction attach when a vessel arrives at the port. There is another class of duties to be performed within the limits of the town.

Section 32 requires the health committee to provide for a "place of reception for the infected, such as they judge best for the accommodation of the sick, and the safety of the inhabitants, whenever the small pox, or any disease dangerous to the public health, shall break out in any town;" and, if the condition of the infected person be such as not to admit of removal, without imminent danger, the house or "place where the sick person is found shall be considered as a hospital for every purpose before mentioned;" and all persons residing in, or "in any way connected with such place," are subjected to the regulations of the health committee. The Caroline was within the city of Rockland; and the small pox "broke out" within its limits. Dr. Robinson testifies that the sick person could not be removed without imminent danger to his life. The man was without medicine, nursing or any of the necessities of one in his situation. Must he be left there to die, simply because he happens to be on board of a vessel a few rods from the shore? The humanity of the law forbids it. He is found in a "place," and cannot be removed. That "place," therefore, becomes a "hospital for every purpose, subject to the regulations" of the health committee. One power which they have, indeed a duty imposed, undoubtedly is, when they have thus providentially been obliged to use a place for the care of the sick of an infectious disease, to cleanse it; and to take such measures for this purpose as they shall judge the safety of the public demands.

Section 33 requires the health committee, "whenever any disease dangerous to the public health shall be found to exist

in any town, to use all possible care to prevent the spreading of the infection."

Under sections 1, 15, 16 and 33, they might purify a "place" where a man had recently died of small pox, before permitting persons to go in there, who might otherwise contract the disease and spread it, without resorting to the provisions of the 18th, 20th, 24th, 25th, and 32d sections, if that were necessary.

But the powers conferred in section 32 may be regarded, not as applying to a distinct class of cases, but as an adjunct of the quarantine power, to be exercised upon the subjects of quarantine, when found within the limits of the town. No restriction to any particular class of cases, such as those on land, is suggested in the statute, but the provision is general and peremptory in its terms, covering all cases where the condition of the sick person will not admit of his removal.

But the health committee have power, also, over the persons of those on board of vessels performing quarantine. Sections 24 and 25. They may "there be detained by force, if necessary, until discharged."

Let us then suppose that a vessel is performing quarantine within the limits of a town, where the persons on board are detained by force, and one of them is so violently seized with small pox as to render his removal impossible. No person can go on board to care for him without the permission of the committee. May they not send him aid, a nurse and medicine? And may they not make his place of confinement comfortable, warm it, and keep it clean? And, after his death, if it is necessary for the health of those still confined on board, or others to whom the committee may permit intercourse with the vessel, may they not cause the place where the man died to be cleansed? The fact that the vessel is private property does not prevent, for we all hold our property in subserviency to the public interest; and the statute expressly gives authority, in this case, to appropriate private property to public uses, and to remove from it "all cause of disease." Sections 15, 16. There is no occasion in this case to

inquire whether the committee would have authority to detain a vessel for the express purpose of making a pest-house of her. This vessel was detained within the town by an authority that is not questioned. She was performing quarantine and was not detained as a hospital. It appears that she was voluntarily submitted to the charge of the health officers. The only question here is, being thus, and remaining thus, lawfully within their jurisdiction, and a person on board becoming so violently sick of an infectious disease, that he could not be removed from the place where they found him, are they not authorized to treat such place as a hospital for him? Fumigation is the common mode resorted to, to purify infected places, and it is generally adopted by health officers in cases of infected vessels, before they are permitted to go up to the town. This fact appears by the testimony in the case. Something of this kind would seem to be necessary to prevent the spread of the contagion, which it is their duty "in every possible way" to do.

Webster, in his Quarto Dictionary, says, that quarantine applies to persons as well as vessels. "The passengers and crew perform quarantine." And this, by our statute, is to be done "at such place, and under such regulations," as the committee shall "judge expedient." So that, upon any view of the case, it would seem that the health committee had power, finding this man so sick in a place within their town that he could not be removed, to provide for him, and to cleanse his place of confinement after he was dead.

The health officers did not take control of the vessel, but only such a place in it as was necessary for the care of the sick man. The presiding Judge instructed the jury that the defendants would have the right to appropriate such portion of the vessel only, to the accommodation of the infected, as they should find necessary for his relief, and to subject that part of it to the regulations of a hospital. All that was decided in the former opinion, in this case, was that the owner could not be divested of the control and possession of the vessel, as such, against his will. And this decision was made

solely upon the quarantine sections of the statute. The former trial, the ruling of the Judge presiding, and the arguments of the counsel, having presented that phase of the case only, there was no other question for the Court to decide. The facts, the rulings and findings of the jury at the last trial, present other and further questions.

2. But if the Court shall come to the conclusion that the committee exceeded their authority, I again most respectfully, but confidently, press upon the consideration of the Court my position upon the former occasion, that it was simply an excess of authority; and that, having authority by the nature of the duties and functions of their office as health officers, upon the general subject matter, and their acts being within the general purview of their authority, if they did not act maliciously, but carelessly merely, the city is liable. The very case referred to by this Court, for the rule that if the agent exceeds his authority the principal is not liable, contains the exception also, more strongly stated than is necessary to this case, as the facts are now presented. And the Court there made the exception the rule of their action. *Thayer* v. *Boston*, 19 Pick. 511.

I cannot employ argument more forcible or more pertinent to the facts in this case, than to adopt the language of the Court in that case, on pages 515 and 516.

3. There was no occasion to prove that the acts of the health committee were the acts of the city, for this is distinctly alleged in the writ, and admitted in the specifications of defence. Under the pleadings, as they were, no question of excess of authority could therefore arise.

4. The acts of the health committee were subsequently adopted and ratified by the city in its corporate capacity. The bill containing a specific charge for the service of cleansing the vessel passed both branches of the city government, and was paid, upon the order of its mayor; and this was done with a full knowledge of all the facts. The jury have settled this by a special finding to that effect. The necessity of this special finding was foreshadowed in the former opinion.

The opinion of the Court was drawn up by

APPLETON, J. — The presiding Justice, in the trial of this cause, was requested to instruct the jury "that the authorities of the city, or the board of health, had no legal right *to take the absolute possession or control* of the vessel or the cabin thereof, to use as a hospital or otherwise, and, if they did, the city would not be liable for such act or its consequences."

This was given with the qualification, that "they *might lawfully take possession or control* of the cabin, so far as was necessary for the relief of the sick man, if he could not be removed without imminent danger."

The presiding Judge further instructed the jury, that "the said (health) committee, *in case there was no hospital in the city*, or in case the condition of the man, who was infected with the small pox, on board the schooner, did not admit of his removal without imminent danger, had the right *to appropriate such portion of the vessel* for the accommodation of the infected person *as they should deem necessary for his relief*, and to subject the portion of the vessel, thus appropriated, to the same regulations as they would be authorized to apply to hospitals."

By the instructions, as requested, with the qualification, as given, the proposition is, that the authorities of the city may lawfully take possession or control of the cabin, so far as may be necessary for the relief of the sick man, if he could not, without imminent danger, be removed therefrom. The instruction, as given, recognizes the right to appropriate such portion of the vessel as the health committee may deem necessary for the accommodation of the sick man, in case his removal would endanger his health, or there was no established hospital in the city. As the portion of the vessel which may be deemed necessary depends upon the judgment of the committee, there is nothing to prevent their taking or appropriating the whole. The instruction, therefore, as given, amounts to this, that the city authorities, in certain specified contingencies, may *take possession of, control and appropriate* the whole or any portion of a vessel, as they may deem expedi-

ent, without the consent or concurrence of the owner or master.

Neither the defendants, nor any officers of theirs, have any right to appropriate or interfere with private property, except so far as that right may be conferred by statute.

By R. S. of 1841, c. 21, provision is made to protect the inhabitants of a town or city against "any person coming from abroad, or residing in any town," who shall be or "shall recently have been infected with any disease or sickness dangerous to the public health," &c.

By section 18, vessels arriving "at any port," having infected persons on board, are required to anchor "below the town of such port," and no person or thing on board "shall be suffered to be brought on shore until the selectmen of the town shall give their written permit for the same." Penalties for the violation of these provisions are established by section 19.

By section 20, the selectmen of the town are authorized to establish quarantine regulations, for a violation of which penalties are prescribed by § 21.

By section 22, it is made the duties of pilots to give notice to the masters of vessels of the orders and regulations of the selectmen in relation to quarantine, and, by § 23, penalties are imposed for the evasion or violation of quarantine regulations after notice.

By section 24, signals are provided by the selectmen, and, during the time prescribed for the quarantine, no person is allowed to go on board, except by permission of the selectmen.

These are the material provisions of the statute relating to the question under discussion, so far as they relate specifically to vessels. They give no authority to the selectmen or to the health committee, who, by § 26, are clothed with the same authority, to take possession of, to control or appropriate a vessel, or any portion of the same, as a hospital.

By section 28, hospitals may be established or licensed "within the town."

By section 32, "whenever the small pox or any other disease, dangerous to the public health, shall break out *in any town*," it is made the duty of the selectmen to *provide* a "hospital or place for the reception for the sick and infected." In case the persons sick and infected cannot safely be removed, it is provided that "the house or place," in which they may be, "shall be considered as a hospital for every purpose before mentioned," and the persons *residing* therein are made "subject to the regulations of the selectmen." In the latter case, "the house or place is not to be regarded as a hospital, either established, licensed, or provided, within the statute, but it is to be "*considered*" as one for the purpose of subjecting those residing therein to "the regulations of the selectmen."

It is apparent, therefore, that section 32 cannot apply to a case like the present. The power of health officers over vessels, "when they arrive at any port in this State, having on board any person infected with a malignant disease," is specially prescribed in previous sections. Having made all necessary regulations for this class, the Legislature, in the following sections, including section 32, proceed to provide for cases where the small pox, or other dangerous disease, should "break out" *in any town*. In such cases, any house or place, where the sick are to be, is to be "considered" as a hospital. Now, from this section, it is clear that a vessel is not to be regarded as a "house or place" within its meaning. It is not a place in which persons reside, as in a house. The Legislature first made provisions, such as were deemed adequate for vessels, and, having done this, they proceeded to make such regulations for hospitals in towns as the occasion seemed to require. All that the Legislature intended was to subject vessels to quarantine regulations,—not to require their seizure and conversion into hospitals.

The power to remove persons and things infected, and to "impress and take up convenient houses and stores for the safe keeping," &c., of the persons and things infected, is giv-

en by § § 6, 7, 8, 9. But it is not pretended that there has been any action under these sections.

When this case was before under consideration, TENNEY, C. J., in delivering the opinion of the Court, in *Mitchell* v. *Rockland*, 41 Maine, 363, says, "no authority has been found which allows health officers, by virtue of their power to cause quarantine regulations to be performed *ex vi termini*, to take the vessel, in which such contagious disease is found, into their own possession and control, to the exclusion of the owner or those whom he has put in charge."

The language of the statute requires that the vessel shall perform quarantine in the cases prescribed, and all having connection with the vessel, as owner, master, &c., are required to comply with the regulations of the selectmen or health officer. This clearly implies, at least, that the owner, and those having possession and control of a vessel under him, shall not be divested of this control and possession by the municipal officers.

The instructions given are at variance with what we regard the true construction of the statute, as heretofore deliberately determined, and a new trial must be had.

Exceptions sustained.

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

RICE, J., did not concur.

COUNTY OF KENNEBEC.

WILLIAM E. COFFIN *& al. versus* ABRAM RICH.

Although a charter granted to a corporation is a contract between it and the State, the obligations of which cannot be impaired by subsequent legislation, corporations, like natural persons, are subject to remedial legislation, and amenable to general laws.

A statute providing that stockholders in corporations shall be personally liable for the corporate debts is constitutional and valid, so far as it applies to such debts subsequently contracted.

But, there being no privity of contract between the creditors of corporations and the individual members, they are personally liable only by express provision of statute; and the repeal of such a statute does not impair the obligation of any contract.

The right of the creditor against any of the individual stockholders is not vested until he recovers his judgment against them.

If the language of the statute is clear and plain, courts of justice have no authority, in consideration of the consequences resulting from it, to give it a construction different from its natural and obvious meaning.

Where an Act of the Legislature is repealed and is re-enacted, with some changes, at the same time, both statutes may properly be taken into consideration, in giving a construction to the latter; but the Act repealed has no force whatever, only so far as it is continued in force by saving clauses and exceptions.

Legislatures have authority to enact retrospective laws, if they affect remedies only; but such laws, if they impair vested rights or create personal liabilities, are unconstitutional and void.

THIS is an action brought by the plaintiffs, as judgment creditors of the Kennebec and Portland Railroad Company, to recover of the defendant, as a stockholder in said company, the amount of their judgment against said corporation.

The case, as made by the parties for the consideration of the full Court, will be readily perceived from the opinion of the Court. The questions arising in the case were fully and ably argued by

Bradbury, for the plaintiffs, and by

H. W. Paine, for the defendant.

The opinion of the Court was drawn up by

DAVIS, J.—In March, 1857, the plaintiffs recovered judgment against the Kennebec and Portland Railroad Company for the sum of $1900,38. The debt, which was the basis of this judgment, was contracted in 1855. The defendant was at that time, and ever since has been, a member of said company, owning twenty-two shares of the capital stock, of the nominal value of one hundred dollars each. The plaintiffs, being unable to find corporate property to satisfy their judgment, instituted proceedings against the defendant, as a stockholder, to render him personally liable to them. The defendant admits the regularity of the proceedings, but he denies that the stockholders are in any case personally liable for the corporate debts.

By the Act of Feb. 16, 1836, the individual property of stockholders was made liable for the corporate debts of all corporations thereafterwards created, each member being liable for a sum equal to the amount of his stock. This Act preceded the charter of the Kennebec and Portland Railroad Company, the latter having been granted in April of the same year; and we are satisfied, notwithstanding the very ingenious argument of the counsel for the defendant, that the corporation was subject to its provisions.

By the R. S. of 1841, the Act of 1836 was repealed, and a new provision, substantially the same, but differing in some respects, was enacted to take the place of it. And it is contended that the Legislature, having abrogated the liability imposed upon stockholders by the former Act, had no right to impose it again upon members of corporations already chartered. It is argued that a statute making stockholders personally liable for the corporate debts, if applied to existing corporations, would be a substantial change of their charters,

by imposing new liabilities, and would, therefore, be unconstitutional, as impairing the obligation of contracts.

It is true, that whatever rights are conferred upon a corporation by its charter are irrevocable, and cannot be controlled by any subsequent statute, unless power for that purpose be reserved. *Wales* v. *Stetson*, 2 Mass. 146. The charter is a contract between the State and the corporation, which the constitution protects from being impaired by any subsequent legislation. *Nicholas* v. *Bertram*, 3 Pick. 342. "Nothing is better settled than that a charter, when accepted by the corporation, becomes a contract which cannot be modified or impaired in its obligation, without the consent of the corporation." *Nichols* v. *Somerset and Kennebec Railroad Co.*, 43 Maine, 351.

But it does not follow that such corporations are altogether beyond the supervision and control of the Legislature. In theory, the body corporate is a person, and, like natural persons, is amenable to general laws. The imposition of a tax upon corporations is no violation of their rights and privileges. *Providence Bank* v. *Billings*, 4 Peters, 514; *Commonwealth* v. *Eastern Bank*, 10 Barr. 442; and they are subject, generally, to remedial legislation, like individuals. *Brown* v. *Pen. Bank*, 8 Mass. 445. Is it any infringement of their charters for the Legislature to enact a law, prospective in its operation, making the stockholders personally liable for the corporate debts contracted while they are members?

This question was before the Supreme Court of Massachusetts, in the case of *Gray* v. *Coffin*, 9 Cush. 192. And it was there held that a statute, "providing to what extent the members of all corporations shall be liable to all persons dealing with and becoming creditors of any corporations," was binding upon existing corporations; and that it rendered the stockholders in such corporations personally liable for corporate debts subsequently contracted. This decision was placed on the ground that, though the statute imposed new personal liabilities upon the members, it did not affect the corporation as such. "It had no tendency to impair, or in any way to

affect or modify, any power, privilege, or immunity, pertaining to the franchise of any corporation; and it therefore seems to be within the just limits of legislative power."

We are satisfied that this decision was correct, and that it is conclusive upon one of the questions raised in the case before us. Though the statute of 1836 was repealed in 1841, a new statute was then enacted, making members of corporations personally liable, to the amount of their stock, for all debts contracted during their membership. The charter of the Kennebec and Portland Railroad Company, though granted previously, had not then been accepted; and the company was not organized until several years afterwards. When the stockholders became members of the corporation, they knew that the law held them personally responsible for the corporate debts. Such was the law when the contract was made between the plaintiff and the corporation; the defendant was a stockholder at the time; and, if there had been no change in the statute since that time, there could be no doubt of the defendant's liability.

A more difficult question still remains. Members of corporations were made personally liable for the corporate debts, by the statute of 1841; but this statute was repealed in 1856. When the statute of 1836 was repealed by that of 1841, "pending suits," and all "*liabilities, rights, and obligations, already effected,*" were saved from the operation of the repealing clause. But, in the repealing Act of 1856, there is no saving clause, except of "suits and processes then pending." This does not embrace the suit before us, as it was not commenced until 1857. We are therefore brought directly to the question — whether the Legislature of 1856, by repealing the statute imposing personal liability upon stockholders for the debts of the corporation, did not thereby absolve them from all such liability for corporate debts contracted before that time.

If, at the same time, and as a part of the repealing Act, a new provision, similar in substance, had not been enacted, it would hardly be contended that the liability continued. There

is no privity of contract between the creditors of the corporation and the individual members. They are, therefore, not personally liable, unless this liability is expressly imposed by statute. *Andover* v. *Flint*, 3 Met. 539. "Such liability," says C. J. SHAW, in the case of *Gray* v. *Coffin*, "is a wide departure from the established rules of law, and is therefore to be construed strictly, and is not to be extended beyond the limits to which it is carried by positive provisions of statute." As this remedy against stockholders does not arise from any contract with them, but is given only by positive statute, therefore a repeal of the statute does not impair the obligation of any contract. The Legislature have power to take away by statute what was given by statute, except vested rights. *People* v. *Livingston*, 6 Wend. 526. And the right of the party, when it exists only by statute, "does not become vested till after judgment." *Oriental Bank* v. *Freese*, 18 Maine, 109. The statute of 1841 was repealed in 1856, excepting from the operation of such repeal only "suits and processes pending" at that time. No persons, except those who had already recovered judgments against stockholders, and those whose actions had then been commenced, can any longer invoke its aid.

It is said, however, that the Legislature could not have intended, by this repeal, to change the existing liabilities of members of corporations; and that they must have intended to save, not only pending actions, but pre-existing liabilities also. Why they did not except such liabilities from the operation of the repealing Act is not for us to say. Whether by design or mistake, the effect is the same. It is only when the words of a statute are obscure, or doubtful, that we have any discretionary power in giving them a construction, or can take into consideration the consequences of any particular interpretation. "If the meaning of statutes is doubtful, the consequences are to be considered in the construction of them; but if the meaning be plain, no consequences are to be regarded, for that would be assuming legislative authority." 4 Bacon's Ab. 652. The saving clause in the Act of 1856 is not obscure, or doubtful, but it is clear and distinct; and it

excepts nothing but "suits and processes pending under or by virtue of" the Act repealed by it.

"Courts of law are expressly bound by the statute. When the Legislature, in the same statute, gives an extension of time in certain specified cases, it would be an assumption of legislative authority to introduce any other proviso." *Troup* v. *Smith*, 20 Johns. 33. "Whenever the situation of the party was such as, in the opinion of the Legislature, to furnish a motive for excepting him from the operation of the law, and the Legislature has made the exception, it would be going far for this Court to add to those exceptions." *McIvar* v. *Ragan*, 2 Wheat. 29. "If the Legislature makes no exception, the courts of justice can make none, as this would be legislating." *Bank* v. *Dalton*, 9 How. U. S. 522.

There can be no doubt, therefore, that the repeal of the statute of 1841 by that of 1856 defeated all rights under the former, except those which had already become vested by a judgment, or were saved by an action already commenced. No further proceedings can be had under a statute which has been repealed. *Com.* v. *Kimball*, 21 Pick. 373; *Springfield* v. *Hampden*, 6 Pick. 501. If the repealed statute merely prescribed a remedy for a previously existing right, some other remedy may be presumed or provided. *Plantation No.* 9 v. *Bean*, 36 Maine, 360. But if the right itself was created by statute, and existed only by virtue of its provisions, then the repeal of the statute defeats the right itself, unless already vested by a judgment. *Butler* v. *Palmer*, 1 Hill, 324. So it has been held by this Court, in reference to this Act now under consideration. After the statute of 1836 had been repealed by that of 1841, no rights existed under the former Act, except such as were expressly secured by the saving clause of the latter. *Longley* v. *Little*, 26 Maine, 162.

Nor can it make any difference that the portion of the Act repealed, now under consideration, was substantially re-enacted as a part of the repealing Act. It was the same in the Acts of 1836 and 1841; but it was not held to make any difference in the case above cited. If a statute is absolutely

repealed, all rights under it are severed, however brief the period intervening before another similar Act is passed. So Legislatures have always understood it. If it were not so, when statutes are revised, codified, and re-enacted, no saving clauses and exceptions would be necessary. A person could still be convicted under a repealed criminal statute, if it was substantially re-enacted at the time of its repeal, though the repealing Act contained no provision to that effect. This cannot be so. If an Act is only amended, the line of its operation is not severed. New threads are interwoven, or old ones taken out. But if it is repealed, though another like it is re-enacted, all connection between the old and the new is cut off, except what is saved by special provisions. The former statute becomes as if it had never existed. *Keye* v. *Goodwin*, 4 Moore & Payne, 341. And the new statute commences as if none had preceded it. Such, we think, is clearly the better rule of construction. "Hence it is usual in any repealing law, to make it operate prospectively only, and to insert a saving clause, preventing the operation of the repeal and continuing the repealed law in force as to all pending prosecutions, and often as to all violations of the existing law already committed." *Com.* v. *Marshall*, 11 Pick, 350. The repealing Act of 1856 contains no such saving clause, embracing debts previously contracted, unless suits thereupon were then pending. We are therefore satisfied that this action cannot be sustained under the statute of 1841.

Nor is this conclusion in conflict with the case of *Wright* v. *Oakley*, 5 Met. 400. It was there held that whether a contract was barred by the statute of limitations, which had been repealed and re-enacted with some modifications, must depend upon the facts, and the law as it was contemporaneous with the facts. But the ground of the decision was that the case was within the saving clause of the repealing Act, which, besides excepting actions then pending, provided that it should not "affect any act done, or any right accruing or accrued, or established," at the time of the repeal. In determining whether the case was within the exception, and giving a con-

struction to the new statute, the Court very properly took into consideration the statute that had been repealed by it; but no intimation was made that the latter had any force or vitality, except so far as specially saved by the repealing Act.

But it is argued, further, that the plaintiff has a right of action against the stockholders by the terms of the statute of 1856. This provides that "the stockholders of all corporations shall be liable for the debts of the corporation *contracted during their ownership of such stock.*" Does this render them liable for debts *contracted prior to the passage of the Act?* If not, the defendant is not liable; for the debt was contracted in 1855.

In general, statutes are to be construed as prospective only, unless the intention to give them a retrospective operation is clearly expressed. *Hastings* v. *Lane*, 15 Maine, 134. The statute of 1856 is not very explicit in this respect. The verbs expressing the liability are in the future tense — "shall be liable;" but the time of liability — "during their ownership of such stock," may include the past as well as the future. And when we consider that this Act was designed to take the place of a similar statute repealed by it, we think it probable that the Legislature intended it to be retrospective. Had they any constitutional power to enact a law making stockholders in corporations personally liable for the corporate debts previously contracted?

We have already seen that a statute imposing such a liability is entirely at variance with established principles of law, and must be construed strictly. The creditor contracts with the corporation only. Aside from the positive provisions of statute, the stockholders are no more liable than for the debts of third persons. The claim of the creditor, like that of a town which has expended money to relieve a pauper whose settlement is in another town, is based entirely upon the statute.

There can be no doubt that Legislatures have the power to pass retrospective statutes, if they affect remedies only. Such is the well settled law of this State. But they have no con-

stitutional power to enact retrospective laws which impair vested rights, or create personal liabilities. This subject was elaborately discussed by MELLEN, C. J., in the case of *Kennebec Purchase* v. *Laboree*, 2 Greenl. 275; and, it was there held that the constitution secures the citizens "against the retroactive effect of legislation upon their property." And, in regard to the question of what is a retrospective law thus unconstitutional, the Court adopted the definition of Judge STORY, "a statute which creates a new obligation, or imposes a new duty." A statute making members of corporations personally liable for the corporate debts is clearly within this definition, and therefore can be held to operate prospectively only.

This was so decided in Massachusetts, in the case of *Gray* v. *Coffin*, previously cited. Such a statute was held to be constitutional, on the ground that "it was future and prospective in its operation, regulating the rights of debtor and creditor as they should afterwards arise." It was therefore concluded that the Legislature intended it to be prospective only. So, we must presume, in regard to the statute of 1856. Whatever the Legislature in fact intended, we are to presume that they intended to do that only which the constitution authorized them to do. "For no legislator could have entertained the opinion that a citizen, free of debt, could be made a debtor by a legislative Act declaring him one." PARKER, C. J., in *Medford* v. *Learned*, 16 Mass. 215.

We have thus reviewed the legal principles upon which this case must depend; and we have carefully considered the able arguments of counsel in this case and in several others, now before us, of like impression. And, if we apply to it those rules of construction which have been recognized in Courts of law, we are brought to this conclusion, that this action cannot be sustained upon the statute of 1841, because it has been repealed, and there is no saving clause in the repealing act which embraces actions subsequently commenced; and that it cannot be maintained upon the statute of 1856, because the debt was contracted prior to its enactment. Ac-

cording to the agreement of the parties a nonsuit must be entered.

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

WARREN LOUD *versus* AMBROSE MERRILL.

The notarial protest of a bill of exchange or promissory note duly certified, is legal evidence of the facts stated therein.

It is not necessary, in an action against the indorser of a note, for the plaintiff to prove that the defendant actually received the notice of non-payment. It is sufficient if it appears that the letter containing the notice, was properly directed, seasonably mailed, and the postage paid.

And where these facts appear, the plaintiff is entitled to recover, though the defendant prove that the only notice be received was insufficient.

The plaintiff having reserved interest at the rate of twelve per cent. per annum, when he received the note from the maker in an action against an accommodation indorser, *it was held*, that the excess over six per cent. should be deducted.

And this fact being proved, by the testimony of the defendant, it was held, that he was entitled to recover costs.

REPORT by RICE, J.

This was an action of ASSUMPSIT upon a promissory note, dated at Hallowell, Dec. 17, 1855, for the sum of $5000, due in one year from date, at the Suffolk Bank, in Boston. It was signed by Reed & Page, a firm doing business in Hallowell, payable to Rufus K. Page, and was indorsed by him and by the defendant.

The defence was, that there was no sufficient demand of payment at maturity to charge the defendant as indorser. There was also a partial defence on the ground of usury.

The plaintiff put into the case the notarial certificate, under the hand and seal of S. Andrews of Boston, a notary public, by which it appeared, that on the twentieth day of December, 1856, he duly demanded payment at the Suffolk Bank, and was informed that the principals had no funds

there, and that thereupon, on the same day, he duly notified the indorsers of the demand and the non-payment of the note.

There was also other evidence, that the letter containing the notice was directed to the defendant, and seasonably mailed, the postage on the letter being pre-paid.

The defendant, for himself, testified, that the only notice he ever received was the one produced by him in Court, of which the following is a copy:—

"Commonwealth of Massachusetts.

"Suffolk ss. Boston, Dec. 17th, 1856.

"Ambrose Merrill, Sir:— A promissory note, for five thousand dollars, dated Hallowell, Dec. 17, 1855, signed Reed & Page, payable to the order of Rufus K. Page, at Suffolk Bank, Boston, at one year after date thereof, indorsed Rufus K. Page, Ambrose Merrill, Warren Loud, having been protested by me, this day, for non-payment, I hereby notify you that the holder looks to you for payment, interest, cost and damages, payment having been duly demanded and refused.

"Done at the request of the Cashier of the Bunker Hill Bank. "S. Andrews, Notary Public."

The defendant also testified, that the plaintiff told him that Reed & Page paid him twelve per cent. interest on the note when he took it of them.

The case was argued by

Williams & Cutler, for the plaintiff, who relied upon the notarial certificate as evidence that the demand was duly made, and the defendant notified of the non-payment. *Ticonic Bank* v. *Stackpole*, 41 Maine, 302. And they contended that there was no evidence in the case that notice of such a demand was not duly sent to the defendant, whether he ever received it or not.

Bradbury argued for defendant:—

The defendant is sued as second indorser on a note signed by Reed & Page, (Henry Reed and John O. Page,) payable to, and first indorsed by, Rufus K. Page.

The defence is, that the notice to Merrill is fatally defective, it being of a protest on the 17th of December, the day the note would be due *without grace,* instead of the 20th, when legally due.

The liability of an indorser is *conditional.* The paper must be presented and demand made *on the day it matures,* and, if not *then* paid, notice must be duly given to the indorsers.

A presentment *before* or *after* the day, is equally out of time; and the indorser is discharged in either case, by the neglect to perform a condition essential to fix his liability.

It is not sufficient that the demand be made *in fact* upon the proper day. *It is also essential that the indorser be notified that the demand has been made on that day.* Any other construction dispenses with notice.

Due notice is as essential as *due demand.* The indorser looks to his notice to see whether he is held; and, if so, to notify those liable before him. If the notice shows too late a demand, he sees he escapes by the laches of the holder. If it shows the demand to have been made on too early a day, he has a right to expect a further presentment at the proper time, and due notice, if the paper shall not then be paid.

He has no right to suppose it will be paid before it matures; and a notice of non-payment on demand then made, does not show its dishonor.

The law presumes it will be paid only at the precise time of its maturity, and the indorser is therefore authorized to require notice of non-payment at that time.

The law is very particular in its requirements as to notice.

It is indispensable that the notice shall contain, 1st, a true description of the note, so as to ascertain its identity; and, 2d, that it shall show that it has been duly presented and is dishonored. Story on Bills, 443; *Ransom* v. *Mash,* 2 Hill, 587; *Ireland* v. *Kepp,* 10 Johns. 430; *Berry* v. *Robinson,* 9 Johns. 121.

The conditional liability of the indorser rests on notice of dishonor, which cannot take place till the paper matures.

In 4 Denio, 163, *Wyman* v. *Alden*, the notice was without date; and, although it described the note exactly, the Court held that it was insufficient, as, for aught appeared, the presentment might be before or after maturity. The principle is, that the day of presentment must appear, that the Court, and not the notary, may determine the time of maturity.

If, then, a notice without date is insufficient because it does not show, on its face, that the notary was correct in judging as to the time of maturity, it incontestably follows that a notice is void which shows the demand was before maturity. Bailey on Bills, 243; 1 Esp. 261. The notice in this case is obviously fatally defective.

It is a notice of a demand made December 17, the day the note would be due without grace.

It merely notified the defendant of an attempt to fix his liability by a demand without the benefit of the days of grace. It is plain he had a right to presume the note would be again presented on the proper day, and, if not then paid, to require to be notified thereof.

It is unlike those cases where there is sufficient in the notice to show and rectify a mistake in it. There is nothing in this notice to indicate any mistake, nothing to lead the defendant to suppose there was any, nothing to put him on his guard in this respect, and to admonish him to move to hold prior parties.

Under date of the "17th," the language is, "having been protested by me, this day, for non-payment, I hereby notify," &c., and the day being the time the note would mature according to its terms, if the law allowed no grace, the defendant was left to suppose it was an attempt to collect without the allowance of grace, and not that there was any mistake in the date of the notice.

None of the cases relating to mistakes in notices have, therefore, any application. In passing, I beg to call the attention of the Court to the fact that these cases rest on a very doubtful and contested, if not, now, repudiated foundation.

The defendant was entitled to notice of demand on the

proper day, to enable him to notify his prior indorser, R. K. Page. This he could not do, on the notice received. No case can be found like this, where the notice has been held good.

The plaintiff, by his laches, deprived the defendant of all remedy over on the first indorser, and thus discharged him.

Where a prior indorser is thus released, there is no authority that excuses such laches in order to hold a subsequent one.

The opinion of the Court was drawn up by

HATHAWAY, J.—Assumpsit against the defendant, as second indorser of a negotiable promissory note, dated Dec. 17, 1855, for five thousand dollars, signed by Reed & Page, payable to the order of Rufus K. Page, one year after date, at the Suffolk Bank, Boston, and indorsed by Rufus K. Page and the defendant. The plaintiff's attorney introduced the note, the protest duly certified, by S. Andrews, a notary public, and the testimony of Joseph Young, Thomas Marshall and the plaintiff, by which it was proved that the note was duly presented for payment, protested for non-payment, and that the defendant was duly notified.

The defendant alleged that the note was prematurely presented for payment, and that he was not so notified of its dishonor as to render him liable as indorser, and introduced a notice, which he testified, was the only notice which he received, and by which it appears, that the note therein described, was presented for payment three days before its maturity.

"The protest of any foreign or inland bill of exchange, or promissory note, or order, duly certified by any notary public, under his hand and official seal, shall be legal evidence of the facts stated in such protest as to the same, and also as to the notice given to the drawer or indorser, in any Court of law." R. S. of 1841, c. 44, § 12; 41 Maine, 302.

It was not incumbent on the plaintiff, to prove that the defendant *received* the note. It was sufficient for him to prove that the note was duly presented for payment at the proper time and place; that payment was refused; that a

legal notice to the defendant was made by the proper person, and that the letter, enclosing it to the defendant, was properly directed, seasonably mailed and the postage paid. Bailey on Bills, 275; 2 Greenl. Ev. § 193; *Shed* v. *Brett*, 1 Pick. 401; *Lord* v. *Appleton*, 15 Maine, 270. All these things appear, by the protest and other evidence introduced by the plantiff, to have been done.

If the defendant would disprove the statements certified in the protest, the burden is upon him. The single fact that he *received* another notice, disproves none of them.

The plaintiff's proof being direct and positive of a legal demand and notice, and that proof being uncontradicted, the liability of the defendant, as indorser, is established.

Reed & Page and Rufus K. Page, were in company in the lumbering business. The defendant testified "that the plaintiff told him that Reed & Page paid him twelve per cent. interest on this note for the money when they had it." That testimony was not contradicted. The defendant indorsed for their accommodation. It would seem, therefore, that the note was prepared for the purpose of obtaining a loan by Reed & Page from the plaintiff, for a year, at twelve per cent. interest, which was paid to him when they received the money. The plaintiff, therefore, received six per cent. usurious interest, which, for the year and days of grace, amounted to three hundred and two dollars and fifty cents, which sum must be deducted from the note, and the plaintiff is entitled to judgment for the balance of the note with interest thereon from its maturity, together with three per cent. damages for protest for non-payment, out of the State. R. S. of 1841, c. 115, § 110. In such case of usury, the statute of 1846, c. 192, (R. S. of 1857, c. 45, § 2,) gives costs to the defendant and no costs to the plaintiff. *Defendant defaulted.*

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

AMOS WYMAN *versus* THOMAS SMITH *& ux.*

By the statute of 1844, c. 123, a stranger had no right to pay the tax on real estate, when the collector had returned the list of unpaid assessments until *after* sixty days from the town treasurer's first notice. But, where such a payment was made by a stranger, *before* the expiration of the sixty days, and the property was not redeemed, *it seems* that the money having remained in the treasurer's hands, might be considered as having been paid afterwards, when the right to pay it had accrued.

But when the tax still remained unpaid by the owner for the term of two years from the date of the assessment, it was the duty of the treasurer to advertise the same a second time; and, if this was not done, there was no forfeiture.

ON REPORT from *Nisi Prius*, by RICE, J.

This was a REAL ACTION to recover certain premises situated in Hallowell. Both parties claimed under Jacob Wyman, who died in 1835, seized and possessed of the premises. The demandant derived his title, through sundry mesne conveyances, from a deed from Augustus Alden, administrator of the estate of said Wyman, dated Nov. 27, 1837. The evidence in the case shows that the sale by Alden was made by virtue of a license from the Probate Court. The regularity of the proceedings was not questioned. The tenants claimed title, through mesne conveyances, by reason of an alleged forfeiture for the non-payment of taxes for the year 1850. The premises were described in the assessment as the "house, &c., occupied by widow Wyman." The tax thereon was returned as unpaid, by the collector, Oct. 15, 1851; and the same person being treasurer, he advertised the same in the State paper, during the same month, the last paper being issued Oct. 30, and the first publication being Oct. 15. On the 15th day of December following, no one, claiming to own the premises, having appeared to pay the taxes thereon, they were paid by James Sherburne, through whom the tenant claimed, and the treasurer gave him the certificate of the payment, according to the statute of 1844, c. 123. No one ever appeared to pay the tax to redeem the property; and the tenants subsequently took possession. The treasurer gave no subsequent notice.

The case was argued by

Stinchfield, for the demandant, and by

J. M. Meserve, for the tenants.

The opinion of the Court was drawn up by

DAVIS, J.—This is a real action. The premises in controversy formerly belonged to Jacob Wyman, now deceased. The demandant claims to hold under a deed from Augustus Alden, administrator of his estate, dated Nov. 27th, 1837. He was duly authorized to sell by a license from the Probate Court; and no suggestion is made, but that the proceedings in regard to the sale, were in conformity to the requirements of the statute. The demandant, therefore, acquired a good title, and must prevail, unless his title has since been lost.

The tenants claim the premises by virtue of having paid the tax assessed thereon for the year 1850, and a subsequent forfeiture, the tax not having since been paid by the owner. It was entered upon the inventory as a "house and lot occupied by widow Wyman," and so described in the collector's return of unpaid taxes, dated Oct. 15th, 1851.

The counsel for the tenants claims, that this is a "tax assessed upon real estate owned by non-residents," within the terms of the statute of 1844, c. 123, § 1. There is nothing, either in the assessment or in the facts reported, to show that the owner was a non-resident; and, if the case turned upon this point, we might doubt it. But both parties seem to have conceded this, and, therefore, we express no opinion in regard to it.

By the statute aforesaid, within three months from the time when the collector returns his list of unpaid taxes, the treasurer was required to give notice thereof; and, "after sixty days from the first publication of the treasurer's first notice," any person might discharge the tax, and acquire a title to the land, subject to be defeated by redemption. The grantor of the tenants in this case paid the tax on the *sixtieth* day. This was not *after* sixty days. But, as the owner did not re-

deem, and the money remained with the treasurer until after the time expired, it may be considered as having been paid afterwards.

The tax remained unpaid by the owner "for the term of two years from the date of the assessment." It then became the duty of the treasurer to advertise the same a second time. Statute of 1844, c. 123, § 5. It does not appear in this case that this second notice was ever given by the treasurer. This not having been done, the property was not forfeited, and the person paying the tax acquired no title. *Brown* v. *Veazie*, 25 Maine, 359. *Judgment for the demandant.*

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

SOMERSET & KENNEBEC RAILROAD CO. *versus* HIRAM R. CUSHING.
SAME *versus* JOSEPH WESTON.

If the charter of a railroad company does not fix the number of shares of the capital stock, it is to be presumed that the Legislature intended that the stockholders or the directors should fix the number. And it is indispensable that the number be so determined before any assessment can be made thereon.

In such case, if the number of shares so fixed exceeds the number actually subscribed for and taken, the stockholders or directors may change the number; but the assessment must be upon the whole number. If the shares are not all taken, an assessment upon the number that have been taken is illegal and void.

A subscriber who has paid the first assessment is not thereby estopped from setting up this defence to a suit for the second.

REPORT by RICE, J.

These actions were ASSUMPSIT, to recover of the defendants, respectively, their subscriptions to the stock of the plaintiff corporation. Weston subscribed for two shares, and Cushing for one share. The first assessment of ten dollars on each share was paid by Cushing, but not by Weston. Sub-

sequent assessments were made thereon which were not paid; and the treasurer thereupon advertised and sold the shares according to the provisions of the by-laws. The proceeds of the sales not amounting to the sum of the assessments, these suits were to recover the balance.

By the charter, the capital stock was to consist of not less than 1500, nor more than 8000 shares. The stockholders, in their by-laws, fixed the number at 7000. At the time of the assessments only 4091 shares had been subscribed for and taken; and the assessments were made upon the latter number, and not upon the whole number. The other material facts appear in the opinion of the Court.

These cases were argued for the plaintiffs by *Bradbury, Morrill & Meserve.*

The action is upon the written contract of defendants to take and pay for certain shares in the capital stock of the plaintiff corporation.

The company was incorporated in 1848.

From the pleadings the corporation is to be regarded as having been duly organized.

It is admitted that the company had, long before the commencement of this action, begun to build the road, and has finally completed the same.

It is also admitted that the several assessments were duly made, and due notice thereof given, and that defendants have neglected to pay.

To entitle plaintiffs to recover the assessments thus made, it is only necessary, in addition to the foregoing facts, to show that the agreement contemplated in the contract of subscription has been executed.

That there is a contract, is not denied. It is admitted that the persons who executed it were duly authorized and empowered by their respective companies.

Does the contract contain all the provisions stipulated for?

The contract covers all the substantial and material provisions contemplated in the subscription, and is in strict conformity with its requirements.

So far as the defence rests upon irregular proceedings of the company and of the directors in the progress of the work, such as location of the tract, filing same, the mortgages and the manner of construction, they are all, (if they exist,) in the nature of conditions subsequent, and cannot affect the right of the plaintiffs to recover. Redfield on Railways, 78, and notes 85 and 86.

The payment of the first assessment by Cushing, one of the defendants, is to be treated as an acquiescence in the doings of the company, or waiver of conditions precedent.

It is said, "Courts are reluctant to admit defences to actions for calls when there has been any considerable acquiescence on the part of the shareholder." Ibid, 86, § 2.

And that a stockholder cannot object, "after having voted at the election of officers, or otherwise acted as a shareholder."

So, "if one act as a shareholder in the organization of a company." Ibid, 87, § 4, and cases there cited. *York and Cumberland Railroad Co.* v. *Pratt*, 40 Maine, 453.

J. H. Webster, for the defendants, argued:—

That the payment of the first assessment by Cushing, placed the plaintiffs in no better condition than they would be if he had not paid. They have sold the share subscribed for by him, and cannot now transfer it to him upon his payment of the assessments. If the share had not been sold, the plaintiffs could recover of him only as upon an open executory contract, founded on his promise to take the stock and pay the assessment; and, upon payment, to have the stock transferred to him. The promise was mutual. Having sold and transferred the share, the company cannot now comply on their part. The plaintiffs, therefore, must now rely upon their statute rights and the statute liability of defendant. *P. S. & P. R. R. Co.* v. *Graham*, 11 Met. 1.

It being agreed that the Court may draw inferences as a jury might, the facts in the case will warrant the inference that when Cushing paid the first assessment, he did so in the belief that the full number of shares had been subscribed for.

By the payment of that assessment, he has not waived any of his rights as to assessments payable subsequently. It does not authorize the company to force a statute liability upon him, by a statute remedy, and, in doing this, to disregard the requirements of the statute.

The plaintiffs are pursuing against these defendants a statute remedy which must be strictly pursued, or it must fail. The plaintiffs have not procured to be subscribed for and taken up the number of shares necessary to bind the defendants. By the contract, the defendants agree to take one or more shares of plaintiffs' capital stock.

If the number of the shares of such stock had been fixed by the charter at 7000, it would have been incumbent on the plaintiffs to procure that number to be subscribed for, before making assessments; and, as that number has never been taken, it would be clear that these actions could not be maintained. *Salem Mill-dam Co.* v. *Ropes*, 6 Pick. 23; *Oldtown & Lincoln Railroad Co.* v. *Veazie*, 39 Maine, 571.

Wherein do the cases at bar differ from the cases above cited? Section 2d of the charter enacts, that "the capital stock of said corporation shall consist of not less than 1500, nor more than 8000 shares."

Who is to determine or fix the number of shares of said stock? The Legislature have not retained that power in their own hands, nor bestowed it anywhere else; the corporation alone, either by their acts, corporate votes, or the votes of its directors, can do it. Although the power to fix the number of shares of the capital stock is not in terms by the charter conferred upon said corporation, is it not in fact as certainly conferred by implication as if expressed in terms?

The plaintiffs, by a corporate vote, on the 30th of March, 1852, adopted their by-laws, and, by these by-laws, fixed the capital stock at 7000 shares, at $100 each. In February, 1853, nearly a year afterwards, as appeared by the subscription paper, the defendants subscribed to its stock.

When defendants subscribed, how did they understand the contract into which they were entering with the plaintiffs?

Did they understand that they were, for each share taken, engaging to take one of an indefinite number of shares of indefinite value? or, that they were subscribing $100 to an indefinite amount of stock? or, was it one share of a stock of 7000 shares, actually subscribed for and taken up, upon which share assessments, to complete the whole enterpise, might be made to the amount of $100? Can any one doubt that the latter was the understanding of the defendants? How did the plaintiffs and their directors understand this contract? As intelligent and reasonable men, could they understand the contract different from what we have supposed to be the understanding of defendants? Can the plaintiffs in a court of law enforce upon the defendants a different contract from any which either party supposed or intended to make at the time? The records of the company show that only about 3000 shares were taken by paying subscribers, and 1000 more were to be received by the contractors in part payment of their contract. About 4000 shares in all were subscribed, leaving a balance from the required number of nearly one-half. If, therefore, plaintiffs prevail, defendants are compelled to pay twice as large a proportion as they would be required to pay, if the plaintiffs had fulfilled the contract on their part.

How stands the case by authorities? Do not the same consequences follow the fixing the number of shares by the corporation, as in this case, as if the same had been fixed by the charter?

In *The Wor. & Nash. R. R. Co.* v. *Hinds*, 8 Cush. 110, the number of shares of the capital stock were neither fixed by the charter, nor determined by the directors, and the Court held, in that case, that the defendant could not be legally held to pay the assessments.

The provisions of the Act under which that decision was made are as follows, viz. — The capital stock of said corporation "shall consist of not more than fifteen hundred shares, the number of which shall be determined from time to time by the directors thereof," &c.

What is the effect of the clause "the number of which shall

be determined from time to time by the directors thereof?" Is it any thing more than saying the directors, and not the company by its corporate vote, shall determine the number of shares? Had that clause been omitted, would the necessity of fixing the shares of its capital stock, to entitle the corporation to make and enforce the collection of assessments, have been less imperious? It is believed that the addition of that clause does not change the company's obligation to determine the number of the shares of its capital stock. If we are right, no action can be maintained by a corporation, whose capital stock is not determined and fixed by its charter, until it is done by the corporation. Can an assessment, made before the number of shares so fixed and determined by the corporation is taken, be enforced? Wherein does the determination of the number of shares made by the company under the provisions of its charter differ, in its effects upon the subscribers to its stock, from the fixing the same in the charter itself? It is very difficult to perceive the difference.

The plaintiff corporation chose to fix the shares of its capital stock by its corporate vote. They fixed it at 7000. The defendants each subscribed for one or two of these shares. They agreed to pay if the whole were taken, not without. And to pay, if necessary to complete the whole enterprise, $100 of a gross sum of $700,000, and not $100 of a gross sum of $400,000. Plaintiffs have procured, at most, but about 4000 shares, and assessed on each share $100. If plaintiffs prevail, defendants will be compelled to pay to the utmost extent, to which, under any and all contingencies, their contract would bind them, while the plaintiffs will be let off with a little more than half performance of its part of the contract.

Is that the way to pursue a statute remedy with necessary strictness and precision?

The case of *Kennebec and Portland Railroad Co.* v. *Jarvis*, 34 Maine, 360, does not in the least militate against our position.

The counsel here commented at length upon the particulars which he claimed distinguished that case from the cases at bar, and contended that it had no applicability to the questions in controversy.

The opinion of the Court was drawn up by

TENNEY, C. J. — The action against Cushing is brought to recover nine assessments of $10 each, upon one share of the capital stock in said company, he having paid the first assessment and no other. The defendant in the other action has omitted to pay either of the ten assessments made upon each of his two shares of the capital stock, and the aggregate amount of those assessments are sought to be recovered.

The plaintiffs rely upon a paper, dated February, 1853, signed by the defendants, and others, in which the subscribers agree to take the number of shares set against their names, in the capital stock of the Somerset and Kennebec Railroad Company; and pay to the treasurer of said company all assessments that shall be made on said shares, in pursuance of the by-laws and charter of said company, not exceeding one hundred dollars on each share, provided that no assessment shall be made on said shares by the directors, or by the stockholders of said company, until a contract, good and sufficient in law, shall be made between the Kennebec and Portland Railroad Company and the Somerset and Kennebec Railroad Company, as specified in the written contract between the parties.

The Somerset and Kennebec Railroad Company, on March 30, 1852, by a corporate vote, adopted their by-laws. One of those by-laws is as follows: "the capital stock of the company shall consist of seven thousand shares of one hundred dollars each." It does not appear that this by-law has since been modified in any particular.

At meetings of the directors of the plaintiffs, holden on June 10, 1853, Sept. 6, 1853, Nov. 29, 1853, and March 7, 1854, assessments were made upon each share of the capital

stock subscribed for; there were ten in number, and each for the sum of $10.

It is admitted that the several assessments were made in the mode required by the charter and by-laws, and that the notices and circulars provided for thereby, in relation to said assessments, were duly given and forwarded; also, that after the neglect of the defendants to pay their several assessments, as before stated, their several shares were sold upon proceedings prescribed by the by-laws.

It is also admitted that, long before the assessments were made, the company had contracted for the construction of their road from Augusta to Skowhegan, and had commenced the work of construction, and that the same was completed to Skowhegan, at the time of the trial of these actions.

It is not contended that the agreement between the Kennebec and Portland Railroad Company and the plaintiffs has not been substantially and effectually made. But it is insisted that the assessments upon the defendants' shares are not in pursuance of the by-laws and charter of the company.

The records show that only 4091 shares of the capital stock have been subscribed for or taken.

By the charter, special laws of 1848, c. 186, § 2, the capital of said corporation shall consist of not less than 1500, nor more than 8000 shares. It is manifest that it was designed by the Legislature that the number of shares of the capital stock should be definitely fixed by the corporation or by its directors. And it is not contended by either party that the determination of the amount of capital stock, by the vote of the stockholders, was not necessary in order to prosecute the enterprise, nor that it was not legal. It certainly was indispensable as a basis of the right, under the charter, to raise money by assessment for the construction of the road, &c. *Worcester and Nashua Railroad Co.* v. *Hinds*, 8 Cush. 110.

Were the assessments upon the defendants' shares made according to the provisions of the contract which they made with the company? The president and directors for the time being are authorized, by the charter, "to make such equal as-

sessments from time to time, on all the shares of the corporation, as they may deem expedient and necessary in the execution and progress of the work," &c. The by-laws, under the head of assessments, confer upon the president and directors the same power in substantially the same terms.

The assessments made upon the defendants' shares were at times when the capital stock consisted of 7000 shares, and $100 each. This number of shares, and the sum at which they should be estimated, not being fixed by the charter, could be changed from time to time by a vote of the stockholders, or of the directors. But it does not appear to have been changed, and, therefore, the assessments, in order to be legal, must be founded upon this determination, as much as though the capital stock was fixed by the Legislature. And could the assessments of the shares of the defendants, amounting to the full sum for which they could be made if all the capital stock had been taken, be regarded as "equal assessments on all the shares of the corporation?"

It is insisted, however, by the plaintiffs, that, by the terms of the contract, they are entitled to recover; and the case of *Kennebec and Portland Railroad Co.* v. *Jarvis*, 34 Maine, 360, is invoked in support of this ground. The contract relied upon in the case cited is distinguishable from the one under consideration.

In that case, the defendant, with others, signed the contract, which was in the following words and figures: — "We, the subscribers, hereto agree and promise to take the number of shares set to our names respectively, in the Kennebec and Portland Railroad Company, which shares are to be each of the value of $100, and to be paid for at the rate, at such times, to such persons, and in such installments, as shall be hereafter required, by a vote of the company. Gardiner, Jan. 5, 1847."

By the charter of that company, § 4, it is enacted that the capital stock may consist of $1,200,000, and shall be divided in shares of $200 each. By an amendatory Act of July, 1846, the capital stock was to be divided into shares of $100. By the 13th by-law, the capital stock was to consist of 12,000

shares of $100 each, and the number of them might be increased from time to time, as the directors should determine, and the Legislature authorize. Provided, &c.

The shares in that corporation were less in number than 12,000, and one ground of defence was that the assessments, being made upon a number less than that required, were unauthorized and void; inasmuch as the promise was upon a condition precedent, that the whole capital should be raised by a subscription for all the shares. It was said by SHEPLEY, C. J., in delivering the opinion of the Court, that "the contract could not have had reference to any certain number of shares, or certain amount of capital as fixed by the charter, and there is no language used in the contract prescribing the number of shares, or the amount of the capital. The promise is not to pay 'all legal assessments.' It is to pay for the shares as he should be required, by a vote of the company, without any reference to assessments, or payments to be made on other shares." "The agreement provided for the payment of the amount of the shares, without any reference to a fixed capital, or to any number of shares, or to any assessment to be made on other shares."

It is very obvious that the construction, put upon the contract in that case, is different from that required on the one executed by the defendants.

It is insisted that, in the case against Cushing, the voluntary payment by him of the first assessment on his share estops him from setting up the defence relied upon.

The case does not find under what circumstances he paid the assessment. It may have been under a want of knowledge that the 7000 shares were not subscribed for, or it may have been with a view to raise money to defray expenses necessarily incurred in arrangements preparatory to the execution of the objects of the incorporation. *Salem Mill-dam Co.* v. *Ropes*, 6 Pick. 23; *Oldtown and Lincoln Railroad Co.* v. *Veazie*, 39 Maine, 571.

Other grounds of defence have been relied upon, but their

consideration is not material to the final disposition of this case.

According to the agreement of parties, the cases are each to be disposed of by the entry of *Judgment for defendants.*

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

JOSEPH CHANDLER *versus* HORATIO G. LEBARRON.

In trover for chattels, the plaintiff offered in evidence a paper material to the issue, purporting to be signed by the vendor of the defendant, and testified that it was signed by him in the plaintiff's presence. The vendor of the defendant, being called by him, testified that the signature was not made by him, and was not genuine. Being thereto requested by the plaintiff, the witness wrote his name upon a piece of paper, *and the plaintiff* offered the latter signature in evidence, to be compared by the jury with the former. — *Held* that the evidence was admissible.

EXCEPTIONS to the ruling of RICE, J.

This was an action of TROVER for a pair of steers. It appeared in evidence, that the plaintiff had once owned them, and had sold them to one James Magna, of whom the defendant had purchased them. There was evidence on both sides, upon the question whether the sale to Magna was absolute, or whether the steers were to remain the property of the plaintiff until they were paid for. On this point, Magna was a witness for the defendant.

The plaintiff then offered in evidence a writing, of which the following is a copy:—

"Wayne, Sept. 15, 1851.

"I hereby certify, that I have this day taken, of Joseph Chandler, one pair of two years old steers, which I agree to keep one year, and return them to said Chandler in fair order, or pay him twenty-seven dollars, with interest, at the expiration of the year. Said steers are to remain in my possession, but the said Chandler's property until paid for.

"James Magna, jr."

The plaintiff testified that the writing was signed by said Magna in his presence. Magna, for the defendant, testified that he did not sign it, and that the signature was not genuine.

The plaintiff thereupon requested said Magna to write his name upon a piece of paper, and the witness did so. The signature so made was offered in evidence by the plaintiff, in connection with the foregoing writing, to be compared by the jury. This evidence was objected to by the defendant, but was admitted by the Court. The verdict was for the plaintiff.

The exceptions were argued by

Bradbury, Morrill & Meserve, for the defendant, and by

Vose, for the plaintiff.

The opinion of the Court was drawn up by

RICE, J. — Trover for a pair of steers. Defendant claimed title to the steers by purchase from James Magna. It therefore became material to determine whether the title to the steers was in Magna, at the time of the sale. To prove this fact, it would seem that Magna was called by the defendant, and testified that the title was in him.

To contradict this witness, the plaintiff proposed to introduce a writing, purporting to be signed by said Magna, showing that the title to the steers was to remain in the plaintiff, from whom he received them, until they were paid for. On being interrogated, Magna denied that he signed that paper. The plaintiff testified that he saw said Magna put his signature thereto. At the request of the counsel for the plaintiff, Magna, in the presence of the Court and jury, wrote his name upon a piece of paper. This signature, and also a note, which the plaintiff testified he saw said Magna sign, were permitted by the Court to go to the jury, for the purpose of being compared with the signature sought to be proved.

The defendant now insists that this was erroneous; and the note, and signature made by Magna in presence of the

jury, were not legitimately in the case, being wholly collateral to the issue being tried.

Whatever may be the rule elsewhere, and it is certainly far from being consistent or uniform, in this State and in Massachusetts the practice is, and ever has been, to give in evidence other signatures of the same person, admitted or proved to be genuine, to papers not otherwise competent evidence in the case, to enable the Court and jury, by an examination and comparison of the genuine specimen with the one which is controverted, to form an opinion whether the latter be or be not genuine. *Homer* v. *Wallis*, 11 Mass. 309; *Moody* v. *Rowell*, 17 Pick. 490; *Hammond's case*, 2 Maine, 33.

Magna, having been called by the defendant to disprove his alleged signature, it might not have been competent for *him* to exhibit signatures of the witness, made at the time, for comparison, because, if the witness were an expert writer he might mislead the jury for the benefit of the party calling him. But, when the plaintiff chose to make the experiment, it was not for the defendant to object.

The ruling of the Judge at the trial seems to have been in strict conformity with well established principles.

The other objections taken at the trial do not seem to be relied upon in the argument.

Exceptions overruled. Judgment on the verdict.

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

DAVIS, J.—Upon my first examination of this case, I did not concur in the opinion of my associates. I have no fault to find with the rule, which, when the genuineness of a signature is in question, allows other signatures of the party, the genuineness of which is admitted or established, to be examined by the jury; though strong objections have been urged to this, on account of its liability to be abused.

But I think this rule should be restricted to signatures made in the usual course of business, or correspondence. To allow a party, *at the time of the trial*, to manufacture signatures

for the inspection of the jury, seems to me to be a manifest abuse of the rule. Signatures made *for the purpose of being examined* were excluded by Lord KENYON, "as the party might write differently from his common mode of writing, through design." *Stranger* v. *Searle*, 1 Esp. N. P., 14. This case is cited with approbation in 1 Greenl. Ev. § 577, note. And it is also quoted as good law by Judge METCALF, in *Keith* v. *Lothrop*, 10 Cush. 453.

In this case, however, upon reflection, I think the evidence was properly admitted. The plaintiff offered a paper purporting to be signed by the witness, who was called by the defendant. The witness denied that the signature was genuine. The plaintiff then requested him to write his name; and the signature so made he offered as contradicting the witness and confirming the genuineness of the first signature. It was a part of the cross-examination of the witness, and was not within the general rule of admitting other signatures in such cases.

INHABITANTS OF GARDINER *versus* INHABITANTS OF FARMINGDALE.

A person, who has been from his birth *non compos mentis* and whose parents are deceased, may *reside* in a town (within the meaning of the statute,) so as to acquire a legal settlement therein; and if he shall continue to reside in a town for the term of five years together, after he is twenty-one years of age, without receiving any support as a pauper from any town, he will gain a lawful settlement therein, in his own right.

THIS action is brought to recover for expenses incurred by the plaintiffs for the support of Nancy Sweatland, a pauper, whose legal settlement the plaintiffs allege was in Farmingdale.

THE FACTS AGREED UPON, sufficiently appear in the opinion of the Court.

The case was argued by *Danforth*, for the plaintiffs, and by *Bradbury, & Morrill*, for defendants.

The opinion of the Court was drawn up by

RICE, J. — The pauper, who is, and from her birth has been *non compos mentis*, had a derivative settlement in the town of Farmingdale. It is admitted by the parties, though the case does not find the fact, that in August, 1851, she was more than 21 years of age.

After the death of her father she lived with her brother Seth, in Farmingdale, till the death of her mother, when she went to live with her sister, Mrs. Sherburn, in West Gardiner, where she remained three or four years, and until Aug. 1851. After the death of the mother, the pauper was supported by the brother and sister aforesaid, they having appropriated her interest as heir at law in the estate of her father.

From August, 1851, to Nov. 1856, the pauper was boarded in Gardiner, a part of the time with a nephew, and a part of the time with a Mrs Mayberry, her brother and sister paying for her board, under contracts which were renewed from year to year. In Nov. 1856, these parties refusing longer to pay for her board, she became chargeable.

It is conceded, that all the requirements of the statute have been complied with, requisite to charge the defendants, if the legal settlement of the pauper is in Farmingdale.

In view of these facts, the defendants contend, that under Rule 6, § 1, c. 32, R. S., 1841, the pauper has gained a settlement in Gardiner.

The provision relied on reads as follows: — "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 time receive, directly or indirectly, any supplies or support as a pauper, from any town, shall thereby gain a settlement in such town."

The plaintiffs, on the other hand, contend that the pauper,

in consequence of being *non compos mentis*, is incapable of gaining a settlement in her own right; that, to acquire a settlement in this way, the pauper must not only remain in the plaintiff town during a period of five years together, but must do so having the intention to make that her home, and that a person in her condition is incapable of having such an intention, and, therefore, though she lived in Gardiner for more than five years together, she did not *reside* there within the meaning of the statute.

There are many cases in the books, where, from the definition given to the word residence, (which, in this statute, means dwelling place or home,) such a conclusion might apparently be deduced. Thus, in *Jefferson* v. *Washington*, 19 Maine, 293, the Court say, that the words dwelling place or home, mean some permanent abode, or residence, with intention to remain; and, in *Turner* v. *Buckfield*, 3 Maine, 229, MELLEN, C. J., says, that the Legislature, by the use of the expression "dwells and has his home," intended to designate some permanent abode, a residence with an intent to remain, or, at least, without an intention of removal. In *Wiscasset* v. *Waldoborough*, 3 Maine, 388, the Court said that the pauper, though incapable of gaining a settlement in his own right, by reason of mental imbecility, might acquire one derivatively from his father.

In *Warren* v. *Thomaston*, 43 Maine, 406, the Court say, "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."

Many other cases will be found in our Reports where language of similar import is used, and used with entire accuracy. But, in applying the principles thus stated, reference must be had to the facts and circumstances in the cases in which the language occurs.

It is well settled, as a general principle, that married women, infants, slaves, and others in like condition, cannot, unless emancipated, gain a settlement in their own right, by a residence separate from their husbands, parents or masters. That

is to say, such persons while in that subordinate condition, cannot have an independent, separate residence. They are supposed to have no will, no intention in opposition to, or different from that of their superiors, and their legal residence follows that of their superiors. *Hallowell* v. *Gardiner*, 1 Maine, 93.

It has also been decided that persons *non compos mentis* are not emancipated on reaching the age of twenty-one years. *Wiscasset* v. *Waldoborough*, 3 Maine, 388; *Tremont* v. *Mt. Desert*, 36 Maine, 390. In the last case this principle was carried so far as to hold that supplies furnished to a child in that condition, though more than twenty-one years of age, constituted the father of such child a pauper.

Now it is believed that on examination of the cases in which the principle referred to has been announced, it will be found that the question before the Court, was, what was the real intention of the party whose residence was in controversy, or whether he was so situated as to be legally capable of having an intention or will, independent of the person to whom he was in subordination, rather than whether, being emancipated, he had sufficient mental capacity to act and determine for himself.

The law is well settled that a minor, who has been emancipated, may acquire a legal settlement in his own right. *Oldtown* v. *Falmouth*, 40 Maine, 160; *Lubec* v. *Eastport*, 3 Maine, 220.

So, too, of slaves. *Winchendon* v. *Hatfield*, 4 Mass. 123.

The same rule is applicable to persons *non compos mentis*. *Fairfax* v. *Vassalborough*, cited in argument in *Hallowell* v. *Gardiner*, 1 Maine, 96; *Sidney* v. *Winthrop*, 5 Maine, 123; *Leeds* v. *Freeport*, 10 Maine, 356; *Augusta* v. *Turner*, 24 Maine, 112.

But it may be suggested that these cases were decided under a different provision of the statute, and, therefore, are not authority in this case.

The cases last cited, except that of *Fairfax* v. *Vassalboro'*, were decided under the following provision of c. 122, § 2,

of statute of 1821. "Any person *resident* in any town at date of the passage of this Act, who have not within one year previous to that date, received support or supplies from some town as a pauper, shall be deemed to have a settlement in the town where he then dwells and has his home."

Thus it will be perceived that the cases must have involved the question whether a person *non compos mentis*, who had been emancipated, was capable of so residing, or being *resident* in a town as thereby to gain a settlement under the provision of the Act of 1821. The principle involved in those cases would seem to be identical with that at issue in the case before us.

The pauper in question had been emancipated by the death of both her parents; she was more than twenty-one years of age; she was not under guardianship; she had long ceased to have a home in Farmingdale; she continued to live in Gardiner for more than five years together, and, during that time, received no supplies or support, directly nor indirectly, as a pauper, from any town. In view of these facts, was her *residence* in Gardiner during these five years, within the meaning of the statute? Within the principle of the decided cases, such was clearly the fact.

According to the agreement of parties, a nonsuit is to be entered.

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

JOHN W. BLODGETT *& al. versus* DAVID L. GARDINER *& al.*

Where one has agreed to pay interest on a debt which he had contracted, and is afterwards prevented from paying the debt by the intervention of a trustee process, interest thereon will continue to accrue, during the pendency of the suit, unless he has funds unemployed, which he has specially reserved and appropriated for the payment of the debt.

It will not be sufficient to discharge him from liability to pay interest, that he had means or securities, from which, or the proceeds of which, he might have paid the debt.

THE facts in this case, as agreed upon, fully appear in the opinion of the Court.

The question in controversy, was argued by

Stinchfield, for plaintiffs, and by

Vose, for defendants.

The opinion of the Court was drawn up by

APPLETON, J.—The defendants, being indebted to the plaintiffs for goods which they had purchased of them, and for which they had agreed to pay interest after the expiration of six months, were summoned as their trustees. The action was for some time pending on the docket of this Court, when it was settled, and an entry of "neither party" made, after which this suit was commenced.

The question in controversy is, whether the defendants are bound to pay interest during the pendency of the suit in which they were summoned as trustees.

The general principles on this subject seem to be these.—When interest is given by way of damage, as the trustee has not agreed to pay interest, and as he is prevented by the intervention of the trustee process from paying the debt, he is not chargeable with interest. *Adams* v. *Cordis* 8 Pick. 260. "When the indebtedness is of such a character," remarks WOODS, J., in *Swamscot Machine Co.* v. *Partridge*, 5 Foster, 369, "that interest can only be recovered upon the ground of a wrongful detention of the principal sum by the debtor, in-

terest is not ordinarily recoverable after the service of the process, for the plain reason that by the process the trustee is ordinarily restrained from paying until the determination of the trustee action." But, if he receives or secures interest, he is chargeable therewith. *Brown* v. *Sillsby*, 10 N. H. 521.

When there is an agreement to pay interest, the interest is as much a part of the debt as the principal, and the trustee is held to pay interest, unless the use of the money has been prevented by the trustee process. *Adams* v. *Cordis*, 8 Pick. 261. When the trustee is, by his contract, bound to pay interest, and, after the service of the trustee process, is ready to pay, and holds money unemployed to await the decision of the law, he is not liable for interest. *Norris* v. *Hall*, 18 Maine, 332. But, if not ready, or if he employs his funds in the ordinary course of business, without any special reservation to meet the demand on account of which he is trusteed, he is chargeable with interest.

The defendant D. L. Gardiner, in his deposition, says, their firm was desirous of paying the demand in suit, and that they had funds to their credit in the American Bank in Hallowell, and that they had notes and other available means with which they could and should have discharged their indebtedness to the plaintiffs, had it not been for the intervention of the trustee process. But, upon examining the disclosure made in the trustee action, the defendants appear to have been indifferent to whom the debt should be paid, and do not there allege that any funds were reserved or appropriated to meet this demand. The deposition of the cashier of the American Bank shows that the defendants made no special deposit, and that, before the trustee process was concluded, they had withdrawn their funds. They undoubtedly had, as the defendant D. L. Gardiner testifies, available funds, such as notes from which they could have raised the means to meet this debt, but they did not do it. Their deposits were withdrawn from the bank, and their available means were used in the usual course of business as they deemed most advisable, without any reser-

vation of unemployed funds to meet this demand, or any deposit specifically made for the payment of this debt.

It follows from the authorities, to which reference has been made, that the defendants are liable for interest on the demand in suit, from the date when, by the agreement between the parties, it became payable.

Defendants defaulted for debt and interest.

TENNEY, C. J., RICE, HATHAWAY, MAY, and DAVIS, J. J., concurred.

HIRAM WILLS *versus* THOMAS WHITTIER *& al.*

A special law of 1850 required all warrants, alleging an offence to have been committed within the city of Augusta, to be made returnable before the municipal court of that city; and where this requirement was not observed, but, according to the direction in the warrant, the person charged was brought before and examined by the magistrate who issued it: — *it was held*, that the warrant conferred no authority on the magistrate to hear and determine the subject matter of the complaint, or on the officer who made the arrest and return of the alleged offender, and in this particular they were trespassers, and liable to him in an action against them to recover damages.

During a vacancy in the office of the municipal judge, the recorder could not be ousted of his jurisdiction by inserting his name in a warrant as a witness.

TRESPASS for false imprisonment. The defendants filed separate pleas.

The case, as made by the parties, is that, "on the day of February, 1854, the defendant Weston, issued a warrant against the plaintiff, in regular form, returnable before him or any other justice of the peace, in and for the county of Kennebec, upon a complaint in due form, charging the plaintiff with having committed the crime of perjury at Augusta, on the trial of an indictment at the preceding November term of the Supreme Judicial Court, held at Augusta, in and for the county of Kennebec.

This warrant was directed to any coroner in said county,

or any constable of the town of Rome in said county, there being no sheriff in said county, and was placed in the hands of the defendant Whittier, for service, who then assumed to act as constable of the town of Rome.

By virtue of this warrant, the defendant Whittier, on the day of February, 1854, arrested the plaintiff at his dwellinghouse in Rome, but left him there on his agreeing to meet the defendant at Belgrade.

The plaintiff met the defendant there, who then carried him before said Weston, in said Belgrade, before whom he also duly returned said complaint and warrant.

The said Weston caused the plaintiff to be arraigned and tried on said complaint, he pleading not guilty. After said trial, the said Weston ordered the plaintiff to give bonds with sufficient sureties for his appearance at the then next term of the Supreme Judicial Court, for the county of Kennebec, in the sum of five hundred dollars, to answer to such indictment as might be found against him, and to be committed until said order was complied with; and ordered him into the custody of said Whittier.

The plaintiff neglecting and declining to give bonds with sureties, as required, the defendant Whittier placed him under keepers, it being late in the afternoon, until the next day, and then, upon mittimus duly issued by said Weston, carried him to Augusta, and committed him with the mittimus to the custody of the jailer, by whom he was fully committed.

The same day, the plaintiff gave the bonds required as aforesaid, with sureties, for his appearance at court, as above stated, and thereupon was discharged from custody.

He attended the next term of said court to answer to any indictment against him, but none was found.

The said Weston then resided in Belgrade, and was duly commissioned and qualified as a justice of the peace in and for said county.

The said Whittier lived in Rome, and derived all his authority to act as constable from the following vote, passed at the annual meeting in Rome, in March, 1853, duly called for

the choice of town officers:—"Voted, that the collector constable berth go to the lowest bidder. Thomas Whittier bid off the collector and constable berth at two cents and two mills on a dollar for collecting."

Subsequently, on the sixteenth day of March, he was duly sworn and gave bond as a constable is required by law, which bond was, on the same day, approved by the selectmen of said Rome.

There was no judge of the municipal court of the city of Augusta, at the time when the warrant was issued, he having resigned, and the recorder of said court was a witness in said warrant.

If, in the opinion of the Court, the plaintiff can maintain his action against defendants, or either of them, judgment is to be rendered for the plaintiff for such sum, as damages, as the Court shall assess; otherwise, the plaintiff to become nonsuit, and judgment is to be rendered for both or either of the defendants, as the case may be.

The case was argued June term, 1855.

Drummond, for plaintiff.

Bradbury & Morrill, for defendants.

The opinion of the Court was drawn up by

CUTTING, J. — The warrant, under which the defendants justify their proceedings against the plaintiff, was made returnable before the magistrate issuing it, or any other justice of the peace within the county of Kennebec, for an offence alleged to have been committed at Augusta.

By a special law of this State, passed in 1850, c. 303, § 1, it is provided that "all warrants alleging any offence to have been committed within said city, (Augusta,) shall be made returnable before said court, (municipal court.)

The warrant was not made returnable before that court, although the offence was therein alleged to have been committed within Augusta, and, consequently, it conferred no authority on the magistrate to hear and determine the subject

matter of the complaint, or on the officer to arrest and return the alleged offender before such magistrate, and, for their acts in this particular, they were trespassers.

During the vacancy in the office of the municipal judge, the recorder could not be ousted of his jurisdiction by inserting his name in the warrant as a witness, otherwise jurisdiction in all such cases might be the creature of a fiction.

According to the agreement of the parties, the defendants must be defaulted, and damages assessed at twenty dollars.

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

WILLIAM R. SMITH *versus* KENNEBEC & PORTLAND R. R. CO., AND GEORGE W. STANLEY, *trustee.*

Coupons, or notes for the payment of the interest on bonds issued, are choses in action and cannot be attached by trustee process, or sold on execution.

Where one holds such notes as collateral security, they are not held by him subject to the provision of c. 119, § 58 of R. S., which applies only to "property not exempted by law from attachment."

EXCEPTIONS to the ruling of RICE, J., by whom the trustee was discharged.

The facts sufficiently appear in the opinion of the Court.

Bradbury, Morrill & Meserve, for plaintiff, contended:—

(1.) The trustee is chargeable under R. S. of 1841, c. 119, § 58, as having property pledged for the payment of a sum of money.

(2.) For that he has converted the property pledged to his own use; and must account for it.

Libbey, for the trustee, argued:—

That the trustee had nothing in his hands and possession belonging to the principal defendants, except choses in action which he held as collateral security. He cannot be charged

therefor. *Runlet* v. *Jordan*, 3 Maine, 47; *Maine Insurance Co.* v. *Weeks*, 7 Mass. 438; *Dickinson* v. *Strong*, 4 Pick. 57; *Perry* v. *Coales*, 9 Mass. 537; *Lerpton* v. *Cutler*, 8 Pick. 298; *Gore* v. *Crosby*, 8 Pick. 555; *Meacham* v. *McCorbitt*, 2 Met. 352.

The opinion of the Court was drawn up by

APPLETON, J.—It appears, from the disclosure of the trustee, that, on or about the 28th of July, 1853, he loaned the defendants the sum of $5000, taking therefor their note of that date, payable on demand, and interest, and that, as collateral to said note, he received the notes of the town of Hallowell to the amount of $5000, to which were attached coupons, or interest notes, said notes for the principal becoming due in 1870, and said notes for the interest being payable semi-annually, at the end of each and every six months from the date of the notes for the principal.

It further appeared that, on the first day of May, 1856, the defendants were indebted to the trustee in the sum of $5,722, 75, and that, on the 5th of May, he received the sum of $5000 from the sale of the notes of the town of Hallowell, and $450 from the sale of coupons or interest warrants, leaving due $276,92, and that he retained, as security for the amount, coupons to the amount of $1050, which were in his hands at the date of the service of the trustee on him, and which have never been paid.

It is insisted that the trustee should be held chargeable for the coupons remaining in his hands, or for the money received from the sale of the bonds, which he held as collateral to the note of the defendants.

But such is not the law. The coupons are choses in action which can neither be attached on the writ, nor sold on execution. Though pledged to the trustee, they are not held by him subject to the provisions of R. S., c. 119, § 58, which apply only to "property not exempted by law from attachment," and which "is to be held and disposed of in like man-

ner as if it had been attached on mesne process," when the debt, it is pledged to secure, has been paid.

Neither can the trustee be charged for the proceeds of the sales of the bonds sold. Whether the sale was authorized or not, is a matter important mainly to the defendants and the trustee. If authorized, the proceeds were not sufficient to meet the liability of the defendants. If the sale was unauthorized, it furnishes no reason for charging the trustee for the proceeds of pledged property when he could not be justly charged for the property itself, and when the money received from its sale was insufficient to meet the purposes for which the pledge was given.

The trustee was properly discharged.

Exceptions overruled.

TENNEY, C. J., RICE, HATHAWAY, MAY, and DAVIS, J. J., concurred.

LUCRETIA COOPER, *Complainant, versus* ROBERT LITTLEFIELD.

In a prosecution under the bastardy Act, the respondent, having submitted to the jurisdiction of the Court, and filed a general demurrer, cannot, under his plea, avail himself of defects in the preliminary proceedings before the magistrate.

The facts alleged in the complaint and declaration of the complainant, being admitted by the demurrer, if the papers in the case show the allegations sufficient, if proved, to entitle the complainant to a judgment of filiation against the respondent, such judgment will be ordered.

COMPLAINT under c. 131 of the R. S. of 1841, in which the respondent is alleged to be the father of the complainant's bastard child.

The respondent filed a general demurrer to the process and proceedings, which was joined. The case is presented on EXCEPTIONS to the decision at *Nisi Prius* of RICE, J., adjudging the complaint and declaration and other proceedings sufficient, on demurrer.

Clay argued in support of the exceptions.

Whitmore, contra.

The opinion of the Court was drawn up by

TENNEY, C. J. — This is a prosecution against the defendant, as the alleged father of the complainant's bastard child, under R. S. of 1841, c. 131. Her accusation and examination under oath, &c., were duly taken by a justice of the peace, on Jan. 23, 1856. Thereupon a warrant was issued by the same justice, on Feb. 13, 1856, for the apprehension of the accused, and that he be brought before him or some other justice of the peace, in and for the county, &c., to find sufficient sureties for his personal appearance before this Court, &c. Upon this warrant, the officer returned that he had arrested the defendant, and he, having given bond for his appearance at Court, as required by the warrant, was released from his arrest, and the bond returned with the warrant. The bond, executed by the defendant and two sureties, in due form, contains in its conditions the recital of the facts stated in the accusation and examination, and that the justice who took them ordered the defendant to give surety for his appearance at Court, to answer to the accusation.

The complainant seasonably filed in Court her declaration in proper form, that she had been delivered of a bastard child, which was begotten by the accused in the month of February, in the year 1855, in his dwellinghouse in West Gardiner, in the county of Kennebec, and that, being put upon the discovery of the truth, during the time of her travail, she accused the respondent of being the father of said child, and that she has always been constant in said accusation.

The defendant entered his appearance in the action, and filed a general demurrer to the declaration and the proceedings, which is joined.

It is objected, on the part of the defendant, that it does not appear that he was ever brought before any justice of the peace or magistrate, for a preliminary examination; and that

the doings of the officer, in taking the bond, was unauthorized, and gave this Court no jurisdiction; and that the process is incomplete, and defective, because there is no record of any proceedings of the magistrate.

The copies, which are before us, show that the proceedings were authorized by law; that, upon the arrest of the defendant, he was brought before the justice of the peace who took the examination and issued the warrant, and that he was ordered to obtain a bond, with surety, and that there was a compliance with that order. The record, which the magistrate probably made, or which, if he did not, he may now complete, is not with the papers. But the defendant having submitted to the jurisdiction of this Court, and filed his demurrer, is precluded from making successfully the objections on which he relies. The defects referred to were in preliminary proceedings, if they really exist, which cannot avail the defendant upon the demurrer. The copies exhibit sufficient to have entitled the complainant to a judgment of filiation against the defendant, on proof of the facts as they appear in the documents. These facts being admitted, as the case is presented, the demurrer was properly overruled, and the complainant is entitled to judgment thereon. *Exceptions overruled.*

RICE, HATHAWAY, APPLETON, MAY, and DAVIS, J. J., concurred.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1858.

COUNTY OF PENOBSCOT.

PREACHERS' AID SOCIETY OF THE MAINE CONFERENCE OF THE METHODIST EPISCOPAL CHURCH *versus* SYLVANUS RICH, *Executor.*

Where a society claimed a legacy given by a will, as being the legatees intended, although in the will the name of the association is not stated with precision, if all the circumstances indicate that this and no other society was intended, their claim will be sustained.

A bequest to charitable uses, to an unincorporated society may be enforced, by virtue of the statute of 43 Eliz. c. 4, which has been regarded as a part of the common law of this State, even if it could not be made effectual without that statute.

A court of equity will take care, if possible, in cases of charitable gifts, to give them effect. And, if the object can be ascertained, the want of a trustee to execute the trust will be supplied by an appointment by the Court.

Where a bequest was made to an unincorporated association, and, after the death of the testator, its members became legally incorporated, the Court directed that the property bequeathed be delivered to the corporation to be held in trust, for the purposes specified by the testator.

BILL IN EQUITY, which is dated March 4, 1858, wherein the plaintiffs allege, in substance, that by an Act of the Legislature of this State, approved on the 26th day of January, 1858, they were created a corporation; that John Ham, deceased,

by his last will and testament made a devise in the following words, to wit: — "I give and bequeath to the Maine Methodist Conference Ministers Aid Society, Penobscot & Kennebec railroad bonds to the amount of $800. To have and to hold as a permanent fund, paying only the annual income thereof yearly to the most needy preachers in the East Maine Conference."

The will is of the date of Feb. 18, 1857; was proved and allowed in Probate at April term, 1857. At the date of the will and at the time of the probate of the same, the plaintiffs were an unincorporated society or association in the State of Maine, under the same name as aforesaid, in which they now sue, which society was connected with the Maine Conference of the Methodist Episcopal church, and was duly organized in the usual manner, with proper officers, &c., holding its annual meetings in connection with the proceedings of said Conference; that the end and design of the society was for the *charitable use* of aiding and assisting needy ministers of said Methodist Episcopal church, in the support and maintenance of themselves and families, which was a religious use, promotive of the good and welfare of the community, and not opposed thereto, and is such an use as law and equity upholds, and will enforce as legal and binding in the settlement of estates.

That said Ham, by the devise, intended to designate said plaintiff association as the object of the bequest. The names are substantially the same. There is no association or corporation of the exact name given in the will, nor any other association or corporation of the Maine Conference existing for that or any similar use or object in Maine or elsewhere. And the plaintiffs charge that it is absolutely certain that they are intended by the said devise.

That, after the death of said Ham, the plaintiffs procured an Act of incorporation for said association under the same name, which Act has been accepted, and the corporation duly organized. That said Act gives them the right to hold real and personal estate to the amount of fifteen thousand dollars, but they have not property of the value of five thousand dol-

lars. The association is merged in the corporation, and the old organization has become extinct.

That the said Sylvanus Rich has been duly appointed executor of said Ham's will and estate, and among the effects in his hands are the bonds devised, which plaintiffs have requested him to deliver to them, and which he refuses to do, alleging he has no right or power, under the will, to deliver the same to plaintiffs. That said bonds are not needed to pay debts, &c.

The prayer is for disclosure and for a decree that said Rich holds said bonds in trust, and that he perform the trust by delivering and assigning them to the plaintiffs for the uses specified in the devise; and for such further relief as may be equitable, &c.

The defendant, in his answer, admits all the material allegations contained in the bill, and assigns the reason for his refusal to deliver to plaintiffs the said bonds, that doubts exist of the validity of the devise, it being to an unincorporated society.

A. W. Paine, for plaintiffs: —

Two questions are presented by the bill, viz.: —

I. Whether an unincorporated association can take a devise under the circumstances set forth in the bill and answer.

II. If so, whether the mistake in the name, in the present case, can or will have the effect to deprive the devisee of the intended gift or legacy.

I. Under the first point, it is to be noticed that, by the bill and answer, the association is shown to be one of a religious character and for a charitable use, and thus within the provisions of the statute of Elizabeth, in regard to "charitable uses." That has been fully adopted and is a part of the common law of Massachusetts and this State. See *Going* v. *Emery*, 16 Pick. 107, 115, and authorities cited, next page.

The question, whether such charitable associations may take property as devisee under a will, has been frequently before the courts in this country, and their decisions have been

almost uniformly in favor of the affirmative. 1 Jarman on Wills, (2d Am. ed.,) 99 and 100, [57, 58,] and notes; Angell & Ames on Corp. (3d ed.) 150, and notes.

In Vermont, *Burr* v. *Smith*, 7 Vt. 241, the doctrine is thus settled.

In Pennsylvania, the doctrine is adopted to the full extent. *Zimmerman* v. *Andres*, 6 Watts & Serg., 218.

In Massachusetts, the question has been often decided. *Burbank* v. *Whitney*, 24 Pick. 146; *Bartlett* v. *Nye*, 4 Met. 378; *Washburn* v. *Sewall*, 9 Met. 280; *Sanderson* v. *White*, 18 Pick. 328; *Brown* v. *Kelsey*, 2 Cush. 243; *Wells* v. *Doane*, 3 Gray, 201.

In New York, the cases of *Potter* v. *Chapin*, 6 Paige, 649; *McCarter* v. *O. A. Society*, 9 Cow. 484.

United States, *Beatty* v. *Kentz*, 2 Pet. 583.

The statute of Elizabeth having been recognized as adopted here before the separation of Maine from Massachusetts, it will be regarded as conclusive that it has been adopted as a part of our common law. *Bartlett* v. *King*, 12 Mass. 537; *Washburn* v. *Sewall*, 9 Met. 280.

In all these cases, the doctrine has been directly affirmed, that such unincorporated societies may take property as devisee, and equity will hold the executor or other party having possession of the legal title as trustee for such charity, and compel him to perform such trust.

Or, in case there is no one thus situated, the Court will appoint a trustee to take charge of the property, so that it may be applied to the uses designated in the will.

The case cited, of *Washburn* v. *Sewall*, 9 Met. 280, is direct and strong to this point. *Brown* v. *Kelsey*, 2 Cush. 243, also affirms the same, and so too, *Bartlett* v. *Nye*, 4 Met. 378; *Beatty* v. *Kentz*, 2 Pet. 583; *Potter* v. *Chapin*, 6 Paige, 649; *McCarter* v. *O. A. Society*, 9 Cow. 484.

It may then be regarded as fully settled, that the devise to the association is good, and that, to uphold it, the Court will appoint a trustee for that purpose, if necessary, in accordance with the principles of the cases last cited. But here it ap-

pears that the association has, since the death, become incorporated by Act of the Legislature. It has thus become a legal body, capable of holding property itself. The devisee has thus consummated its own existence, by merging its former immature state into the mature one; the child has become a man, the guardian may then be dismissed, and the man himself take the charge of his estate. The identity of the old association and the new incorporation being established, the Court can thus decree the conveyance directly to them. Or, at least, if they cannot do this, yet, acting in conformity with the decision of the Court, and especially in *Washburn* v. *Sewall*, 9 Met. 280, the Court can appoint the corporation as the trustee for the purpose of carrying out the object of the devise. This they can do with perfect propriety, for a corporation may act as trustee when the trust is not inconsistent with the character and object of the corporation. *Phillips Academy* v. *King*, 12 Mass. 546.

But it is on the principle of the established identity of the association with the corporation, that the decree is asked to have the bonds assigned and delivered to them. The association has become merged in the new incorporation, and is thus itself the object of the testator's favor.

II. What effect has the mistake made by the testator in the use of the name of the intended devisee upon the validity of the devise?

The true name of the association to which the devise was made is "Preachers' Aid Society of the Maine Conference of the Methodist Episcopal Church."

The name used is—"The Maine Methodist Conference Ministers' Aid Society."

In both, the same idea is expressed, the adjective instead of the possessive form of expression being used.

The word "preacher," being regarded as the same or equivalent to "minister," as in common parlance it always is the same, the two forms of words convey exactly the same idea, and not only so, but the collocation of the words convey the same and no other idea.

The object of testator was, clearly, the association or society, established in connection with the Maine Methodist Conference and having for its object the aiding of poor and needy ministers of the Methodist denomination.

There was but one association of that kind, and, in giving expression to his idea, he merely gave the adjective form instead of another to the expression. He fortunately got in all the words necessary to ensure the meaning of the name that the association had adopted. Thus, the Maine Conference is mentioned, the Methodist denomination is made certain, and the particular object in view, the aiding of poor ministers, is pointed out. It was a body having these various qualifications that the testator had in his mind to endow. The Methodist denomination was to be the great object; the Maine Conference the particular object; the aiding of needy ministers the end. The society having these great constituent qualifications was to be made the creature of his bounty. The name designated the full idea, the name of the plaintiff society expressed the same, no more, no less. And, when it is considered that there is no other society answering to the name, the conclusion is inevitable.

It being then conceded or proved that the society is the one intended, is there any thing in the way of the Court giving the devise the intended direction.

It is hardly necessary to refer to any of that large class of cases in which the Court have given effect to a devise by adopting as devisee a person wrongly named in the will. Such cases are numerous, and all go to settle the principle to be that—"Where the name or description of the person or legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake will not disappoint the bequest." 1 Jarman on Wills, (2d Am. ed.,) 328, [330,] note, and authorities cited; or, in the language of the text,—

"It is sufficient that the devisee is so designated as to be distinguished from every other person."

"And this, whether the object of the gift be a corporation

or an individual." 1 Jarman on Wills, 328–9, [330,] and note. The same doctrine is laid down by Angell & Ames on Corp., 150, § 7; *Wood* v. *White*, 32 Maine, 340.

A devise to a corporation by the name which it bears in common parlance, though not the true corporate name, is good. *Sutton* v. *Cole*, 3 Pick. 237, and cases cited. And the same is applicable to unincorporated associations. *Bartlett* v. *King*, 12 Mass. 543, and cases cited.

This whole subject is so fully discussed, and principles so distinctly settled, in two recent cases in Massachusetts, that no further argument seems necessary upon this point. *Tucker* v. *Seaman's Aid Society*, 7 Met. 188; *Minot* v. *Boston Asylum, &c.*, 7 Met. 416.

The defendant submitted the case on his part upon his answer, without argument.

The opinion of the Court was drawn up by

TENNEY, C. J.—The case is presented on bill and answer. The statements of the former are substantially admitted by the latter.

The defendant declined to deliver the bonds bequeathed by the will, on account of a doubt which he entertained, whether the society, unincorporated at the time of the execution of the will, and the death of the testator, though having a legal existence when the bill was filed, could take the bequest, and he wished the decree of the Court for his direction in the premises.

No objection can be made to the maintenance of the bill, on account of the want of proper parties thereto. In cases like the present, trustees and executors are supposed to represent all parties in interest. Story's Eq. Plead. § 150.

The society, to which the legacy was given, is not, in *name*, the one which was known as having an existence, before its incorporation. But there can be no doubt, from the statements in the bill, admitted in the answer, that the plaintiffs were the society intended by the testator, as the one which should be the almoner of his bequest. The principle stated

by SHAW, C. J., in delivering the opinion of the Court, in *Tucker & als.* v. *Seaman's Aid Society & als.*, 7 Met. 188, will well apply:—"That the evidence does not create the gift, but simply directs it. When the name or description in the will does not designate with precision any person, but, when the circumstances come to be proved, so many of them concur to indicate that a particular person was intended, and no similar conclusive circumstances appear, to distinguish any other person, the person thus shown to be intended will take."

2. A bequest to charitable uses, to an unincorporated society, may be enforced, by virtue of the statute of 43 Eliz., c. 4, which has been regarded as a part of the common law of this State, even if it could not be made effectual without that statute. The better opinion of the most eminent jurists, in England and in this country, is, that a donation to charitable uses could be carried into effect, in chancery, without the aid of the statute of Elizabeth. *Burbank* v. *Whitney*, 24 Pick. 146, and cases therein cited.

3. It appears from the bequest itself, and is admitted in the answer, that the association at the time of the execution of the will, and the corporation since, had for its object a charitable and religious use, promotive of public good, and in no way opposed thereto. The legacy, in its general character, is similar to those which have often been before courts of equity; is one which falls within the provision of the statute of Elizabeth, and which the law will uphold. *Tucker & als.* v. *Seaman's Aid Society & als.*, before cited; *Minot & al.* v. *Boston Farm School, &c.*, Ibid. 416.

The Court will take care, if possible, in cases of charitable gifts, to give them effect. And, if the object can be ascertained, the want of a trustee to execute the trust will be supplied by an appointment by the Court. *Kingsbury* v. *Gould, Ex'r*, 9 Met. 280.

The plaintiffs now exist as a corporation. Special Laws of 1858, c. 131. They have, therefore, a capacity to execute the trust, according to the will. It will effectuate the intention

of the testator that they should do so. For that purpose, they are hereby constituted trustees; and it is decreed that the executor deliver to the treasurer, or other proper officer or officers of the corporation, the bonds which are the subject of the testator's bequest, with the legal assignment thereof.

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

INHABITANTS OF VEAZIE *versus* GIDEON MAYO *& als.*

The statute of 1853, c. 41, § 3, (R. S. 1857, c. 51, § 15,) relating to the construction of railroads across highways and streets in cities and towns, is remedial in its provisions, and applies to railroad corporations previously, as well as those subsequently chartered, unless they had, at the time of the passage of the Act, completed or actually entered upon the construction of their road.

That Act was designed to afford greater security to the public having occasion to use highways and streets across which railroads were to be made; and it was but the exercise of that police power which is always necessarily retained by the people, in their sovereign capacity, for the public safety, and of which they cannot be divested by prior Legislative enactments, nor by chartered immunities.

Before the construction of a road across any street of a city, the written assent of the mayor and aldermen must be obtained, stating the manner and conditions upon which such crossing may be made; and this must be recorded in the County Commissioners' office. But the provision requiring it to be recorded is merely directory, and does not constitute a condition precedent, to be performed before the company are authorized to proceed with the construction of their road.

The city council of Bangor is a body entirely distinct and different from the mayor and aldermen; and the assent of the former to the construction of a railroad, across a street in that city, was nugatory and conferred no authority for that purpose.

REPORT by APPLETON, J.

This was an action of TRESPASS ON THE CASE against the defendants, as "directors" of the Penobscot Railroad Company.

It appeared in evidence that said railroad was located in 1852. The directors thereupon contracted with certain per-

sons to make and grade that portion of the railroad within the limits of the city of Bangor. On the thirteenth day of May, 1853, they procured an order to be passed by the "city council," permitting them to cross certain streets, stating the manner and the conditions upon which the crossings might be made. But it did not appear that this order was recorded in the County Commissioners' office.

An Act was passed, March 26th, 1853, incorporating a part of Bangor into the town of Veazie. This Act was accepted by the inhabitants upon the territory, June 27, 1853; and the first meeting for the choice of officers was held on the fifth day of July following.

The contractors for making and grading the railroad commenced their work in the summer of 1853; and, in October and November of that year, they made the road across a certain highway in Veazie, which had formerly been one of the streets in Bangor, across which the city council had consented that the road might be made. In grading the railroad across said highway, the workmen cut away and lowered the highway several feet. And, while it was in this condition, one John Phillips, while walking along the highway in the evening, in the use of ordinary care, fell into the excavation and broke his leg, and was otherwise injured. The defendants were directors of the railroad company at that time; and the workmen who made the excavation across the highway were the employees of the contractors, and did the work in performance of the contract.

Phillips afterwards commenced an action against the town of Veazie, to recover damages for his injuries, and recovered about $1650, which the plaintiffs paid before commencing this suit.

The plaintiffs also claimed to recover for sums of money expended by them, subsequently, in repairing said highway.

The defendants put into the case the charter of the Penobscot Railroad Company, and the record of their location, which was filed in the office of the County Commissioners, Dec. 30th, 1852. And they also proved that the defect,

which occasioned the injury, was within the limits of said location.

The case was submitted to the full Court by the parties, with the agreement that if the action was maintainable upon the testimony it should stand for trial; otherwise a nonsuit was to be entered.

Wakefield argued for plaintiffs.

Washburn & N. Wilson argued for defendants.

1. The charter of the Penobscot Railroad Company was granted prior to the law of 1853, and the company, therefore, were not subject to its provisions. The statute was prospective in its operation, and was not designed to apply to railroad corporations chartered before that time.

2. If designed by the Legislature to apply to companies previously incorporated, the Penobscot Railroad Company was saved from its operation by section 17 of their charter, which provides that the Legislature shall not "impose any other or further duties, liabilities or obligations." If the statute of 1853 does not impose any new duties or liabilities, the plaintiffs cannot recover, for there is nothing in the charter by which their action can be sustained. If that statute does impose new liabilities, it is void as to the defendants, because in violation of the charter.

3. The Penobscot Railroad Company were not only incorporated before 1853; they had completed the location of their road, and it was recorded in the County Commissioners' office in December, 1852. This gave them a complete, perfect, indefeasible right to construct their road within the limits of their location, of which no subsequent Legislature could divest them. If rights thus perfected and secured under the provisions of the charter can be annulled by the Legislature, then the supposed immunities of corporations are without any foundation, and they have no security from legislative encroachment.

4. But, even if the defendants are subject to the provisions of the statute of 1853, they are not liable. They had the

assent of the city council of Bangor, given while the *locus in quo* was within a street of that city, that they might construct their railroad across the street. The subsequent incorporation of that portion of the city into the town of Veazie did not affect the rights conferred. It is not proved or pretended that the contractors were guilty of any negligence, or want of care, in constructing the railroad across the highway. The workmen were not the servants of the corporation, nor of the defendants.

5. The defendants, if liable at all, were liable to Phillips, and not to the plaintiffs.

Other points made by counsel, not having been considered in the opinion of the Court, are omitted.

The opinion of the Court was drawn up by

RICE, J. — This action is brought to recover of the defendants, as directors of the Penobscot Railroad Company, the amount of a judgment recovered against said town of Veazie by one Phillips, for an injury occasioned by a defect in one of the public ways in that town, which defect, the plaintiffs allege, was caused by the operations of the railroad company in the construction of their road. The action is based upon a provision in the 3d section of c. 41, of the Acts of 1853, which is as follows: — "No railroad shall cross any street of a city, not a county road, without the written consent of the mayor and aldermen of the city, which written assent shall determine and state the manner and conditions upon which such crossing may be made; and shall be recorded in the County Commissioners' office. And every such crossing, made contrary to the foregoing provisions, shall be considered a nuisance and liable to all the provisions of law relating to nuisances, and the directors of the company making the same shall be personally liable therefor."

This statute is remedial, and applies to railroad corporations which had been chartered before its enactment, as well as to those of a subsequent date, unless they had actually entered upon the construction of their road, under prior

existing laws. The Act was designed to afford greater security to the public, having occasion to use our public highways while railroads are in process of construction, and to protect such ways from injury, as far as practicable, by the construction of such railroads. It does not conflict with any of the provisions in the charter of the Penobscot Railroad Company, nor impose upon that corporation any additional duties, liabilities or obligations, but was simply designed more effectually to compel a compliance with the provisions of the charter, and, particularly, those contained in the eighth section thereof.

But, independent of and aside from all charter provisions, it is only the exercise of that police power which is always necessarily retained by the people in their sovereign capacity, for the security of the public safety, and of which they cannot be divested by legislative enactment or chartered immunities.

It appears that the city council of the city of Bangor, on the 30th of May, 1853, accepted the report of a committee, prescribing the terms on which this company should be permitted to cross certain streets in that city. This report or order of the city council was not recorded, as required by the Act of 1853, before the company commenced the construction of their road. The provision for recording is directory, and does not constitute a condition precedent, to be performed before the company would be authorized to proceed with the construction of their road. *Pond* v. *Negus*, 3 Mass. 232; *The People* v. *Peck*, 11 Wend. 604; *Hooker* v. *Young*, 5 Cow. 269.

But it is contended by the plaintiffs that the acts of the city council were only preliminary, and not final; that no written permission was given by that body, in the action which was had therein; and, further, that the city council had no authority, under the statute, to act in the premises, and consequently that their action, whatever it may have been, was entirely nugatory.

Section 4th, of the charter of the city of Bangor, provides that the executive power of said city, and the administration of police, with all the powers of selectmen of Bangor, except

as is provided in the eighteenth section of said charter, shall be vested in the mayor and aldermen, as fully as if the same had been particularly enumerated therein. And all other powers now vested in the inhabitants of said town, and all powers granted by the Act, shall be vested in the mayor, aldermen and common council of said city, to be exercised when acting separately, by a concurrent vote, each board to have a negative upon the other. The city council includes the common council, as well as the board of Aldermen. This is a distinct body from the mayor and aldermen. Its action may be entirely different from that of the board of aldermen; the common council being much larger, numerically, than the board of aldermen, would have the absolute control when acting with that body in the capacity of city council. Hence, it by no means follows that the action of the city council and that of the mayor and aldermen, would be the same upon the same subject. The statute required the company, before proceeding to construct their road, to obtain the written assent of the mayor and aldermen. This they did not do. The action of the city council, whether preliminary or final, was unauthorized, and consequently unavailing.

According to the provisions of the report, the action is to stand for trial.

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

JOHN HOLYOKE *versus* CHARLES D. GILMORE.

One, who had performed labor on masts, brought an action therefor, under c. 144 of the laws of 1855, and the masts were attached for his *lien* thereon. They were held by a creditor of the owner, as collateral security, and afterwards received by him, in payment of the debt for which he held them. The lien-claimant obtained judgment and execution in the ordinary mode, and, on the execution, the officer seized and sold the masts. In a suit by the creditor against the officer, *it was held:*—

That such judgment and execution conferred upon the officer no authority to take any property, but that of the judgment debtor.

That, in the suit of the lien-claimant against the original owner, the purchaser of the property was entitled to notice, without which his rights would not be affected by the judgment, unless he had actually waived his right to be notified.

That the owner was not estopped to claim the property by reason of his receipt to the officer who attached it on the writ, in the former suit, even though he might be in a suit by the officer against him for a breach of his contract in the non-delivery of it.

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

TRESPASS for taking four masts, by a deputy of the defendant, who is sheriff of the county of Penobscot. The writ is dated Sept. 4, 1857.

From the report, it appeared that plaintiff held the masts as collateral security, when they were attached, and afterwards took them from one Williamson for advances.

"The masts arrived in Brewer, in June, 1856, and were attached on the 3d day of July following, on a writ in the action of Largay *v.* Williamson. The count in the writ sets forth a lien-claim, stated in an account annexed. The direction in the writ was to attach goods and estate of said Williamson, especially masts and spars marked," &c.

The action was duly entered in court, and judgment in ordinary form was obtained at the next April term of the court, and execution issued in common form; and, within thirty days from the rendition of judgment, the masts were seized and sold on said execution.

Defendant introduced, subject to objection, testimony tend-

ing to show that Largay agreed with Williamson to do the work on the logs, and that the services were rendered.

Defendant also put in evidence a receipt, in common form, dated July 5, 1856, signed by plaintiff, and given to the officer attaching the masts on the writ in favor of Largay.

It also appeared that the plaintiff, at the time of the sale of the masts on the execution, claimed the property as his own. Also, that plaintiff requested an attorney to answer to said suit for Williamson.

Peters, for defendant: —

The only element wanting, to establish a good lien-claim, is a notice to the owner. This was waived by plaintiff, by his control of the action. He had all the advantages which he could have had by coming into court more formally.

But plaintiff was not an owner. His claim rested in contract. If he had any title, it was merely collateral; and his receipt to the officer discharged it.

He is estopped from claiming the property, as he made no claim of ownership to it when it was attached in the original suit, but gave the officer his receipt for it, as the property of Williamson. *Sawyer* v. *Mason*, 19 Maine, 49.

Godfrey & Shaw, for plaintiff.

The opinion of the Court was drawn up by

RICE, J. — Trespass for taking four masts. By the report of the case, it appears that the general property in the masts in controversy was originally in one Williamson, but they were held by the present plaintiff as collateral security for indebtedness from Williamson to him, and were subsequently received by him in payment for that indebtedness.

One Largay, who had performed labor upon the masts for Williamson, sued out a writ of attachment against said Williamson, and the masts were attached thereon, on the 3d day of July, 1856, by a deputy of the defendant, who is the sheriff of Penobscot county. The writ contained a count setting forth a lien-claim in an account annexed. The direction in the writ

was to attach goods and estate of said Williamson, especially masts and spars, marked, &c.

Judgment was obtained against said Williamson, in the ordinary form, at April term, 1857, and execution, also, in the ordinary form, issued thereon, and, within thirty days after judgment, the masts were seized and sold on that execution.

The plaintiff was not notified to come in and defend against the suit of Largay, as provided in c. 144 of statute of 1855. Nor do we find that the evidence shows that he waived his right to such notice.

That judgment and the execution issued thereon gave the officer no authority to take the property of the plaintiff. *Redington* v. *Frye*, 43 Maine, 578.

The plaintiff, on the 5th of July, 1856, receipted to the officer for the property attached on the writ of Largay *v.* Williamson, as having been attached as the property of Williamson.

The defendant now contends that the plaintiff is estopped from claiming that property, by reason of the admission in that receipt.

If he had been sued for the non-delivery of the property, when demanded upon the receipt, such might have been the result. This, however, was not done. On the contrary, the property, evidently, was returned to the party holding the receipt. The parties were thereby restored to their original condition. After this, the property was seized upon the execution and sold, notwithstanding the plaintiff, at the time of the sale, claimed the said masts as his own.

Under such circumstances, the defendant proceeded at his peril, and, not being protected by his precept, he became liable. According to the agreement, a default must be entered for $110, and interest from the time of taking, as damages.

Defendant defaulted.

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

SAMUEL PRATT *versus* DANIEL BUNKER.

In an action of trespass against a sheriff, in which he is directly charged, the declaration will be supported by proof that the alleged trespass was committed by one who was acting as his deputy, for whose misfeasance he is by law answerable, although there is no such averment in the writ.

ON EXCEPTIONS to the ruling, at *Nisi Prius*, of APPLETON, J.

TRESPASS for taking personal property. Plea, general issue, with a brief statement to the effect that the taking, if there was any, was by virtue of legal process against one Amos Rines, who was the owner of the property.

The defendant was, at the time of the alleged taking, the sheriff of the county of Somerset.

Plaintiff put in evidence tending to show that, on April 20, 1857, one Williams took and carried away the property, and, after keeping it a few days, sold the same by auction; that the property was the plaintiff's. There was evidence as to the value of the property. It was admitted that said Williams was, at the time of taking the property, a deputy of defendant.

The plaintiff having stopped, the defendant moved for a nonsuit. On motion of plaintiff therefor, the presiding Judge granted leave to amend his declaration by adding a new count, declaring that the trespass was committed by Williams, a deputy of defendant, for whose official acts he is by law answerable. The defendant objected to the amendment.

The motion for nonsuit was overruled. Whereupon a default was entered, subject to the right of defendant to except to the rulings and decision of the Judge.

G. P. Sewall, for plaintiff: —

Trespass *vi et armis* may be maintained against the defendant, directly charging him generally, on proof that the taking was by his deputy.

Sheriffs are liable for misfeasance of their deputies. R. S. of 1841, c. 104, § 10.

The original count in the plaintiff's writ was sufficient to hold him on the evidence submitted.

A deputy is the servant of the sheriff, and his act is the act of his superior. In trespass, all are principals, and there was no necessity of naming in the declaration the person employed by the defendant to commit the act complained of. *Grennel* v. *Phillips*, 1 Mass. 530.

The declaration and pleadings in the case under consideration, were precisely the same as in that cited. The defendant having, in his brief statement, justified the act, is estopped to deny that he committed it.

The case cited has not been overruled nor doubted in Massachusetts, nor in this State.

The same principle was affirmed in *Campbell* v. *Phillips*, 17 Mass. 244, and afterwards, by this Court, in *Walker* v. *Foxcroft*, 2 Maine, 270; *Lambard* v. *Fowler*, 25 Maine, 308, and is not now an open question.

If necessary, however, to allege that the defendant took, &c., by Williams, his deputy, the amendment proposed was properly admitted. *Phillips* v. *Bridge*, 11 Mass. 246; 25 Maine, 308.

Rowe & Bartlett, for defendant.

The opinion of the Court was drawn up by

CUTTING, J. — The authorities cited by the plaintiff's counsel, fully sustain his proposition, that the action was rightly commenced against the sheriff, without an averment of the misfeasance of his deputy. Had it been otherwise, the amendment was within the discretion of the presiding Judge, since it was for the same cause of action.

It is contended that the trespass proved was by Williams, and, when committed, that there is no proof he was acting under color of legal process, or as a deputy of the defendant. But the plaintiff having proved that Williams took the property and sold the same at auction, and that he was then the deputy of the defendant, taken in connection with the defend-

ant's brief statement, that such acts were done by virtue of legal process against one Amos Rines, who was the owner of the property, was *prima facie* sufficient to maintain the action and to call on the defendant to sustain his justification.

Exceptions overruled.

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

JOHN W. WITHEE, *Executor, versus* MOSES ROWE, *Appellant.*

In appeals from the Probate Court, when questions of fact arise, the proceedings are analogous to the proceedings in courts of equity, when issues of fact are prepared for the jury, under the direction of the Court. The *form* of the issues may be agreed upon by the parties, subject to the approval of the Court; or, if the parties disagree, (as to the form of the issue,) that matter may be referred to a master.

But the Court will determine what questions shall be submitted to the jury. When the appeal is from a decree allowing and approving a will, various questions of fact, as well as of law, may be involved; and whether the facts in dispute shall *all* be settled by the jury, is subject to the discretion of the Court. There may be important questions of fact, not submitted to the jury, which will control the final decree of the Court.

Upon such an appeal, the great question, embracing all others, is whether the instrument is the last will and testament of the person appearing on its face to be the testator. But this is not a question for the jury. It involves matters of law, as well as of fact, and is to be determined by the Court, in the final decree, upon the law applicable to all the facts, whether settled by the jury, or by the Court.

Upon such an appeal, three distinct issues of fact were submitted to the jury under the direction of the Court: — (1.) the signing of the alleged will by the supposed testatrix; (2.) the sanity of the supposed testatrix; (3.) the attestation of the alleged will. Upon these issues the jury returned one verdict only, "that the instrument is not the last will and testament of M. E. W.," the supposed testatrix. *It was held* that the verdict did not find the issues presented, and, being defective and uncertain, was void.

Issues of fact in Probate are to be tried, and the verdict rendered, recorded, and affirmed, with the same precision and strictness, and according to the same rules as in proceedings at common law. Until a verdict is declared and affirmed by all the jury, in open court, and constructively recorded, it is of no force. And this rule applies as well to special as to general verdicts.

Withee *v.* Rowe.

A witness, who is an expert, may give his opinion whether a signature is genuine or simulated, upon an examination thereof at the time of trial, though he is unacquainted with the handwriting of the person whose signature it purports to be.

One who has been treasurer and clerk of a railroad company, and who has been accustomed to examine signatures upon transfers of stock, and upon bank bills, in order to determine their genuineness, may be admitted to testify as an expert.

MOTION for a new trial, and EXCEPTIONS to the ruling of APPLETON, J.

This case was an appeal from the decree of the Probate Court for the county of Penobscot, allowing and approving a certain instrument, as the last will and testament of Mary E. Withee. The following issues were framed and joined by the counsel for the parties, under the direction of the Court, and were submitted to the jury upon the evidence in the case.

(1.) And now the said appellant comes, &c., and for plea, says that said supposed will was not signed by the said Mary Elizabeth Withee, or by some person in her presence and by her express direction, and of this he puts himself on the country.

(2.) And for further plea, &c., says that said supposed testatrix was not of sound mind at the time of said execution of said instrument, and of this, &c.

(3.) And for further plea, &c., that the said instrument was not duly attested, and of, &c.

After the testimony was finished, the following questions were prepared and given to the jury, with directions to answer them in writing, according as their finding should be.

(1.) "Did the testatrix sign the will; or was it signed in her presence, and by her express direction?"

(2.) "Was said testatrix of sound mind when said will was executed?"

(3.) "Was said will duly attested?"

To each of these questions the jury, on coming into Court, returned in writing, as their answer, "Nay"; each answer being signed by their foreman, who delivered the questions with the answers thereon, to the clerk, and they were by him

read aloud in open Court. But they were not otherwise read, affirmed or recorded.

Before the jury retired, they were instructed by the presiding Judge that they need not return a verdict with their answers and the questions; but that, on their return, a verdict would be prepared for them, according to their answers.

After the jury returned, and the questions and answers had been read by the clerk, the counsel for the appellant prepared a verdict, which was exhibited to the Court, and then was signed by the foreman of the jury. After stating the term of the Court and the names of the parties to the case, the verdict is as follows:—"The jury find that the said instrument, offered as the last will and testament of Mary Elizabeth Withee, is not the last will and testament of the said Mary Elizabeth Withee."

This verdict was then returned by the jury, read aloud by the clerk, affirmed by the jury, and recorded in the usual manner.

After the jury had been discharged, on the same day, the appellee filed a motion that the verdict be set aside and a new trial granted,—

1. Because said verdict is against the evidence in the case.
2. Because it is against the weight of evidence.
3. Because it is against law.
4. Because the verdict does not conform to, follow, or find upon the several issues, or any of them, joined in this case.
5. Because the verdict does not find that the said paper, purporting to be the will of Mary Elizabeth Withee, was not duly signed by the said Mary, nor that the said Mary was not of sound and disposing mind at the time of executing the same, nor that the same was not duly attested and subscribed, nor any thing in relation to any of said questions or issues, as set forth in the several pleas and issues joined under the direction of the Court.
6. Because said verdict assumes to find a conclusion, and not the facts put in issue as aforesaid, from which the Court alone could draw a conclusion, and thereby by said verdict

the jury have assumed to find and declare a result which they could not legally find.

7. Because no issue joined in the case presented the matter found by the jury.

8. Because said verdict, in other and in all respects, is so informal, insufficient, argumentative, general and defective, and irresponsive to the issues, that no judgment can be legally rendered thereon.

This motion was overruled by the presiding Judge, and the appellee excepted.

It is unnecessary to publish a report of the evidence, as the opinion of the Court will be readily understood without it. Several points were raised by the exceptions, and discussed at great length by counsel, which were not considered by the Court. They are therefore omitted.

Upon the question of the genuineness of the signature of the supposed testatrix, the appellant called N. D. Gould as a witness, who was admitted to be an expert. The signature to the instrument purporting to be a will was exhibited to him. He did not profess to have any knowledge of the handwriting of the testatrix. He was asked if, in his opinion, the signature was genuine. He answered, that he did not think it a genuine signature of anybody. The question and answer were seasonably objected to by the appellee, but were admitted by the Court.

The appellant also called Elias Merrill as an expert. Upon examination by the Court, he testified that he had been treasurer and clerk of the Penobscot and Kennebec Railroad Company for five years, and had kept the books of the corporation; and that he had been in the habit of examining the signatures to transfers of stock, and also the signatures to bank bills, to test their genuineness.

The appellee contended that this was not sufficient evidence of the qualifications of the witness to testify as an expert, and objected to his being permitted to testify in that capacity. But he was admitted by the Court.

To these and various other rulings, many of which were not considered by the full Court, the appellee excepted.

The motion and exceptions were elaborately argued by *Kent* for the appellee, and by *Rowe* and *A. Sanborn* for the appellant.

Kent, for the appellee, presented the following points: —

1. The *questions and answers* returned by the jury did not constitute a *verdict*. They were not so understood by the Court, nor the jury, nor the parties. The jury were expressly instructed, before they retired, that they need not return any verdict, but that one would be prepared for them upon their return, in accordance with their answers. No one supposed that their answers were the verdict, or any part of it. They were findings preparatory for, and preliminary to the verdict.

And, if intended for a verdict, they did not become complete and valid as such, because they were neither affirmed by the jury, nor recorded by the Court. No verdict can be regarded as final and valid "until it is pronounced and recorded in open court." *Goodwin* v. *Appleton*, 22 Maine, 453. Until that was done, the jury had the right to alter it. It is the affirmation of the verdict by the jury in open court, and its being recorded, that give it its validity, and make it final and conclusive upon the parties. *Roberts* v. *Rockbottom*, 7 Met. 49. Until a verdict is read in open court, to the jury, and they each and all assent to the announcement of the clerk, "So you say, Mr. Foreman; and, so you all say, gentlemen," any juror may revoke his consent to it. Up to that point, there is a *locus penitentiæ*. It is this public affirmation of it, in open court, that gives it its validity, and stamps it as conclusive. *Root* v. *Sherwood*, 6 Johns. 68; *Blackley* v. *Sheldon*, 7 Johns. 32.

That the questions and answers were thus read to the jury, affirmed by them, and recorded by the Court, is not pretended. They, therefore, are not the verdict; and, if so intended, are invalid, and cannot be the basis of a decree by the Court.

2. The only verdict, therefore, is that rendered by the jury, "that the instrument was not the last will and testament" of the supposed testatrix.

And this, we contend, was not a finding upon either of the issues presented to the jury by the pleadings in the case. There might have been many other reasons, involving other issues than those framed by the parties, why the instrument was not her last will and testament. And, *non constat* but that the verdict of the jury was based upon other facts, not submitted to them.

It might not have been her *last* will and testament, because there was another of later date.

Or, the will might have been defective for want of apt words for such an instrument, and therefore invalid.

Or, it might have been obtained by fraud and deception. Or the testatrix might have been incapable of making such a will, on account of her coverture. *Parker* v. *Parker*, 11 Cush. 519.

The verdict, therefore, does not establish the fact, either one way or the other, upon either one of the issues presented to the jury. Instead of furnishing the Court with judicial information of the facts in dispute, so as to enable it to make a final decree in the case, the jury have usurped the place of the Court, and have undertaken themselves to make the decree.

And, if the Court could be presumed to know, judicially, (which it certainly cannot,) that there were no other facts in controversy except those submitted to the jury, the difficulty is not obviated. For, throwing the questions and answers aside, which it is confidently believed the Court will do, because not recorded and affirmed, the *verdict* furnishes no evidence that the jury agreed upon any one of the issues framed by the parties. They may have all been of the opinion that the will was invalid; *some*, because the testatrix was insane; *some*, because she never signed the will; and *some*, because it was not duly attested. And, though all not agreeing upon *any one* of these questions, they still might have

agreed to the verdict; which, after all, was a finding upon matters of law, quite as much as upon matters of fact.

A verdict, in all cases, must conform to the issues presented, and be a definite finding thereon. See *Gerrish* v. *Train*, 3 Pick. 124; *Shapleigh* v. *Wentworth*, 13 Met. 358; *Stiles* v. *Granville*, 6 Cush. 658; *Patterson* v. *U. States*, 2 Wheat. 221; *Brown* v. *Henderson*, 4 Mumf. 492.

3. The presiding Judge erred in admitting the testimony of Gould. Though an expert, he did not claim to have any knowledge of the handwriting of the testatrix, and should not have been allowed to give his opinion in regard to its genuineness. The authorities are conflicting; but there is no decision of this Court sustaining the admission of such evidence.

4. Elias Merrill was not qualified to testify as *an expert*, and ought not to have been admitted as such a witness. The question of his admission, upon the facts testified to by him, before his examination in chief, was one of law. See Greenl. Ev. § 581, note.

Such testimony is exceptional, and is to be admitted with great caution. *Doe* v. *Suckmore*, 5 A. & E. 751; *Gurney* v. *Langland*, 5 B. & A. 330.

His testimony is not admissible, unless he is shown *in fact* to have been an expert. *Page* v. *Homans*, 14 Maine, 478.

An expert must be a person of extraordinary skill in the matter to which he is called. "Such testimony must, in its very nature, be confined to scientific men, extensive and trained observers, deriving skill from professional experience." *Norman* v. *Wells*, 17 Wend. 162. See also, *Lyon* v. *Lyman*, 9 Conn. 160; *Robinson* v. *Stark*, 15 N. H. 112; *Moody* v. *Rowell*, 17 Pick. 496; *Lincoln* v. *Barry*, 5 Cush. 590.

In the case of *People* v. *Spooner*, 1 Denio, 343, the witness offered had been a clerk in chancery ten or eleven years, and had been accustomed to examine signatures as to their being genuine. And, because he was admitted, a new trial was granted. BRONSON, C. J., in giving the opinion of the Court, said "there was nothing, either in the official employment or in the profession of the witness, that proved that he had a

higher degree of skill than such as is common to several large classes of individuals."

The witness in that case may be presumed, certainly, to have had as much skill and experience as the witness in the case at bar.

Rowe, for the appellant, replied, *first*, to the objections taken to the testimony of the experts; and then, to the objections urged to the *verdict*.

1. In regard to the testimony of Gould, it is submitted that the ruling of the Court was in accordance with the better opinion, both in this country and in England. *Revett* v. *Braham*, 4 T. R. 497; *Rex* v. *Catoe*, 4 Esp. 117. In *Moody* v. *Rowell*, 17 Pick. 490, all the authorities are elaborately discussed by SHAW, C. J.; and the case of *Gurney* v. *Langland*, cited for the appellee, is pronounced unsound.

The next question is whether the Court erred in admitting Mr. Merrill to testify as an expert, upon the facts disclosed on the *voir dire*. Those facts are, that he had been for five years treasurer and clerk of the Penobscot and Kennebec Railroad Company; that he had been in the habit of examining signatures, in his business of treasurer and clerk, and of examining bank bills to test their genuineness.

It is admitted that, in this State, experts are admissible to testify upon comparison of handwritings. In New York, they are not so admitted. In England, the practice varies, and the law is unsettled. The case of *Mudd* v. *Suckermore*, 5 Ad. & E. 703, (31 E. C. L. R., 791 to 812,) presents an amusing and instructive *expose* of the confusion which there prevails in practice, as to the mode of proof of signatures.

"Experts are persons instructed by experience, selected by courts or parties in a cause, on account of their knowledge or skill." Bouvier's Law Dict.; 1 Greenl. on Ev. § 440.

The comparison of handwritings is not a profession; there is no class whose members are *ex officio* experts. All men in the higher walks of business, in this country of paper money and multitudinous promissory notes, have more or less ex-

perience in testing the genuineness of signatures, and must acquire some skill.

PARKER, C. J., says, in *Robertson* v. *Stark*, 15 N. H., 113, cited on the other side, "witnesses, who have made it a subject of study and observation, may be admitted to give their opinion respecting handwriting, whether it is forged or is that of a particular individual." Lord DENMAN says, in *Mudd* v. *Suckermore*, (31 E. C. L. R., 810,) "the witness must be conversant with handwriting—a banker, a printer, the officer of a court of justice, to be entitled to any degree of authority;" and again, "but if he is a person of some skill, (however low in degree and however generally shared with him,) he does what, possibly, the jury may be incompetent to do." In *Tilman* v. *Tarver*, R. & M., 141, (21 E. C. L. R., 400,) ABBOTT, C. J., directed the person producing the paper to compare it with the genuine signature, and to say, upon oath, whether he believed the writings were by the same person, citing a similar instance where Mr. Justice Lawrence directed a gentleman, accidentally in court, to make a comparison of writings, and testify. These were ancient writings, but that can make no difference in the principle. The remark of C. J. BRONSON, in the *People* v. *Spooner*, 1 Denio, 343, is mere *obiter dictum*, as the case was decided on the ground that experts in handwriting could not be received at all, and, therefore, it was unnecessary to decide whether the witness offered, a clerk in chancery, was an expert; and Mr. BRONSON wisely said, in effect, that several classes of persons had as high a degree of skill as clerks in chancery. In the case of *Lincoln* v. *Barry*, 5 Cush. 591, also cited by the counsel, the Court say:—"there must always be a preliminary inquiry by the Court as to the fact of the witness' science and skill, and his capacity to form an opinion upon the subject matter; and this must often depend upon circumstances of so peculiar a nature and character, that it is difficult to lay down any general rule to guide the decision of the Judge in such a case."

To determine what qualifications should be required in a witness to enable him to testify by comparison, it may be

necessary to consider what more such an one is authorized to do than can be done by any ordinary witness. The usual mode of proving or disproving the genuineness of a signature, to which there is no subscribing witness, is, by the opinion of witnesses who have seen the party write, have corresponded with him, or have seen his genuine signature in some other way. Now, one of this class, in testifying, forms his opinion by a comparison of the signature in question, with the impression in his mind, the image on his memory, left by the genuine writing. That impression may be weak, that image may be faint, from a want of care in observing, or from lapse of time. The expert, in testifying, gives an opinion, formed by a comparison of the signature in question with the genuine signature before him. How much more skill and experience does it require to make the latter comparison than the former?

In the case cited by the counsel from 9 Conn., a cashier was admitted because he was a cashier. If a cashier of a $50,000 bank, who may not have been in office more than a week, has the requisite skill and experience, "*virtute officii*," why should Mr. Merrill have been excluded, who for the last five years has been engaged in collecting and disbursing all the funds used in constructing and operating a railway fifty-five miles in length and costing nearly $2,000,000, and who probably handles more money than such cashier?

If Mr. Merrill had not the requisite experience, who has it? How many years must a man be engaged in examining money and comparing signatures? How many bank bills must he examine? How many signatures must he test? It is palpable that there can be no rule. The practice is to admit men of much less experience and skill; and that practice is founded on the common sense of the matter.

2. On the motion for a new trial, the only question is this, has the appellee, as a matter of law, a right to demand another trial by jury? The counsel, in his argument, seems to claim this as a matter of right, as in a case at common law. We deny that he has, or ever had, a right to demand a trial by jury. This Court, sitting as a court of probate,

does not derive its authority, or mode of proceeding, from the common law. The statute has conferred upon it the powers of ecclesiastical courts, and prescribed modes of proceeding borrowed from those courts, and the courts of chancery. The whole proceeding is that of a court in the exercise of chancery powers. There are not, necessarily, any pleadings in the common law sense of the term; but the case comes up for a hearing, in the first instance, by the Court, upon the prayer that the will be allowed, and, upon the reasons against its allowance, filed in the Court below; the Court having full power to settle all questions of fact, as well as of law. If the Court wishes the aid of a jury in settling any question of fact, the statute authorizes them to frame a feigned issue and send it to a jury for trial, as practiced in courts of chancery; a practice not known, I believe, to the ecclesiastical courts of Great Britain. In the trial of such issues, this Court has one great advantage over the English Courts of Chancery, for it has its own jury, presides at the trial, and hears the evidence; whilst the chancellor is under the necessity of sending the issue to be tried in a Court of Law; and whilst the English Court of Chancery has no knowledge of the doings or conclusions of the jury, save what the verdict affords, this Court knows every thing which takes place at the trial; for every thing appears upon its records or files. But such verdicts are never conclusive in England. They do not bind the conscience of the Court. The practice there is to send them back as often as they prove unsatisfactory, or to decide the matter of fact in direct opposition to their finding. The object in sending the questions to a jury is to satisfy the conscience of the Court. If the verdict returned satisfies that conscience, it is acted upon by the Court; if it does not, it is set aside and a new trial is ordered at law, or the Court proceed to decide the cause without the aid of a jury. 2 Story's Eq. Jur. § 1447; Adam's Eq., 670 * 377.

The verdict, then, is not necessary to, nor does it constitute the basis of the judgment, as in a suit at law. The

matter of form, then, is not material, as at common law. It is enough to satisfy the Court that the issue presented has been decided. In our mode of proceeding, with the jury present in the probate court, no formal verdict is necessary. It is enough for the Court to put such questions as it pleases, and for the jury to answer them. If the Court be satisfied with those answers, it may go on and make the decree. If dissatisfied, it may put the same questions to another jury. If a verdict be returned after the strictest common law form, after the strictest and most regular trial, it binds nobody, and may be set aside by the Judge, if he is at all dissatisfied with the result to which the jury came.

Suppose no verdict had been taken, except so far as the answers of the jury had been considered a verdict; what then? The decree in such cases requiring no verdict to rest upon, as before shown, the want of one would not vitiate it. "But the answers were not affirmed and recorded;" there was no need of affirming them, if the conscience of the Court was satisfied. But the counsel wittily says, "between the first finding and the recording, there is usually *locus penitentiæ*," which was wanting in this case. The jury were informed by the Court that a verdict would be framed upon, and in accordance with, their answers. They understood that the verdict, signed by their foreman, was but the formal, technical expression of the ideas expressed by them in their answers; and under that impression they affirmed it. Here was more than the ordinary "*locus penitentiæ*," all the delay whilst the verdict was being prepared; and yet, not a penitential sigh or tear was heard or seen on the panel.

But "it was not recorded." Recording is not necessary to give validity to a decree. If deemed important to have it recorded, the Court have power over their own records, and can order it. The record of this case is not yet closed, and the answers are on the files of the Court. As a matter of fact, those answers are as much recorded, that is, spread upon the record, as is the formal verdict. The only difference is,

that the clerk told the customary lie to the jury about the latter; "hearken to your verdict as the Court have recorded it," and did not tell it about the former.

I maintain, further, that the verdict is sufficient. The form of the verdict, if one be taken, is entirely subject to the discretion of the Court, and is sufficient when it expresses the conclusion which necessarily results from the finding by the jury. The whole argument of the counsel to the contrary proceeds on the ground that the Court, sitting in this matter, are sitting as a Court of common law, and are to be governed by the strictest rules of common law. In *Dublin* v. *Chadbourn*, 16 Mass. 442, JACKSON, J., says, "there is no case in our jurisprudence in which the due execution of a will, the sanity of the testator, the attestation of the witnesses, or any question of that kind, can be tried in a court of common law." In *Small & als.* v. *Small*, 4 Greenl. 220–5, MELLEN, C. J., says, "the question, whether an instrument purporting to be a last will and testament ought to be approved and allowed as such, is one of purely probate jurisdiction, and so not examinable by us, in virtue of our common law jurisdiction." This distinction is well settled and established by our statute and uniform practice.

But I maintain, further, that if this were a case at common law, the verdict must either be sustained as sufficient, or amended.

Hobart, 54, lays down this rule, "that, though the verdict may not conclude formally, or punctually, in the words of the issue, yet, if the point in issue can be concluded out of the finding, the Court shall work the verdict into form, and make it serve."

This rule was cited and acted on in *Hawks* v. *Crofton*, 2 Burr. 698; and another case, *Adlam* v. *Tow*, was cited from the bench, where a similar doctrine was laid down; and stated to be the law in *Porter* v. *Rummery*, and *Pettes & wife* v. *Bingham, Ex'r*, 10 N. H., 514. If erroneous in form, the Court have power to amend it, both at common law, and by statute. *Petrie* v. *Hannay*, 3 T. R. 659; *Ferguson* v. *Mahon*

39 Eng. Com. Law R., 11 Adol. & El. 179; *Rew* v. *Barker*, 2 Cowen, 408, 410; *Clark* v. *Lamb*, 8 Pick. 415–418; *Crofton* v. *Illsley*, 6 Greenl. 48; *Close* v. *Gillespie*, 3 Johns. 518; 14 Johns. 219; *Hammer* v. *McConnel*, 2 Hammond, 31.

The Court have the amplest material to amend by. They have written evidence of what facts the jury did find. They know that the jury intended to render, and supposed that they were rendering, such a verdict as those facts justified and required. If there be any error, it is the error of the officer of the Court who drew up the verdict.

If, therefore, the verdict be erroneous, the contestant now moves that it may be amended and put in proper form.

The opinion of the Court was drawn up by

TENNEY C. J. — It is provided in R. S. of 1857, c. 63, § 24, that, in appeals from the Judge of Probate to this Court, if, upon a hearing, any question of fact occurs proper for a trial by a jury, an issue may be formed for that purpose, under the direction of the Court, and so tried. This course is analogous to that pursued in equity courts, where a feigned issue is prepared under the direction of the chancellor, or other person who exercises his authority. If the court of chancery is distinct from the courts of common law, and having full equity jurisdiction, the issues thus prepared are sent to a court of common law for trial. 1 Hoffman's Eq. Prac. 504. In that case, the Court of Chancery passes an order directing when and where the issue shall be tried, and the question to be put in issue, and summitted to the jury. Ibid, 504; 3 ibid, appendix, No. 173. If the parties differ as to the form of the issue, the question is referred to a master for settlement. Ibid, 505. When common law courts have limited equity jurisdiction, feigned issues are often tried by a jury in attendance for the purpose of trying issues of fact, arising in common law proceedings. This is the case, in this State, in matters of probate, and perhaps in those presented in equity suits before them.

When a will has been filed in a Probate Court, for approv-

al and allowance, and the subject comes before this Court as the Supreme Court of Probate, on an appeal from the Judge of Probate, certain questions of fact have often arisen which are controverted. Whether the will was executed by the one whose signature purports to be affixed thereto; whether he was of sound and disposing mind at the time of the execution, are examples. In such cases, it is usual for the Court to direct issues as a matter of course. But, whether the facts in dispute, shall all be settled by the jury or not, is subject to the discretion of the Court, in the exercise of its discretion.

Notwithstanding certain issues of fact may be tried and determined by a jury in probate proceedings, other questions of grave import, of law, and even of fact, may be suffered to remain, to be settled by the Court, and which may materially influence the final decree. Something in the will itself, aside from any thing involved in the issues of fact, tried by a jury, may bear upon the question, whether the will shall be approved or not. The jurisdiction of the Court of Probate in the county, where the decree from which the appeal was taken, may be denied. Another will, claimed to have been executed subsequently to the one in controversy, may be introduced, in relation to which no issue of fact has been made up.

The great question involved, where a will is offered for probate, is whether it is the last will and testament of the person, purporting upon its face, to be the testator. Answers to the questions, in proper form, was it, or not, executed in a legal sense, by the person whose name is affixed thereto? was he, or not, at the time of the execution, of a sound and disposing mind and memory? and, was the will attested according to the requirements of law? are all material elements in this general inquiry. All these may be answered in favor of the party praying that the will may be approved and allowed; and other questions may still demand the attention of the Court, before a final decree can be pronounced.

Upon issues in probate, the law gives no sanction to a relaxation of the fixed rules, relating to a jury trial in common law proceedings. The issues are to be determined by a jury,

through a verdict in form, in one case as in the other. The same precision in the issues made up, and the same direct and exclusive finding of the jury thereon, are required in probate trials as in those at common law. *Germand* v. *Germand*, 6 Johns. Ch. 347. No rule of law or practice has dispensed with the mode which has been in use under the latter, to fix with certainty, that the verdict returned and signed by the foreman, is the finding of each member of the panel, when the proceedings are before the Supreme Court of Probate. The law is well settled, that in trials in the court of the last resort, in probate and at common law, the verdict after being returned into court, in order to be obligatory, must be constructively, at least, recorded. Till that is done, any member of the jury may withhold his assent, though he was satisfied of its truths when it was made up and signed by the foreman. To make it binding upon the parties, each juror must signify his approval in open court.

The legal definition to the term "verdict," is the answer of the jury concerning any matter of fact, in any cause committed to them for trial; wherein every one of the twelve jurors must agree, or it cannot be a verdict. 1 Just. 226. A privy verdict is of no force, unless afterwards affirmed by a public verdict, given in open court, wherein the jury may, if they please, vary the privy verdict. But the only effectual and legal verdict, is the public verdict, in which they openly declare to have found the issue for the plaintiff or defendant. 3 Black. Com. 377. The verdict is not valid and final until pronounced and recorded in open court. *Goodwin* v. *Appleton*, 22 Maine, 453. When a verdict has been returned, affirmed and constructively recorded, the duties of the jury in relation to it, have been fully performed, and their power exhausted; (*Snell* v. *Bangor Steam Nav. Co.*, 30 Maine, 337,) clearly implying that their duty is unperformed, and the power not exhausted till this is done.

In the case before us, three distinct issues were directed by the Court. They were made up and signed by the counsel for the appellant, and joined by the counsel for the appellee.

One of these issues was upon the denial that the will was signed by the supposed testatrix, or by some person in her presence, and by her express direction. Another, upon the denial that she was of sound mind, at the time of the execution of the instrument, and the third was upon the allegation that the will was not duly attested. The case does not disclose that there were other controverted facts involved; and, we do not presume that there were; but such a condition of things is not negatived. But general rules must be applied, unless cases are brought within the principle of some exception. What questions of law may arise in a given case, dependent upon the finding of a jury upon a special issue, which is precise, the jury cannot foresee and know. The point presented by the issue, should be rigidly adhered to in the verdict returned.

The verdict in this case, which was returned, recorded and affirmed, is in these words: — "The jury find that the said instrument offered as the last will and testament of the said Mary Elizabeth Withee, is not the last will and testament of the said Mary Elizabeth Withee," and is signed by the foreman. This verdict is not an affirmation that they agreed one way or the other, as an entire jury, upon either of the issues. They have, by the verdict, covered the whole case, under the great question which was submitted on the appeal, and decided the law and fact against the appellee. The case of *Coffin, Judge*, v. *Jones*, 11 Met. 45, cited for the appellant, is in point. This was debt on an administration bond. The defendant pleaded, 1st, *non est factum;* 2d, *solvit ad diem*, and 3d, *solvit post diem.* Issues were joined upon each plea. At the trial, the jury found "that defendant is not indebted to the plaintiff in manner and form as alleged in the writ and declaration." It is said, by WILDE, J., in delivering the opinion of the Court, "some of the jury might have been of the opinion that the deed had not been executed by the defendant, or that it had been improperly altered, but that no payment had been made; while others might be satisfied with the evidence of the execution of the deed, and also of payment. If the jury were

divided in opinion, they could not agree on either of the issues, yet, they would all agree that the defendant was not indebted;" "so that the verdict is substantially defective and uncertain."

But the counsel for the appellant insists that, in this case, the uncertainty arising from the general verdict is removed by the special findings of the jury. The evidence of these findings is upon a paper, containing, in substance, the question presented in each issue prepared by the Court, answered by the word "Nay," signed by the foreman and handed to the clerk, who read the questions and answers in open court. But the case finds that the said questions and answers were not otherwise read, recorded or affirmed.

According to the principles already stated, the verdict which was put into form, signed by the foreman, recorded and affirmed, not being a verdict upon the issues, cannot be valid for any purpose, and, therefore, cannot aid the appellant under the special findings. And, if a verdict conforming to the issues, in form, properly verified by the signature of the foreman is ineffectual, unless it is recorded and affirmed, it cannot with propriety be held, that the simple answer in writing signed by the foreman, read in court, without record, or affirmation will be valid.

The verdict cannot now be amended. The written answers of the foreman to the questions proposed have not been shown to have been the answers of each juror, when they were read in Court. Some of them, and even all, may have varied from their first opinion, as they had a right to do; and we have not the evidence, that the law requires, that the opinion was unanimous. There being no verdict in the case, in the legal sense of the term, no foundation for an amendment exists.

The exceptions, therefore, taken to the overruling of the motion of the appellee, on the fourth, fifth, sixth and seventh grounds, as stated in the motion, are sustained; and overruled on the other grounds.

N. D. Gould was introduced as a witness by the appellant,

to give his opinion, touching the handwriting of the signature to the will. He was admitted by the counsel for the appellee to be an expert in relation to handwriting generally. But he did not profess to have any knowledge whatever of the handwriting of the supposed testatrix. The question was put to him, whether in his opinion, the signature to the will was a genuine signature. This was objected to by the appellee, but he was allowed to answer, and testified that he did not think it was the genuine signature of any body.

The question involved in the evidence thus allowed, has been much discussed in courts, and decisions thereon, are not in perfect harmony. But it is believed, that the better opinion, is in favor of the competency of the evidence. In this State and Massachusetts, it is practically held admissible with general uniformity. We think, too, it is admissible on principle.

It cannot be supposed, that a person in making a disposition of his property by will would designedly counterfeit the handwriting of his signature. If an instrument, purporting to be the last will and testament of a deceased individual, should be proved to have the signature in a counterfeited hand, and that by persons who knew well his handwriting, it cannot be doubted, that such evidence would tend to invalidate the will, and would be held competent. If evidence should be offered, tending to prove, that persons of experience in judging of handwriting, could determine with a high degree of certainty whether handwriting of a person of whom, and of whose handwriting they were entirely ignorant, was natural or simulated, we see no reason for excluding the evidence as relevant to the issue. If it is proper in the testimony of an expert, who has knowledge of the handwriting of the person, whose supposed signature is denied to be genuine, we see no legal ground for its exclusion in the other case. An expert in analyzing the blood which has stained white cotton cloth, has been allowed to testify, that a distinction can be detected between the blood of human beings and that of some other animals; and have been permitted to testify accordingly.

State v. *Knights*, 43 Maine, 11. This has been allowed on the same principle, that physicians and chemists have given opinions touching the presence of arsenic, prussic acid and other poisons in the human system, even from the effects of each, as determined by skill and experience. And certainly with no less propriety was the evidence in question held admissible.

We do not doubt, that Elias Merrill, under the evidence offered, was properly regarded as an expert, and as such, permitted to give testimony. No objections were made to the opinions expressed by him, but the rulings were only in relation to his being allowed to testify at all, as an expert.

The questions put to the witness, who testified to the execution of the will, we think, were not objectionable, under the remark of the Court, that being upon collateral matters, the answers could not be contradicted, but must be received as true. The truth of the statements which were relevant, introduced by the appellee, could be tested to some extent in the same manner. *Exceptions sustained.*

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

EBENEZER W. ELDER *versus* SAMUEL LARRABEE.

As a general rule, one part owner of a vessel is the agent for the other part owners, and, in all that concerns the business and employment of the vessel, may bind them for necessary supplies and repairs.

But the authority of one part owner so to bind the others, though ordinarily implied from their community of interest, and the relations which they sustain to each, is not conclusively to be presumed from these facts, but it is subject to be modified, controlled or negatived by other facts and circumstances.

Though repairs in a given case are necessary, and are made by order of one of the part owners, and the others give no notice of dissent to the person making the repairs, it does not follow conclusively as a matter of law, that they are all liable therefor.

Elder *v.* Larrabee.

When such repairs are made in the home port, and the person making them by order of one part owner, knows who the other owners are, and, having opportunity to consult them, neglects to do so, unless he can show that they all assented to the repairs, he should be presumed to have made them on the credit of those, only, who employed him; and his remedy is against them alone, or against the vessel itself, by proceedings *in rem*.

EXCEPTIONS to the ruling of APPLETON, J.

This was ASSUMPSIT against the defendant as a part owner of the schoner Regulator, for materials furnished for repairs. The facts are fully stated in the opinion of the Court.

Ingersol, for the plaintiff.

F. A. Wilson, for the defendant.

The opinion of the Court was drawn up by

RICE, J.—Assumpsit for the price of a sail furnished for the schooner Regulator. In 1856, as appears from the evidence in the case, the plaintiff and defendant were owners of the schooner Regulator, each owning one-half thereof. By arrangement between them, in the spring of that year, the management of the schooner was entrusted to the defendant, who caused her to be repaired, paying the bills from the earnings of the vessel. In the spring of 1857, she was again repaired by the defendant, who appointed Capt. Green master, and sent her to sea. June 8, 1857, the plaintiff conveyed his half of the schooner to Laforrest Cushing, who immediately afterwards went to Boston, where the schooner then was, and induced Green to surrender the command of her to him, after which he took the oath required by law, as master, and returned with the schooner to Bangor. On the day of his arrival at Bangor, he called on the defendant, who resided in that city, and inquired of him what he should do with the schooner. Defendant said, "do nothing." Whereupon Cushing told him, "help yourself if you can — I own half of her." After some further conversation, in which the defendant manifested a determination to prevent Cushing from having the control of the schooner, they separated. Soon after this, the

bill for which this action has been brought, was incurred by Cushing.

The jury, under instructions from the Court, returned a general verdict for the plaintiff, and also found specially, that the repairs were necessary; that they were made upon the credit of the vessel and owners, and that the defendant did not notify the plaintiff before the repairs were made that he would not be accountable for them.

The presiding Judge was requested, by the defendant's counsel, to instruct the jury that said Cushing was not legally master under the above state of facts, to order repairs or to bind the owners therefor.

This request was refused as is now contended erroneously.

The repairs were made in a home port, and the plaintiff now claims to recover on the ground that they were ordered by Cushing, not as master or ship's husband, but as part owner. The question, therefore, whether Cushing was or was not legally master is unimportant, as it is not denied that he was at the time part owner.

Had he authority, under the circumstances, as part owner, to render the defendant or co-owner liable for the repairs in question?

In general all the part owners are liable each for the whole amount, for all the repairs of a ship, or for necessaries actually supplied to her in good faith. Parson's Mercantile Law, 335.

In all that concerns the repairs and necessaries of the ship, one part-owner is the agent for the other part-owners. Collyer on Part. § 1226; and may bind his fellows for repairs and necessaries. Ib. § 1218.

Part owners of ships are tenants in common holding distinct but undivided interests; and each is deemed the agent of the others as to the ordinary repairs, employment and business of the ship in the absence of any known dissent. Story's Agency, § 40; each being liable for the whole *in solido*. Ib. § 419.

With regard to the repairs of a ship, and the necessaries for the employment of it, one part owner may, by ordering those things on credit, render his companions liable to be sued for the price of them, unless their liability be expressly provided against. Abbott on Shipping, § 105.

Such is the general authority which, at the common law, one part owner has to bind his co-owners for the necessaries and repairs required for the employment of the ship. This authority arises from an implied agency on the part of one part owner to act for the rest. The implication of agency arises from the fact that, ordinarily, public policy, as well as the interest of the owners, requires that ships should be employed, this species of property having been "originally invented for use and profit, not for pleasure or delight; to plow the sea, not to lie by the walls."

But, in this case, the question whether there be no qualification or limitation to these general principles becomes important and pertinent. Because, if there be no qualification or limitation, the result must follow that one part owner may be placed wholly at the mercy of each and all of his co-owners, and that, so long as he retains any interest in a ship, he may be rendered liable for necessary repairs, against his will and protestation, to an indefinite amount. Such absolute and unqualified authority in one person to bind another, under all circumstances, or his agent, would be not only anomalous, but highly dangerous. It does not exist. The authority of one part owner to bind another, for necessaries or repairs, arises, as has already been remarked, from an implied agency, deduced from the common interest which ordinarily exists between parties sustaining such relations to each other; but, as in other cases where authority in one person to act for another is implied, is subject to be rebutted, modified and controlled.

In all cases of this sort, we are to understand that the expenses are incurred with the consent of all, or, at least, a majority of the part owners; for neither a single part owner, nor a minority of the part owners have any right to make any such

repairs, or incur any such expenses against the will of the majority; the latter have a complete authority to regulate the whole concerns of the ship.

The general understanding, at the common law, is, if there be no express or implied agreement between the owners, either by their conduct or by their acts sanctioning any such repairs or expenditures, although any one or more of the owners have a right to incur them, yet, they have no remedy over against the others for contribution thereto; but they must themselves, whether they constitute a majority or a minority of the owners, bear the whole charge.

The reason usually given for this doctrine is that no one part owner has a right to control another, against his will, to incur any burthen or expense, even although necessary for the preservation of the common property; but it should be left to his own free choice. Story's Agency, § § 420, 421, 422, 427.

Chancellor Kent, 3 Com. 155, restricts the authorities of one part owner, to bind another part owner, for repairs, &c., to cases where the one to be rendered liable is absent.

Applying these general principles, thus qualified and limited, to the case at bar, how are the rights and liabilities of the parties to be affected thereby?

The schooner, at the time the repairs were made, was in a home port. She had recently been placed, by the plaintiff, then a part owner with the defendant, under his exclusive charge and management. Acting under this authority from the plaintiff, the defendant had caused her to be repaired, appointed a master, and sent her to sea. Of these facts the plaintiff could not have been ignorant.

In this condition of things, the plaintiff conveyed his interest to Cushing, who, without the consent, and, as the case shows, against the known will of the defendant, proceeds to Boston, and induces the master thus appointed to leave the vessel, and himself assumes control as master, thus taking the schooner out of the control of the defendant, where she had been placed by the plaintiff, and, under these circumstances,

presents himself at Bangor, before the defendant, and desires to know what he shall do with her. The answer is distinct and unqualified — "do nothing."

Here was a distinct denial of authority to Cushing to act for the defendant, in relation to the schooner. He was, therefore, not his agent, in fact, and could not bind him by reason of any express authority to act in his behalf.

Whether the relation which subsisted between these parties, that of part owners, would enable a stranger to recover against the defendant for repairs or necessaries for the use of the schooner, ordered by Cushing, on the ground of implied authority, we do not deem it necessary now to determine. But that the plaintiff cannot recover we think is clear. The jury, it is true, have found that the defendant did not notify the plaintiff before the work was done, that he would not be accountable for the repairs. Nor does the case show that the defendant had any knowledge that repairs were being made by the plaintiff, before they were completed, or before this suit was commenced. And, as we have already seen, the schooner was in a home port; that the plaintiff knew that she had been in the defendant's charge and under his sole control, as ship's husband, until within a few days of the time of making the repairs, that he had repaired her that spring, appointed her a master, and sent her to sea. In addition, there is in the case no evidence that the defendant has had any connection with the schooner, or has in any way participated in her earnings, since Cushing intruded himself into the office of master.

Under such circumstances, the Judge erred when he instructed the jury that if "Cushing was owner of one-half of said schooner, and was master at the time the repairs were ordered, and that the repairs were done by the plaintiff, and were necessary, the defendant would be liable unless the plaintiff had notice, before the repairs were made, that the defendant would not consent to the same." *Hardy* v. *Sprowl*, 31 Maine, 71. It was the duty of the plaintiff, under such circumstances, before attempting to charge the defendant, to have ascertain-

ed whether he desired the repairs to be made, or, at least, to see that he had knowledge that they were to be made.

If the defendant had interposed unreasonable objections to the employment of the vessel, Cushing had an ample remedy by application to a Court in Admiralty, in which case the rights of both parties would have been fully protected.

As the case is presented, it shows a determination on the part of Cushing to control the vessel, regardless of the rights or wishes of the defendant; and there is ground to infer that the plaintiff was not unwilling to aid and assist him in carrying out that determination.

The exceptions are sustained, and, according to the terms of the report, a nonsuit is to be entered.

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

WILLIAM ROUNDS *versus* ALFRED STETSON.

By R. S., 1841, c. 30, § 15, (R. S., 1857, c. 23, § 13,) when a beast, taken up as an estray, is impounded, the pound keeper is required to post, and keep posted for three days, advertisements thereof, signed by him, &c. And, by the statute of 1853, c. 17, § 1, (R. S., 1857, c. 23, § 14,) the pound keeper is required, in ten days after the notice has been given, to sell the beast, giving forty-eight hours notice of the time and place and cause of the sale. Upon a case presented, *it was held* that the "ten days," specified in the statute, do not begin to run, until the "three days" have fully expired; and that the time and place of sale cannot be fixed, and notice thereof given, until the ten days have expired.

REPORT by APPLETON, J.

This was an action of TROVER against the defendant, to recover the value of a cow sold by him, as pound keeper of the city of Bangor. It appeared in evidence that the cow was duly committed to the pound, August 20, 1857. The notices required by the statute were duly given and kept posted three days, from August 20th to August 22d, inclusive. The beast,

not being replevied nor redeemed, on the *first day of September* he posted up notices for the sale thereof, to be made on the *third* day of September; and the sale was made on that day.

The case was argued by

Sanborn, for the plaintiff, and by

Ingersol, for the defendant.

The opinion of the Court was drawn up by

RICE, J. — Section 15, of c. 30, R. S. of 1841, provides that, whenever any pound-keeper shall have received any beast committed to pound under the provision of that chapter, he shall forthwith post, and keep posted for three days, at his dwellinghouse and in two other public places in the same town, advertisements, by him subscribed, stating the name of the impounder or finder, the time and cause of impounding, and a brief description of the beast; notifying the owner to pay what is legally and justly demandable, and to take the beast away; and shall give public notice by the town crier, if such there be within the town.

Section 1 of c. 17, statutes of 1853, provides that, when any beast shall be impounded, and proceedings had in the manner set forth in the 15th and preceding sections of c. 30, R. S., if the forfeiture, damages, fees, charges and costs shall not be paid, or the beast replevied, *within ten days after the notice provided in the fifteenth section shall have been given*, the pound-keeper shall, without any other process, sell the said beast at public auction, *after having posted up in two public places in the town or city where said beast shall be impounded, at least forty-eight hours before the time of sale*, notices of the time and place and cause of said sale, in which he shall insert a brief description of the beast, &c.

The principal question, raised by the facts reported in this case, is as to the time within which the owner of the impounded beasts may reclaim them, or, in other words, at

what time the pound-keeper may lawfully sell them at public auction.

The notice, required to be posted and kept posted three days, by § 15, c. 30, R. S., cannot be deemed to have been given, until the said three days shall have fully expired. Ten days are then allowed, within which to pay any forfeiture, damages, fees, charges and costs that may have accrued. A sale cannot lawfully be made until after the expiration of ten days, nor until after having posted up in two public places in the town or city where said beast shall be impounded, at least forty-eight hours before the time of sale, notices of the time and place of sale. This notice cannot be given during the ten days allowed, within which to pay the forfeiture, damages, &c. During that time, which was reduced, by the statute of 1853, from twenty to ten days, the owner has a right to reclaim his beasts, without being subjected to any charge for advertisements for sale. Such, we think, is the natural construction of the words of the statute. But, were the language doubtful, the statute should not be so construed as to incur forfeiture, but the reverse. This statute is penal in its nature. And, in such cases, entire strictness is requisite. *Smith* v. *Gates*, 21 Pick. 55.

The sale was premature. Consequently, by the terms of the report, a default must be entered.

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

CHARLES A. GILMORE *versus* ANDREW MCNEIL *& al.*

The officer to whom an accountable receipt is given, for property attached by him, must have the receipt with him when he demands the property, so that he may be able to surrender it to the receipter; otherwise the demand will be insufficient to render the receipter liable in an action thereon.

But it is not necessary, in such case, that the officer should exhibit the receipt, or make any actual offer to surrender or discharge it. It is sufficient, if he have it *with him*, so that he is able to give it up to the receipter, upon a delivery of the property.

Where a receipt is in the usual form, it is not necessary that the officer should have the execution in his possession, to make a demand for the property sufficient; such a demand may be made, even before judgment is rendered.

Though the instructions to the jury are technically accurate, yet, if they are calculated to mislead the common and ordinary mind, not conversant with legal terms and phrases, the verdict will be set aside.

EXCEPTIONS to the ruling of APPLETON, J.

The case was ASSUMPSIT, upon a receipt given by the defendants to the plaintiff, for property attached by him, as sheriff of the county of Penobscot, upon a writ against McNeil, in favor of John A. Wallis. The defence was that there was no sufficient demand within thirty days from the rendition of judgment. The plaintiff testified to such a demand, he having the execution and also the receipt "with him" at the time of the demand. The presiding Judge instructed the jury, upon special inquiry by the foreman, that, in order to constitute a valid demand, "the officer must have the execution and the receipt *in hand*, in order that, if the property be surrendered, he may surrender the receipt."

The jury returned a general verdict for the defendants, with a special finding that there was no demand.

Godfrey & Shaw, for the plaintiff.

Peters argued for defendants, making the following points:

1. The plaintiff has not suffered by the instructions. The case shows the plaintiff had the execution and the receipt in hand at the time of the demand. The ruling went no further

than the proof. The particular language used would never have been thought of, if the case had terminated differently.

2. The jury found that there was "*no* demand." If *none*, the question of its sufficiency, and the instructions of the Court thereon, are immaterial.

3. The phrase "in hand," means simply "in possession." Such is the general use of the words. See Webster's Dictionary: "hand," "possession." As, "the estate is *in the hands* of the owner. The papers are *in my* hands." See also Eastman's Digest, p. 335, items 5 and 9.

4. But, even upon a more critical view of it, the ruling was correct. The officer should have had the receipt in hand, in order to surrender it. Bouvier's Law Dictionary, "demand," 10, and the numerous cases there cited.

So, also, the officer must have had the execution in his hands at the time, upon which to seize the property, if it had been surrendered. An officer is not only bound to have his precept with him; he is always bound to exhibit it if required to do so. Howe's Practice, 152, and cases cited.

The opinion of the Court was drawn up by

CUTTING, J. — This action is founded on the defendants' accountable receipt to the plaintiff, sheriff of the county, for property by him previously attached on a writ in favor of one Wallis, and against McNeil. The receipt is not made a part of the case, and we have no knowledge of its tenor, except that it "specified that a demand on one should be a demand on both," but we may assume that it is in the usual form of receipts to officers for the safe keeping and delivery of attached property on demand.

It appears that the plaintiff testified that he made a demand on McNeil within the thirty days after judgment, and that he had the receipt and execution with him at the time. This evidence, if believed, was sufficient to have authorized the jury to return a verdict for the plaintiff. The law is well settled, in *Freeman* v. *Boynton*, 7 Mass. 483, "that, whenever

a demand of payment is made, the person making the demand should have with him the evidence of the debt; for, otherwise, the debtor may well refuse to pay, on the ground that he has a right to have his obligation or contract, or to see it cancelled when he is called upon to discharge it." See, also, *Shaw* v. *Reed*, 12 Pick. 132. But the verdict, it seems, was rendered for the defendant, and we must conclude that the jury either disregarded the plaintiff's testimony, or were improperly instructed by the presiding Judge in a matter of law. The plaintiff contends, as a person placed in his situation very naturally would, that the error was in the Judge, who, in answer to a question by the foreman as to what constituted a demand, replied "that the officer must have the execution and the receipt in hand, in order that, if the property be surrendered on demand, he may surrender the receipt," &c. Hence, the question arises as to what the jury understood by the words *in hand*. It is urged in argument, by the defendant's counsel, that their fair import is the same as *in his possession*, or *on hand*, and that such construction is inferable from what follows, viz.: — "in order that the property may be surrendered," &c. To one conversant with legal terms and phrases, such might be deemed the fair interpretation; but, would it be so to the common and ordinary mind untrammeled by the nice distinctions and technicalities of the law? The plaintiff had previously sworn that, when he made the demand, he had both execution and receipt *with him;* and it seems that the foreman wished to satisfy himself whether "*with him*" was sufficient. He undoubtedly argued to himself in this wise — if the execution and receipt were *with him*, still they might have been concealed from the observation of the person on whom demand was made, and I wish to know whether it be necessary that they should be exhibited, taken from his pocket and presented for inspection. Hence, he ventures the inquiry and asks the Court for instruction on this point, and when he receives it "*in hand*," he thereupon, probably, said to his fellows, "this is as I supposed, they must be in hand so as to be exposed to view; the defendant ought to

have seen them, of which, there is no evidence, and consequently there has been no legal demand," and thereupon he conscientiously signs and returns his verdict, which, according to the construction of the defendant's counsel, convicts the plaintiff of perjury, but of no such thing, according to the jury's construction of the language of the Court. A verdict cannot stand based upon an instruction so well calculated to mislead a jury. The learned Judge had, no doubt, the true legal idea in his mind, but was unfortunate in his communication.

Again, the Judge instructed that not only the receipt, but also the execution must be in hand. If the receipt was in the usual form, the presence of the execution would be unnecessary; a demand might have been made even before judgment. And, in this particular, there was error.

Exceptions sustained, and verdict set aside.

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

WILLIAM F. OXNARD *versus* SAMUEL A. BLAKE.

A mortgage of personal property, made by a debtor to secure a creditor, without his knowledge, although recorded, is inoperative, until it is approved or assented to by such creditor.

Where a debtor, at the same time, executes and causes to be recorded separate and independent mortgages of the same property to several of his creditors, without the knowledge of either, that mortgage which is soonest ratified will first have effect; and the others, becoming operative by subsequent ratification, will be subject to it.

The recording of a mortgage, at the instance of the mortgager, will not amount to a delivery of it, and though made effectual by the subsequent ratification of the mortgagee, it cannot affect the rights which another mortgagee acquired by a *prior* ratification of a mortgage to him of the same property, made and recorded at the same time.

REPORT by APPLETON, J.

REPLEVIN for a stock of merchandize. The writ is dated

March 14, 1857. Plea, the general issue, and a brief statement alleging that the property was not in plaintiff, but in the defendant, as tenant in common with other persons, and that he was rightfully in possession as such owner and tenant in common; that this action cannot be maintained, and praying for a return, &c.

It appears from the Report that Roxana Jordan originally was the owner of the goods replevied; that she was engaged in selling goods at Bangor, in December, 1856, on which day she made separate and independent mortgages severally to said plaintiff and said defendant, to secure her indebtedness to them, respectively.

The said mortgages were made at the same time and received and recorded at the same instant of time, and done by said Roxana in the absence of both the plaintiff and defendant, and without their knowledge at the time, although plaintiff had previously requested a mortgage, and said Jordan at such time declined to give it. On the day said mortgages were made and recorded, the plaintiff called on said Jordan again for a mortgage, and she then informed plaintiff she had that day made one to him, and he approved of it. After the mortgages had been recorded, said Jordan took them, and they were for a while in her possession. Before either the plaintiff or defendant got their mortgages, said Jordan informed defendant of the mortgage to him, and he approved of it.

After this, plaintiff received his mortgage from said Jordan and took possession of said goods. Whereupon, defendant came to Bangor, and then received his mortgage from said Jordan, and took said goods, without the plaintiff's knowledge, from the place where plaintiff had stored them, and carried them away to another place in order to hold possession of them. The plaintiff then brought this action.

Plaintiff testified: "I called on Mrs. Jordan on the day the mortgage was made, and asked for a mortgage; she said, I have made one this day to you, and one to Skinner, and one to Blake. I asked where it was. She said it was being re-

corded. I told Plaisted, my attorney, to get it and send it to me."

The case to be submitted on report to the full Court, to determine the rights of the parties, to have jury powers, and to enter judgment by nonsuit or default.

J. A. Peters, for plaintiff, argued:—

That plaintiff's mortgage first became operative. It was first *approved*. It was the first that was *delivered*; first *received* by either of the mortgagees. Plaintiff was the first that received *possession* of the goods under the mortgages. He has, therefore, superior rights.

The mortgages were independent; neither affected the other. It would have been otherwise if they had been simultaneously made and *accepted*. Each mortgage was inoperative as a contract until it had been ratified. The plaintiff's was ratified on the day it was made, the other mortgages are subject to his. What constitutes a ratification, see 24 Pick. 203.

A mortgage is a contract. *Dole* v. *Bodman*, 3 Met. and cases cited on both sides. See, also, *Travis* v. *Bishop*, 13 Met. 304; *Call* v. *Calef*, ib. 362.

A return will be ordered, or not, according to the rights of the parties in the title. 15 Maine, 373; 4 Pick. 168; 18 Pick. 427.

Plaintiff claims the whole stock; the first *contract* of the mortgager was with him.

Rowe & Bartlett, for defendant, argued:—

That the parties are tenants in common. The mortgager intended to make them so. The title of each dates from the time of the delivery for record.

The mortgages being for the sole, unconditional benefit of the mortgagees, their assent is presumed. 3 Barn. & Ad. 31; 4 Mason, 214; 4 Day, 395; *Thompson* v. *Leach*, 2 Salk. 618.

The subsequent ratification, by mortgagees, relates back, and gives effect to mortgages from their date, except against

intervening title for new consideration. Vin. Abr. "Disagreement," A., pl. 5, 10; 13 Mass. 361; 3 Maine, 373.

When Oxnard ratified, he knew of Blake's mortgage, and that it was made and recorded at the same time with his own. He knew it was Mrs. Jordan's intention to make himself and Blake and Skinner tenants in common. He knew that for that purpose she had made the three mortgages and left them to be recorded. He approved of what she had done, and accepted the conveyance to himself, with the understanding that he was to be tenant in common with them. He might have repudiated the mortgage and attached, or insisted upon having a new mortgage to himself, which would not have made him tenant in common with them. Co. Litt. 21, a; *Shove* v. *Dow*, 13 Mass. 535; *Sigourney* v. *Eaton*, 14 Pick. 415; *Burnett* v. *Pratt*, 22 Pick. 558.

One tenant in common cannot maintain replevin against his co-tenant. *Wills* v. *Noyes*, 12 Pick. 324–6; *Barnes* v. *Bartlett*, 15 Pick. 71, 75.

The opinion of the Court was drawn up by

HATHAWAY, J.—Roxana Jordan mortgaged the replevied merchandize to the plaintiff, by his request, to secure her debt to him, and he took possession of it under the mortgage, which was duly recorded.

Although Mrs. Jordan also made a mortgage of the same merchandize to the defendant, and had it recorded at the same time with the mortgage and record thereof to the plaintiff, yet the defendant had no knowledge of it till *after* the mortgage to the plaintiff had been made, as he requested, and recorded and "*approved*" by him, which was equivalent to an actual delivery of the mortgage by the mortgager to the plaintiff. *Hedge* v. *Drew*, 12 Pick. 141. A deed takes effect from its delivery, and Mrs. Jordan had no legal right to take the plaintiff's mortgage from the registry, after it had been approved and assented to by him, for it was his property.

The case finds no privity between the plaintiff and the defendant, nor any authority in the plaintiff to assent to the

mortgage of Mrs. Jordan to the defendant, nor any knowledge of the plaintiff that the defendant would assent to it.

The mere making of the mortgage by Mrs. Jordan to the defendant, and causing it to be recorded without his assent or knowledge, did not amount to a delivery of it to him, so as to enable him, by his subsequent assent to it, to defeat or impair the title to the merchandize which had been previously acquired by the plaintiff. *Maynard* v. *Maynard*, 10 Mass. 456; *Harrison* v. *Phillips Academy*, 12 Mass. 461; *Dole* v. *Bodman*, 3 Met. 139, cited in argument.

Defendant defaulted.

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

THE STATE *versus* THE INHABITANTS OF BREWER.

The inhabitants of a town are authorized by § 30 of c. 25 of R. S. of 1841, (re-enacted in R. S. of 1857,) to discontinue a town way at a meeting legally called for that purpose; no previous action of the selectmen being requisite to make such discontinuance effectual.

REPORT by APPLETON, J.

INDICTMENT found at August term, 1857, against the defendants for not maintaining in repair a way in said town called the *Rowell road.*

It was admitted, under a plea of not guilty, that said road was out of repair during the time alleged, but the defendants denied their liability to keep said road in repair, and contended that it had been discontinued.

It appeared that said road was laid out as a private way, and, upon an article in the warrant for that purpose, was accepted at the annual spring town meeting of 1847.

Under an article in the warrant for that purpose, it was, at the annual spring town meeting of 1849, discontinued by the town. It did not appear that previous to such discontinuance

by the town, in 1849, any previous action of the selectmen was had in relation to it, more than to insert an article in the warrant to see whether the town would discontinue said road. It appeared that the selectmen did not determine any damages for the discontinuance to any person; that nothing, in any way, was done by them on that subject, and that no request was made to them by any person to do so.

The attorney for the State contended that defendants' liability existed for repair; and that the road was not legally discontinued, because no previous action, except as aforesaid, was had by said selectmen, and because no action was had upon the question of damages.

And, in order to present the questions arising to the full Court, the Judge presiding ruled, *pro forma*, that said objections, taken by the attorney for the State to the discontinuance, were good, and instructed the jury, upon the foregoing evidence and admissions, that the allegations in the indictment were made out, and they might render a verdict against the defendants; which they did.

Whereupon it was agreed that the case should be reported, and, if the full Court should be of opinion that the instructions were correct, said verdict is to stand; otherwise, the verdict is to be set aside and a *nolle prosequi* entered.

The case was argued by

J. H. Hillard, County Attorney, for the prosecution, and by

Peters, for the defendants.

The opinion of the Court was drawn up by

CUTTING, J. — It appears that the defendants were indicted, at the August criminal term of this Court, 1857, for not keeping in repair a road, which had been laid out as a private way. It is admitted that the road was out of repair, and the defence set up is that, at the annual spring town meeting of 1849, the same was discontinued by the town, upon an article in the warrant for that purpose. There is no record of any proceedings of the selectmen prior to the meeting, except the

insertion of the article in the warrant, and, for this reason, the counsel for the State contends that the road was not legally discontinued. We have compared the 30th section of c. 25 of the R. S. of 1841, under which the proceedings of the town were had, with the 9th section of c. 118 of the statutes of 1821, and do not discover any material difference as to the mode provided in each for discontinuing town or private ways. The last named section has received the construction of this Court, in *Latham* v. *Wilton*, 23 Maine, 125, where it was held, on a similar discontinuance of a town way, that no previous action of the selectmen was necessary, and we see no good reason for disturbing that decision. We have heard of no complaint as to the statute, or its construction, and presume there has been none, for it was re-enacted in the R. S. of 1857, in substantially the same words.

According to the agreement of the parties, the verdict must be set aside, and a *nolle prosequi* entered.

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

STATE *versus* SAMUEL G. STIMPSON.

In an indictment may be joined a count charging one with larceny, and a count against him as receiver of stolen goods.

One, who knowingly receives or aids in concealing goods stolen *in another State* and brought into this State, is made liable therefor by c. 156, § 10 of Revised Statutes.

On EXCEPTIONS to the ruling of APPLETON, J.

This was an INDICTMENT against the defendant, containing two counts, (1st and 2d,) charging him with stealing certain property therein described, and two other counts, charging him with receiving the same property knowing it to be stolen.

The government introduced evidence tending to prove that the property described was stolen without this State, and in

the Commonwealth of Massachusetts, and brought into this State by another person than the defendant. *In defence*, evidence was introduced proving that, at the time of the larceny, the defendant was at Palmyra.

The presiding Judge was requested to instruct the jury that, if they believed the property described was stolen without the State, and brought into the county of Penobscot without the agency or knowledge of the defendant, the courts here would not have jurisdiction of the offence in this case, and that the indictment charging the defendant with the larceny, and with having received the same goods, knowing them to be stolen, as charged in the indictment, could not be sustained. The Judge declined to give the instruction as requested, but instructed the jury that, if they believed, from the evidence, that the defendant bought, received, or aided in concealing the property, as set forth in the indictment, he, at that time, knowing the same to have been stolen, it would be their duty to convict, notwithstanding the original larceny might have been committed in Massachusetts.

The jury found the defendant guilty, as charged in the third and fourth counts, and not guilty as to the other counts.

A. L. Simpson, in support of the exceptions, argued: —

That two distinct offences are charged in the indictment. Larceny, and the receiving and concealing stolen goods, should not be joined; they are offences of different natures.

The larceny, if committed, was committed not in this, but in another State, and our courts have no jurisdiction over the subject matter. It was no offence against our laws, for which our courts can award punishment. 3 Gray, 434; *Abbott* v. *Bayly*, 6 Pick. 89.

What our statutes may define to be larceny, may be no offence against the laws of Massachusetts. An indictment might lie for stealing a slave in South Carolina, but would such indictment lie in this State?

If the instructions are correct, a man that steals a horse or slave in Texas is liable to be indicted, tried and punished in

any State into which he has taken the horse or slave; and, if he should be indicted in several States, after he has been convicted in one State, on requisition, he would be liable to be delivered to the authorities of another State to be again tried.

J. H. Hillard, County Attorney, contra.

1. The counts are properly joined. 9 Car. & Payne, 289; *Carlton* v. *Commonwealth*, 5 Met. 534; Wheaton's Am. Com. Law, § 414, and cases cited; *State* v. *Burke*, 38 Maine, 574; *Com.* v. *Gillespie*, 7 S. & R. 469.

2. The stealing of the goods in Massachusetts and the bringing them into this State, by the person who stole them, was a larceny here. *State* v. *Somerville*, 21 Maine, 14; *Commonwealth* v. *Dewitt*, 10 Mass. 154; *Commonwealth* v. *Cushing*, 1 Mass. 116; *Commonwealth* v. *Andrews*, 2 Mass. 14; *Commonwealth* v. *Lord*, in York, 1792, referred to in last case; *State* v. *Ellis*, 3 Conn. 185; *State* v. *Mackridge*, 11 Ver. 654; *Commonwealth* v. *Rand*, 7 Met. 475; *Commonwealth* v. *Upsichard*, 3 Gray, 434; *Cummings* v. *State*, 1 Har. & Johns. 340; *Hamilton* v. *State*, 11 Ohio, 435.

If the person who stole the goods in Massachusetts and brought them here can be convicted of the larceny here, as the authorities conclusively show, then it follows, necessarily, that those who receive the goods here, or aid in concealing them, are guilty of violating the provisions of the statute of this State. c. 156, § 10.

The cases of *Commonwealth* v. *Andrews*, and *Commonwealth* v. *Dewitt*, before cited, are in point, and appear to be conclusive.

HATHAWAY, J., announced the opinion of the Court, that there was no error in the ruling and instructions of the Judge at *Nisi Prius*, and ordered an entry of

Exceptions overruled.

RICE, J., remarked, that the instructions, as applicable to the third count, are correct; as applicable to the *fourth* count, they would be erroneous, it not being alleged in that count,

that the principal larceny was committed in this State. See *Commonwealth* v. *Andrews*, 2 Mass. 14.

As to this doctrine of *constructive* larceny, I do not feel at all satisfied; and, if it were a new question, I should be opposed to it. On principle, it is, in my judgment, erroneous; and, being so, should not be extended.

COUNTY OF WALDO.

ELIAB STEVENS *& al. versus* JAMES H. ADAMS.

A note payable in cash or specific articles on demand is the evidence of a promise in the alternative; and a demand of payment, before suit is brought, is necessary, that the maker may elect the mode of payment.

But if the defendant, in his specifications of defence, does not refer to a want of demand as a ground relied upon in defence, a demand will be regarded as admitted for the purpose of the trial.

REPORT by HATHAWAY, J.

The action was ASSUMPSIT, on a promissory note given by defendant to plaintiffs, for $71, payable "in cash or peddlers' truck at cash prices, on demand."

The defendant's specifications of the grounds of his defence are, substantially, (1,) that his account in set-off is of greater amount than plaintiff's demand against him; (2,) that the note was without consideration, and is void; (3,) that defendant does not owe the plaintiffs, and that they are indebted to defendant; (4,) defendant never promised in manner and form as plaintiffs have declared, &c.

The general issue was pleaded and joined. The case was, by consent, withdrawn from the jury, and submitted to the full Court on report, to be disposed of according to the legal rights of the parties.

Nickerson, for the plaintiffs.

Wilcox, for the defendant.

The opinion of the Court was drawn up by

CUTTING, J. — The note declared on, being made payable in cash or specific articles on demand, is the evidence of a promise in the alternative; and the alternative belongs to the promisor. 2 Parsons on Con. 163. And, before an action thereon could be maintained, it was necessary for the payee to have demanded payment of the maker, who then could have elected in which mode he would discharge his contract. *Lobdell* v. *Hopkins*, 5 Cow. 518; *Vance* v. *Bloomer*, 20 Wend. 192; *Chandler* v. *Winship*, 6 Mass. 310. There being no evidence of a demand, this action would have been prematurely commenced, unless the specifications filed in defence have operated as a waiver of such proof. The 1st, 2d and 3d specifications refer to no such grounds of defence, and the 4th is in substance the general issue and no specification.

Such being the state of the pleadings, both the genuineness of the defendant's signature and the demand on him were not put in issue, and the plaintiff had no occasion to produce evidence upon those points, and they must be "regarded as admitted for the purpose of the trial." *Day* v. *Frye*, 41 Maine, 326. The demand being then admitted, and there being no defence set up of payment in either money or the specific articles by the defendant, and sustained by evidence, the action is maintainable. *Defendant defaulted.*

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

JAMES KEENE *versus* SEWARD LORD.

An execution was satisfied, in part, by a levy upon a parcel of land, and the residue, by a sale of an equity of redemption of another parcel, the creditor becoming the purchaser. The debtor afterwards, by purchase, obtained a re-conveyance of the equity from the creditor, who discharged the debtor, expressly reserving his rights under the levy. Subsequently, the creditor discovered that at the time of the levy, the land was subject to a mortgage, which still existed; whereupon he claimed to rescind the bargain. In an action of debt brought some years after, to recover the amount for which the execution was satisfied, by the levy, *it was held*, that the re-conveyance of the equity, and the discharge, should be regarded as a full and final settlement of the whole matter.

REPORT by TENNEY, C. J.

DEBT, upon a judgment recovered in 1841. The execution was satisfied, in part, by a levy upon real estate, and the residue by the seizure and sale of an equity of redemption. At the sale, John S. Abbott, who had become the creditor in interest, purchased the equity of redemption. The debtor neglecting to redeem of Abbott within the year, his right of redemption became barred. On payment, soon after, of the sum for which the right of redemption was sold, with interest thereon, and a few dollars in addition, Abbott released to him the right he had acquired. He also gave the debtor a writing (under seal,) to the effect, that in consideration of the said levy, and of the sale of said right of redemption, which right the debtor had purchased of him and paid therefor, he engaged and bound himself that he would not demand of the said Lord, or require him to pay any thing more on said execution; but the obligation was in no way to affect the levy, which was to be relied upon.

The land levied upon was incumbered by mortgage made by the debtor's grantor; and the mortgage deed had been registered before the conveyance to the debtor. This was not known to the creditor, until after the obligation before named, had been given by him. The mortgager had instituted proceedings to foreclose the mortgage, a few months prior to

the date of the aforenamed obligation; and the right of redemption afterwards became barred.

When the creditor ascertained the existence of the mortgage, he offered to refund to the debtor the amount paid for the equity of redemption of the other lot, and requested that his obligation should be surrendered to him; but the debtor refused to give it up.

On Nov. 7, 1849, the creditor finding property of the said Lord that could be attached, commenced this action, claiming to recover the amount for which said execution was satisfied by the levy, the mortgage upon the estate being unknown to the creditor, or his agent, at the time of levy.

The action was referred by rule of court, to John H. Webster, who reported the evidence produced at the hearing before him, and made an alternative award, referring to the Court certain questions as to the legal rights of the parties, upon a statement of the facts as shown by the evidence.

It was contended, on the part of the plaintiff, that the writing relied upon as a discharge of the defendant, was given under a misapprehension, created by the conduct and misrepresentations of the defendant; his claim, therefore, ought not to be prejudiced thereby.

The case was argued by *J. S. Abbott*, for plaintiff, and by *Hutchinson*, for the defendant.

The opinion of the Court was drawn up by

HATHAWAY, J. — From all the facts found and presented in the report of the referee, the conclusion of the Court is that *John S. Abbott's re-conveyance* to the defendant of the equity of redemption, October 10, 1842, and his *discharge* of the defendant, of the same date, from any further liability upon the judgment, "in consideration for which discharge, said Lord paid said Abbott the money and interest which Abbott paid for said equity, and a very few, say five dollars more," *are* competent evidence of a full and final *settlement* of the whole matter, which cannot be safely disturbed after so long

a time, and that judgment must be rendered for the defendant for his costs, according to the alternative report of the referee.

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

ELIAB STEVENS *& al. versus* CHARLES M. WEBSTER.

A case, on demurrer and joinder, cannot legally come before the full Court on *report;* but must be presented on exceptions, according to c. 82, § 19 of R. S.

Whether a defendant, after having filed his specifications of the grounds of defence, upon which he relies, can, at a subsequent term, without leave of Court, demur to the declaration for any defect not noticed in such specifications, — *quære.*

REPORT by HATHAWAY, J.

This is an action of ASSUMPSIT, in which the defendant is declared against, as the maker of a promissory note; and was entered at the October term, 1857. Prior to the next (January) term, the defendant filed his specifications of defence, and the action was continued to the May term, 1858, when the defendant filed a demurrer, which was joined. The following report of the case was made: — "On demurrer. The writ, pleadings, specifications of defence constitute the case, which is submitted to the whole Court, to be disposed of according to the legal rights of the parties."

Nickerson, for the plaintiffs.

Wilcox, for the defendant.

The opinion of the Court was drawn up by

CUTTING, J. — This action was entered at the October term of this Court, 1857, and specifications filed agreeably to the statute, fourteen days before the then next January term, and, at the May term following, the defendant filed a general demurrer to the declaration, which is joined. The pre-

siding Justice, instead of ruling upon the demurrer, as by R. S. c. 82, § 19, it was made his imperative duty to do, reports the case thus made up for our adjudication; whereas, the demurrer can come before us only upon the exceptions of the aggrieved party; for, says the statute, "the Judge shall rule on it, and his ruling shall be final, unless the party aggrieved excepts to it; and, if the Law Court deems such exceptions frivolous, it shall award treble costs against the party excepting, from the time the exceptions were filed." Neither the Judge nor the parties were authorized thus to disregard the statute, and, in so doing, to present to us so crude a mass of material.

It may, however, be worthy of consideration, when the question shall be duly presented, whether the defendant, after having filed his specifications of defence, can, at a subsequent term, without leave of Court, demur to the declaration for any defect not noticed in such specifications. If such practice should be adopted, it might occasion much delay and unnecessary expense. The specifications are designed to notify the plaintiff what points are made in the defence, and he comes prepared with his witnesses to meet the issues, when, perhaps, to his surprise, he is met with a demurrer and a defective writ. The section of the statute, above cited, authorizes either party to demur "in any stage of the pleadings," but not in any stage of the proceedings; the stage in the pleadings is the direct line between the declaration and the surrebutter; the demurrer to specifications allowed by another section of the statute, is in a devious line, and is of modern invention, unknown to the common law, and practically, as yet, unknown to us. This case, not being properly before us, must be dismissed from the law docket.

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

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DESCENT AND DISTRIBUTION.

1. Under our present laws, if one die intestate, and, at the time of his death, the next of kin living are nephews and nieces, the children of a deceased nephew of the intestate take, by representation, the share of the intestate's estate, to which their parent would be entitled, if alive. *Doane* v. *Freeman*, 113.

2. The provision of c. 93, § 16 of R. S. of 1841, by which the husband of one who died intestate was entitled to the residue of her personal property, after the payment of her debts, &c., was not intended to be repealed by the Act of 1848, c. 73, which provides that the real and personal estate of a married woman, dying intestate, shall descend or be distributed to her *heirs*.
Mace v. *Cushman*, 250.

3. Technically, at common law, *heirs* are such by kindred blood, and inherit real estate *only;* but, in this State, the descent and distribution of property is regulated by statute, and persons are made heirs by statute, who are not such by the common law. Statutes are not to be construed by technical rules, unless clearly so intended. The word "heirs" in the statute of 1848, c. 73, means the persons entitled to the property of the deceased, by the then existing laws. *Ib.*

DEVISE.

Under a devise, *in trust*, to executors for the children of the testator, till the youngest shall arrive at the age of twenty-one years, (the executors, in the mean time, to manage the estate, and receive the income,) the executors took a fee simple estate *in trust*, defeasible when the youngest child should come to the age of twenty-one years. *Pearce* v. *Savage*, 90.

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The statutes of this State do not confer on the Supreme Judicial Court authority to decree a dissolution of the bonds of matrimony between parties who were married in a foreign country, if they have not cohabited in this State after marriage, and only one of them has ever been a resident of the State. *Goodwin* v. *Goodwin*, 377.

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by order of one part owner, knows who the other owners are, and, having opportunity to consult them, neglects to do so, unless he can show that they all assented to the repairs, he should be presumed to have made them on the credit of those, only, who employed him; and his remedy is against them alone, or against the vessel itself, by proceedings *in rem*.

Elder v. *Larrabee*, 590.

STATUTE.

1. If the language of the statute is clear and plain, courts of justice have no authority, in consideration of the consequences resulting from it, to give it a construction different from its natural and obvious meaning.

Coffin v. *Rich*, 507.

2. Where an Act of the Legislature is repealed and is re-enacted, with some changes, at the same time, both statutes may properly be taken into consideration, in giving a construction to the latter; but the Act repealed has no force whatever, only so far as it is continued in force by saving clauses and exceptions. *Ib.*

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1. By the statute of 1844, c. 123, a stranger had no right to pay the tax on real estate, when the collector had returned the list of unpaid assessments, until *after* sixty days from the town treasurer's first notice. But, where such a payment was made by a stranger, *before* the expiration of the sixty days, and the property was not redeemed, *it seems* that the money, having remained in the treasurer's hands, might be considered as having been paid afterwards, when the right to pay it had accrued. *Wyman* v. *Smith*, 522.

2. But when the tax still remained unpaid by the owner for the term of two years from the date of the assessment, it was the duty of the treasurer to advertise the same a second time; and, if this was not done, there was no forfeiture. *Ib.*

See EVIDENCE, 7, 8.

TENANTS IN COMMON.

1. The possession of one tenant in common of real estate is always presumed to be in maintenance of the right of all the tenants, if his acts will admit of that construction. And, if he enters upon the common property and takes the whole rents and profits, without paying over any share thereof to his co-tenants, such possession is not to be considered adverse, but in support of the common title. *Thornton* v. *York Bank*, 158.

2. But if one tenant in common takes actual and exclusive possession of the entire estate, under a deed of the whole, duly acknowledged and recorded, from one who has no title, and receives the rents and profits, denying the right of any other person in the land, such possession is a disseizin of his co-tenants. *Ib.*

3. When such possession is apparently exclusive and adverse, the presumption of disseizin may be rebutted by other evidence showing that the rights of the co-tenants have been admitted or acknowledged. *Ib.*

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